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Volume 33  
Issue 1 *Symposium: Federal Preemption of  
State Tort Law: The Problem of Medical Drugs  
and Devices*

Article 6

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12-15-2005

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Michael S. Greve

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### Recommended Citation

Michael S. Greve *Federal Preemption: James Madison, Call Your Office*, 33 Pepp. L. Rev. Iss. 1 (2006)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol33/iss1/6>

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# Federal Preemption: James Madison, Call Your Office

Michael S. Greve<sup>\*</sup>

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## I. PARALLEL PREEMPTION WORLDS

Erwin Chemerinsky has highlighted the crucial problem and, as it turns out, the central point of our disagreement with respect to preemption and its federalism dimension. Federalism, Chemerinsky says, is (or ought to be) about empowering government at all levels.<sup>1</sup> This perspective implies preemption doctrines that ensure, so far as possible, that the strictest regulator—whether that is the federal government or a single state—shall dominate the entire universe of transactions. In other words, more regulation is *ipso facto* better regulation. Chemerinsky is not alone in taking this view. Of late, a growing band of scholars, advocates, and Supreme Court Justices have embraced similar “empowerment” theories of

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<sup>\*</sup> John G. Serale Scholar, American Enterprise Institute; PhD (Cornell 1985).

1. Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 70 (2005) [hereinafter Chemerinsky, *The Need to Limit Federal Preemption*]; see also Erwin Chemerinsky, *Empowering States When it Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1328-29 (2004) [hereinafter Chemerinsky, *A Different Approach*] (stating that rather than looking at federalism “primarily in terms of limiting federal power so as to protect state sovereignty,” we can view federalism as “empowering government.”).

federalism.<sup>2</sup> But those theories are antithetical to the constitutional logic and architecture.

A constitution, or at any rate the Constitution we have, is not about empowering but about *disciplining* government, and federalism is a large part of that enterprise. As James Madison famously wrote, “you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>3</sup> For the purpose of controlling the governed, one central empowered sovereign is quite enough and (as the examples of France and of most authoritarian regimes teach) probably more efficient than a more decentralized and fragmented arrangement.<sup>4</sup> The point of endowing subordinate (state) sovereigns with authority over the same citizens and territory—while limiting the central authority’s sphere of authority—is to create rival centers of power, to make “[a]mbition . . . counteract ambition,”<sup>5</sup> and in that fashion to make government control and discipline itself.<sup>6</sup> The constitutional structure—not, as Chemerinsky would have it, the Bill of Rights exclusively<sup>7</sup>—is supposed to do the work here.

From this constitutional vantage, the preemption landscape will look very different from Chemerinsky’s universe. His empowerment federalism produces an exceedingly robust presumption against preemption.<sup>8</sup> The constitutional perspective, in contrast, suggests that a judicial presumption for or against preemption should depend on the congruence of federal regulation with the core purposes of enumerated federal powers—foremost, the protection of interstate commerce.<sup>9</sup> For reasons suggested below,<sup>10</sup> I am somewhat skeptical about the extent to which constitutional presumptions can yield a coherent “preemption jurisprudence.” But to the extent that we can approximate that objective, we can do a whole lot better than

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2. See, e.g., Ernest Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1369-73 (2001) (discussing the “ideal theory of federalism” and evaluating the current federalism jurisprudence of the Supreme Court); REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” *passim* (Douglas T. Kendall ed., 2004); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 56-65 (2005).

3. THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

4. See generally Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341 (2004) (describing the development of French and German constitutional law in the wake of, among other factors, the authoritarian regimes of Napoleonic France and Nazi Germany).

5. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 268.

6. *Id.* Madison noted that by dividing the powers “between two distinct governments” America created a “double security” as “to the rights of the people.” *Id.* at 270. This design would cause “[t]he different governments [to] control each other; at the same time that each [would] be controlled [sic] by itself.” *Id.*

7. Chemerinsky, *The Need to Limit Federal Preemption*, *supra* note 1, at 74-75.

8. See also Chemerinsky, *A Different Approach*, *supra* note 1, at 1317-18. Chemerinsky notes that if states are viewed as independent sovereigns in the federal system, which they should be under the empowerment theory of federalism, then “there is a presumption against finding preemption.” *Id.* (internal quotation marks omitted).

9. Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 107 (2002) [hereinafter Greve, *Federalism’s Frontier*].

10. See discussion *infra* Part V.

Chemerinskian empowerment federalism—and probably, somewhat better than the Rehnquist Court.

## II. OPPORTUNISM, EVERYWHERE YOU LOOK

The principal obstacle to a coherent preemption doctrine, Chemerinsky argues, is the political opportunism of the Rehnquist Court, meaning its conservative majority.<sup>11</sup> Echoing other scholars,<sup>12</sup> Chemerinsky observes a sharp discontinuity between federalism cases and preemption cases.<sup>13</sup> A bloc of five conservative Justices holds together (more precisely, held together) very well in federalism cases, where a pro-federalism, pro-state stance generally translates into a substantively conservative policy position, such as a narrower scope for federal civil rights laws.<sup>14</sup> On account of that congruence, the conservatives consistently vote for state empowerment and against the federal government. But their pro-state sentiment, the theory continues, goes by the boards in preemption cases, where a pro-state stance typically translates into a liberal, pro-regulatory position that would allow a broader range of action for state legislators, trial lawyers, and attorneys general. In that context, the conservative bloc is said to set federalism aside and to vote against the states.<sup>15</sup> None of this is tenable, however. Putting aside that the once-stable federalism bloc has collapsed,<sup>16</sup> the “conservative flip-flop” account is empirically baseless, politically tendentious, and theoretically flawed.

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11. Chemerinsky, *The Need to Limit Federal Preemption*, *supra* note 1, at 70.

12. See, e.g., Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462-63 (2002); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 753-54 (2000); Brady Baybeck & William Lowry, *Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court and Preemption Cases*, PUBLIUS, Summer 2000, at 73, 82-91.

13. Chemerinsky, *The Need to Limit Federal Preemption*, *supra* note 1, at 70-74.

14. *Id.* at 70-71.

15. *Id.* at 72-74.

16. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that Title II of the Americans with Disabilities Act was a valid exercise of congressional authority); *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003) (holding that state employees could recover money damages when the state failed to act in accordance with the family-care provision of the Family and Medical Leave Act); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 637-38 (1999) (holding that recipients of federal funding could be liable for damages in an action based on “student-on-student harassment.”). Supreme Court decisions postdating this conference confirm the disintegration of the federalism bloc. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (holding that the Controlled Substances Act was a valid exercise of congressional power and that Congress had the power to control “portions of [interstate] markets that [were] supplied with drugs produced and consumed locally.”); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1502 (2005) (holding that Title IX’s private right of action included claims for retaliation “where the funding recipient retaliate[d] against an individual because he . . . complained about sex discrimination.”).

Jonathan Klick and I have undertaken an empirical study of the Rehnquist Court's preemption decisions.<sup>17</sup> There are 105 such decisions between the 1987-1988 and the 2003-2004 terms inclusive.<sup>18</sup> Upon inspection, the cases distribute themselves in ways that differ substantially from common perceptions of the jurisprudence and of judicial voting behavior in this area. The most striking difference between perception and reality is the widespread impression of a conservative flip-flop. The conservative Justices do tend to vote together in preemption cases, but they do so regardless of whether the outcome is for or against preemption. They vote together because *all* Justices tend to vote together in preemption cases. More than half of the Rehnquist Court's preemption cases have been decided unanimously, or nearly so.<sup>19</sup> Conservative Justices may be more likely to vote for preemption than are liberal Justices, but they do not necessarily do so consistently.<sup>20</sup>

Only two cases fit the picture of a wholesale "inversion," such that the five so-called conservative Justices vote for preemption and the liberal Justices, "for the states" (as in, against preemption). Chemerinsky manages to unearth one of those cases, *Lorillard Tobacco Co. v. Reilly*<sup>21</sup> (and even here, the picture is arguably complicated by the dormant Commerce Clause issues presented and decided in the case).<sup>22</sup> Ignoring the only other such case, *Circuit City Stores, Inc. v. Adams*,<sup>23</sup> Chemerinsky moves on to *Geier v. American Honda Motor Co.*<sup>24</sup> That case—his bete noire—comes close, but it's no cigar: the pro-preemption majority opinion was written by Justice Breyer, and the conservative Justice Thomas was among the dissenters.<sup>25</sup> Chemerinsky's third example is *American Insurance Ass'n v. Garamendi*,<sup>26</sup> where Justice Thomas and Justice Scalia joined Justice Ginsburg and Justice Stevens in dissenting from the majority's pro-preemption ruling.<sup>27</sup> If that is an example of "the conservative Rehnquist Court" in action, I give up.

Perhaps, one could still argue that the conservative Justices' anti-regulatory policy preferences too often override their ostensible federalism commitments. But if so, one ought to be prepared to entertain the

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17. See Michael Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. (forthcoming 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=634263](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=634263).

18. *Id.* at 6 and app. A.

19. *Id.* at 17.

20. See *id.* at 51.

21. Chemerinsky, *The Need to Limit Federal Preemption*, *supra* note 1, at 72-73 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)).

22. The determination of separate (and dispositive) legal issues in a single case raises a distinct possibility of strategic judicial voting. In other words, one cannot simply assume that the preemption votes in *Lorillard* are independent observations.

23. 532 U.S. 105 (2001).

24. Chemerinsky, *The Need to Limit Federal Preemption*, *supra* note 1, at 72 (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)).

25. *Geier*, 529 U.S. at 864, 886.

26. Chemerinsky, *The Need to Limit Federal Preemption*, *supra* note 1, at 73 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)).

27. *Garamendi*, 539 U.S. at 430.

hypothesis that the same opportunism might be at work on the liberal side. How is it that Justices Stevens, Souter, and Ginsburg, the most implacable opponents of the Rehnquist Court's federalism, suddenly discover their federalist credentials and affections in preemption cases?<sup>28</sup> What principle, other than a premise of "the strictest regulator always wins," might explain *that* discontinuity? Among the scholars who take the conservative Justices to task for inconsistency and "hypocrisy" at the federalism front, none (so far as I can see) have asked, let alone answered, that question – including Chemerinsky.<sup>29</sup> The selective deployment of the "flip-flop" theory, coupled with its lack of a sound empirical foundation, suggests that its principal point is not to explain but to polemicize: let's hoist the conservatives by their federalism petard and mobilize their "states' rights" sympathies for pro-regulatory purposes.

That strategy requires an identification of a pro-state position in preemption cases with "federalism." In other words, one has to argue that anything the states wish to do is *ipso facto* federalism. That view has found some takers,<sup>30</sup> but it is transparently absurd. States often seek to finance their operations by taxing citizens, firms, and transactions in other states. The satisfaction of domestic political demands by means of external wealth transfers (such as extraterritorial taxation or export cartels of the *Parker v. Brown* variety),<sup>31</sup> raising rivals' costs, and throwing up protectionist barriers is an efficient strategy from the states' vantage, though obviously not from a global wealth perspective. To argue that federalism demands a "pro-state" position in preemption cases over federal statutes that aim to protect interstate commerce (and the states themselves) against such stratagems is to argue that federalism must let the states go their exploitative ways.

One could, I suppose, have a "states' rights" theory of that description—just as one can have an "individual rights" theory that would justify my fist in your face. But a more consistent, attractive, and constitutional position is to insist that states' rights cannot possibly encompass rights to aggression (and to the Framers' minds, state exploitation of non-citizens did constitute an "act of aggression").<sup>32</sup> On that view, a rock-ribbed federalist who votes "for the states" in federalism cases may well vote "against the states" in

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28. The liberal Justices vote more consistently against preemption than the conservative Justices vote for it. See Greve & Klick, *supra* note 17, manuscript at 57.

29. See, e.g., Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1286 (calling the decision by a conservative majority in *Alden* and several subsequent federalism cases "the height of judicial hypocrisy"); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1245 (2002) (accusing conservative Justices of "engaging in unbridled hypocrisy").

30. See, e.g., Kendall, *supra* note 2, at 61-63, 137-38.

31. See *Parker v. Brown*, 317 U.S. 341 (1943).

32. THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 3, at 31.

preemption cases, to the extent that federal statutes preempt the states from acting on their opportunistic, exploitative preferences.

The operative word, alas, is “may.” It is not at all clear that the Justices’ preemption analysis has been informed by constitutional considerations that merit that honorific.

### III. INCOHERENCE (?)

As noted, over half of the Supreme Court’s preemption decisions are unanimous (or nearly so).<sup>33</sup> That remarkable figure, which far exceeds the degree of unanimity in the general run of Supreme Court decisions,<sup>34</sup> may seem to suggest that on the whole, the rules of the preemption game are tolerably clear. Nonetheless, scholars are virtually unanimous in lamenting the lack of predictability and doctrinal coherence in the Supreme Court’s preemption decisions. By and large, those misgivings strike me as justified. Three observations illustrate the point.

First, several close and important preemption cases contain rousing invocations of “federalism”—met by other Justices’ studied indifference to federalism concerns or by perplexed statements to the effect that the case at bar has nothing to do with federalism (and how could anyone think otherwise?). One does not consistently find individual Justices on one or the other side of that divide. In his dissent in *AT&T Corp. v. Iowa Utilities Board*,<sup>35</sup> Justice Breyer appealed to federalism concerns, which Justice Scalia’s majority opinion dismissed with an air of consternation.<sup>36</sup> In *Geier*, it was Justice Breyer’s turn to simply ignore the dissenters’ federalism protestations.<sup>37</sup> The point here is not to accuse, let alone convict, Justice Breyer or any other Justice of inconsistency. Good and sufficient legal reasons may prompt Justices to raise federalism concerns in some preemption cases but not others. The point is simply this: even at the basic level of deciding whether preemption cases are merely exercises in statutory construction or rather (or also) present federalism questions, there appears to be little judicial agreement.

Second, and (as noted) quite at odds with the common picture of ideological voting behavior, preemption cases are increasingly decided by unlikely coalitions. In important cases (such as *Garamendi*), one now finds members of what one might call the Chemerinsky bloc—Justices Souter,

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33. Greve & Klick, *supra* note 17, manuscript at 17.

34. Over half (54 of 105) of the Rehnquist Court’s preemption decisions were unanimous, significantly higher than the general degree of unanimity for the court, which is 40.3% for all cases. *Id.* To compare this with a recent general statistical summary of general unanimity, see *The Supreme Court, 2003 Term: The Statistics*, 118 HARV. L. REV. 497, 502 (2004) (an example of the Harvard Law Review’s annual statistical summary of the Court’s decisions for each Term—Table I (C) in the 1986-2003 publications contains the Court’s unanimity statistics).

35. 525 U.S. 366 (1999).

36. *Id.* at 412 (Breyer, J., dissenting); *id.* at 378 n.6.

37. See generally *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). Justice Breyer’s opinion for the Court does not discuss or even mention the dissenters’ federalism arguments. *Id.*

Stevens, and Ginsburg—in a voting coalition with the Court’s most conservative members.<sup>38</sup>

A third indication of the lack of coherence emerges from the statistical pattern of preemption cases.<sup>39</sup> Trying to explain that pattern, one finds that certain “signals” or “cues” explain quite a bit of the variance. For example, it matters a whole lot with respect to the outcomes what the Solicitor General has to say.<sup>40</sup> It also matters whether a state is a party to the case: Pro-preemption outcomes are far more likely in cases among private parties than in cases to which a state is a party.<sup>41</sup> A heavy reliance on signals suggests that the Court has no other reliable way of ordering the universe of cases. To that extent, the near-universal laments about the lack of coherence and doctrinal clarity in preemption law have an empirical basis.

With characteristic good cheer, Dean Starr has assured us that by the end of the day, we shall have engineered a coherent preemption regime.<sup>42</sup> I share his aspiration, and I shall try to contribute what little I can to this lofty objective—though not without conceding the real limits to the enterprise. Preemption cases are statutory interpretation cases, which raises the question of whether preemption law can be any more coherent than the underlying statutes. Those statutes will always be ambiguous (at least in the cases that become the stuff of litigation), so one has to approach statutory interpretation with some set of presumptions. The presumptions, not the statutes, are supposed to yield coherence. What then should they be?

That substantive inquiry does not settle the independent question of how aggressively or intensively we should deploy those presumptions. Even under the most robust set of presumptions, the differences in the underlying statutes will and should matter a great deal. In other words, there is a real limit to the extent to which one can squeeze a coherent “preemption law” out of the presumption lemon. But we should insist on presumptions that cohere internally, with the constitutional framework, and over the general run of cases. It is on those margins that we should and probably can do better.

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38. Michael S. Greve, *The Term the Constitution Died*, 2 GEO. J. L. & PUB. POL’Y 227, 232-34 (2004). Here again, one ought to be careful before jumping to behavioralist inferences. Preemption cases tend to be arcane and, moreover, involve a wide range of competing considerations, from statutory construction to the role of constitutional (federalism) canons to the weight of pragmatic, economic considerations. The Justices may follow legal considerations that give way to more overtly political preferences in big, one-dimensional constitutional cases that play out on Broadway. Perhaps advocates in preemption cases—unlike lawyers who argue, say, affirmative action or abortion cases—can reasonably assume, or at least hope, that legal arguments might actually matter. Their trouble on this theory is that they cannot predict what legal arguments might matter to whom in what case. Preemption lawyers on all sides must build judicial coalitions in the sand. *Id.*

39. See generally Greve & Klick, *supra* note 17.

40. See *id.* at 39-43.

41. See *id.* at 30-34.

42. Kenneth W. Star, Dean, Pepperdine University School of Law, Welcome Address at the Pepperdine Law Review Symposium: Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices (April 9, 2005).



#### IV. “TRADITION” AND “CLEAR STATEMENTS”

The key presumption in preemption law is a presumption against preemption in areas of traditional state authority, unless Congress clearly indicates an intent to preempt.<sup>43</sup> That presumption appeals to many liberals (including Chemerinsky) because it favors pro-regulatory constituencies—legislators as well as state attorneys general, state courts, and plaintiffs’ lawyers—in close cases. It appeals to many conservatives because it sounds protective of the states and seems to capture a part of the original, constitutional idea of enumerated powers.<sup>44</sup> It appeals to scholars with no overt ideological agenda because it promises to give states something important to do in an era of a constitutionally unlimited government—in other words, to salvage a piece of federalism after the constitutional revolution of the New Deal.<sup>45</sup> Even with the best of intentions, however, it is notoriously difficult to mimic, replicate, or even approximate first-order principles with second-best rules. So here: important features of the enumerated powers logic get lost in translation into a “presumption against preemption” in areas of traditional state authority.

First, the category of “traditional state powers” is arbitrary. In *Medtronic, Inc. v. Lohr*,<sup>46</sup> Justice Stevens first identified health and safety regulation as a “traditional” state task;<sup>47</sup> then acknowledged that federal intervention in the field of drugs and medical devices dates back to 1906;<sup>48</sup> and finally nonetheless invoked the presumption against federal preemption of “traditional” state functions in support of an anti-preemption ruling.<sup>49</sup> With equal justice, one could argue that drugs and medical devices have “traditionally” been of such overriding federal concern as to prompt an early and, at the time, quite unusual federal intervention as soon as those products showed up in interstate commerce.

Even if “traditional state powers” were a more reliable category, it would not tell us much about the crucial question of which powers fall under that category. A century ago, the Supreme Court confronted the question of whether Congress could regulate liability questions over employer-employee relations in the railroad industry.<sup>50</sup> Back then, the corporate employers’ opposition to the federal intervention rested on the slogan that has now become the trial bar’s mantra: tort law is an area of “traditional state authority.” (The more things change, the more they stay the same.) The

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43. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

44. KENNETH STARR ET AL., *THE LAW OF PREEMPTION* 5-14, 40-56 (1991).

45. See, e.g., Young, *supra* note 2, at 1369.

46. 518 U.S. 470 (1996). *Medtronic* is discussed at length by several contributors to this volume. See Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005); David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95 (2005).

47. *Medtronic*, 518 U.S. at 475.

48. *Id.*

49. *Id.* at 485.

50. See *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908).

Supreme Court responded, correctly to my mind, that every authority will be exercised at some point for the first time.<sup>51</sup> At most, “tradition” can offer interpretive help. It cannot be a substitute for a substantive, textually grounded analysis.

Second, and more important, the presumption against preemption saves only half of the enumerated powers logic. That logic “empowers” state governments principally by disabling the national government from acting in some sphere. Within that sphere, the federal government cannot impose a ceiling on what states may do.<sup>52</sup> In that sense, the states are empowered – and good for them. The flip side is that the federal government cannot set a floor under the states either.<sup>53</sup> The encumbrance on the free exercise of the states’ powers is not federal preemption but the threat that the losers of redistributive policies may “vote with their feet.” In short, under the enumerated powers arrangement, state power and the discipline of interstate competition come in a single package.

The “presumption against preemption” captures only the first half: Congress should not easily be able to set a ceiling. It fails to capture the second part, which is that Congress has no power to set a floor. A congressional “floor,” after all, leaves states free to regulate more stringently. So, it is not a true preemption, and therefore cannot be subject to a presumption against preemption. The presumption, it transpires, does not mimic the original rules at all. Rather, it substitutes for genuine state competition a freakish arrangement that subjects private actors to overlapping regulatory regimes without exits or stopping points.<sup>54</sup> It is manifestly calculated not to approximate, but rather to *invert* the first-order rules.

Consistent with their embrace of the “presumption against preemption,” anti-preemption scholars often argue that the “clear statement” rule that governs statutory federalism cases should be extended to preemption cases.<sup>55</sup> In statutory federalism cases, their argument runs, the Supreme Court generally applies a “clear statement” rule, which holds that Congress will not be presumed to have exposed state or local governments to private suits unless Congress has clearly expressed its intent to that effect.<sup>56</sup> But why

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51. *Id.* at 521-22.

52. See Greve, *Federalism’s Frontier*, *supra* note 9, at 107.

53. See *id.*

54. See generally *id.* at 107-08.

55. See STARR ET AL., *supra* note 44, at 40-56; Young, *supra* note 2, at 1386-88.

56. *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 464 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

should that presumption *not* apply in preemption cases, which pose very similar federalism risks?

The answer is that the federalism risks are *not* comparable. There is a real and constitutionally meaningful difference between an affirmative command to a state authority—whether through direct “commandeering” or by exposing state authorities to private suits—and a mere limitation upon the exercise of that authority. While I am inclined to think that the distinction between a positive order and a “negative,” preemptive restriction is persuasive even at a purely conceptual level, it also rests on firm constitutional ground. A crucial difference between the Articles of Confederation and the U.S. Constitution is the federal government’s authority to enforce its own laws directly, without the assistance or intermediation of the states.<sup>57</sup> This central element of the federal order in turn implies that federal attempts to dragoon state governments into service are inherently suspect. The constitutional architecture reflects this principle and baseline expectation. The federal authority to restrain the states under the Supremacy Clause sweeps across the entire field in which the federal government is competent to act. In contrast, instances where the federal government may commandeer the states’ performance are carefully circumscribed and limited in number, and most of those clauses (for example, the Fugitive Slave Clause)<sup>58</sup> have not been notable success stories. In short, the constitutional structure itself implies a distinction between restraining the states and bossing them around.

The distinction between affirmative command and mere limitation is basic to federalism cases. For example, it distinguishes *Printz v. United States*,<sup>59</sup> a true commandeering case, from *Reno v. Condon*,<sup>60</sup> a mere “limitations” case. In “clear statement” cases, one cannot explain the rationale for the rule and its range without the distinction between affirmative command and mere limits. On the flipside, this means that the clear statement rule should *not* apply in preemption cases.

## V. CONSTITUTIONAL PRESUMPTIONS

So what *is* the right rule or presumption for preemption cases? To my mind, one has to tie preemption presumptions to the original constitutional logic—that is, the logic of enumerated powers. I will confine myself to suggesting the general direction of such an approach.

Left to their own devices, states would do very bad things to one another, to the national government, and to each other’s citizens. Factions and interest groups, operating at the state level, would persistently seek to tax and exploit other states and their citizens. States would enact debtor

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57. See PETER HAY & RONALD D. ROTUNDA, *THE UNITED STATES FEDERAL SYSTEM* 7-12 (1982) (comparing the central government’s role under the Articles and the Constitution).

58. U.S. CONST. art. IV, § 2, cl. 3, *superseded by* U.S. CONST. amend. XIII.

59. 521 U.S. 898 (1997).

60. 528 U.S. 141 (2000).

relief laws, coin paper money, form compacts and alliances to the detriment of other states, and engage in various other nefarious schemes.

The Constitution supplies means to counteract those risks. With respect to state activities that particularly alarmed the Framers—paper money, impairments of the obligation of contracts, and so forth—Article 1, Section 10 provides for either a complete prohibition or for a requirement of congressional consent.<sup>61</sup> Beyond that, the Supremacy Clause,<sup>62</sup> in conjunction with the federal government's enumerated powers,<sup>63</sup> affords a ready means of redress for sectarian state schemes.

Under this general framework, should any judicial presumption attach to the exercise of federal (preemptive) legislation? The answer depends on what it takes to render the constitutional provisions adequate to their intended purpose.

At least one of the Framers—James Madison, as it happens—doubted that enterprise altogether: he left the Constitutional Convention in despair because he thought the proposed Constitution failed to afford sufficient means to keep state-based factions under control.<sup>64</sup> At the Convention, Madison had pushed hard but unsuccessfully for a national “negative”—that is to say, a constitutional proviso that no state law may take effect without the affirmative assent of the United States Congress.<sup>65</sup> Madison remained committed to that idea as late as October 24, 1787 after the close of the Convention.<sup>66</sup> In a famous letter to Thomas Jefferson, Madison wrote:

The restraints agst. [sic] paper [admissions], and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be [controlled] by some provision which reaches all cases whatsoever. The partial provision made [in the Constitution], supposes the disposition which will evade it.<sup>67</sup>

Repeat after Madison: “The partial provision made, supposes the disposition [on the part of the states] which will evade it.”<sup>68</sup> More clearly than his contemporaries (with the possible exception of Hamilton) and far

61. U.S. CONST. art. I, § 10.

62. U.S. CONST. art. I, § 2, cl. 1.

63. U.S. CONST. art. I, § 8.

64. See Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 670-71 (1999) (undertaking a splendid discussion of Madison's proposal and its fate at the Constitutional Convention).

65. *Id.*

66. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS 146 (Jack N. Rakove ed., 1999).

67. *Id.*

68. *Id.*

more clearly than the great majority of contemporary experts on preemption and federalism law, Madison understood that the federal government does not act on states, period. It acts and operates on states that have every incentive, every reason, and countless means to evade federal strictures.

While that may seem an unduly pessimistic view of the matter, American constitutional history provides ample reason to believe that it is right. In particular, the dormant or “negative” Commerce Clause, which bars certain forms of state legislation even in the absence of any congressional intervention, points in that direction. That so-called “clause,” of course, does not appear in the Constitution, and there are good reasons to describe it as a wholesale judicial invention.<sup>69</sup> If the dormant Commerce Clause has nonetheless withstood the test of time, that is probably because one cannot make the federal system work without it. The affirmative exercise of federal supremacy is too uncertain and too fraught with institutional impediments to serve as a safeguard against the states’ “disposition to evade it.”<sup>70</sup>

The logical extension of that basic insight, it seems to me, is to afford federal statutes broad preemptive force where such statutes are demonstrably targeted to curtail the federalism risks that alarmed the Framers – in particular, the risk of interstate exploitation and interferences with interstate commerce.<sup>71</sup> With respect to federal laws that regulate network industries, interstate spillovers (such as pollution),<sup>72</sup> or cost shifting (such as products liability and class actions),<sup>73</sup> one ought to start with the Madisonian intuition and read federal preemptive statutes for all they are worth. That implies, among other things, an expansive implied preemption doctrine. Conversely, where Congress purports to regulate economic activities and preempts state legislation that has no adverse effects on interstate commerce, a more restrictive interpretation seems warranted. Statutes regulating workplace conditions or localized environmental events fit this description.<sup>74</sup> The regulating states will at all events have to live with the costs as well as the benefits of their laws, and state competition acts as a potent disciplining mechanism. Nothing in federalism’s constitutional architecture warrants a judicial presumption in favor of the federal government. In fact, in these

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69. See *Okl. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring) (“[T]he ‘negative Commerce Clause’ . . . is ‘negative’ not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution.”); *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (describing the dormant Commerce Clause as “a sort of intellectual adverse possession.”).

70. For a slightly more elaborate explication of this point, see Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 315-19 (2003); see also Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25 (2005).

71. See Robert Justin Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 163 (2004).

72. See 33 U.S.C. § 1151 (2000), *superseded by* Pub. L. 92-500, § 2, 88 Stat. 816.

73. See 8 U.S.C. §1101 (2000), *repealed by* *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003) (repealing the current version of the statute and recognizing a prior version based on implied preemption); see also Memorandum on Deterring Illegal Immigration, 60 Fed. Reg. 7885 (Feb. 7, 1995) (interpreting § 1101’s cost-shifting implications).

74. 29 U.S.C. § 670 (2000).

sorts of contexts, a “presumption against preemption” and a “clear statement rule” look like sensible ways of approximating the logic of the constitutional, enumerated powers architecture.

In some quarters, a set of preemption presumptions that deliberately mimics the constitutional logic will be suspect as an attempt to resurrect, in the guise of an underhanded judicial canon, a discredited “Constitution in Exile.” That charge might have merit if the presumptions were deployed very aggressively, as a judicial means of constructing statutes that Congress never enacted. I am inclined to think, however, that the structure of most federal preemption statutes actually tracks the constitutional intuitions reasonably well. To that extent, the presumptions just sketched would aid in the faithful judicial interpretation of congressional purposes and their application to state laws that Congress, in the nature of things, could not have foreseen. But I must leave that large subject for another day.

