

Howard J. Trienens Visiting Scholar Program

PREEMPTION: FIRST PRINCIPLES

*Stephen F. Williams**

I want to identify some first principles related to the general issue of preemption. As a result, what I have to say will be more or less completely abstracted from the caselaw. I apologize for that, but a plunge into the detail of the decisions would be a distraction from what I'm about.

* * *

Although it wasn't always so,¹ all hands currently agree that preemption cases depend on some notion of congressional intent. The judicial search for this intent is usually carried on at a rather micro level: a study of the meaning and interplay of the relevant statutory provisions. This is, of course, essential.

But micro-level statutory interpretation is often aided by having a broader sense of the statute's overall purpose and where it fits in our constitutional scheme. Indeed, the Court often—though not always—applies a presumption. The conventional one is that of *Rice v. Santa Fe Elevator Co.*:² a presumption against preemption. My argument is that, at least in any case where analysis of the statutory details leaves room for application of a presumption or background norm, the structure and function of federalism permit the derivation of such a background norm—a norm that, as I'll try to show, will vary with the circumstances. To that end, I propose an in-

* Hon. Stephen F. Williams is a Senior Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. Judge Williams delivered an earlier version of this paper at the Northwestern University School of Law on February 28, 2008 during the annual Howard J. Trienens Visiting Judicial Scholar Program. I would like to express gratitude to Stephen E. Sachs for his help on both speech and article.

¹ See Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the Lochner Era*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 48–49 (Richard A. Epstein & Michael S. Greve eds., 2007).

² 331 U.S. 218 (1947). In the Supreme Court's recent decision of *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), the majority opinion makes no reference to a presumption and the dissent cites *Rice*.

quiry that I think should precede the choice of a presumption for any particular case.

Specifically, the inquiry would be *why* Congress has chosen to *nationalize* the issue involved (insofar as it has). After all, the preemption question is about the *degree* to which Congress has nationalized the area; it seems basic to ask *why* it has nationalized it at all. As are all inquiries used to resolve a preemption issue, this question goes to the congressional purpose. But it goes to a very specific dimension of that purpose: why nationalization? More specifically, I believe the essential question is: What interstate collective action problem did Congress seek to solve?

The pertinence of the question derives from the inherent character of a federal regime. Federalism is a kind of halfway house between a unitary nation-state and a loose alliance. Unlike a unitary state, a federal union presupposes sufficient diversity of geographic, social, and economic endowments, or at least such expanse, that many political decisions can be best made at the level of the constituent bodies. But unlike a loose alliance, the constituent bodies are closely enough related that some issues are sensibly propelled up to the higher level for resolution on a non-unanimous basis—as opposed to the unanimity rule that would normally apply in an alliance. It seems virtually tautological to say, as a general matter, that the issues to be resolved at the center are those which, in the absence of central resolution, would result in “defective” regulation (or “defective” lack of regulation). “Defective” is in quotes as a way of recognizing that there may be varied criteria for defectiveness.

While the role of the interstate collective action problems in question can be inferred from a federal structure generally, it was manifest in the history of the federal structure adopted in 1787. Take, for example, the issue of national defense.³ Defense is a classic “public good.” If it were left to the states, each would be tempted to hang back and let others bear the burden while still receiving the benefits. Interstate pollution is another classic collective action problem: that of physical externalities. With no federal authority, states would give less consideration to the out-of-state damages that home-state polluters inflict than to in-state damages; indeed, they might well pay out-of-state damages no attention at all. Finally, the example perhaps most commonly cited as a reason for adopting the Constitution—to limit states’ power to burden interstate trade—is as typical a collective action problem as one can imagine.

Of course every public policy decision has some potential for interstate collective action difficulties. Take a paradigm of state control: real estate law. Those drafting the laws may place a lower value on simplicity than

³ Akhil Amar identifies national defense as the Framers’ primary concern. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 43–53 (2005).

they would if they took into account out-of-staters' interests in minimizing transaction costs. But here, the collective action problem seems slight to vanishing. A state has a great interest itself in keeping transaction costs down and probably wouldn't do materially better if its legislators did think of out-of-state transactors; the case for any federal intervention is accordingly weak.

The Framers plainly had interstate collective action problems very much in mind. The Constitutional Convention's initial description of the Article I powers, before it was sent to the Committee of Detail, was functional rather than categorical. The Committee of the Whole on June 13, 1787 adopted the following:

- Resolved. that the national Legislature ought to be empowered
- [1] to enjoy the legislative rights vested in Congress by the confederation—
and moreover
 - [2] to legislate in all cases to which the separate States are incompetent: or
 - [3] in which the harmony of the United States may be interrupted by the exercise of individual legislation.⁴

This language was repeated from the Virginia Plan,⁵ drafted by James Madison, who had long expressed his concern that certain activities, such as interstate commerce, could “never be so regulated by the States acting in their separate capacities. . . . The nature of the thing therefore proves [that] power . . . to be within the reason of the foederal [sic] Constitution.”⁶ Similarly, Jared Ingersoll employed near identical language during the Constitutional Convention when he wrote that commerce should be subject to federal regulation “because the States individually are incompetent to the purpose.”⁷

Later, in full convention, Gunning Bedford of Delaware successfully offered an amendment to this resolution, adding a power “to legislate in all

⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 229 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND].

⁵ See *id.* at 21.

⁶ Letter from James Madison to James Monroe (Aug. 7, 1785), in 2 THE FOUNDERS' CONSTITUTION 481, 481 (Philip B. Kurland & Ralph Lerner eds., 1987) (“They can no more exercise this power separately, than they could separately carry on war, or separately form treaties of alliance or Commerce.”); see also James Madison, Draft of Resolutions on Foreign Trade (Nov. 12, 1785), in 2 THE FOUNDERS' CONSTITUTION, *supra*, at 482, 482 (“[T]he unrestrained exercise of the powers possessed by each State over its own commerce may be productive of discord among the parties to the Union; and . . . Congs. ought to be vested with authority to regulate the same in certain cases.”).

⁷ Jared Ingersoll, Draft Speech, in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 102 (James H. Hutson ed., 1987).

cases for the general interests of the Union.”⁸ The resolution was then sent to the Committee of Detail, which reported back on August 6 with language that changed the Bedford resolution’s functional approach to a categorical enumeration of powers closely resembling the final version of Article I, Section 8.⁹ The new language was adopted without discussion.¹⁰

Bedford’s addition appears superficially far broader than authority to cure interstate collective action problems. Nonetheless, when Edmund Randolph objected that Bedford’s addition of that clause “involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police,”¹¹ Bedford responded by explaining that the “general interest” language was “not more extensive or formidable than the clause as it stands: *no State* being *separately* competent to legislate for the *general interest* of the Union.”¹²

Even Bedford’s explanatory language might seem susceptible of a very broad reading, allowing Congress to address any problem perceived to be present within the federal union. But that reading would transform his rebuttal of Randolph’s comment into a concession that Randolph was completely correct, and surely would have encouraged Randolph to press on with his objection. By contrast, conditioning federal action on the incompetence of individual states to “separately” solve the problem is coherent, fits Bedford’s claim that his amendment added nothing to the prior formulation, and fits comfortably within the concept of federalism as a solution to interstate collective action problems.

Of course, some constitutional provisions can’t be said to rest on concern for collective action at all. In the collective action model, there is no ranking of states, no notion that any is inferior to any other. It is simply that each, pursuing its own advantage, may adopt rules (or engage in other conduct) whose costs are significantly felt outside the enacting jurisdiction. But this is not the case for the Civil War Amendments, for example. Historically they rest on the premise that some states pose exceptional risks of certain kinds of discriminations and deprivations. So I exclude action under those amendments from my analysis.

⁸ 2 FARRAND, *supra* note 4, at 26; *see also* Robert Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1339 (1934) (citing Madison’s debates, as reported in H.R. Doc. No. 398 (1927)).

⁹ Stern, *supra* note 8, at 1340.

¹⁰ *Id.*; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996).

¹¹ 2 FARRAND, *supra* note 4, at 26.

¹² *Id.* at 27; *cf.* Stern, *supra* note 8, at 1340 (arguing that the “absence of objection to or comment upon the change” indicates that the convention believed that the enumeration conformed to the previously approved standard).

* * *

Let's now look at some interstate collective action problems and at how the *kind* of collective action problem involved would affect the inferences that can logically be drawn as to how far Congress intended to press nationalization. First, consider the issue of interstate pollution externalities. Suppose Congress enacted federal legislation addressed to this problem.¹³ It might, for example, require that each state give as much consideration to out-of-state pollution damage as to in-state damage; it might set some minimum tradeoff formula—e.g., that each state must compel pollution reduction at least up to the point where the marginal cost of pollution control equaled the marginal benefit in damages reduced (including damages at out-of-state locations); it might require that no state emit border-crossing pollution that might injure the health of citizens in neighboring states.¹⁴ All these formulae have in common that they are plainly aimed at solving the issue of interstate pollution externalities—i.e., the relative indifference of each state's legislators to out-of-state damage. Given that purpose, it would be extremely odd to impute to Congress an intent to preempt more demanding state rules. Here the type of collective action problem involved easily dictates a presumption against preemption.

Second, let me take a case at roughly the opposite end of the spectrum: a statute authorizing agency specification of minimum standards for products traveling in interstate commerce or services sold in interstate commerce. Here it is at least plausible to suppose that Congress nationalized the issue so as to protect the interstate market from the sort of balkanization that would flow from standards developed at the state level. The collective action issue is simply that individual states are likely not to take full account of the costs flowing from inconsistent standards. Of course no state is utterly indifferent to those costs. Each is bound to recognize that imposition of inconsistent standards reduces economies of scale and that that reduction in turn will affect *in-state* prices—a bit. But this is only a slice of the aggregate price-increasing impact. If Congress's purpose was to remedy state disregard of this aggregate effect, a presumption of intent to preempt would follow.

In some contexts the interstate collective action problem for product standards seems especially acute. Product safety issues inherently pose

¹³ See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996). Dean Revesz analyzes the few sections of the Clean Air Act that address the problem of interstate externalities; he finds them, and their interpretation, woefully defective. He then proposes an elegant but extraordinarily complex solution. *Id.* at 2374–94.

¹⁴ Cf. Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (2000) (authorizing the promulgation of ambient air standards “requisite to protect the public health” with an “adequate margin of safety”).

questions of a tradeoff between safety and cost. In a single, completely isolated jurisdiction, lawmakers would have considerable incentive to consider the impact of safety demands on price. But in our federal system, given (1) the Supreme Court's rather mild limits on in personam jurisdiction, (2) its almost complete *laissez faire* as to state choice-of-law decisions, (3) the way in which products and buyers wander among the states, and (4) modern courts' virtually complete indifference to contract provisions relating to liability, firms selling in interstate commerce cannot, as a practical matter, match selling prices to varying levels of litigation risk. A firm can't sell widgets cheaply in a state with relatively undemanding product safety standards because lawsuits involving products can end up anywhere. Because the firms have no effective way of pricing on the basis of local liability standards, no state gets a meaningful price signal for the stringency of its rulings. As a result, state development of liability standards proceeds with artificially reduced concern for the effect on price. In short, states externalize the costs of their liability rulings onto customers in other states.¹⁵

Even services sold in interstate commerce present collective action problems. Suppose a state imposes special disclosure rules on firms selling cell phone service. The requirement's costs obviously include the out-of-pocket costs of complying. But the cell phone service providers have a choice as to how to respond, and their responses will affect the form of interstate externality. If they spread the costs to customers nationwide, the regulation gets a free ride. Further, other states get a signal that they can impose regulatory burdens without fear that their consumers will pay the costs. But if the service providers assign the costs to their local customers, they spoil their image as nationwide providers offering the same array of services in all states at the same price—a cost of little or no interest to the enacting state. With one phone company reaction, the regulating state will have externalized its regulatory costs; with the other, it will have inflicted balkanization costs on its sister states.

Third, let's consider national rules that govern air or water emissions but are plainly *not* addressed to interstate physical externalities. This describes virtually all of our current national antipollution regulation. Local environmental controls carry some risk of regulatory cost externalization, but the risk will vary from field to field. For regulations affecting large plants, much of the pollution control equipment may be more or less tailor-made (this is no more than a guess); if so, then the balkanization costs imposed by independent state action will be slight. At the other end of the spectrum are rules governing emissions at thousands of establishments—

¹⁵ See generally *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991) (Neely, J.); RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* (1988).

dry cleaners come to mind—or even products such as motorboats, for which the market in pollution controls (or the product itself) is likely to be nationwide. For such items the balkanization rationale looms rather powerfully, with the implication that preemption makes sense.

But an alternative explanation for a congressional decision to nationalize might be congressional concern over a “race to the bottom.” First I want to separate the two strands of thought that have gone under the label. Then I’ll consider the preemption implications, and finally I’ll very briefly address the plausibility of the idea.

Scholars have applied the race-to-the-bottom label to two quite different intuitions about states’ regulatory incentives and behavior. The first, the pure race-to-the-bottom theory, is that interstate *competition* for investment causes states to adopt laxer regulations than they would absent the competition. If the theory is sound, the distortion would, for example, generate greater laxity in state controls on industrial pollution than the state’s citizens genuinely preferred. The second theory is a *public choice* claim, namely that at the state level polluters enjoy a greater advantage, relative to environmentalists, than they do at the federal level. This might be true, for example, if environmentalists enjoyed economies of scale in lobbying at the federal level in comparison to the state level, whereas polluters did not.

As to either claim, the preemption implications are rather obvious. If Congress has really decided to nationalize an issue because of a concern that competition would drive states into a race to the bottom, or that polluters have a greater rent-seeking advantage at the state level, then congressional action would presumably be aimed at assuring a minimum stringency level. Greater state stringency—because a state somehow evades the competitive trap or because the polluters in a particular state prove to have no relative advantage (*vis-à-vis* their position in Congress itself)—in no way thwarts Congress’s solution to this supposed collective action problem.

But what of the plausibility? This is a very big topic, on which for the most part I will punt to Dean Richard Revesz’s sophisticated treatment of the subject.¹⁶ He concludes that there is no good reason to suppose that interstate regulatory competition should as a general matter become a race to the bottom, at least in the realm of environmental law. While states presumably compete to attract industry—and firms in turn compete to attract employees who will live in a state’s environment—there is no reason to think that the competition is generally unhealthy. Just as firms and individuals must, the states necessarily make tradeoffs between the benefits of

¹⁶ See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

stringency—enhanced safety, health, and amenity—and its cost. As Dean Revesz argues, the same principle applies to state taxes and services, where again there is competition—competition to provide maximum *net* benefit; yet most people seem to accept that a perfectly healthy competition is at work, *not* a race to the bottom. (Even the E.U. currently protects each nation’s authority to choose tax rates.¹⁷) Thus, the variation in state levels of environmental, safety, or health regulations seems less attributable to a race to the bottom than to (1) different natural endowments (Colorado is not Louisiana!), (2) different costs and benefits (and different estimates of these), and (3) different tastes and marketing objectives. These three are not intended to be analytically separate; the second and third differences in all probability flow in large measure from the first.

Normally we expect competition among firms to yield consumer benefits, so long as the competing firms are unable to externalize costs and none has market power. The first condition is readily solved by the sort of legislation aimed at interstate spillovers discussed above; the second seems improbable in most instances of states’ competition for investment. It seems curious to suppose that competition among states will generally yield perverse results.

As to the conceptually distinct public choice analysis, I again punt to Dean Revesz.¹⁸ I would simply note that as a support for federal imposition of national rules, the theory requires not only that polluters’ clout at the state level be superior to their clout at the federal level, but that the net effect at the state level causes state pollution control to fall below some standard for optimal stringency. Otherwise, the federal intervention would have the effect of increasing stringency beyond that optimum.

It might be argued that Madison’s famous essay on faction, *The Federalist No. 10*, places the august weight of the Framers behind the public choice version of race to the bottom. The core of his argument for shifting issues to the center is this passage:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive ex-

¹⁷ Treaty Establishing the European Community art. 93, Dec. 29, 2006, 2006 O.J. (C 321 E) 37, 79 (“The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.”).

¹⁸ See generally Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 555 (2001).

ists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

But Madison said nothing to classify particular interests or to suggest that any class had a systematic advantage in a smaller polity. Unless we subscribe to the idea that a group favoring greater stringency of regulation is by definition not a faction at all, Madison's remark really does not address the lopsidedness that is at the heart of the public choice theory of the race to the bottom.

Of course a court cannot *tell* Congress that fears of a race to the bottom are misplaced. So a clear congressional declaration that the legislation was driven by concern for such a race would compel deference. But absent a fairly clear lead from Congress, I would suggest that a strong presumption against a supposed effort to prevent a race to the bottom would be most in keeping with reality and the overall purpose of the Constitution. Exclusion of race-to-the-bottom rationales (in either form) will commonly leave a likely congressional purpose to facilitate an efficient national market, specifically to constrain excessive balkanization (or other state externalization of regulatory costs).

Let me now return to the issue of national environmental standards not grounded in any effort to prevent interstate pollution externalities. We have two interstate collective action problems that theoretically might be in play: on one hand (1) a somewhat mixed case on balkanization, ranging from possibly weak in the case of control devices for major plants to probably quite strong for small ones and for products, and on the other hand (2) "race-to-the-bottom" rationales (in the pure competitive form and the loose public choice form) that look factually dubious. Yet the premise that competition is inherently distorting seems to run against our procompetitive national ethos, and the disparagement of state governments implicit in the public choice theory seems out of tune with the initial premises of the federal union. Thus, it may make sense for courts to resist the race-to-the-bottom theories, subject of course to the recognition that a clearly expressed congressional viewpoint would prevail.

* * *

I want to close by mentioning several possible objections.

Objection 1: There is little in the analysis that takes any special account of the *United States* Constitution or history.

I accept the criticism in the limited sense of agreeing that my method isn't primarily grounded in the text or history of specific clauses. But the

Founders certainly were interested in structure,¹⁹ as described above, and I've tried to reframe that structural concern in terms of modern political economy.

Objection 2: It is rather fictional to think of congressional action as a response to a collective action problem. Congress acts when some interest group mobilizes at the national level and triumphs.

Although that may be a bit cynical, I would largely agree. But we do live in a constitutional republic, and when the legislature acts, the system overall may benefit if we generally impute to it a goal of carrying out one of the missions for which it was empowered. This is a variation on the maxim that hypocrisy is the homage that vice pays to virtue. Moreover, where the conflict of contending interest groups has yielded a reasonably clear answer in the legislation, a court will have no need for a presumption. In the remaining cases, where no clear answer emerges, it seems reasonable to impute to Congress goals that are consistent with federalism's overall structure and purpose.

Objection 3: One of the most useful functions of a federal system as opposed to a unified nation is that the states provide training grounds in which politicians can develop their skills in political competition and leadership, and voters can develop their skill at sifting wheat from chaff.²⁰ Anything that tends to cut down state legislative power reduces the significance of this proving ground.

Agreed, in part. I would say in mitigation that for realms in which there has been serious federal action, states are commonly left only with the power to fill in nooks and crannies. Moreover, my proposed analysis is directed largely to state rules that intentionally or accidentally impose external costs on other states. Rules that constrain political competition over nooks and crannies, or over opportunities for cost externalization, may only improve the quality of the states as proving grounds. To put it another way: disabling states from externalizing regulatory costs leaves their politicians competing over a set of options that are healthy vis-à-vis the system as a whole.

Objection 4: Some of the constitutional grants of power to Congress, even if ultimately driven by concern over collective action problems, may be worded in a way that allows Congress to adopt laws that simply aren't responses to any interstate collective action problem. There are, for example, readings of the Commerce Clause that would clearly allow legislation in such situations.

¹⁹ See generally GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* (2d ed. 1997).

²⁰ Robert Cooter, *Who Gets on Top in Democracy? Elections as Filters*, 10 SUP. CT. ECON. REV. 127 (2003).

This is surely true. Indeed, I've already mentioned that the Civil War Amendments don't address an interstate collective action problem of the normal sort. Obviously courts should be alive to that possibility. I don't mean to invite courts to force an analytical round peg into a square hole.

Objection 5: The proposal almost completely abandons the current quest for "balance" between state and federal power.

Agreed. Rather, it focuses on the risk that state action may impose costs on the welfare of *citizens* of other states. It is thus directly addressed to the end toward which—as the Constitution's preamble argues—governments are constituted. One can, of course, imagine economic, political, and juridical circumstances under which use of the preemption background norm suggested here would lead to radical imbalance. But it is hard to believe that rejecting such a preemption doctrine would be the most promising cure for such imbalance.

* * *

As this brief review of objections suggests, there may be many cases where the search for a genuine interstate collective action problem will be in vain. But I hope that what I've said has at least enough plausibility to stir some doubt about the soundness of any across-the-board presumption against preemption, such as the one embraced in *Rice v. Santa Fe Elevator Co.*

