



**FEDERAL PREEMPTION:  
STATES' POWERS, NATIONAL INTERESTS**

Edited by Richard A. Epstein and Michael S. Greve

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When does federal law trump state law? The arcane topic of federal preemption has become the stuff of public debate and major news stories. The partisan lines are clearly drawn. On one side, consumer advocates, plaintiffs' attorneys, and state officials argue that broad federal preemption claims interfere with the states' historic police power to protect their citizens against corporate misconduct. On the other side, corporations and federal agencies maintain that preemption is a vital safeguard against unwarranted and inconsistent state interferences with the national economy and against aggressive trial lawyers and attorneys general.

Fierce struggles along these lines dominate the political debate, judicial decisions, and legal commentary in a wide range of 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; from pharmaceutical drugs to pesticides to outboard motors. In all these areas, billions of dollars hang on regulatory nuances and arcane points of legal interpretation.

The preemption debate is also being waged in the shadow of broader, sometimes constitutional arguments concerning the role and utility of federalism and "states' rights" in a modern, highly mobile, integrated economy. Legal scholars are sharply divided over both the substance of those arguments and the extent to which they should dominate economic considerations or statutory language.

What the preemption debate needs is an examination that reflects the delicate interplay between our constitutional structure and the details of specific regulations.

A year ago, Richard A. Epstein and Michael S. Greve, two leading scholars in the field of preemption, assembled an exceptional group of prominent legal scholars and practicing attorneys for a probing analysis and spirited discussion of these difficult issues. Their

essays have now been published in *Federal Preemption: States' Powers, National Interests* (AEI Press, May 2007). The volume includes a preface by Kenneth W. Starr, dean of the Pepperdine University Law School and former solicitor general of the United States, and introductory and concluding essays by the editors. The essays are arranged in three parts.

In Part I, Viet Dinh and Stephen Gardbaum trace the antecedents of modern preemption law—respectively, the nineteenth-century understanding and the transition from the *Lochner* Court to the New Deal. The New Deal largely settled the constitutional disputes of the earlier eras, but the authors of these essays demonstrate why 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 existing preemption law in a wide range of policy arenas: drug regulation (Daniel Troy); telecommunications (Thomas Hazlett); banking, insurance, and corporate law (Hal Scott); environmental policy (Thomas Merrill); and products liability (Samuel Issacharoff and Catherine Sharkey). Jointly and severally, the essays provide both an in-depth examination of preemption at work and a good sense of the awesome range of legal and economic questions that fall under the heading of preemption.

Part III returns to the broader questions. Robert Gasaway and Ashley Parrish explore the internal logic of preemption doctrine, and Ernest A. Young examines its federalism dimension. Anne van Aaken's essay contrasts the American understanding of preemption with that of the European Union.

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Preface by former solicitor general **Kenneth W. Starr**, Pepperdine University School of Law

Introduction: "Preemption in Context," by **Richard A. Epstein**, University of Chicago Law School, and **Michael S. Greve**, AEI

## **PART I: CONSTITUTIONAL CONTEXT**

Chapter 1: "Federal Displacement of State Law: The Nineteenth-Century View," by former assistant attorney general **Viet C. Dinh**, Georgetown University Law Center

Chapter 2: "The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption during the *Lochner* Era," by **Stephen A. Gardbaum**, UCLA School of Law

## **PART II: APPLICATIONS**

Chapter 3: "The Case for FDA Preemption," by former FDA chief counsel **Daniel E. Troy**, Sidley Austin LLP

Chapter 4: "Federal Preemption in Cellular Phone Regulation," by former FCC chief economist **Thomas W. Hazlett**, George Mason University School of Law

Chapter 5: "Federalism and Financial Regulation," by **Hal S. Scott**, Harvard Law School

Chapter 6: "Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules," by former deputy solicitor general **Thomas W. Merrill**, Columbia Law School

Chapter 7: "Supreme Court Preemption: The Contested Middle Ground of Products Liability," by **Samuel Issacharoff**, NYU School of Law, and **Catherine M. Sharkey**, Columbia Law School

## **PART III: THE LOGIC OF PREEMPTION**

Chapter 8: "The Problem of Federal Preemption: Toward a Formal Solution," by **Robert R. Gasaway** and **Ashley C. Parrish**, both of Kirkland & Ellis LLP

Chapter 9: "Federal Preemption and State Autonomy," by **Ernest A. Young**, University of Texas School of Law

Chapter 10: "Supremacy and Preemption: A View from Europe," by **Anne van Aaken**, Institute of European and International Business Law, University of St. Gallen

Conclusion by **Michael S. Greve** and **Richard A. Epstein**