Balancing of Markets, Litigation and Regulation

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THE BALANCING OF MARKETS, LITIGATION AND REGULATION

Keith N. Hylton, Larry E. Ribstein, Paul H. Rubin, Todd J. Zywicki
Moderator: Geoffrey J. Lysaught

GEORGE LYSAGHT: Good morning, as I am sure most of you are probably aware, in addition to judicial education programs that the Law and Economics Center conducts, we also have a division that focuses on public policy research, known as the Searle Civil Justice Institute. In November, we held a public policy roundtable where we commissioned a variety of research and brought together a group of experts, both academic and practitioner experts, to discuss the issue of balancing the appropriate roles of markets, litigation, and regulation. And the notion there is that each one—markets, litigation, and regulation—can and probably should play a role in addressing various consumer harms.

You might expect that as institutions, they have various strengths and weaknesses in pursing that mission of addressing particular consumer harms. So, the question is: what are the appropriate roles of markets, litigation, and regulation? If they do have institutional competencies, should we have an expectation that they would work in a somewhat coordinated fashion, in an efficient and effective manner together? And if that were a reasonable hypothesis, why is it that at least observationally it looks like there is overlap, contradiction, and confusion produced by our litigation, regulation, and market systems?

Each of the individuals on this panel were participants in that public policy roundtable. We thought that this would be an interesting dialogue to share with all of you in your practices. So, on our panel today, we have Paul Rubin, who is a Professor of Economics at Emory University, Larry Ribstein, who is a Professor of Law from the University of Illinois, Keith Hylton, who is a Professor of Law from Boston University, and Todd Zywicki, who is a Professor of Law at George Mason University. Without further ado, I will hand it over to Paul Rubin.

PAUL H. RUBIN: I am an economist. So, I start with markets, by looking at safety and looking at various ways of achieving it. And of course, the three ways that is addressed are regulation, both common and tort law litigation, and markets. And two of them are very visible; tort law and regulation are very visible. Markets are less visible, but in fact, markets are probably the strongest force for safety that we actually have in an economy such as ours. People want safety, and as people get richer, they want more safety, and markets are in the business of providing what people want.

So, as people get richer and want more safety, lo and behold, markets provide more safety independently of any of the other forces. As long as
markets work well, they provide a good deal of safety. I provide some evidence in my paper. For example, if we look at the relation between income and safety—safety measured by accidental death rates—we find that both for the U.S. over time and across the world, as incomes go up, accidental death rates go down. A robust relationship, both statistically significant and economically significant, which leads to a substantial reduction—an increase in incomes leads to a substantial reduction in accidental death rates. There is more direct evidence.

Many people look at what is called a statistical value of life, and the way that economists measure that is to look at various jobs, look at the risks associated with that job, and see what happens to wages as the risk of injury or death goes up. It is universally found that as risks go up, wages go up. People demand compensation for accepting risks. The numbers are in the $3 million to $5 million range. In fact, I was chief economist at the Consumer Product Safety Commission a while ago; that agency and many other agencies use those numbers routinely in deciding on levels of safety.

But the point I want to make now is that there is a market there. As risks go up, people demand higher pay, which of course creates incentives for employers to make workplaces safer, and that is what we observe over time. Workplaces have become safer because people demand more safety. Products have become safer. Cars have become safer. Again, mostly because people demand more safety, and many studies have looked at things like accidental death rates over time, and they have thrown in creation of agencies such as the National Highway Traffic Safety Administration (NHTSA), and the Consumer Product Safety Commission (CPSC), and you really do not see any breaking point in the data from those agencies. Death rates go down as incomes go up, and it has been that way for as long as we can measure.

Then in the paper I provide a little anecdotal evidence about particular products. But again, the point about markets is we do not see them. They work subtly, but they work all the time. I mentioned something called ground fault circuit interrupters (GFCI). You probably know them as those little boxes in your bathroom that occasionally you have to push the button or your toothbrush will not work; but those are an important safety device. They have been around for about thirty or forty years, now. Over time, they have continually been modified, and continually been changed.

Originally, they were used for swimming pools. Now, they are used for almost all places where water and electricity are near each other; just recently, for wet bars in homes. This has happened almost entirely through a market process, one you do not see. Many of the GFCIs are hidden; you can see the one in your bathroom, but you do not see the other ones that may be somewhere else in your house, but they have been increased. The sophistication has been increased through a market process, through a function of the market, adopted into the National Electric Code, which then, is often mandated by law in states.
But the point is that the actual improvement has happened through the market, not obviously, but in a way that is not seen by the very important group I work with, the CPSC; a good part of what that agency does is deal with voluntary standards organizations, which are mainly made up of representatives of industry, and continually looking for new ways to improve safety. As I say, a subtle process, one that is not seen, but one that is very important. So, markets are very important. We see them when they fail.

When there is a market failure—when cars roll over when they should not or when there is a dangerous drug—then we see that markets are not working, and we have a tendency to say, “Let’s do something about it. We have to regulate this. We have to control it.” But most of the time, markets do work, and they work subtly, and we do not see them. It is only when they stop working that we may see them. Now, there are some times when markets will not work, and there are two basic conditions when markets will not provide the optimal amount of safety.

One of them is when there are third party effects: when my decision affects your risk. In the modern U.S. economy, an important example is automobiles. If I have a safe car, you are safer. If I have an unsafe car, in certain ways, if I don’t have a good braking system or a good lighting system, I can impose risks on third parties, but I do not have any incentive to take account of those risks. So, when I am deciding how safe a car to buy, I consider myself and my family and people maybe in the car with me, but I do not consider fully the effects of safety on others. And that is where the role for some non-market system comes in.

The most important non-market system, of course, is the tort system, which regulates—along with traffic laws, and insurance, and so forth—but the tort system also has an important role in regulating third-party safety events between strangers, between people with no contractual relations. We also regulate more directly through NHTSA. NHTSA regulates both third-party effects and non-third party effects. They do not seem to differentiate, as they regulate internal car safety as well as external safety. But that is a case where you need something besides a market where there are third-party effects.

You need something besides a market. At CPSC where I used to work, most of the products we dealt with were individual risk, but some were third-party risks; things like fires can affect third parties. So, there is a stronger case for regulating fire safety, perhaps more so for other things that CPSC regulates. But not much regulation is involved with third-party risks. Much of tort law, as we will see, is not involved with third-party events.

The other case where markets may not work is information. If people do not know about risks, then the market may not provide the optimal level of safety. The way the markets are effective is that people are less likely to know about risks because many, many risks we face in today’s world are very, very small. CPSC has regulated very small risks. Some big risks too: automobiles were risky, cigarettes of course, and swimming pools. But
most of the risks were quite small and because they are small, people may not learn about them.

So, there may be a case for some sort of third-party regulation, but again, whether that is beneficial or not beneficial is a question I will try to address. But we start with markets. They are a good first step for creating safety. We will mainly do something else when markets may not work, and they may not work for third-party effects or because of information. On the other hand, information is a tricky thing. The example that has been most carefully studied by economists and others is the Food and Drug Administration (FDA), which regulates the safety of new drugs. And the consensus among scholars who have studied the FDA is that it overregulates in the sense that it creates too much safety.

Now, how can there be too much safety? Well, think of some new drug that can cure a disease. If the drug takes five years to get to market instead of taking three years, then those extra two years, people suffer from the disease. So, there is a trade-off between the risk of the drug and the risk of the disease. I do not know of any studies where it was not invariably found that the FDA errs on the side of too much safety. Our life expectancy is probably a little bit shorter because the FDA does not allow quite enough new drugs to be sold. Why does it do that? Well, the politics is very clear.

If a drug would save your life, but it is not sold, you probably do not know about it, and so no one has any reason to complain. If a drug is sold that harms someone, there are Congressional hearings, the FDA is blamed, people ask, "Why did you allow that drug? Why didn't you provide more safety?" The result is a very clear political pressure for the FDA to overregulate, and I think that is also due to an information failure. On the one side, you think, "Well, if drugs were sold that were not regulated, people would not have information about them, and too many would be sold." On the other side though, people do not have information about drugs that are not sold.

So, the FDA does not worry about the effects of not selling a drug. Rather, they worry about the effects of selling too many drugs, and so they tend to overregulate with respect to safety. That is probably most severe at the FDA. Among other things, the FDA has more prior approval authority. Mostly CPSC dealt with stuff after it was sold, but at the FDA for example, you have to have a drug approved, and there is a good deal of evidence that it does overregulate. I am always amazed, if you talk to the FDA, and you say, "Well, my grandmother took this medicine and it really cured her. Why don't you approve it?" They will say, "That is an anecdote. There is no data there. We rely on science. We are a scientific agency. We do not care about anecdotes." If you turn it around and say, "What good have you done?" They immediately talk anecdotes. They talk about, "Well, we kept this drug off the market. We kept that drug off the market."

I have never seen any FDA publication that actually looked at the evidence of the effectiveness of the FDA itself. Even though there is lots of
research on it, the FDA seems to ignore that and only talk anecdotally about the good they have done.

Let me get to tort law, which is probably of more interest to you than the others. Again, tort law with the respect to strangers and automobile accidents, makes good sense. Much of modern American tort law, as you know, deals with non-stranger situations: product liability, medical malpractice, or both; situations where people are not strangers, where conceivably, they could contract with each other, they could arrange what terms would govern in the event of an accident. In particular, for malpractice and product liability with respect to drugs, are two things I have written about. For both of these there is a trade-off—better care versus more care—because malpractice and liability for malpractice increases the cost of medical care.

The result is some people buy less of it. Similarly with drugs, you increase the price, some people buy fewer drugs. Fewer drugs are developed. There is a real trade-off between more drugs and safer drugs, more medical care and safer medical care. In the paper I wrote a couple of years ago with a colleague, we found that on the margin, in the U.S., we probably erred too far in the direction of liability.

We looked at all the states over a twenty-five year period, and we looked at accident rates and accidental death rates as a function of tort reform, and we found that tort reform—which is to say, reduction of damage payments, damage caps, things like that—actually led to fewer accidental deaths. In other words, by reforming the tort system, by cutting back on the scope of liability, fewer people were killed probably because more doctors were available in emergency rooms, and the result was better treatment and fewer deaths.

In terms of the relationship, one issue that was just litigated in two cases before the Supreme Court, is preemption: whether FDA approval preempts state tort law in the case of medical products. The Supreme Court ruled that there was preemption in the case of medical devices. They ruled there was not preemption for drugs in a recent case.

In my view, since both the tort system and the regulatory system have an incentive to overregulate if we put the two of them together, we are going to get even more overregulation, fewer new drugs, more expensive new drugs, and probably on net, make consumers less healthy than they would be if there were preemption, if the FDA did preempt state tort law.

GEoffrey J. Lysaught: That is very interesting. Larry?

Larry E. Ribstein: I am going to talk about preemption. This is based on an article that I am doing with Erin O’Hara at Vanderbilt University. It comes out of our book that we published about a year and a half ago, which I highly recommend to all of you, called, “The Law Market.” In it we envision law as being virtually traded, in a kind of market. The federal courts
and Congress act as a kind of umpire or referee in this market. This is where we get to preemption.

Sometimes it seems like the court system is making ad hoc decisions. Yesterday, J.W. Verret was talking about Dodd-Frank, and he made some judgments that I happen to agree with about Dodd-Frank, which is that Dodd-Frank preempted when it should not have, and it did not preempt when it should have. I sense that that is true, but I would like to come up with some kind of theory about when the courts should preempt and when they should not.

To some extent, this obviously depends on Congressional intent. You are going to be looking at Congress for some expression of when a law should be preempted. That expression is not always there, so we need a gap-filler. The gap-filler that I am talking about here is based on Constitutional norms about what Congress should be doing. We may not know what Congress explicitly intended to do in a given case. So, maybe we could fill in the gap by asking what Congress should have been doing under the Constitution when it enacted the law.

The answer is that Congress serves a coordinating role in the law market. I see two kinds of coordination problems: horizontal coordination, and vertical coordination.

Horizontal coordination is coordination among the states. You can see two kinds of horizontal coordination problems. One deals with what I would call positive spillovers: when a state enacts a law that has effects in other states. So, a state enacts or decides a tort case in a way that has implications for the manufacturer and sale of that product all over the country. State laws also theoretically can have negative spillover effects, which comes about because of choice of law rules. A choice of law rule makes a state law effective in another state in a way that causes deregulation in the other state. Corporate law is an example of this because of the internal affairs doctrine, which causes Delaware law to apply to corporations all over the country. I am not going to worry about that kind of negative spillover effect because whether any state's law applies in another state is up to that other state.

Then, you have a vertical coordination problem, the other kind of coordination problem that I am talking about, which is state versus federal. The federal government wants to limit the positive spillover problems among the states. On the other hand, if the federal government goes too far and shuts down the law market too much, then it is imposing a top-down solution that reduces the benefits that we get from having multiple states. Multiple states give parties the opportunity to escape bad laws and make it possible for different states to have different laws that are appropriate for different parts of the country. So, we have to coordinate states versus the federal government.

Our point with respect to preemption is that it addresses both kinds of coordination problems. In other words, it helps achieve horizontal coordi-
nation of the states getting too unruly and without getting into a vertical coordination problem of the federal government oppressing state variation. That is what we are trying to achieve with our preemption rule.

Again, Congress can decide whether to give the law a particular kind of preemptive effect. The problem is that Congress does not usually focus on the exact preemptive effect that its laws are supposed to have. So there are gaps in the law about what Congress intends in terms of the scope of preemption. When you look at the preemption cases, as I have done to some extent, you see a mess because the question is, when are the courts actually applying Congressional intent and when are they filling in the gaps with policy arguments? If they are filling in the gaps with policy arguments, is this an appropriate role for the courts, or should they be deciding preemption strictly on Congressional intent? Then again, you have the gaps there that somebody has to fill. So how do you fill these gaps?

I am going to Constitutional norms to figure out what Congress should have been doing when it adopted the law. Erin and I think that what Congress should have been doing is playing a coordination role. That is what the Commerce Clause is all about, which is one of the key Constitutional provisions that Congress is acting under in preemption cases, along with, rarely, Full Faith and Credit. These Constitutional provisions, under which Congress is enacting the laws that are being given preemptive effect, involve some kind of coordination function.

Again, the question is, how do we help Congress achieve this coordination function by deciding to what extent the laws have preemptive effect? Our basic approach is that preemption decisions should reflect the need for coordination. But we are not excluding other policies.

We also take several considerations into account in deciding when coordination needs to be achieved. One factor the court should be looking at is, do we need to coordinate the states? Maybe the states have already coordinated. But sometimes we are going to preempt even when the states have already coordinated when it is a bad kind of coordination. For example, all of the state attorneys general can get together and decide the states are all going to adopt a similar policy, and maybe that policy has perverse or adverse public policy consequences that Congress was concerned about.

One other consideration here is that the amount of coordination we want under the federal law depends on the type of federal law. So, if we are talking about the federal law imposing federal policy on the states, we are going to demand less evidence that coordination is necessary because that is a bottom-up and not a top-down solution. We are not talking about necessarily imposing federal policy if the federal policy we are talking about is something like arbitration or choice of law.

Let me give you two examples, which are really drawn from the kind of issues we were talking about yesterday on the Dodd-Frank panel. Corporate law is a situation which the states have already coordinated and they
have done a pretty good job of coordinating. We do not get the positive spillovers that I was talking about. By deciding which corporations they are going to charter, states are not interfering with other states. So, that situation, we do not need the federal government to step in and impose a solution on the states. We would say be careful about preemption there and only preempt when Congress has made it explicit that it wants to preempt state law.

On the other hand, where the states have been unruly is in cases involving consumer and tort law. There are several preemption cases on the Supreme Court this term particularly involving national standards and tort law. Those are situations for which we really need national coordination. So we would say, "Presume in favor of preemption in those situations."

In summary, presume against preemption where the states have already coordinated, as through a choice of law or arbitration rule. But presume in favor of preemption in situations where the states have not coordinated, where they refuse to impose national standards, where the states are imposing their own rules on other states. Thank you.

GEOFFREY J. LYSAUGHT: Mr. Hylton.

KEITH N. HYLTON: Thanks. Following up on what Larry said, I am not as confident that I could articulate a general theory of preemption. I think Larry is dealing with a different set of cases than I am dealing with, so maybe it is possible to do it for his set of cases. I would rather think of preemption in terms of specific problems that come before courts. And so, the specific area that I want to take a look at is product liability litigation.

Maybe it is the most important area of preemption because you have so much money invested into designing products and into the regulatory process. So, here is an area of preemption where certainly the decisions matter a lot and there is a whole lot at stake. What I want to do in this talk is try to accomplish two things. One is to provide an economic theory of preemption as a choice between regulatory regimes trying to choose the best regulatory regime. And the second is to extrapolate from this regulatory choice model to look at implications for some of the broader controversies about preemption.

Preemption is a topic that begins with fairly concrete problems, especially the products liability area, and then, expands from there into all sorts of questions about the relationship between state and federal power. And there is a large amount of literature now that looks at general preemption issues in terms of these conflicts between state and federal power. And what I want to suggest is that the practical work of the preemption doctrine can be done sort of independently of this whole business about the relationship between state and federal power. So, I wanted to make some reflections on that before I wrap it up.
The concrete problem that I am thinking about is, say, something like a medical product whose design is challenged in a products liability lawsuit. What typically happens is the manufacturer comes in and says, "Well, the design of this product has been approved by the FDA under the medical devices act, so the plaintiff's lawsuit is preempted. There is no point in considering this question." The court's choice in these cases is, in essence, a choice between two regulatory regimes, two regulators.

Either the FDA regulates the design, or the court gets to regulate the design, or common law courts get to regulate the design, and gets to decide independently on the design of the product or at least reconsider these design questions in addition to the FDA's choices. So, how do you choose? How do you decide between two regulatory regimes? What's the best regulator? Well, you have to figure out what you are getting out of regulation. What are you getting out of the design regulation? Well one, you are hopefully getting some reduction in the injuries to consumers of this product.

But it is not just that, that you are worried about, because if you choose a safer design, you are also foregoing the utility of this relatively risky design, assuming that it has some additional utility. And so, products liability law has generated a risk utility test to trade off these two, weigh these different trade offs in any product design case. In a sense, the risk utility test is an effort to look at the net consumer welfare impact of a regulatory standard governing design.

The second question is the cost of compliance. How much does it cost to comply with this regulatory order? Because the net benefits of regulation would be the benefits from the change in design, then subtract away the compliance cost on the regulator firms, and then the third component would be the administrative costs of the regulatory regime and the risk connected to the regulatory regime. So, you could have a regulator that is very good in terms of the design issues, in terms of minimizing compliance cost, but the administrative costs of running this regulatory regime are so high that it swamps all of the benefits that you get out of regulation, or the risk is so great that it swamps the benefits.

There is an objective function that goes behind the choice between regulatory regimes. It is looking at the net benefit to consumers minus compliance cost or net benefits to society, if you want to, minus the compliance cost, minus the administrative costs, minus the risk that is imposed by the regulatory regime. So, in a sense, if you wanted to think about the economics of choosing regulatory regimes, those are the fundamental components in that choice.

The most important one is the net benefit, which I have described as the consumer welfare differential. The consumer welfare differential that results from regulation: to what extent does the regulation lead to a reduction in risk which completely offsets any reduction in utility? To what extent does the risk utility test come out in favor of regulation? So, there are a bunch of factors that go into looking at the first component. One is the ex-
pertise of the two regulators, whether it is the court or the FDA, and here, it is often an obvious choice in those cases.

Very often, the regulator, the FDA for example, has experts who are in a much better position to examine and to evaluate this consumer welfare differential than a court, which consists of having a jury look at these things. So, the expertise factor often weighs in favor of preemption; that is, in favor of winning the regulatory regime, the federal regulator makes the decision on product design. But then, there are other factors as well. One is the extent to which local information is important in deciding the optimal design choice or what’s best for society, and there are some cases in which local information is important.

Take for example, a nuisance case, in which some federal regulatory regime has asserted that it can preempt certain kinds of nuisance claims. Well nuisance claims are, at least in the common law, very heavily influenced by local factors, and it is highly unlikely that any regulatory regime in D.C. can make a general decision on local factors on how a court should weigh or consider local factors. So, that will cut against preemption.

The third factor is political independence, or the degree to which the regulatory regime is vulnerable to capture bias from pressure groups. This is something in which courts are in a pretty unique position, as they are able to look over the shoulders of the regulatory regime and say whether it seems to be vulnerable to bias or distorted decision making. We have seen examples of that in certain cases, in Wyeth v. Levine, the court looked at the FDA’s own statements about the preemptive effects of its regulation and said, “Well, we do not think we are going to trust those statements because they do not appear to be objective and reliable.” And then, you have other cases.

One famous one is Wilson v. Bradlees in the First Circuit in 1996, where Judge Boudin looked at the regulatory process in that case and said, “Well, it seems to me that the industry is written the relevant regulations, and they were written independently by the regulatory agency and that was the basis on which they chose not to preempt in that case.” So, there are cases out there in which courts are in a position to examine the regulatory process itself, in terms of its independence, or in terms of its vulnerability to bias.

The compliance cost factor. It is a little more complicated in the products liability case because, in looking at this consumer welfare differential, you are actually taking compliance cost into account. And so, the only other compliance cost to consider would be the loss in profits from being forced to choose a safer design; that is not explicitly part of the legal standard, nor is it explicitly part of the regulatory process. In theory, it ought to be, but there are many reasons why maybe it should not be in practice: one is a difficulty of actually getting objective information on this factor.

Another point to add is that in a competitive industry, that profit differential would not matter much—in the long run at least—because those
profits are competed away by the entry of other firms. The third factor is
administrative cost and risk and usually the administrative cost factor will
point toward preemption, point toward leaving this matter to the agency.
Why? Because the agency typically moves first, and so, if courts are con-
sidering these things, that simply adds to the administrative cost. But that is
not always the case. There may be other cases in which a different answer
should be reached.

The risk factor often points in favor of the agency as well because the
agency is one regulator among multiple regulators with different objectives
and subject to different kinds of distortion in their decision making. So,
there is an optimal rule on preemption that is suggested by this. I have re-
ferred to it as something I call the congruence theory. And it runs roughly
as follows: if the agency’s regulatory process is rigorous and independent, a
common law claim should be preempted if the regulatory standard and the
common law standard are congruent in the sense that the agency standard
incorporates all of the factors that would be examined under the common
law standard.

In other words, if the regulatory process exhausts all of the issues that
would be considered in the plaintiff’s tort lawsuit, then that is a strong case
for preemption, and if it does so in a way that is independent and rigorous.
And again, I pointed to these three factors that are part of the standard. One
is the expertise of the agency, another is the degree of local information,
and a third is the extent to which the agency is independent and not vulner-
able to bias. So, this congruence theory leads to a whole bunch of variables
that go into the preemption decision.

One is the extent to which local information is important in deciding
the issue of consumer welfare or risk utility; to the extent that local infor-
mation is important, then that goes against preemption. To the extent that it
is a case in which expertise is important, that cuts in favor of preemption.
For example, a pacemaker is a product which the expertise of the agency
would matter a lot and certainly would be greater than what you find in a
court, and local information is relatively unimportant. So, that is a case in
which you are more likely to find preemption.

I have used this theory to try to explain the preemption cases that have
come out of courts and I have an earlier paper that was published in the
Supreme Court Economic Review in 2008 that looks at a sample of 243
federal court opinions and 118 state court decisions.3 And I created a bunch
of variables to try to test the theory. So, I found evidence supporting this
congruence theory in that sample of cases, and if you run through some of
the better known Supreme Court cases, I think they line up with the theory
in general.

For example, in Medtronic v. Lohr4 in 1996, the design that was at-
tacked had been approved under the FDA substantial equivalence test. Un-
der that test, the FDA does not really examine the risk utility issues. It just
asks, "Well, is this product equivalent to something that was on the market before 1976? If so, that is okay. We will just give you a free pass."

When the plaintiff comes to court with a design claim, that design claim is going to look into all sorts of issues that the FDA did not look into at all. So, there is no congruence there. There is no sense in which there is congruence between the regulatory process and the common law process. The theory predicts that in a case like that, a court should not find preemption, and that is what the court found in the Lohr case.

On the back end of that is the Riegal\textsuperscript{5} case where the design had been through the premarket approval process, which is much more involved and rigorous and looks into all the risk utility issues. There, the court found preemption, of course, because there is congruence.

The last thing I will say, is if courts could move away from the fundamental issue in this area—the case law, and the issue basing preemption on the Supremacy Clause, and the conflict between federal and state law—it seems to me that a common law court is in the position to take the decision of a regulatory agency to improve a product as just a piece of evidence in favor of regulatory compliance, and use that evidence in conjunction with all of the other factors that I have been laying out, as courts actually seem to be doing under the surface to establish a pattern for preemption decisions. One that, in a sense, divorces this whole preemption case law from all of the business about the Supremacy Clause in federal–state power, because that is an unstable basis for the preemption case law.

The courts' opinions are changing on these issues, and it gets us into a whole lot of problems about determining whether you have to decide these cases on the basis of some notion of Congressional intent. Then, you open the legislative process to gaming by industries that bargain with Congress, and they are going to make a real effort to try to fashion that legislative intent.

So, we would be better off if the whole preemption case law—which for the most part I think has done a good job of choosing the right regulatory regimes—were articulated clearly and were moved away from this whole issue of state and federal power, which is an uncertain and shifting area of the law. That is all.

GEOFFREY J. LYSAUTHT: Thank you.

TODD J. ZYWICKI: Yesterday, I talked about the CFPB and other sorts of things. Now, everybody is thinking, "All right, smart guy, how would you think about these questions?" So, that is what I am going to spend the next few minutes talking about. Thinking about primarily the area of consumer protection generally, my example is going to primarily be drawn from consumer credit, but the lessons are going to be, I think, pretty applicable to all areas of consumer protection: whether it is commercial advertising, perhaps
pharmaceuticals, some of the obesity issues we were talking about yesterday, and that sort of thing.

And the way I want to frame this—the way I think about it, and the way we thought about it when I was at the FTC, and I want to urge you to think about it—is think about two different types of regulation. To sort of overgeneralize: market reinforcing regulation versus market replacing regulation. Market reinforcing regulation, on one hand, and market replacing regulation on the other hand. Now, what do I mean by those?

Well, building on what particularly Professor Rubin has said and what the other members of the panel have said, is market reinforcing regulation is basically the idea that we start with the market as our primary ordering system. We try to think about the ways in which we can make markets work better for consumers, to harness the power of competition and consumer choice, and everything that goes along with that. And provide a prompt for that to work better for consumers and use the invisible hand of the market as a form of regulation that will lead to higher quality products and lower prices for consumers.

Versus market replacing regulation, which would be basically substantive regulation where a regulator, a legislator, or oftentimes a judge, basically dictates what the attributes of a product should be, and basically takes it out of the market process. If we look at consumer credit, we see over the history in the United States, that these two different forms of regulations move in cycles.

If you go back to the beginning of the 20th Century, what you see was a period—or even going back before that—we had very strict substantive regulation, market replacing regulation on consumer credit, very strict interest rates, usury ceilings on credit is what they called them, for instance. As we moved from an agriculture society to a more urban society, labor based society, in the beginning of the 20th Century, we saw this great migration to the cities, where people were moving off of the farms and into the cities and a lot of immigrants were coming in, and what we found was that the very low interest rates that were allowed by law, did not enable the making of small loans to wage earners.

So, people would have periodic disruptions in their labor just because of the business cycle, because of seasonal output, in factories. What you had was more and more people who needed access to short-term credit in order to pay their bills, to deal with medical bills, to deal with the rent, to deal with utility bills and everything that came about. What we found at the beginning of the 20th Century was a great flourishing of illegal lending because legal lending was not economical, so we saw was a huge amount of illegal lending. You can look at the beginning of the 20th Century in the cities and you could see this was a real problem.

So, what consumer reform advocates of the day said was, “Alright. We can’t wish away the need of these wage earners for credit.” And everything that goes along with illegal lending went along with that, right? So,
people basically said, “Alright, let’s not pretend like these people don’t need credit and let’s not pretend like we’re going to get rid of credit by having ill-designed regulations. Let’s free up the markets and come up with mechanisms for allowing higher priced short-term loans to consumers.” And so, that is what they did, and that was how, in a variety of ways, we started making access to credit available to people.

And it is expensive, right? It is expensive to make a short-term small dollar loan with a high risk of default. Well, what happened was—in a curious way—if you look back in history, what you see is that many people blame the Great Depression on too much consumer credit. Sounds like something we have heard recently? So, the response to the Great Depression was that they came in and they re-imposed substantive limitations on lending, and I could go into the details, but it is not that important.

But the effect was, beginning in the ‘40s and ‘50s, we brought back many of these old-style regulations such as usury regulations, and that sort of thing, such that by the 1960s, what we saw was that illegal lending and loan sharking was the second biggest revenue source of the mafia. Gambling was the only bigger revenue source than illegal lending for the mafia in the 1960s. Again, what we saw was a coalition of economists, and this is one of those issues that economists always agree on 100%; every economist understands the implications of interest rates ceilings, and that they lead to reductions in access to credit and proliferation of illegal lending.

We saw beginning finally in the 1960s and ‘70s, was in the effort to fight organized crime as well as to just make credit available to consumers, we saw an erosion of usury ceiling, substantive limitations, and that sort of thing. Basically, what we got was a proliferation of different sorts of credit markets that a lot of people find aesthetically unpleasing like payday lending and that sort of thing. Now, what we are seeing with the CFPB and the Dodd-Frank bill, I think, is a resurgence of this old view of re-imposing substantive regulation on the issuance of credit.

In my view, it is inevitable that we are going to get a lot of the same effects that we had in the past as a result of this. But unfortunately, as I think we saw in the past, what has happened and the way in which the CFPB has been crafted and will probably be implemented, is a desire to just wish away the unintended consequences that come along with this. So, to briefly give you a sense then, of why substantive regulation and market replacing regulation is dangerous, is that basically what you get is three effects.

You get term re-pricing; so for instance, when they restricted interest rates on credit cards, what happened is that credit card issuers just imposed annual fees on credit cards. When they got rid of restrictions on interest rates, annual fees disappeared for most credit cards. You get product substitution. For instance, Arkansas, which had the strictest usury regulations in the 1970s, was also the pawn shop capital of America. People could not get a small loan. People could not get a credit card in Arkansas. So, as a
result, the only way people could get credit in order to fix a transmission or to pay utility bills, was to go to a pawn shop. And this is how these creatures like layaway and all these other crazy things came into effect.

The other big factor was most credit was tied to a particular department store or retailer. The reason was because what a retailer could do—they could not charge a market rate of interest for credit—but what they could do, would be to just tie it to the price of goods and hide the real price of credit in the price of goods. So, empirical studies found for instance, that in Arkansas, a refrigerator cost about 8% or 10% more than a refrigerator cost in Texas. The reason was because Arkansas retailers were burying the price of credit in the price of the goods.

This gave retailers a comparative advantage in evading usury laws by just tying those things together and regular banks could not do that. And the final effect was rationing. This is basically the leg breakers I was talking about. Either people would have no credit at all, or they would basically have to go to Tony Soprano in order to get the money that they wanted.

I think that is the logic of the CFPB, which if you look at the logic of the CFPB, it has got a lot of substantive regulation. It has things like bans on prepayment penalties, bans on arbitration clauses, strict restrictions on mortgage brokers, and various other terms of loans, which I think are going to have all these offsetting effects, which nobody has really thought about. Prepayment penalties, for instance: it’s very clear that a prepayment penalty in a mortgage, is traded off with the lower interest rates. So, getting rid of prepayment penalties, on average, increases interest rates by about forty to sixty basis points on the loan. Now, the biggest problems are the unintended consequences of substantive regulation.

What I want to address is market reinforcing regulation and talk about why Dodd-Frank came about, and the CFPB, and why I think of it as a lost opportunity to fix things that have gone wrong in the way regulatory structure handles consumer protection. A good example is the Truth in Lending Act (TILA). When the Truth in Lending Act was originally introduced, it was three pages long. The idea behind the Truth in Lending Act was to try to create standardized disclosures so that consumers could easily compare among different loan offerings and decide which one was the best.

It did not tell consumers what they should choose, it just helped the market process, and competition, and dynamism to work on their own. Now over time, Reg Z—associated with TILA and being reauthorized by the Federal Reserve—is now thousands and thousands of pages long. And the reason is that over time, what we have gotten are these accretions to the Truth in Lending Act, first by piecemeal regulatory add-ons and litigation add-ons. The problem with taking a sort of piecemeal, or regulatory, or litigation approach to this, is that what it does is just adds on more things here and there, without integrating the overall effect.

We see this, whether it is warnings, or credit disclosures, or whatever. You get the problem of information overload for consumers, because once
you add on, you lose track of the central animating purpose. I heard a story over the weekend. Apparently, in the 1970s or '80s sometime, Ford Motor Company actually designed and built a car that was consistent with every tort judgment that had ever been leveled against Ford Automotive Company; they had to have thicker walls by the gas tank, and they had to have this, and they had to have that, and that sort of thing. What they discovered was that by the time they were done, the car cost thousands of dollars more, weighed thousands of pounds more, and could not move because once you took each different piece and tried to put it on the car, it would not work anymore.

There is a regulatory confusion that I think is also in the CFPB, which is the effort to try to do substantive regulation through the backdoor of disclosure regulation. What they end up doing is messing up both. It is what I call normative disclosure, and I will give you my favorite example, which is the one we have all seen now. We have all seen our credit card statements, right? On the front page of our credit card statement, a quarter of the page is a little box that tells you how long it is going to take you to pay off your credit card balance if you only make the minimum payment. It also tells you that if you only make the minimum payment, that your credit card balance will keep going up. They put that in there, it is on your statement, right? Not in your terms, it is actually on your statement. Now, the question is: how many people in this room would do the following?

Would you, number one, want to know how long it would take you to pay off your minimum balance if you only made the minimum payment? And number two, would you be willing to stop using your card? Because if you keep using your card, you keep adding to that, so it becomes useless, right? So, how many people find it useful to know every single month how long it would take you to pay off your credit card balance by only making minimum payments, and would consider stop using that card and paying off the balance only by making the minimum payment?

Now this is an unrepresentative study, but the Federal Reserve found that about 4% of Americans would actually find that useful. Why is that there then? It is obviously not because it is helping consumers to make decisions in the disclosure sense, to shop among the products they want. Obviously, what it is trying to do is use disclosure to change consumer behavior. What does it actually do? It clutters up the statement.

First, what we have to do is identify the market value of disclosure; that is useful to deal with market values in the market for information, not for substantive problems. So, what we are trying to do is use disclosure to solve substantive problems, or what some people think are substantive problems, like over-indebtedness, not disclosure. We have to understand what the problem is.

Second, we have to appreciate that people do not choose perfectly, but by and large, people choose better than their regulators. People focus on the factors that matter to them. People who revolve their balances know
what their interest rate is. I know I do not know what my interest rate is on my credit card. I would wager that many of you do not know what your interest rate is on your credit card. That is perfectly rational if you are not revolving balances, right? If you are not revolving a balance, it does not matter what your interest rate is. You care about benefits, annual fees, those sorts of things. People who revolve actually know what their interest rates are.

Finally, we get the problem if we do come in with substantive regulation and impose it, that it sets it in amber and it is very hard to change regulations or change case law after they have been rendered. Whereas market-based mechanisms can be much more dynamic and adjust for innovation and that sort of thing. So I think, by and large, what we want to think about is what can we do with market reinforcing regulation? What can we do with disclosure laws, and what can we not do and keep that more in mind?

GEOFFREY J. LYSAUGHT: Before we open it up to questions, why don’t we take a few minutes to go back through the panel and see if there are any additional thoughts that have occurred and we will start with Professor Rubin.

PAUL H. RUBIN: I more or less agree with Keith. I think we may disagree on how to implement some of Keith’s tests in particular cases, but I think looking at overall utility of the regulation, is the right way to go. The problem I have is that sometimes the regulation does not accomplish the goal that we think it would accomplish, and I guess there I would disagree with him.

We do not really have a choice in the FDA case, for example, between FDA and state. We have a choice between FDA plus state, or only FDA. We are not going to replace FDA regulation with state tort law, or rather add on a separate system. So, the question is, do we gain by adding on that separate system or are we better off just with the FDA?

GEOFFREY J. LYSAUGHT: Professor Ribstein?

LARRY E. RIBSTEIN: Yes, another comment about Keith. And that is, the problem that I think you have to confront with preemption is that we are fundamentally getting back to Congressional intent. These cases do not involve something like the dormant Commerce Clause where you are invalidating legislation because it has some inherent problem. This involves a Congressional decision to act and that is the only reason the preemption decision arises in the first place. So, since we are linking the preemption decision with the Congressional decision to act, the preemption rule has to relate to what Congress decides to do.

This idea of comparative regulatory competence, while it is a very attractive notion from an efficiency standpoint, raises the question: did Con-
gress really care about regulatory competence? When you think about all the political factors and so forth that go into a Congressional decision, it can be unclear. So that is why Erin and I, in our paper, talk about this inherent—although less satisfying—idea of coordination. It is very complex. It does not have the ring of satisfaction that you get from something like efficiency or comparative regulatory competence, but it ties into Congress's constitutional role under the Commerce Clause and Supremacy Clause.

If we ask why we use something like the Supremacy Clause in the Constitution, which is where preemption comes from, the answer is because we need to have a referee, and the referee's decision has to be final. And so it seems logical to refer that decision to a coordination objective. My challenge to Keith here, as it was in the prior panel, is to link his theory to what Congress was doing, rather than to what might seem a bit more satisfying theory of efficiency.

KEITH N. HYLTON: Thank you. First thing I want to say is that what I have tried to do in my paper, and in the previous paper that I referred to, is set up a positive theory of the preemption case law. I am taking a look at all these preemption cases, and I am saying, "Can I come up with a good economic story that explains the outcomes in these cases and does so in a way that is logically coherent, and simpler, and easier to follow than the stuff that is already out there in the Supreme Court's decisions?" And so, my assertion is that I think I have come up with that.

The stuff in the Supreme Court's case law talks about conflicts between state and federal law and that over-predicts preemption in every case because there is always some potential conflict between the federal regulation and state law. Based on the theory set out in the Supreme Court's decisions, you really cannot make sense of the Supreme Court's decisions on preemption. So, you have to come up with some alternative theory.

And when you come up with an alternative theory, it is going to be based on the facts in the cases and the trade offs; the social consequences that come out of the decision to choose one regulator versus another. That kind of reasoning makes sense of the cases, makes sense in terms of economics, and as I said before, offers a sparse and simpler explanation of what is going on in the case law.

Now, as for the issue of Congressional intent and Congress's power: it seems to me that the regulatory decision is a fact that any court is in a position to take into account when making a decision on whether to find, in a sense, that compliance with regulation is a defense to a state tort law claim or any tort law claim. So, there is certainly room there and a court has a power to find a common law basis for a defense that works in the same functional manner as a preemption defense. It can be called a regulatory compliance defense.

It could be called anything else, but it could be based on the factors that really count in a preemption decision and not on that nonsense in the
Supreme Court’s case law about conflicts, because that stuff does not really tell you how to decide a case, at least from what I can see. Moreover, to the extent that you rely on the conflict’s theory and Congressional intent, you get yourself into a problem of trying to figure out Congressional intent, which is very hard to do in the vast majority of cases, and you open the door up to gaming in the legislative process because industries know when they bargain with Congress about some regulatory statute, they know that what they would like to get is preemption.

What does that mean? That means they go to the legislators and they say, “Let’s put some pieces of state common law on the trading table. Why don’t we give you this and you give us preemption?” And that seems to me, a pretty crazy way to let the legislative process work, to let industries come in and buy off state common law. So, those are big problems that I think it would be good if courts could try to get themselves out of.

TODD J. ZYWICKI: I will just say a brief word to dovetail some of the preemption discussion that we have had and just talk about preemption in the context of consumer credit, because I mentioned this yesterday when I started talking about the CFPB and that Dodd-Frank makes it more difficult to preempt state laws.

We have this kind of cool and unusual sort of system in the United States of this dual banking system, where we have national banks that are regulated by the Comptroller of the Currency and we have state banks that are regulated by state bank examiners. What I like about that system is that it allows great competition.

So, the logic for preemption, is if you have an aggressive federal regulator who has set up to do things, which as I said yesterday I like the idea of an integrated federal regulator, I just wish it was done differently. But the idea is that, in theory, consumers can have a choice, right? If state regulators say, “We are going to give you a lot of consumer protection.” Whenever you hear a lot of consumer protection when it comes to credit, that also means a lot fewer of you are going to get access to credit and it is going to cost more, right?

That is what the trade off is. In theory, you could go to a state bank and get that package or you could go to a federal bank and get a different package of less regulation, and less regulation in terms, and that sort of thing. And we have set up a process through the national banking system where consumers can shop among banks around the entire country. In fact, we saw that after the Marquette decision in 1978, in which there was the Arkansas bank, which had very low interest rates but a 20% approval rate for a credit card and they gave a $600 credit limit and a $55 annual fee. Then, we had the South Dakota and the Delaware banks, which had market-based interest rates, no annual fee, benefits, everything else that we get along with it. And consumers obviously opted for the latter rather than the former. I think that the preemption fits into thinking about how to facilitate...
that competition among different systems, and among different banks, and among different consumers.

GEOFFREY J. LYSAUGHT: Questions? I guess while we are thinking of questions, let me try to advance the discussion here in what I hope will illuminate the competing theories here or the ideas here, but perhaps drive us to some consensus on issues, and let us use the specific example of Wyeth v. Levine because I think we actually get to different answers. Professor Rubin, I think, articulates that he would be in favor of preemption. Wyeth was wrong, primarily because the FDA already overregulates in adding tort litigation on top of that, which gets us to an even worse result.

I think Professor Ribstein would articulate that the state tort litigation system is not well coordinated and therefore, preemption probably would have made sense in Wyeth. But Professor Hylton, I think, views Wyeth as potentially a good outcome or a right outcome, because we had reason to doubt the FDA’s political independence and there was additional information that was not taken into account by the FDA in its decision. And so, therefore, there was an opportunity for the outcome to include that new information as well.

So, I guess to start with, did I get your judicial decision right? And then, help us understand a little bit better why you think your argument sort of gets to the right answer and is there room—given that you were not all considering the same factors—room to drive toward consensus?

LARRY E. RIBSTEIN: Yes, you are definitely right about my position, that this is an area where we really need coordination and keep in mind that Congress has acted. It is not just a matter of, we want the states to be better coordinated, but Congress has made the decision. The states are represented in Congress, so there is a political burden that you have to overcome in order to get Congressional action, but Congress overcame that burden and acted. So, what were they thinking?

We can fill in the gap a bit by saying, “Well, Congress was serving its umpire coordination role. With the states going off in all kinds of different directions, let us impose a national standard.” And then, if it is in fact the case that Keith would go in a different direction, I would just ask, how do we know that Congress cares about the FDA’s competence here? In other words, it might be a good thing to think about from an efficiency standpoint, but is this really something we should be thinking about under the Commerce Clause and the Supremacy Clause?

PAUL H. RUBIN: So Geoff, that is a great example and I want to congratulate you on choosing that one, but it strikes me, that that is also a good example because in the context of the Supreme Court’s case law on preemption, which develops this complex theory, I find it hard to understand the decision in Wyeth on the basis of much of the theory that the Su-
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preme Court has developed. So, there must be something else going on to explain how the Court could decide there is no preemption in Wyeth. In terms of the political independence part, that is a minor part of what I had to say about Wyeth because the Supreme Court was referring only to some statements that the FDA had said about the preemptive effect of its own decisions.

And they were fairly recent statements, the Supreme Court said, “Well, we are not going to really pay attention to those statements.” So, that is sort of a side part. It is tangential. It is not really core to the case, but I guess what I am saying is that Wyeth was potentially a good decision, but it makes sense under the theory I am offering here. Why is that?

Well, based on the timing issue, the common law and regulatory standards are not really congruent in a case like that because the whole theory of the Court’s decision is that there was later developing post-approval information that had developed on a risk that was not really fully incorporated by the FDA’s own warning requirement. And to be specific, in Wyeth, we had an anti-nausea drug that if injected into the arm, could go into the artery and require the arm to be amputated. It caused gangrene and required the arm to be amputated. So, the plaintiff’s theory was that the warnings should have been much more severe than they were.

They should have been more severe. You could say, “Well, you could get your nausea alleviated for a little bit, but the risk is you might lose your arm.” Well, you might say, “In that case, I think I will just be nauseous for a little bit longer.” And so, the plaintiff’s theory was that the warning should have made clear to the doctor that given the late developing information on the risk of having your arm cut off, doctors should have been warned, “Hey, you should not do this.” You just should not do this injection. To me, that is an important piece of information.

I can understand why a court might look at that and say, “Well, that is important enough information, that maybe the warning should have been updated as a result.” Therefore, it breaks this congruence between the regulatory and common law standard under my approach, and it makes sense of the Wyeth decision.

GEOFFREY J. LYSAUGHT: Professor Rubin?

PAUL H. RUBIN: Well, it is my understanding there were several warnings. I think it was actually a physician’s assistant or a nurse who violated those warnings. So then to say, “Well, had there been another warning, the person would have noticed it.” And of course, there was liability. The person that did the actual injecting and the hospital both were held liable, as they should be. They clearly violated the policy in this case. There is always going to be post-approval information. We are going to open the system up again. Then the FDA has to take that into account, and they are already too slow and too restrictive in approving drugs.
And if you just add an extra burden, they are going to get worse, or you are going to have liability because there is always something you have learned after the case. So, there is always some stronger warning that you could have put on the product. Again, no matter how many warnings there are, there is always some stronger warning. Of course, you put more and more warnings on, you can lose even more valuable information. I saw that at CPSC.

Some of our products had long hang tags of warnings where maybe one of the warnings was important and the other fifteen were not, but consumers had no way of telling which of them were important. And you see that when you have lawyers write warnings, they become longer and longer and less and less valuable to consumers. The other thing about Wyeth was it was very similar to a previous case, with which Keith agreed, Riegel v. Medtronic, where the Supreme Court did find preemption, and at least the language of the Court was that it was because there was specific preemption in the statute for devices.

But then, in Wyeth, there was no specific preemption for products, for drugs. But from an economic perspective, it does not seem to matter. In fact, the approval process for drugs is more rigorous than for devices. So, if you are going to preempt in the case of devices, it does not make any sense not to preempt in the case of drugs as well.

We gave this paper at the previous conference that Geoff mentioned. The gentleman in the audience who was more of a consumer representative, he agreed with me that cases should have been decided the same way. But of course, he would have gone the other way then I went, but both of us agreed that it is hard to find consistency between Riegel v. Medtronic and Wyeth v. Levine.

LARRY E. RIBSTEIN: My doctor’s known me for a long period, and he told me to disregard these warnings. Every time I keep coming back to him, telling him I am not going take a drug because of what I read. He says, “Just stop reading the warnings.” For whatever that is worth.

GEOFFREY J. LYSAUGHT: Any other questions from the floor? Yes, sir?

AUDIENCE MEMBER: Let me back up. What bothers me is that if you recognize we have a federal structure in our country between national and state, Ribstein and Hylton, your positions are potentially inconsistent with that structure because of the way you are looking for a consensus or because of the factors you are looking at. And a good example is Truth in Lending Act. It is a disclosure statute, and it discloses and calculates the annual percentage rate based on how the statute decides it should be done. However, it does not deal with limitations on interest rates.

And so, you can effectively disclose an interest rate for Truth in Lending purposes. It is not mandating an interest rate. You can disclose an an-
annual percentage rate for Truth in Lending purposes that, in fact, is above usury rates in certain states. And one could argue under either of your theories that the Truth in Lending would effectively preempt the usury statutory provisions and cause a recalculation under state law based on the APR, and that is the concern. It is kind of a difficult issue on the calculation issue. That is my concern about both of your proposals.

KEITH N. HYLTON: It would create a recalculation under state law or it would just preempt the state cap?

AUDIENCE MEMBER: State law on interest rate calculation.

KEITH N. HYLTON: Oh, I see.

AUDIENCE MEMBER: The interest rate calculation is totally different.

KEITH N. HYLTON: From the APR.

AUDIENCE MEMBER: And so what I could argue under either of your proposals, is that the disclosure statute preempts the interest rate calculation.

LARRY E. RIBSTEIN: I would be looking for a coordination problem there, and that would really depend on whether you get chartering state limits on interest rates, or in other words, whether there is some national order to the way the interest rates have been imposed. If there is not, then it is possible that there is enough ambiguity in the statute that you would want to emphasize federal coordination. I just do not see a problem. I do not see that as being one of the more problematic applications of my analysis. I am not saying that there is no ambiguity.

AUDIENCE MEMBER: A federalistic [sic] nature is you are disclosing. You are not controlling the calculation for usury purposes, and the federalistic [sic] structure is that states can be oddballs. They can opt out of what may not be within the parameter of federal government.

LARRY E. RIBSTEIN: Right, and we ought to tolerate states being oddballs. I think that is clear and that we should have a policy, therefore, that takes states being oddballs into the calculus, and that is what we are trying to do. I am distinguishing what Keith is trying to do by not having a calculus that really takes all that into consideration.

KEITH N. HYLTON: Yes, I will admit that. In fact, I'm going to just pass on this one. I am not going to try to answer it because so much of what I am trying to deal with in my paper is regulatory agencies and the detailed
body of rules they are developing. And when Congress writes a statute that
tells people what to do, I have not really tried to deal with those cases. That
is one sense in which Larry's paper is complementary to mine because Lar-
ry is dealing with precisely those kinds of cases. So, I am not even going to
try to deal with it.

PAUL H. RUBIN: There is a funny point about federalism, I think, that is
kind of kicking around. Which is that—I have observed by looking at the
Supreme Court over many years—in some sense the Supreme Court has
flipped federalism on its head from how federalism was originally intended.
This is a gross generalization, but basically, if you look at the original Con-
stitutional structure, the purpose of federalism was to promote individual
liberty, right? Federalism was a means of promoting individual liberty and
integrated markets.

Over time, for whatever reason, federalism has come to be seen as a
theory of state power as sort of an end in itself, and at least as I read the
Supreme Court jurisprudence, it kind of lost the ideal of federalism as a
means to the end of individual liberty. I will just express that view and will
not belabor it because it is a little bit off topic here, but I think it relates to
some of the questions in that it is related to preemption, sort of that orienta-
tion.

LARRY E. RIBSTEIN: I definitely agree. I like that characterization be-
cause I do think you need to distinguish between good exercises of state
power and bad exercises of state power, and I think that issue was raised by
the last question.

(D.N.H. 1999), aff'd, 250 F.3d 10 (1st Cir. 2001).
3 See Keith N. Hylton, Preemption and Products Liability: A Positive Theory, 16 SUP. CT. ECON.
REV. 205 (2008).