

**WHOSE FALSE FEDERALISM?: THE
CONSTITUTIONALITY OF STATE ATTORNEYS
GENERAL CIVIL LAW ENFORCEMENT AND
CORPORATE WRONGDOERS' LONGING FOR
LOCHNER**

BY:

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**ACTIVIST STATE ATTORNEYS GENERAL:
*UPHOLDING GOOD GOVERNMENT OR
UNDERMINING DEMOCRATIC PRINCIPLE(S)?***

INTRODUCTION

Over the past several years, state attorneys general have significantly stepped-up civil law enforcement efforts against large, wealthy corporate wrongdoers. Proponents of this trend suggest it is a healthy exercise of state police power, while critics suggest it violates fundamental constitutional principles of federalism.

This paper introduces and analyzes the several constitutional arguments made against state attorneys general use of civil litigation and concludes the criticism amounts to little more than overheated rhetoric. This paper then turns to the particular criticisms levied by Michael S. Greve to illustrate the logical inconsistency and transparent motives of his arguments.

I. Modern Origins of State Attorneys General Use of Civil Litigation against Interstate Corporate Offenders

A. The “New Federalism”

In November 1986, an entity known as “The Working Group on Federalism” issued a report which took the position that expansive judicial interpretations of the commerce and supremacy clauses had seriously damaged the autonomy of state law, and unconstitutionally expanded the power of the federal government.¹ The Group urged a constitutional basis for a “federal balance” and offered several practical reasons for ensuring states retain sovereignty.²

A year later, former President Ronald Reagan proclaimed a “New Federalism” under which many regulatory and enforcement activities of the

federal government devolved to, or were encouraged to be pursued by, the states.³ Executive Order 12612⁴ strived to limit the size and scope of the national government and reserve all but enumerated constitutional powers to the states.⁵ Additionally, the order encouraged diversity in states' adoption of public policies and set forth a presumption in favor of state action when resolving uncertainties about national authority.⁶ Finally, the executive order directed the federal government to restrain from establishing uniform, national standards for programs and, when possible, to defer to state standards.⁷

President George H.W. Bush reaffirmed Executive Order 12612 on February 16, 1990, noting that principles of federalism were "central" to his administration.⁸ In 1999, President William J. Clinton issued his own Executive Order which in many respects mirrors Executive Order 12612.⁹

B. State Attorneys General Fill the Gap

Beginning in the early 1980s, state attorneys general¹⁰ began to coordinate their prosecutorial efforts. Cooperative civil prosecutions accelerated later in the 1980s when the National Association of Attorneys General (NAAG)¹¹ promulgated a series of anti-trust and consumer protection enforcement guidelines which encouraged state attorneys general to follow uniform standards in the exercise of prosecutorial discretion.¹²

Several factors contributed to this development: First, state attorneys general had become increasingly frustrated with the hands-off approach to law enforcement dictated by the Reagan Administration's New Federalism.¹³ Second, state attorneys general had often been overmatched by the vast

financial and legal resources of national and multi-national corporate wrongdoers and desired to level the playing field.¹⁴ Third, and more practically, the dramatic and swift expansion of telecommunications (facsimile, e-mail, etc.) beginning in the early 1980s allowed state attorneys general to communicate and coordinate much more than previously possible.¹⁵

As we are all aware, state attorneys general increased civil law enforcement efforts have been highly effective,¹⁶ with the forty-six state, \$206 billion tobacco settlement in 1998 serving as a testament to the strength of cooperative and coordinated multi-state litigation. This effectiveness is not limited to coordinated, multi-state actions. In recent years, former New York State Attorney General Elliot Spitzer has utilized that state's law to obtain a \$100 million settlement from Merrill Lynch for damages caused by the fraudulent and incestuous relationship between that Company's securities analysts and investment bankers; and, our own state Attorney General, with the assistance of this paper's authors, obtained a settlement which exceeds \$100 million from MCI, Inc. as a result of its corporate predecessor's tax fraud.

II. Attorneys General Civil Law Enforcement is Federalism in Action

A. What is Federalism?

At its core, federalism is the allocation of governmental authority to the level of government best suited to address the problem at hand. Thus, there are two sides of federalism: one is protecting state authority when appropriate; and the other is ensuring the federal government has power where national rules are necessary.¹⁷ The question posed by attorneys general use of multi-state

litigation is whether the practice impermissibly encroaches upon the sphere of federal authority.

The Constitution and decisions of the Supreme Court have recognized two types of federalism limits on state action: permanent limits and contingent limits.¹⁸ Permanent limits on state action include those which are expressly stated in the text of the Constitution¹⁹ and those that have been inferred by the Supreme Court from the structure of the constitutional plan.²⁰ Contingent limits on state action include constitutional prohibitions on state action which may be waived by Congress²¹ and limits on state action, such as preemption and the Dormant Commerce Clause doctrine, in areas where there is concurrent federal and state authority. The remainder of this section illustrates how none of these limitations are implicated by multi-state attorney general action.

B. Prohibitions and Limitations of State Action

1. Express Prohibitions on State Action

Article I, Section 10, Clause 1 of the United States Constitution specifies certain activities in which the states may never engage, such as certain fiscal,²² foreign affairs,²³ military²⁴ and lawmaking activities.²⁵ Simply put, these explicit prohibitions apply only to narrow categories of state action and are not implicated by attorney general civil law enforcement actions.

2. Limits on State Action Inferred from the Constitutional Plan

In the seminal case of *M'Culloch v. Maryland*,²⁶ the Court considered whether Congress has the power to incorporate a national bank and whether a state may tax the branches of such bank within its borders. The Court struck

down Maryland's power to tax the Bank of the United States, relying upon the underlying constitutional structural principle that political power cannot be wielded over those not represented in the government wielding it.²⁷

While a state's inability to impose burdens directly upon the federal government is an important constitutional principle, this principle is inapplicable to attorney general civil litigation because these actions involve an application of state powers onto private persons and entities. Thus, despite the cries of "regulation by litigation" and "government by indictment," concerns of extra-territorial taxation are a non-issue. State attorneys general do not levy taxes on anyone, and a corporate wrongdoer's decision to increase prices on prospective consumers is not compulsory.

Actions of state attorneys general which seek to enforce federal law are a bit different, but nonetheless constitutionally acceptable. Federal law allows the states and federal government to pursue anti-trust actions. Thus, a circumstance may arise when several states pursue action against a corporate defendant the Department of Justice refuses to prosecute. Similarly, state and federal anti-trust cases against the same corporate defendant may be consolidated in a federal multi-district litigation proceeding, where disputes over trial strategy and even settlement may arise.²⁸ Disputes of this nature do not rise to a constitutional interference with state sovereignty because Congress expressly has given the states the power to enforce federal anti-trust law.

C. Waivable Prohibitions on State Action

While the second and third clauses of Article I, Section 10 contain several additional limitations on state authority which may be waived by Congress, only one limitation contained therein may provide the basis for a substantive attack on attorneys general use of multi-state litigation. Clause 3 of Section 10 states that “no State shall, without the Consent of Congress... enter into any Agreement or Compact with another State....”²⁹ This provision, known as the Compact Clause, is designed to prevent the states from usurping the power of the federal government.³⁰

1. The Scope of Compact Clause Doctrine

a. Does the Agreement Encroach Upon or Interfere with the Supremacy of the United States?

Analysis of state cooperation under the Compact Clause requires three inquiries. The first is whether the interstate cooperation at issue encroaches upon or interferes “with the just supremacy of the United States.”³¹

The leading modern Compact Clause case is *United States Steel Corp. v. Multistate Tax Commission*.³² In that case, the Court reviewed an agreement among twenty-one states designed, among other things, to facilitate the determination of tax liability for multi-state business taxpayers and promote uniformity and compatibility among state tax systems.³³ The compact resulted from model legislation adopted by the legislatures of the participating states, which created the Multistate Tax Commission (MTC) composed of the tax administrators from all the member states.³⁴ The MTC was authorized to study

local and state tax systems, develop recommendations for greater uniformity in state tax laws, and conduct audits of businesses for member states.³⁵

After an extensive review, the Supreme Court rejected the Compact Clause challenge to the MTC. The Court acknowledged that the MTC and its creation its creation of a multi-state administrative authority increased the power of member states over corporations subject to their respective taxing jurisdictions, but noted “the test is whether the Compact enhances state power quoad the National Government.”³⁶ According to the Court, the MTC did not impermissibly enhance state power because it did not “purport to authorize the member States to exercise any powers they could not exercise in its absence,” there was no “delegation of sovereign power to the Commission[,] each State retained complete freedom to adopt or reject the rules and regulations of the Commission,” and each state could “withdraw at any time.”³⁷

b. Has Congress Approved the Agreement?

The second inquiry of a Compact Clause analysis is whether Congress has consented to the interstate agreement. The Supreme Court has recognized that “Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.”³⁸ Congress may also condition its approval on acceptance by the states of a modified compact or agreement.³⁹

c. Is the Compact Invalid Despite Congressional Approval?

The final consideration is whether the states have engaged in activities in areas in which they are expressly excluded. It is worth noting that in such areas

even Congress “cannot authorize a state to disregard an explicit constitutional prohibition.”⁴⁰

2. The Compact Clause and Attorney General Multi-District Litigation

Opponents of interstate cooperation among attorneys general, including Michael S. Greve, contend “multistate settlements directly regulate interstate commerce” without congressional approval.⁴¹ Commentators and courts alike reject this contention on several grounds:

First, as with the MTC, interstate cooperation among state attorneys general is non-binding - “each State is free to withdraw at any time.”⁴² Moreover, multi-state litigation compacts do nothing more than increase “the bargaining power of the ... States quoad corporations subject to their respective ... jurisdictions.”⁴³ Accordingly, numerous federal courts have found that state attorneys general are free to join together in joint litigation efforts (no matter whether exercising prosecutorial authority pursuant to NAAG guidelines)⁴⁴ without offending the Compact Clause of the United States Constitution.⁴⁵

Secondly, the suggestion that multi-state settlements regulate interstate commerce conveniently overlooks one important point: Coordinated law enforcement actions among state attorneys general are not acts of national legislation. Instead, multi-state legislation is a collection of individual lawsuits, each of which seeks to enforce existing laws passed by each respective state’s legislature. Thus, when state attorneys general bring action under existing law, they are simply giving life to the policies enacted by their state legislatures. This is not a usurpation of legislative power. To the contrary, the state attorneys

general are performing a “quintessentially executive function – the execution of the law by prosecuting an settling lawsuits against those believed to be in violation of it.”⁴⁶

D. Limits on State Action in Areas of Concurrent Authority

The dual sovereignties of federal and state power can best be imagined as two partially overlapping circles which create three areas of authority: an area of exclusive federal sovereignty, an area of exclusive state sovereignty and an area where federal and state sovereignty is concurrent.

Federal and state sovereignty is not equal within the area of concurrent authority. The Constitution makes federal law supreme.⁴⁷ Thus, areas which are typically thought to be within state sovereignty can be transformed into areas of exclusive federal control through the preemptive effect of federal legislation⁴⁸ or the application of the Dormant Commerce Clause.⁴⁹

Neither the various preemption doctrines nor the Dormant Commerce Clause are particularly instructive when examining the constitutionality of attorneys general multi-state litigation compacts because these doctrines address attacks on specific state laws,⁵⁰ not the cooperative actions of state executive officials. Nevertheless, given the regularity with which these challenges are made by critics who allege “[e]xtraterritorial regulation is the true source of AG activism,” we will briefly address these doctrines and the manner in which they arise and are rejected within attorneys general multi-district litigation.

1. Federal Preemption

Two sorts of attacks have been made on coordinated attorneys general actions: First, critics have suggested that attorneys general utilization of NAAG guidelines is preempted by federal law in areas such as anti-trust and air travel advertising. Secondly, tobacco companies and think tanks have made several coordinated and unsuccessful attacks on specific state laws resulting from the tobacco litigation Master Settlement Agreement,⁵¹ such as the Model Act⁵² and Qualifying Statute.⁵³

a. NAAG Guidelines

Critics have suggested that federal law preempts state attorneys general enforcement of NAAG anti-trust guidelines under their respective state anti-trust laws, citing the “comprehensive scheme” of federal antitrust regulation and the need for national uniformity in merger policy.⁵⁴ Other critics have suggested that state attorneys general attempts to enforce NAAG air travel advertising guidelines are expressly or impliedly preempted.⁵⁵

These arguments have been rejected because NAAG encourages all states to follow its prosecution guidelines; thus, leading to greater interstate consistency than individual states employment of their separately-derived prosecutorial considerations. Moreover, there is no clearly defined congressional intent to preempt NAAG guidelines in either field. In fact, in the case of anti-trust law, Congress has expressly recognized the role of state anti-trust enforcement.⁵⁶

b. Tobacco Cases

Opponents of coordinated attorneys general actions have made every conceivable Supremacy Clause attack on the tobacco settlement and have lost the vast majority of cases.⁵⁷ Courts have regularly found that there has been no expression of clear Congressional intent to preempt state tobacco regulation, nor is scheme of federal regulation of tobacco sufficient to preempt the entire field.⁵⁸

Opponents suggest their challenges have been unsuccessful *because the federal judiciary is not activist enough*. In fact, Michael S. Greve opposes a “clear statement rule,” which would allow preemption only when Congress clearly expresses an intent to preempt, and argues federal courts should strike down state laws that interfere with the free market whenever they get a chance.⁵⁹ Yet, Greve simultaneously suggests states should be free to prohibit affirmative action, regulate abortion and prevent localities from enacting anti-discrimination laws that protect homosexuals.⁶⁰ This constitutional dichotomy (pro-preemption of state laws which govern the safety or health of the citizenry, such as product liability laws, and anti-preemption of state laws which enforce an ultra-conservative social agenda) finds no support in the constitution and harkens the fully discredited *Lochner* era in which an activist Supreme Court invented a fundamental right to economic liberty and property.⁶¹

2. Dormant Commerce Clause

Similar to their attacks on attorneys general cooperative lawsuits, critics of the tobacco settlement argued the Qualifying Statute violated the Dormant Commerce Clause because it allegedly regulated tobacco transactions beyond

the boundaries of the State enacting the Qualifying statute.⁶² Courts have rejected this argument because the Qualifying State only regulated commerce within the State. A Louisiana federal magistrate judge recently noted with regard to this argument that “[t]o the extent the statutes may affect prices charged by out-of-state distributors, the situation is no different from when any business incurs higher expenses as a result of regulations imposed by one or more states. The business is free to pass those expenses on to its customers, including customers in other states. *The business’s decision to choose the latter course does not render the state’s regulation unconstitutional.*”⁶³

III. Of “False Federalism” and Constitutional Make-Believe

In his recent work entitled *Government by Indictment: Attorneys General and their False Federalism*, Michael S. Greve promotes his vision of “real federalism,”⁶⁴ which he contrasts with state attorneys general “false federalism” of “government by indictment.”⁶⁵ Greve’s earlier works expand upon his “real federalism” by offering the premise that neither federal⁶⁶ nor state governments⁶⁷ can be trusted and the citizens should be protected from both. Greve’s solution is to promote *increased* federal preemption of state laws and an activist judiciary,⁶⁸ except in matters where Greve believes the federal government cannot be trusted.⁶⁹ Greve argues the states should legislate within this realm, but fails to offer any principled explanation as to why some state regulations should be constitutionally tolerated and others not. A critical examination of Greve’s offerings reveals why this is so: Greve’s argument is nothing more than a schizophrenic call for unbridled judicial activism which has no constitutional

footing.⁷⁰ As one commentator has convincingly suggested, Greve's version of federalism is nothing more than "a radical, largely anti-government agenda, with certain exceptions for pet political causes."⁷¹

A. The States are Good?

1. Competitive Federalism

In *Real Federalism*, Greve contends "real federalism ... aims to provide citizens with *choices* among different sovereigns, regulatory regimes, and packages of government services." The basic theory is rooted in what Greve labels "competitive federalism": Citizens are free to choose their residency based upon the package of goods, services and protections provided by their state of choice. If one does not believe, for instance, that the State of Mississippi regulates the environment enough, the citizen may move to another state which regulates the environment commensurate with her expectations and desires. Similarly, businesses will gravitate to those states which offer a package of goods, services and regulations which conform to their expectations and desires. The end result is that states are provided an incentive to compete for citizens and business, which will encourage innovation and competitive discipline.⁷² Thus, under Greve's fantastical theory of federalism, citizens will choose their state of residency the same way most of us decide what to have for lunch on any particular day, and other factors, such as availability of work and location of family and friends, are not on the menu.

2. Race to the Bottom

Commentators have noted competitive federalism may lead to destructive competition among states in a “race to the bottom.” The concern is certain states will adopt policies and programs which are inconsistent with their citizens’ preferences and/or best interests in the name of business development, creating “downward pressure” on remaining states to provide even greater business incentives which further defeat the best interests of the citizenry.⁷³

Commentators have noted that federal regulation is the best method of counteracting the “race to the bottom” because all states must abide by the same regulatory scheme.⁷⁴ Moreover, federal regulation serves to ameliorate the extent to which a state can export the costs of its laws and regulations because all states must conform to the same standards.⁷⁵

Greve contends that “race to the bottom” concerns are inflated, noting certain states already have stronger environmental and employment discrimination protections than the federal government.⁷⁶ This contention may be correct, and it serves to illustrate the primary flaw in Greve’s “real federalism”: “[O]ne cannot logically argue against federal power by asserting that states are more trustworthy and then complain when the states enact and enforce laws.”⁷⁷

B. The States are Bad?

Greve paints the states as paragons of policy on one hand; and on the other, he attacks states as participants in a vast conspiracy to exploit each others citizens. With overheated rhetoric, Greve suggests state attorneys general regularly engage in “extraterritorial regulation” when they enforce their state laws

against non-resident corporate wrongdoers.⁷⁸ In order to curtail this perceived abuse, Greve calls for a “Delaware” model of commercial tort law;⁷⁹ and ironically, increased federal preemption and judicial activism. The self-serving, logical inconsistency of Greve’s argument is best summarized by Douglas Kendall:

If one were to summarize Greve’s principle of federalism in a single sentence, it might read something like this: the federal government’s authority should be limited in order to give states more authority because the federal government can’t be trusted and the states can, except when they can’t, which turns out to be fairly often, which means that the federal government’s authority should be expanded in order to allow the federal government to preempt the states.⁸⁰

C. Greve’s True Agenda

When one considers Greve’s inconsistent calls for increased and decreased state action, a single theme emerges: States should be free to act *only* if they are regulating in the service of a socially and religiously conservative agenda – to restrict abortion, require school prayer, prohibit affirmative action.⁸¹ However, when states act to provide greater protection to workers or the environment than the federal government might be willing to provide, they need to be stopped in their tracks.

Despite Greve’s arguments, it is important to note he acknowledges attorney general civil law enforcement actions are constitutional under the current standards set by the Supreme Court. Thus, the question presented by Greve is one of policy: Should the state’s top law enforcement official be entitled to civilly prosecute corporate wrongdoers when the corporate wrongdoer may opt to pass its costs to customers in other states to cover its losses? The answer is yes; and

ironically, it is the free market which allows the customers and/or stockholders to adjust for such actions.

When state attorneys general reach a settlement with or obtain a judgment against a public company, securities holders may opt to sell their stock, and sue responsible parties for their losses if the circumstances warrant.⁸² When state attorneys general reach a settlement with or obtain a judgment against a private company, prospective customers may opt to purchase another product which has not engaged in illegal actions and decided to pass the costs of their illegal acts to innocent purchasers. Regardless, it remains abundantly clear that these sorts of decisions are best left in the hands of consumers and have no place in precluding law enforcement against corporate wrongdoers.

CONCLUSION

The ultimate trick of Greve and his ilk is their desire to marry the Constitution and *laissez faire* economics in an effort to insulate national and multi-national corporate wrongdoers from the highly effective civil law enforcement efforts of state attorneys general. The United States Supreme Court long-ago recognized this exercise is improper, and their decision remains true today, no matter whether one dresses his desire for such as a fundamental right⁸³ or a “real federalism” pipe-dream.

This is not to say, however, that federalism and free markets cannot co-exist effectively. Attorney general civil law enforcement is a prime example of such: Federalism reserves to the states the ability to enforce laws which protect their citizenry and to band together in doing so if they so choose, even when the

offender is a multi-state or multi-national corporation which may opt to pass its losses on to consumers. If successful in their lawsuit, the offending company may opt to pass the cost of the law enforcement effort on to consumers in the form of inflated prices for the goods it offers. If it does, the consumer will determine whether to purchase the product with an inflated price, or purchase another fairly-priced product. This is the proper relationship of federalism and the free market – separate and powerful forces which, when allowed to operate independently, jointly serve the ends of justice.

¹ Luther C. McKinney & Dewey J. Caton, *What to Do When the Attorney General Calls: State Regulation of National Advertising*, 3 DePaul Bus. L.J. 119, 124 (1990-91) (citing, Report of the Working Group on Federalism of the Domestic Policy Council, *The Status of Federalism in America* (Nov. 1986)).

² *Id.* The reasons for state sovereignty include a) “The science of government is the science of experiment” (suggesting that states can experiment with “novel, risky, even exotic, approaches to their problems without threatening the nation as a whole”); b) “States are engaged in public policy competition among themselves” (implying that states are in a better position to rectify misguided public policy); c) “State legislative bodies are in a position to be more responsive to constituents than is Congress”; d) “States can make public policy tailored to their unique circumstances”; and e) “State sovereignty is an essential safeguard of liberty.” *Id.* at 124 n.37 (citing *The Status of Federalism in America*, supra note 1, at ppgs. 52-57).

³ *Id.* at 123.

⁴ Issued by President Reagan on October 26, 1987.

⁵ Exec. Order No. 12612, 3 C.F.R. 252 (1988), *repealed by* Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999).

⁶ *Id.*

⁷ *Id.* When President Reagan took office, the Justice Department terminated anti-trust litigation against IBM, foreshadowing the *laissez faire* anti-trust and consumer protection enforcement guidelines soon promulgated by the Justice Department and Federal Trade Commission. See, Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 998, 2005 (2001). The size of the FTC staff was cut in half during the Reagan presidency and the agency brought only forty-one new consumer fraud cases, fewer than half the number under President Jimmy Carter two years earlier. *Id.*

⁸ *President’s Memorandum for the Heads of Executive Departments Regarding Federalism Executive Order* (Feb. 16, 1990).

⁹ President Clinton originally rescinded President Reagan's Executive Order in 1998 but restored it the same year following strong criticism. See, Exec. Order No. 13083, 63 Fed. Reg. 27651 (May 14, 1998), *suspended by* Exec. Order No. 13095, 63 Fed. Reg. 42565 (Aug. 7, 1998).

¹⁰ The State Attorney General is an independent executive officer who is popularly elected in 43 states and appointed by the Governor in 5 states (Alaska, Hawaii, New Hampshire, New Jersey and Wyoming). One state selects its attorney general by secret ballot of the legislature (Maine); and in another (Tennessee), the state Supreme Court appoints the attorney general. Most state attorneys general possess all powers reserved at common law, as well as certain other statutory authority. See, Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. at 2002.

¹¹ See, Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. at 2004 n. 25 ("NAAG, founded in 1907, is the professional organization of state attorneys general and serves as a nonpartisan forum in which attorneys general share information and coordinate their activities. The membership of NAAG consists of the attorneys general of the fifty states, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.")

¹² *Id.* at 2004 n. 25 (citing, Vertical Restraints Guidelines, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1243, at 996 (Dec. 5, 1985); Horizontal Merger Guidelines, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306, at S-1 (Mar. 12, 1987); Guidelines for Air Travel Advertising, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345, at S-1 (Dec. 17, 1987); Report and Recommended Guidelines of NAAG's Task Force on the Car Rental Industry, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1395, at 1022 (Dec. 15, 1988)).

¹³ *Id.* at 2005 n. 30.

¹⁴ *Id.* at 2003-04 (citing *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F.Supp. 1287, 1289 (D. Md. 1981), settlement approved, 605 F.Supp. 440 (D. Md. 1984) as one of the first of such actions).

¹⁵ *Id.* at 2005.

¹⁶ "As an example of effectiveness, between 1995 and 1997, the attorneys general reached settlements in multistate cases with America Online, American Cyanamid, Bausch & Lomb, General Motors, Louisiana Pacific, Mazda, Packard Bell, and Sears, Roebuck." *Id.* at 2006. Multistate actions have also produced significant monetary settlements. For example, in 1987, forty-one attorneys general reached an agreement with Chrysler under which the car company paid more than \$16 million to customers whose odometers had been tampered with before they purchased their cars; in 1997, Sears agreed to pay \$165 million in penalties, refunds and legal fees concerning the collection of credit card bills from customers who had filed for bankruptcy protection as a result of a joint prosecution in all 50 states; and in 2000, generic drug manufacturer Mylan Laboratories reached a settlement with thirty-three states for \$147 million as a result of the states' claims that Mylan had unlawfully attempted to corner the market on two drugs. *Id.*

¹⁷ *Redefining Federalism: Listening to the States in Shaping "Our Federalism"* (Douglas T. Kendall, ed., 2004).

¹⁸ See, Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. at 2011.

¹⁹ *Id.* (citing, U.S. Const. art. I, 10, cl. 1. That part of the Constitution reads: "No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass

any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”).

²⁰ *Id.* (citing, Lawrence H. Tribe, *American Constitutional Law* 1024 (3d ed. 2000)). Professor Tribe observes: “There are Union-reinforcing restrictions [on state action] that flow from the Constitution’s structure alone.... Such restrictions include the ban on state secession, the rules that flow from the core principle that in our Union of states citizens choose states rather than states choosing citizens, and the principle that neither the states nor Congress may reshape the relationships specified in the Constitution between citizens of the nation and their federal representatives.”

²¹ *Id.* (citing, U.S. Const. art. I, 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws....”); *Id.* cl. 3 (“No State shall, without the Consent of Congress, lay any Duty on Tonnage, keep Troops or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War....”); 1 Tribe, *American Constitutional Law*, supra note 18 at 1023).

²² *Id.* at 2012. In the fiscal sphere, no state may “coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.” U.S. Const. art. I, 10, cl. 1.

²³ *Id.* In the foreign affairs arena, the clause prohibits states from “entering into any Treaty, Alliance, or Confederation.” *Id.*

²⁴ *Id.* The power of states to engage in military action is restricted by the clause’s prohibition on “granting Letters of Marque or Reprisal.” *Id.* Letters of marquee and reprisal were “licenses authorizing a private citizen to engage in reprisals against citizens or vessels of another nation.” *Black’s Law Dictionary* 917 (7th ed. 1999).

²⁵ *Id.* No state legislature may “pass any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts.” U.S. Const. art. I, 10, cl. 1.

²⁶ 17 U.S. (4 Wheat.) 316 (1819).

²⁷ “When a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control.” *Id.* at 436. Thus, Justice Marshall argued, Maryland would be imposing a tax, indirectly through the federal government, on the citizens of other states.

²⁸ *Id.* at 2014-15. This is what happened in the Microsoft anti-trust litigation. Nineteen states and the Department of Justice pursued Microsoft in a consolidated proceeding. The Department of Justice settled with Microsoft and a number of states opposed the settlement. See, Stephen Labaton & Steve Lohr, *Judge to Hear From 9 States on Microsoft: Group Challenges U.S. on Proposed Settlement*, N.Y. Times, Nov. 7, 2001, at C1.

²⁹ U.S. Const. art. I, 10, cl. 3.

³⁰ Professor Tribe sees these restrictions on state power as part of the Constitution’s plan for preserving the Union. 1 Tribe, *American Constitutional Law*, supra note 18, at 1021. In the debate at the constitutional convention over what would become the provisions of Article I, section 10, James Madison asked, “Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified, among ourselves, as well as in every other confederated republic ancient and Modern.” 1 Wilbourn E. Benton, *1787: Drafting the U.S. Constitution* 1049 (1986).

³¹ *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

³² *Id.*

³³ *Id.* at 456.

³⁴ *Id.*

³⁵ *Id.* at 456-57.

³⁶ *Id.* at 473.

³⁷ *Id.*

³⁸ *Cuyler v. Adams*, 449 U.S. 433, 441 (1981).

³⁹ *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 275 (1959) (finding that Congress conditioned approval of interstate agency on the state's waiving of any immunity from suit it might have enjoyed).

⁴⁰ 1 Tribe, *American Constitutional Law*, supra note 18 at 1238. Professor Tribe notes that "Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action (such as the commands of 1 of the Fourteenth Amendment)" or "license state violation of a constitutional norm too basic to the very nature and structure of the Union for it to be subject to compromise." *Id.*

⁴¹ Michael S. Greve, *Government by Indictment: Attorneys General and their False Federalism*, AEI Working Paper #110, *35 (2005) (calling on Congress to enact what he dubs the Federal Compact Clause Enforcement Act).

⁴² *U.S. Steel Corp.*, 434 U.S. at 473 (1978).

⁴³ *Id.*

⁴⁴ One commentator has noted that the National Association of Attorneys General guidelines do not implicate Compact Clause concerns. *To Form a More Perfect Union?: Federalism and Informal Interstate*, 102 Harv. L. Rev. 842, 859 (1989) ("State regulation pursuant to the NAAG guidelines does not implicate compact clause concerns. First, the NAAG guidelines, like the Multistate Tax Commission, do not increase the power of the states with respect to the federal government. The guidelines do not authorize the member states to exercise any powers that they could not exercise in its absence; instead, the guidelines simply coordinate and improve the traditional police powers of the states. In theoretical terms, the guidelines simply solve collective action problems among the several states. Second, like interstate banking statutes, the NAAG guidelines lack the traditional formal characteristics of interstate compacts. Not only are the guidelines informal and nonstatutory, but each state is free to withdraw from the agreement- the states are linked solely by reciprocity. Moreover, the states have not ceded power to a new administrative body; NAAG has neither prosecutorial nor enforcement authority. Third, even if the guidelines did constitute a compact under the compact clause, there are substantial indications of implicit congressional approval. For example, after NAAG issued the antitrust guidelines and while it was drafting the advertising guidelines, Congress rejected a measure authorizing the FTC to regulate air travel advertising. In sum, given both the peculiar structure of the NAAG guidelines and the Court's construction of the compact clause, state action pursuant to the guidelines is wholly consistent with the compact clause.").

⁴⁵ Plaintiffs have challenged the Master Settlement Agreement reached among the state attorneys general and major tobacco companies on Compact Clause grounds on several occasions in different jurisdictions, and lost every time. *Hise v. Phillip Morris, Inc.*, 46 F.Supp.2d 1201, 1210 (N.D. Okla. 1999); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1197-98 (C.D. Cal. 2000) (“Each participating state could have independently settled its litigation with the participating manufacturers and enacted both the Qualifying Statute and the Model Act. As was the case in *United States Steel*, the M.S.A. § “does not purport to authorize the member States to exercise any powers they could not exercise in its absence. The fact that the states acted collectively to settle their dispute with the participating manufacturers, in the absence of an encroachment on federal power, does not create a violation of the Interstate Compact Clause.”) (internal citations omitted); *Star Scientific Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002) (“Although the Master Settlement Agreement implicates the Commerce Clause, we see no reason to conclude that it encroaches on federal power... [T]he Master Settlement Agreement may result in an increase in bargaining power of the States vis-à-vis the tobacco manufacturers, but this increase in power does not interfere with federal supremacy because the Master Settlement Agreement “does not purport to authorize the member States to exercise any powers they could not exercise in its absence.”); *A.B. Coker v. Foti*, 2006 WL 3307445 (W.D. La. Nov. 9, 2006), Report and Recommendation of Magistrate Hornsby (“The legal standard described in *Multistate Tax Commission* is quite friendly to such multistate agreements. The dissenters in that case and the Plaintiffs in this action take issue with the standard, but it must be applied, and it does not provide a basis for a claim in this case.”), overturned for further development of the record at the same cite, with the district court noting it is (“inclined to agree with the reasoning of Magistrate Hornsby’s Report and Recommendation”).

⁴⁶ See, Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. at 2019-20.

⁴⁷ *Id.* at 2022-23 (citing *Clafflin v. Houseman*, 93 U.S. 130, 136 (1876) (“The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.”)).

⁴⁸ *Id.* State law can be preempted by Congress in one of three ways: 1) “express preemption” results when Congress explicitly states in the language of a statute its intention to preclude state activity in a certain area; 2) “implied preemption” results, as its name suggests, when the structure or objectives or Congressional enactments preclude state action by implication; and 3) “conflict preemption” results when “Congress did not necessarily focus on preemption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives.” 1 Tribe, *American Constitutional Law*, supra note 18, at 1176-77; see also, *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (describing express, implied and conflict preemption).

⁴⁹ *Id.* The Dormant Commerce Clause does not appear in the text of the Constitution. Rather, the Dormant Commerce Clause is an implicit restraint on state activity resulting from the Supreme Court’s construction of the Commerce Clause. Under the Court’s Commerce Clause jurisprudence, states may regulate interstate commerce unless a state’s regulation “clearly discriminates against interstate commerce... [and is not] demonstrably justified by a valid factor unrelated to economic protectionism;” or “the burden imposed on such commerce is clearly excessive in relation to putative local benefits.” *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁵⁰ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990) (“Our cases have established that state law is pre-empted under the Supremacy Clause ... in three circumstances.”); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (“State law is preempted to the extent it actually conflicts with federal law.”); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Although the criteria for determining the validity of state statutes affecting interstate

commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly....”).

⁵¹ The Master Settlement Agreement (“MSA”) is the contract entered in November 1998 among the five major domestic tobacco companies (Philip Morris, Inc.; R.J. Reynolds Tobacco, Inc.; Brown & Williamson Tobacco Corp.; Lorillard Tobacco Co.; and, Liggett Group), forty-six states, the District of Columbia and five territories. Pursuant to the MSA, the states agreed to dismiss their pending lawsuits, or to refrain from filing suit, against the tobacco companies in exchange for yearly payments, to be sued to defray health costs from smoking-related illnesses and to fund smoking prevention programs. *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1185 (C.D. Calif. 2000).

⁵² The Model Act was not specifically mentioned in the MSA, but the statute was enacted by several settling states and banned repatriators from importing cigarettes labeled “For Export Only.” The statute was an attempt to ensure that products created specifically for overseas use are not brought into the United States. *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1187 (C.D. Calif. 2000).

⁵³ Among other things, the Qualifying Statute was enacted by several states and aimed to ensure “that the state will have an eventual source of recovery from them if they are proved to have acted culpably.” *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1186-87 (C.D. Calif. 2000).

⁵⁴ *To Form a More Perfect Union?: Federalism and Informal Interstate*, 102 Harvard L. Rev. 842, 853-57 (1989) (discussing and rejecting the criticism of the preemption proponents).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., *Premium Tobacco v. Fisher*, 51 F.Supp.2d 1099 (D. Colo. 1999); *Hise v. Philip Morris, Inc.*, 46 F.Supp.2d 1201 (N.D. Okla. 1999), *aff’d mem.*, 2000 WL 192892 (10th Cir. Feb. 17, 2000); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 104 F.Supp.2d 501 (W.D. Pa. 2000); *Forces Action Project LLC v. California*, 2000 WL 20977 (N.D. Cal. Jan. 5, 2000); *PTI, Inc. v. Philip Morris, Inc.*, 100 F.Supp.2d 1179 (C.D. Cal. 2000); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002); *A.B. Coker, Inc. v. Foti*, 2006 WL 3307445 (Nov. 9, 2006).

⁵⁸ *Id.*

⁵⁹ See, Michael S. Greve, *Federalism’s Frontier*, 7 Tex. Rev. L. & Pol. 93, 110-21 (2002).

⁶⁰ *Id.* at 100-03.

⁶¹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁶² See, e.g., *Star Scientific Inc.*, 278 F.3d at 355-56 (“Star Scientific argues that the statute requires it to make payments on cigarettes sold by it to independent distributors in other states if the cigarettes are later sold in Virginia. It maintains that, in this manner, the qualifying statute regulates transactions beyond the Commonwealth’s borders and excessively burdens interstate commerce.”).

⁶³ *A.B. Coker, Inc.*, 2006 WL 3307445, *8 (citing *Star Scientific* and *Grand River Enterprises Six Nations Ltd. v. Pryor*, 425 F.3d 158 (2nd Cir. 2005), as reaching identical conclusions).

⁶⁴ Michael S. Greve, *Government by Indictment: Attorneys General and their False Federalism*, AEI Working Paper #110, *33 (May 24, 2005).

⁶⁵ *Id.* at *5.

⁶⁶ Michael S. Greve, *Federalism's Frontier*, 7 *Tex. Rev. L. & Pol.* 93 (2002). In a particularly tasteless rant, Greve suggests the federal government enacts statutes, such those protecting school children from gun violence and women from domestic violence, "for the same reason that prompts a dog to lick its testicles: it does it because it can." *Id.* at 118.

⁶⁷ Michael S. Greve, *Real Federalism: Why it Matters, How it Could Happen* 82 (1999) ("[F]or all their alleged flexibility and 'closeness to the people, the states may be the least responsible, most interest-group-infested, most meddlesome of all government institutions." *Id.* In fact, Greve goes so far as to "denounce the states as real federalism's real enemies.") *Id.* at 81.

⁶⁸ See, Greve, *Federalism's Frontier*, *supra* note 66, at 110-16.

⁶⁹ Greve believes the states should limit affirmative action in their universities and, if they do not, for the Court to prohibit affirmative action. He believes states can prevent localities from enacting anti-discrimination laws that protect gays and lesbians; and, he promotes greater state authority to regulate abortion. See, Greve, *Real Federalism*, note 67 at ppgs. 96-97, 100-03.

⁷⁰ One commentator has summed up Greve's agenda as follows: "Now imagine that you have the same substantive agenda as the libertarian federalists. You do not want either the federal or state governments interfering with the free market, which means that you oppose strong environmental, health and safety laws. You long for the *Lochner* era, when the Court was serious about restricting the activities of both levels of government. But the *Lochner* era has been so discredited, by liberals and conservatives alike, that you risk ridicule if you simply advocate for a return to that era. So what do you do? You pretend that this is all about federalism, and that the federalism you envision is enshrined in the Constitution. And this is precisely what Greve tries to do in *Real Federalism*. In advocating limits on both state and federal authority, he claims that these limits flow from a proper understanding of federalism." Douglas T. Kendall, *Redefining Federalism*, 55 *ELR* 10445, 10453 (2005).

⁷¹ Douglas T. Kendall, *Redefining Federalism: Listening to the States in Shaping "Our Federalism"* 32 (2004).

⁷² See, Greve, *Real Federalism* 2-9.

⁷³ See, Kendall, *Redefining Federalism: Listening to the States in Shaping "Our Federalism"* 34-35.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (citing, Greve, *Real Federalism*, ppgs. 5-7).

⁷⁷ *Id.* at 35. Most commentators, as well as the United States Supreme Court, recognizes this logical inconsistency. Greve simply chastises the five Supreme Court Justices who do so as promoters of "false federalism."

⁷⁸ Greve points to the recent Martin Act settlements reached by former New York Attorney General, Elliot Spitzer, suggesting that shareholders in other states pay for the settlements reached, yet do not have the opportunity to vote for or against Mr. Spitzer. See, Greve, *Government by Indictment*, *supra* note 64, pg. 29.

⁷⁹ In essence, Greve argues that corporations should only be subject to suit under the law of their incorporation. Consider this example: State X enacts a law abolishes all securities fraud actions. Corporation A, knowing it intends to defraud shareholders, incorporates in State X and defrauds the citizens of State Y within the boundaries of State Y. Greve's proposal would insulate Corporation A from liability, despite the fact that defrauding shareholders is illegal in State Y. This is a classic "race to the bottom" situation because it allowed State X to gain an illicit political advantage to the detriment of the citizenry of State Y.

Greve uses product liability law as an example: If one state determines a product is defective, Greve suggests that state effectively sets safety standards for the entire nation because the producer will work to make the product meet the safety regulations of a particular state. See, Greve, *Federalism's Frontier*, supra note 65, ppgs. 100-04. Thus, under Greve's fantastical version of federalism, states should not be allowed to enact and enforce product liability laws.

⁸⁰ Kendall, *Redefining Federalism: Listening to the States in Shaping "Our Federalism"*, pg. 38.

⁸¹ Kendall, *Redefining Federalism: Listening to the States in Shaping "Our Federalism"*, pg. 39.

⁸² The recent WorldCom and Enron class actions are examples of this.

⁸³ *Lochner v. New York*, 198 U.S. 45 (1905) (recognizing a fundamental right of bankers and their employers to property and economic liberty). The *Lochner* decision has been abandoned by the Court and is widely considered by conservatives and liberals to be among the worst decisions in the history of the Supreme Court.