

Around Juristocracy: The Reallocation of Judicial Authority in Preemption Doctrine

This is an essay at once narrower than, and orthogonal to, the topic of juristocracy. “Juristocracy” is, of course, Ran Hirschl’s term for a global—or at least international—expansion of judicial authority consisting in several overlapping strands; these are, “the constitutionalization of rights, the establishment of judicial review, and the judicialization of politics.” (Hirschl, 2000). Such an expansion is seen—at least by Hirschl—as essentially counter-majoritarian and hence anti-democratic. *Lochner* writ large and late, the constitutionalization of rights generally (and not just contract rights) is a sort of rear guard action on the part of fading “elites.” Juristocracy thus serves as a brake on, among other things, legislatively engineered wealth transfers from the relevant elites to ... everybody else. The notion of juristocracy thus raises fundamental (and difficult) questions ranging across constitutional theory. At bottom, I think, are concerns about efficiency and equity raised by the establishment and exercise of the judicial power. I have no correspondingly general argument or theory to offer in response to such concerns. Here, I intend merely to discuss one aspect of the U.S. Court’s federalism. In particular, I wish to consider certain shifts in judicial power attending the development of the Rehnquist Court’s preemption jurisprudence.

Recent decades have seen an expansion of preemption doctrine as traditionally understood, especially with respect to notions of implied preemption and regulatory authority. (*Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*; *Geier v. American Honda Motor Co.*, etc.) That expansion, as it favors the domain of federal authority over the domain of state authority, runs counter to the simplest caricature of the Rehnquist Court’s federalism. It also involves, among other things, at least a marginal diminution

of authority for one set of judges—as the set of state law claims over which they may preside is diminished—coincident with a certain tension, and perhaps a shift in power, between state courts generally and the federal Court. At the same time, this aspect of the Court’s federalism may be seen as serving the interest of certain corporate elites more clearly, or more durably, than the more general swing towards state (versus federal) power.

There are several reasons why such a parochial discussion might be of interest in the larger comparative debate. First, whereas the larger debate generally regards the judicial reassignment (or re-calibration) of legislative authority, this is an opportunity to attend to a rich example of judicial activity with respect to the scope of administrative authority. That is a topic of ongoing interest, not just in U.S. constitutional jurisprudence, but in, e.g., the European Union and its member states. Second, application of implied preemption principles makes conspicuous very general questions about the rationality or efficiency of fundamental elements of federal design (questions considered explicitly in the Marshall Court’s early exploration of implied preemption in *M’Culloch v. Maryland*). Third, the debate about the rationalization of *regulatory* schema takes place against the backdrop of a highly active and diverse body of civil litigation; that provides, on the one hand, an opportunity to raise questions about democracy and distribution beyond the legislative realm and, on the other, a rich domain in which to examine the effects, on the ground, of a certain form of judicial (re)allocation. For example, we can ask about popular access to the courts on the one hand and background rates of litigation activity, substitution effects, and so forth, on the other.

My discussion will proceed as follows: first, I mean to review briefly the reemergence of implied preemption doctrine and its application to the regulatory arena. Second, I mean to consider arguments on behalf of regulatory preemption in a particular (and heavily litigated) regulatory domain, that of the regulations and administrative activities of the United States federal Food and Drug Administration. *Pace Medtronic*, this is a domain where recent preemption doctrine has achieved a striking purchase in the federal Courts of Appeal and even, to an extent, the state courts. It is also a domain where the statements (and *ad hoc* litigation activities) of the regulatory agency itself have played a significant role in shaping the federal-state balance struck by the courts. Third, I mean to consider efficiency and equity aspects of regulatory rationalization in this domain. I will suggest that a strong version of regulatory preemption is at least narrowly efficient in the FDA domain in ways that, e.g., mere regulatory deference cannot be. More broadly, however, preemption itself fails to address several of the central functions served by the body of tort law that it circumscribes: (a) the broader efficiency served by enterprise liability and (b) the distributional (and democratic) effects of citizens' access to the courts as fora in which to seek redress for corporate harms. That failure may be subject to repair, but not via preemption doctrine alone.