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Introduction

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Introduction

By STANLEY MOSK*

I suppose it should come as no great surprise to discover that politicians often do not mean what they publicly profess. Nevertheless, I still marvel at how frequently leaders of our government, from presidents to members of Congress, talk about limiting the powers of the national government and returning authority to the states—and then proceed time and time again to preempt the rights of the states to decide issues involving their own citizens. Reading politicians' lips doesn't reveal what is on their minds.

In the 1850s, until the Civil War, states' rights seemed to be designed primarily to protect slavery. When the civil rights movement developed in the Martin Luther King, Jr. era, states' rights became associated with George Wallace and Orval Faubus, who spoke of nullification, the right of the states to reject federal law. Fortunately we are long past that period of confrontation. Parenthetically, I must confess to getting perverse delight these days in recalling Wallace standing in the doorway of the University of Alabama to prevent black students from entering, as I tune in on Saturday TV and watch the current University of Alabama football team, with a black quarterback and a majority of black players.

Recalcitrant states were undoubtedly compelled to accord equal rights to all citizens regardless of skin color because of the vigilance of the federal government. That is because the federal government may set minimum constitutional standards. On the other hand, however, the whim of federal government should not foreclose the states from exercising internal power.

In modern times every president and every candidate for president of both parties has promised to limit the federal government, to curtail federal bureaucracy, and to return government to the people at the state and local levels. Richard Nixon made that pledge. Jimmy Carter, a rank outsider, campaigned against Washington on behalf of the outsiders in the states. Ronald Reagan, too, promised to get the federal government off our backs and to return authority to the states and localities. He

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grandly termed his the "new federalism." On January 23, 1989, President Bush spoke to the anti-abortion demonstrators:¹ reverse *Roe v. Wade*,² he urged, and deliver the problem to the states.³ Even Chief Justice Rehnquist joined that repetitive chorus. In his February 1989 talk to the ABA in Denver, he said, "We are in a position where we must think not about creating new federal causes of action, but of remitting to state courts some of the business now handled by the federal courts. . . ."⁴

Not only do presidential candidates make those pronouncements during their campaigns and tenure of office, but most senators and congressmen of both parties echo the same pledge. Yet no sooner do members of Congress get off the plane at Dulles Airport than they pass measures to increase the powers of the federal government, and presidents dutifully sign the measures. In field after field, they have passed laws which purport to preempt the rights of states, and even in some areas in which their intent is not clearly specified, federal courts have completed the preemptive task for them.

Although this may prove to be a cure for your insomnia, let me review some of the subjects in which states' rights have been curtailed on a theory of federal preemption. At the outset it may be helpful to mention the general circumstances in which federal preemption applies.

Case law attributes Congress' power to preempt state laws to the Supremacy Clause of Article VI of the Federal Constitution,⁵ but I perceive Article I, section 8, clause 18, as more relevant.⁶ However, it is broadly asserted—though frequently ignored—that preemption is not favored unless Congress has unmistakably so ordained, or the nature of the regulated subject matter permits the courts no other conclusion.⁷

In determining whether federal law preempts similar or conflicting state constitutions and laws, a reviewing court must look to congressional intent. Congress has assumed the authority to explicitly define the

1. Los Angeles Times, Jan. 24, 1989, part 1, at 19, col. 1.

2. 410 U.S. 113 (1973).

3. Cf. Boston Globe, Jan. 23, 1989, at 1.

4. *Rehnquist Urges Limits on Burden of Federal Courts*, MANHATTAN LAWYER, Feb. 14-Feb. 20, 1989, at 16.

5. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby. . . ." U.S. CONST. art. VI.

6. "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested in this Constitution, in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18; see *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

7. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

extent to which its enactments preempt state law. Generally relying on the Commerce Clause, it categorically declares that the proposed law is intended to displace competing state law⁸. Although such an explicit intent is rare, the Employee Retirement Income Security Act (ERISA)⁹ is a notable example of such a manifest purpose, explicitly preempting any state law which relates to an employee benefit plan.¹⁰

In the absence of such explicit statutory language, courts are left to determine whether Congress implicitly indicated an intent to occupy the whole field of a given area, to the exclusion of state law. Such a purpose may be inferred when the pervasive nature of the federal regulation precludes supplementation by the states, when the federal interest in the field is so dominant as to preclude the enforcement of state constitutions or laws on the same subject, or when "the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal the same purpose."¹¹

Finally, even when Congress has not entirely displaced state regulation in a particular field, federal courts hold that state law may be preempted if it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with both state and federal law,¹² or when the state law stands as an obstacle to the accomplishment of Congress' objectives¹³.

I. Federal Laws with Preemptive Effect

From the foregoing analysis it appears that a determination of federal preemption is, in the absence of explicit congressional intent, an ad hoc process which depends on the unique facts of each case. Thus, let me give you a small, though probably representative, sample of some federal laws that the U.S. Supreme Court has determined have preemptive effect. Many of these cases are quite recent, revealing that the trend is continuing.

A. Employee Retirement Security Act

As I mentioned above, ERISA is perhaps the most notable and frequently litigated federal act that preempts competing state law.¹⁴ The

8. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

9. 29 U.S.C. §§ 1001-1461 (1982 & Supp V 1987).

10. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62 (1987).

11. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-54 (1982).

12. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

13. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

14. *See supra* text accompanying notes 7-8.

statute declares that regulation of employee pension plans is exclusively a federal concern,¹⁵ and thus ERISA preempts all state laws that relate to a qualified employee benefit plan.¹⁶ ERISA has been held to preempt an employee's common law tort and contract claims arising from an employer's insurer's termination of benefits under an ERISA plan.¹⁷ Similarly, state common law claims for bad faith insurance practices do not come within ERISA's "insurance savings clause" and thus are preempted by ERISA's exclusive civil enforcement procedures.¹⁸

Mentioning *Pilot Life* is not good for my blood pressure. My dissent in *Commercial Life Ins. Co. v. Superior Court*¹⁹ ventured the view that a United States Supreme Court opinion, such as *Pilot Life*, based almost entirely on "common sense" as authority, is hardly helpful to the bench, the bar, or the public. After all, common sense is in the eye, or the mind, of the beholder. I also emphasized the exceptions provided in ERISA which should permit state action, when based entirely on state laws.

B. Labor Law

At the risk of stepping on a land mine, I venture into the field in which Professor Grodin is the preeminent expert. The National Labor Relations Act (NLRA)²⁰ gives the National Labor Relations Board (NLRB) primary jurisdiction to consider in the first instance what conduct is prohibited or protected by the NLRA.²¹ States are prohibited from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits.²² Applying this standard, the Supreme Court recently held that the NLRA preempts a state common law tort action for interference with an employment contract because such a cause of action is arguably within the ambit of the NLRA.²³

Moreover, under the authority of the NLRA, states are preempted from regulating conduct that Congress intended to leave unregulated.²⁴

15. 29 U.S.C. § 1144(a) (1982); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-23 (1981); *see generally* 29 U.S.C. §§ 1001, 1001(a) (1982).

16. *Mackey v. Lanier Collections Agency & Serv., Inc.*, 108 S. Ct. 2182, 2185 (1988).

17. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62 (1987).

18. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987).

19. 47 Cal. 3d 473, 485, 253 Cal. Rptr. 682, 689, 764 P.2d 1059, 1066 (1988) (Mosk, J., dissenting).

20. 29 U.S.C. §§ 151-169 (1982).

21. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985) (citing *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983)).

22. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

23. *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 676 (1983).

24. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976).

Consequently, the Supreme Court has held that states cannot prohibit secondary boycotts,²⁵ overtime limitations,²⁶ or other conduct that Congress has determined should be controlled only by market forces.²⁷

Nevertheless, the absolute preemptive effect of the NLRA is uncertain; all is not lost. Not all state laws or regulations which may affect labor-management relations appear to be preempted by the primary jurisdiction of the NLRB. For example, the NLRA does not prohibit states from providing unemployment benefits to striking union members.²⁸ Similarly, allowing management or union members to bring suit on the basis of state law claims such as breach of contract,²⁹ trespass,³⁰ or intentional infliction of emotional distress,³¹ does not implicate activity arguably within the jurisdiction of the NLRB. Finally, a state law requiring an employer to give her employees severance pay if her plant unexpectedly closes does not run afoul of the NLRA's preemptive effect, despite the fact that such a law aids people covered by the act.³²

In addition to the NLRA, other federal laws affecting workers' rights preempt state laws. For example, section 301 of the Labor Management Relations Act of 1947 (LMRA)³³ preempts all state laws, or state law claims, that affect the interpretation of collective bargaining agreements.³⁴ Also, the Railroad Labor Act³⁵ preempts all state laws banning union security agreements.³⁶

C. Laws Affecting Indians

Because the regulation of Indian tribes is a subject constitutionally committed to the federal government, state laws regulating, taxing, or otherwise interfering with the sovereign rights of tribal organizations are preempted by federal law.³⁷ To this end, the Supreme Court recently held that (1) the Pueblo Lands Act of 1924³⁸ prohibits states from regu-

25. *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964).

26. *Int'l Ass'n of Machinists v. Wisconsin*, 427 U.S. at 149-51.

27. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 750 (1984).

28. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979).

29. *Belknap, Inc. v. Hale*, 463 U.S. 491, 511-12 (1983).

30. *Sears, Roebuck & Co. v. San Diego Council of Carpenters*, 436 U.S. 180, 207 (1978).

31. *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977).

32. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 23 (1987).

33. 29 U.S.C. § 185(a) (1982).

34. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

35. 29 U.S.C. § 151-163 (1982).

36. *Railroad Employees' Dept. v. Hanson*, 351 U.S. 225, 232 (1956).

37. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

38. 43 Stat. 636, 25 U.S.C. § 331 (1982).

lating non-Indians' commercial transactions with the Pueblo Indians;³⁹ (2) states may not tax a tribe's royalty interest in oil and gas leaseholds granted under the Indian Mineral Leasing Act;⁴⁰ and (3) states may not tax non-Indian companies performing essential services mandated by federal regulations on Indian reservations.⁴¹ The California Supreme Court even refused to allow prosecution for violating state fish and game laws and depleting a state natural resource on a stream running through an Indian reservation.⁴²

D. Laws Affecting Aliens

Legislation affecting aliens is also the exclusive responsibility of the federal government. Thus, federal laws regulating aliens preempt state laws that burden aliens in a manner not contemplated by Congress.⁴³

E. Laws Affecting Military Operations

State law cannot be used to limit the national purpose of providing for the common defense. Provisions of the Servicemen's Group Life Insurance Act⁴⁴ that provide service people the right to freely designate their beneficiaries, preempt inconsistent state laws such as forced share provisions of a state's probate code.⁴⁵ Finally, the Supreme Court recently held that the Federal Tort Claims Act⁴⁶ preempted a state law imposing tort liability on a military contract, and concluded that such claims are within the immune, discretionary function provisions of the act.⁴⁷

F. Federal Regulatory Agencies

The crowning affront, it seems to me, is that even federal regulations

39. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 250-51 (1985).

40. 25 U.S.C. §§ 396-416, 2101-2108 (1982); see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987).

41. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 845 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980).

42. *Mattz v. Superior Court*, 46 Cal. 3d 355, 250 Cal. Rptr. 278, 758 P.2d 606 (1988).

43. See, e.g., *Toll v. Moreno*, 458 U.S. 1 (1982) (Maryland law charging nonresident tuition for resident aliens preempted by federal law); *Plyer v. Doe*, 457 U.S. 202 (1982) (federal law preempts Texas classification of aliens that excluded children of illegal aliens from public schools). *But see De Canas v. Bica*, 424 U.S. 351 (1976) (California law barring employment to illegal aliens was harmonious with Immigration and Naturalization Act, hence not preempted.).

44. 38 U.S.C. § 770(a) (1982).

45. *Ridgway v. Ridgway*, 454 U.S. 46, 56 (1981).

46. 28 U.S.C. § 1346 (1982).

47. *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2517 (1988).

may preempt state laws in the same manner as federal statutes.⁴⁸ Here is a brief list of recent action by federal regulatory agencies which has preempted state law:

1. *Federal Energy Regulatory Commission (FERC)*

The FERC has the authority to set rates for the interstate sale of natural gas, electricity and other energy sources.⁴⁹ It has exclusive jurisdiction to regulate wholesale interstate utility rates.⁵⁰ A state is not free to set rates that do not conform to the FERC rates.⁵¹ Further, when state regulations affect the Commission's ability to regulate the interstate transportation and/or sale of natural gas, state law is preempted.⁵²

2. *Federal Aviation Administration (FAA)*

The Federal Aviation Act,⁵³ which provides that all transfers of aircraft must be recorded with the FAA, preempts state law allowing an unrecorded transfer of title to an aircraft.⁵⁴

3. *Federal Home Loan Bank Board*

Board regulations allowing federally chartered savings and loans to enforce due-on-sale clauses in mortgages preempt conflicting state law here in California, which prohibits such clauses.⁵⁵

4. *Federal Communications Commission*

FCC regulations concerning the operational aspects of cable television signals preempt competing state standards.⁵⁶

G. Laws Affecting the Environment

Some federal environmental legislation has been found to have preemptive effect. Thus, while the Court liberally construed the Clean

48. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

49. 16 U.S.C. §§ 797, 824 (1982).

50. 16 U.S.C. §§ 824d, 824e (1982).

51. *Nantahala Power v. Thornburg*, 476 U.S. 953, 966 (1986).

52. *Schneidewind v. ANR Pipeline*, 485 U.S. 293 (1988) (preemptive effect of FERC regulations limits a state's ability to regulate a utility's sale of its own securities, when such regulation will affect an area within FERC's jurisdiction); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (state courts cannot award recovery on a contract rate that exceeds the rate filed with FERC).

53. 49 App. U.S.C. §§ 1301-1557 (1982 & Supp. V 1987).

54. *Philko Aviation, Inc. v. Shackel*, 462 U.S. 406, 410 (1983).

55. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

56. *New York v. F.C.C.*, 486 U.S. 57 (1988).

Water Act⁵⁷ to accommodate stricter, competing state legislation, it nonetheless recently invalidated a Vermont nuisance action, which sought to impose liability on an unclean New York point source, as inconsistent with the act.⁵⁸ Similarly, while the Court has acknowledged that states may regulate the safety aspects of nuclear facilities,⁵⁹ it has also held that the Atomic Energy Act⁶⁰ preempts state law regulating the disposal of hazardous nuclear waste.⁶¹ Finally, the Court has ruled that the Surface Mining Control and Reclamation Act of 1977⁶² preempts state laws regulating coal producers when the state law actually conflicts with federal law.⁶³

In 1986 the people of California overwhelmingly passed Proposition 65, which requires businesses to provide a warning if their chemicals pose a significant risk of cancer, birth defects, or other reproductive harm. That certainly seems reasonable enough. Nevertheless, there are three lawsuits pending in federal courts asserting that the proposition violates a federal law that prescribes the labels to be placed on pesticides.

H. Other Miscellaneous Preemption Cases

1. *Federal Arbitration Act*

The Federal Arbitration Act⁶⁴ preempts state laws that withdraw the power to enforce arbitration agreements under the Act,⁶⁵ or that allow state law actions to be maintained without regard for a private agreement to arbitrate.⁶⁶

2. *The Williams Act*

The Williams Act,⁶⁷ which regulates takeovers of companies listed on a national security exchange, preempts inconsistent state regulation that may inhibit takeovers.⁶⁸

57. 33 U.S.C. §§ 1251-1376 (1982).

58. *International Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

59. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984).

60. 42 U.S.C. §§ 2011-2296 (1982 & Supp. V 1987).

61. *P.G. & E. v. State Energy Resources Comm'n*, 461 U.S. 190, 219 (1983).

62. 30 U.S.C. §§ 1201-1328 (1982 & Supp. V 1987).

63. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

64. 9 U.S.C. §§ 1-14 (1982).

65. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

66. *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987).

67. 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d) (f) (1982)).

68. *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982).

3. *Agricultural Fair Practices Act*

The Agricultural Fair Practices Act⁶⁹ may preempt state laws regulating agricultural associations.⁷⁰

4. *The Hague Service Convention*

When applicable, The Hague Service Convention, a multilateral treaty, providing uniform standards for international service of process, preempts inconsistent state law.⁷¹

5. *Social Security Act*

Provisions of the Social Security Act⁷² exempting benefits from execution, levy, or attachment preempt conflicting state laws designed to attach a prisoner's social security benefits to pay for his incarceration.⁷³

6. *The Wild-Free Roaming Horses & Burros Act*

This Act⁷⁴ may also have preemptive effect.⁷⁵

II. Laws That Explicitly Do Not Have Preemptive Effect

There are a few, very few, bright spots. For as Congress may explicitly provide for federal preemption, it may also explicitly limit the preemptive effect of federal laws by signaling an intention to accommodate consistent, or even stricter, state laws that further the purpose of the complimentary federal law. For example, under the Federal Water Pollution Control Act,⁷⁶ states are free to adopt more stringent water pollution standards, above and beyond those set by the act.⁷⁷ Similarly, the preemption sections of the Civil Rights Act⁷⁸ severely limit Title VII's preemptive effect by allowing state fair employment laws to have the same effect as they had before the enactment of Title VII.⁷⁹ Finally, as I have consistently insisted, beginning in an article published over twenty years ago, federal law does not automatically preempt state antitrust

69. 7 U.S.C. §§ 2301-2306 (1982).

70. *Michigan Cannery & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984).

71. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104, 2108 (1988).

72. 42 U.S.C. §§ 301-1397 (1982).

73. *Bennett v. Arkansas*, 108 S. Ct. 1204, 1205 (1988).

74. 16 U.S.C. §§ 1331-1340 (1982 & Supp. V 1987).

75. *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976).

76. 33 U.S.C. §§ 1251-1376 (1982).

77. 33 U.S.C. § 1370 (1982).

78. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

79. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987).

laws.⁸⁰ That can be particularly significant in a state like California which has a very good antitrust statute, the Cartwright Act.⁸¹

Conclusion

After all of the foregoing, what is my conclusion? No, it is not secession from the union. I am not declaring war on the feds. I hope only that the federal government will exercise restraint rather than running roughshod over legitimate efforts of the states to regulate the affairs of their own citizens.

One possible solution is contained in an interesting academic debate between Professor Erwin Chemerinsky of the University of Southern California and Professor Martin Redish of Northwestern University.⁸² It is not actually a true debate, for they agree on substance, disagreeing only on some peripheral matters.

The general theme is that litigants should be able to choose between federal and state courts for the determination of constitutional issues. Professor Chemerinsky contends that the litigant choice principle has many advantages.⁸³ First, permitting a party with a constitutional claim to choose whether to litigate in federal or state court improves the opportunity for protecting constitutional rights. The state and federal courts throughout the country vary considerably. In a nation with fifty state court systems and ninety-one federal districts, it is evident that some state courts will be superior to some federal courts in protecting individual rights, while in other areas, the state courts will be inferior to the federal judiciary. Actually, the courts probably vary depending on the particular issue; a state court might be better in upholding some constitutional rights, but ineffective as to others.

The litigant choice principle allows a party with a constitutional claim to choose between state or federal court and thus to select the forum likely to provide the most understanding hearing. The litigant and

80. See Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 ABA ANTITRUST SECTION 358, 361-68 (1962).

81. CAL. BUS. & PROF. CODE §§ 16720-16727 (1989). *But see* State *ex rel.* Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147, 1170, 252 Cal. Rptr. 221, 235, 762 P.2d 385, 399 (1988) (Mosk, J., dissenting) (arguing against holding of majority, *id.* at 1168, 252 Cal. Rptr. at 234, 762 P.2d at 398, that Cartwright Act is not broader than Sherman Act and common law on the question of merger coverage).

82. Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988); Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369 (1988).

83. See Chemerinsky, *Parity Reconsidered*, *supra* note 82.

his attorney are in the optimal position to assess which court in that geographic area offers the better chance of objectively vindicating the particular constitutional claim. Of course, mere exercise of the choice of forum does not determine whether federal or state constitutional law will control.

Although I have merely scratched the surface, I hope you received my message: I am not enthused about federal preemption. I prefer to allow the states to be, as Brandeis put it, laboratories in the science of self-government. And so, on states' rights I conclude with the views of Professor Dick Howard of the University of Virginia, who recently wrote that a state constitution is a fit place for the people of a state to

record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life. . . .

A study of constitutionalism in the United States is incomplete if one considers only the Federal Constitution. That document deserves all the attention we can give it. But those who drafted it understood that an enduring and viable federal system rested as well on the pillars of the state constitutions. It is through those constitutions that the people of the respective states structure governments closer to them than is possible in Washington. Pluralism and a dispersal of power are among the buttresses of our free society. Maintaining the state constitutions in good repair, and understanding their postulates, are important in carrying forward a system of government that has served us well for two centuries and gives us hope and promise for the next century and beyond.⁸⁴

84. Howard, *The Renaissance of State Constitutional Law*, 63 U. VA. INST. OF GOV'T NEWSL., Sept. 1986, at 5 (published by University of Virginia Center for Public Service).

