To Form A More Perfect Union

By Wayne Fisher

From time to time, I think it is not only appropriate but also essential to remind ourselves, as members of the International Academy of Trial Lawyers, of the purpose for our existence. Are we merely a fraternal or collegial group enjoying the warm friendship of one another or do we have an even higher or more lofty purpose?

Recently, I refreshed my memory by rereading the Certificate of Incorporation for the IATL filed in 1954. It specifically states, among other things, that:

> "The purposes for which the said corporation [IATL] is to be formed are as follows:
>
> "..To cooperate with and make recommendations to legislative bodies. . promote reforms in the law facilitate the administration of justice . ."

This address deals with a very serious problem that should concern us all; that is, the alarming frequency with which federal courts in recent years have held that federal law preempts state law in areas that affect the lives of all our citizens. While this problem may, at first blush, sound somewhat esoteric, it is a problem that goes to the very heart of our system of government and how it will function in the future. I offer the following remarks to inform and challenge you.

In the past year, we celebrated the 200th anniversary of our Bill of Rights. We celebrated the strength and stability of our government, as we watched other govermnents fall. We celebrated the genius of our Fathers, in whose vision we now enjoy our liberties.

As we embark on our third century as a nation, the time for celebration has ended, and the time for work has begun. The great German poet, Goethe, who lived through a crisis of freedom, said to his generation: " What you have inherited from your fathers, earn over again for yourselves or it will not be yours."[1] We must work as hard now to preserve our liberty as the Framers did to create it.

As trial lawyers, we have some difficult work ahead. Right now, in our courts, our constitutional structure is under attack.

Our Constitution was founded upon the principle of dual sovereignty between the states and the federal government.[2] The rights given to the federal government by our Constitution were "few and defined"; the rights given to states were "numerous and indefinite."[3] This balance of power between the states and the federal government, or what has come to be known as the principle of federalism, was the bulwark of our Constitution.

However, during the last five years, we have witnessed a dramatic erosion of our federalist structure. Under the doctrine of implied preemption, federal courts have eradicated powers and rights of states that have existed since the founding of the republic. This usurpation of states' rights is unprecedented. And, as Professor Laurence Tribe has said, this view of preemption "has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration."[4]

This is not just an ideological debate. This is real. Each day in our courts citizens are being stripped of their rights and remedies. States are being stripped of their powers to make and enforce their own law. The very concept of federalism is being preempted.

To comprehend the threat we face, we must understand the historical bases for the delineation of powers between our federal and state governments. I will first address the larger context of the origins of federalism and its erosion. A good starting place for this discussion is the Articles of Confederation. Those articles united the thirteen states but failed to provide a system of governance. The confederation had no executive. The individual republics were bound together, as one commentator has said, by a "rope of sand."[5]

The Constitution was established in order "to form a *more perfect union*...."[6] And the shape of that union was the subject of inspired debate. There were those who felt that the new country needed a strong central government to harmonize the discord among individual states. There were others who feared that such a government would prove fatal to individual liberties and state sovereignty.

The Constitution struck a compromise over the balance of power between the states and the federal government.[7] Under this compromise, states possessed concurrent sovereignty with the federal government, subject only to the limitations of the Supremacy Clause.[8] The Federal government was granted limited enumerated powers, while state governments retained all other powers.[9] James Madison wrote that under the Constitution the states' powers extended "to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[10]

The debate over these issues continued even after the Constitution was adopted. Many expressed concern about the "implied powers" of this new federal government and the failure of the Constitution to address or protect individual liberties and the powers of state governments. [11] A cry arose for a bin of rights to resolve these concerns. Although some felt that an independent judiciary and state constitutional protections were enough to prevent abuses of federal power and transgressions on individual liberty, most agreed that a bill of rights was required. The Bill of Rights was soon adopted.[12]

In addition to the provisions to protect individual liberty, the Bill of Rights contains an explicit check on abuses of power by the federal government. The Tenth Amendment to the Constitution provides that " [t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. "[13] If the federal government acts outside its enumerated powers, Hamilton wrote, it invades the residuary powers of states and commits "acts of usurpation."[14]

While the retention of state sovereignty served to protect individual liberties and prevent abuses by the federal government the federalist structure created a tension between the dual sovereigns. This power struggle between state and federal governments - a power struggle which is inherent in our Constitution - is today being waged in our courts.[15] And, as Justice Sandra Day O'Connor has stated, "[i]n the tension between federal and state power lies the promise of liberty."[16]

In the two centuries since its inception, the grand design of federalism has been eroded. Much of this erosion is due to politics. As a general matter, the political party in office inclines toward a broad construction of the Constitution and an increase in federal power, while the party not in office tends toward a strict construction and a return of power to the states.[17] The appointed judiciary is not immune from such politics since the views and philosophies of prospective judges are taken into account in the process of their political appointments.

A Federalist judiciary, led by John Marshall, first recognized the "implied powers" of the federal government and annulled a state law which conflicted with those "implied powers."[18] A New Deal judiciary first recognized the power of Congress, under the Commerce Clause, to regulate virtually any activity.[19] From those premises, it seems the present judiciary is in the process of severely undermining federalism, as the Framers conceived it.

This new judicial. activism presents an unusual paradox. In my lifetime, "states-righters" were generally considered very conservative on the political spectrum. The concept of "states rights" conjures up images of Dixiecrats and others who zealously fought for the principle that primary governmental authority should remain in our individual states. A conservative judicial philosophy embraced the view that courts should not engage in judicial activism and assume the mantle of legislators. Ironically, however, some conservatives on the courts now seem to lead the charge to undermine federalism through judicial activism.

First, the present judiciary has removed the Tenth Amendment as a check on abuses of federal power. That amendment, which was so important to the Framers, no longer has much legal significance. In 1985, the Supreme Court held that the boundaries of federalism are to be politically settled, rather than judicially maintained.[20] Justice Powell, in dissent, said that the decision "rejects almost 200 years of the understanding of the constitutional status of federalism." [21]

Second, the present Judiciary has expanded the doctrine of implied preemption to eliminate states' rights and remedies, even without expressed premption by Congress and without provision of an alternative federal remedy. Professor Tribe calls this new breed of premption a "major departure from established principles of federalism."[22]

The concept of federal premption itself originates in the Supremacy Clause of the Constitution.[23] Where federal law is supreme, conflicting state law must yield.[24] When Congress explicitly states its intention to preempt state law, state law is preempted.[25]

However, in most cases, congressional intent to preempt state law is ambiguous or unstated. In those cases, the duty falls upon the Judiciary to interpret congressional intent and determine whether state law should be preempted. Federalism hangs in the balance.

Historically, most of our courts have resolved the benefit of the doubt against federal preemption of state law.[27] To protect federalism, courts recognized a presumption against preemption. The Supreme Court held that this presumption ensured that the delicate balance between state and federal government "will not be disturbed unintentionally by Congress or unnecessarily by the Courts."[28] The presumption had particular significance in areas traditionally regulated by the states, such as health and safety concerns and state tort remedies.[29]

In recent years, federal courts have tended to ignore the presumption against preemption and the balance of federalism. Under the doctrine of implied preemption, federal courts have invaded areas traditionally regulated by states and have emasculated state laws. Even when federal law has not expressed the clear intent by Congress to override state law, federal courts have judicially written such legislation under the guise of "implied" preemption. This "implied" legislation represents a particularly virulent form of judicial activism.

The extent of this recent, pervasive usurpation of state law by federal courts is alarming. I offer a few examples.

(1) Courts have interpreted a federal statute designed to provide minimum federal standards for employee benefit plans in such a way as to preempt all state tort actions by an employee.[30] Now, even if a group health insurer denies coverage fraudulently or with the intent to harm an employee, that employee has no recourse other than to sue in federal court, without a jury trial, to recover only the benefits he should have been provided.[31] Over 134 million American workers are insured under such employee benefit plans, and all of them are left without a remedy for the tortious conduct practiced upon them.[32] An insurance carrier acting in bad faith in the denial or handling of group hospitalization or medical claims can now do so with impunity. The state courts must stand by helplessly while these injustices are perpetrated on our citizens.

(2) The Supreme Court has interpreted a federal statute that expressly applies to suits against federal employees in such a way as to preempt state products liability actions against private government contractors.[33] The Supreme Court did this despite the fact that Congress had rejected attempts by the contractors, on six separate occasions, to provide legislative immunity from state tort Suits.[34] Now, any American killed or injured by a defective product produced under government contract may be unable to sue those responsible or recover compensation for their injuries.

(3) Under the doctrine of implied preemption, courts have held that certain state tort actions against automobile manufacturers are preempted by the National Traffic and Motor Safety Act of 1966.[35] These courts found preemption even though Congress expressed a contrary intent in the Act's saving clause. That saving clause provides that "[c]ompliance with a Federal motor vehicle standard ... does not exempt any person from liability under common law."[36] The United States Supreme Court has refused to review those cases. Thus, Americans killed or injured by a defectively designed automobile may be left without a remedy.

(4) Under the doctrine of implied preemption, courts have also precluded certain state tort actions against drug manufacturers,[37] against employers,[38] against unions,[39] against maritime insurance companies,[40] against common carriers,[41] against pesticide manufacturers,[42] and others. In what might have been the nadir of federalism, a Houston federal district court recently held that a state wrongful death action against an airline was preempted by the Federal Aviation Act.[43] The court found preemption despite the fact that the Federal Aviation Act provided no remedy for wrongful death. The import of this decision would have been that there is no cause of action, either state or federal, for wrongful death if it occurs on a commercial airliner. That opinion remains unpublished, however, and the case was settled prior to appeal.

These decisions are remarkable for their failure to discuss or even consider the intrusion on state powers or the sacrifice of citizens' rights. The long-term ramifications of these decisions are truly ominous.

First, these decisions have ignored established precedent which distinguished state regulation from state common-law theories of liability.[44] Under prior judicial interpretation, state regulation could conflict with federal regulation and thus be preempted.[45]

On the other hand, state common law does not regulate the conduct of defendants, but instead provides compensation for tort victims.[46] State tort compensation is "deeply rooted in local feeling and responsibility"[47] and courts will not permit preemption of "traditional state tort law," unless "Congress intended to preclude such awards."[48] There is no conflict between federal regulation and state compensation, since a defendant can choose to operate under minimum federal standards and pay for the injuries that result, or choose to operate under higher standards to guard against potential injuries.[49]

Second, these decisions have ignored established precedent which refused to find preemption in those cases in which tort victims would be left without a remedy. Shortly after our republic was founded, Chief Justice John Marshall, in *Marbury v. Madison*, discussed this principle. He said: "The government of the United States has been emphatically termed a government of laws, and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for violation of a vested legal right."[50]

Nonetheless, in the face of legislative *silence*, some modern courts feel free to preempt state tort law even when no alternative federal remedy is available. Such a position, as Justice Blackmun said in the Karen Silkwood case, is "inconceivable."[51] And, as the majority held in *Silkwood,* "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[52] Such a denial of judicial recourse is a denial of due process and a denial of our rights to access to the courts.[53]

Finally, these decisions have ignored the public policy ramifications. Not only do these decisions strip injured citizens of rights to tort compensation and shift the burden of their loss to the public treasuries, but these decisions also immunize the conduct of wrongdoers and permit them to do harm with impunity.

Congress certainly did not intend such a result. If a manufacturer approached Congress, as some have done, and asked Congress to provide them immunity for their conduct which, through negligence or intent, kills or injures our citizens, can any one of us imagine that Congress would embrace such legislation?[54] Of course not. But that is often the effect of federal preemption of state laws.

This trend ignores the societal value of state laws designed to guard against harm and designed to shift the burden of loss from the innocent citizen to the guilty wrongdoer. At the same time, these courts remove all incentives from manufacturers and others to improve product designs, to increase warnings to consumers, to restrain representations in advertising, or to do anything more than what is required by federal minimum standards to improve the lot of our citizens.

Federalism is in jeopardy. The Framers' vision of a limited federal government of enumerated powers is being replaced with a new judicial vision of a pervasive federal government supplanting state governments in their traditional enforcement of both common-law and statutory remedies.

As trial lawyers, we should fight to protect the liberties guaranteed by our Constitution. It is our mandate to do so. Chief Justice Earl Warren once observed that "[t]rial lawyers have always been and are today the men [and women] who preserve the basic principles of justice and keep alive those provisions of our Constitution and statutes which preserve and enlarge our freedoms."[55] And, against this growing threat of implied preemption, we must remain vigilant to preserve the powers of states to ensure our fundamental liberties.

We should encourage Congress to restore the balance of power. Congress should enact savings clauses to prevent further intrusion of federal regulation on the states. But, as we have seen, even explicit savings clauses are no guarantee that some in the federal judiciary will abstain from broad preemption of state laws.

This battle must be fought in our courts. And, we have not yet lost the war. Just last year, the Supreme courts issued two decisions that focused on the importance of federalism and states rights in our constitutional structure.[56] Early this year, the Supreme Court heard reargument in the *Cippolone* case the cigarette manufacturer case that Professor Tribe credits with the birth of this new breed of implied preemption .[57] Chief Justice Rehnquist, in his year-end report on the federal judiciary, emphasized the need to reexamine the role of the federal courts and their impact on federalism[58] And, some federal courts have refused to find implied federal preemption in the absence of clear congressional intent.[59]

As trial lawyers, we must convince our courts of the need to preserve the sovereignty of state government, of the need to assure remedies to injured citizens, of the need to preserve state laws designed to prevent harm to our citizens, and of the need to require tortfeasors to answer for the deaths and injuries they cause.

We cannot permit the rights and powers of state governments to be subjugated to an all -powerful federal government. State sovereignty must be independent and must remain respected by our courts. For, as Hamilton observed, "a dependent sovereignty is nonsense."[60]

The Framers did not consider federalism an empty guarantee. Rather, a healthy balance of power between the states and the federal government reduces the risk of tyranny and abuse of power.[61] In order to forma more perfect union, we must restore respect for the power of states to enact laws to protect and preserve the health, safety, and well-being of our citizens.

ENDNOTES

1. Stevenson, "Politics and Morality," Saturday Review, Feb. 7, 1959 at 12.

2. See Gregory v. Ashcroft, 115 L.Ed.2d 410, 421 (1991).

3. The *Federalist No*. 45 at 292 (J. Madison) (C. Rossiter ed. 196 1).

4.ribe, *Federalism with* Smoke and *Mirrors,* The Nation, June 7, 1986, at 790.

5 D. H. Montgomery, The Student's American History 230

(2d ed. 1925).

6 U.S. CONST. Preamble.

7 See Marcotti, *Federalism and* the Rise *of* State Courts, ABA J.,April 1, 1987, at 63

8 Taffin v. *Levitt, 493* U.S. 455, 458 (1990).

9 *The Federalist No*. 45 at 292-93.

10. Id.

11. See G. S. Wood, *The Creation of the American Republic,* at 536-43 (1972)

12. Id.

13. U.S. CONST. amend. X

14 The *Federalist No*. 33 at 204 (A. Hamilton) (C. Rossiter ed. 196 1).

15 Marcotti, supra note 7, at 60.

16. Gregory v. Ashcroft, 115 L.Ed.2d at 423.

17 *See* generally Marcotti, supra note 7.

18 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579(1819).

19 . See United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); see also Van Alstyne,The Second Death *of Federalism, 83* Mich.L. Rev. 1709,1710 (1985)

20 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling National League *of* Cities v. Usery, 426 U.S. 833 (1976)); see also Van Alstyne, supra note 19, at 1720-24

21. Garcia, 469 U.S. at 560 (Powell, J., dissenting).

22. Tribe, supra note 4, at 788.

23. U.S. CONST. art. IV, cl. 2.

24.See *Gibbons v*. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

25. See *Jones v. Rath Packing Co.,* 430 U.S. 519, 530-31(1977).

26. Tribe, *supra* note 4, at 789.

27. *See Maryland v. Louisiana,* 451 U.S. 725, 726 (198 1).

28. *Jones v. Rath Packing Co.,* 430 U.S. at 525.

29. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144 (1963); see also *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707, 715 (1985) (health and safety concerns);*Abbott v. American Cyanamid Co.,* 844 F.2d 1108, 1112 (4th Cir. 1988) (tort remedies).

30. *See Pilot Life Ins. Co. v. Dedeaux, 481* U.S. 41, 47-48 (1987) (interpretation of Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982))

31. Id.; *see also* Note, *Blind Faith Conquers Bad Faitk- Only Congress Can Save Us After Pilot Life Insucrance Co. v. Dedeaux, 21 Loy.* L.A. L. Rev. 1343 (1988).

32 Id.; 21 Loy L.A. L. Rev. at 1347.

33. *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988) (establishment of federal common-law government contractor defense through interpretation of the discretionary function exception of the Federal Torts Claims Act, 28 U.S.C. § 2680(a)).

34. Id at 515 n.1 (Brennan, J., dissenting).

35. *See, e.g., Wood v. General Motors Corp.,* 865 F.2d 395 (Ist Cir. 1988), *cert. denied,* 494 U.S. 1065 (1990) (passive restraints); *Kitts v. General Motors Corp.,* 875 F.2d 787 (10th Cir. 1989), *cert. denied,494 U.S.* 1065 (1990) (passive restraints); *Taylor v. General Motors* Corp., 875 F.2d 816 (1 Ith Cir. 1989), *cert. denied, 494 U.S.* 1065 (1990) (air bags).

36 15 U.S.C. § 1397(c) (emphasis added).

37. *Hurley v. Lederle Laboratories,* 651 F. Supp. 993 (E.D. Tex. 1986).

38. *Miller v. A.T&T Network Systems,* 850 F.2d 543, 550 (9th Cir. 1988).

39. International B*d of Electrical Workers, AFI -CIO v. Hechler* 481 U.S. 851, 862 (1987).

40. *See Atkinson v. Gates, McDonald & Co*., 838 F.2d 808, 813 (5th Cir. 1988).

41. *See Hughes v. United Van Lines, Inc.,* 829 F.2d 1407, 1412-13 (7th Cir 1987), *cert. denied,* 485 U.S. 913 (1988).

42. *See Fitzgerald v. Mallinckrodt,* Inc., 681 F. Supp. 404 (E.D. Mich. 1987).

43. *Howard v. Northwest Airlines, Inc.,* slip opinion H-91-2731 (S.D. Tex. December 31, 1991).

44. Edell & Walters, *The Doctrine of Implied Preemption in Products Liability Cases-Federalism in the Balance,* 54 Tenn.L. Rev. 603, 604-05 (1987).

45. See *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 14243 (1963) ("Compliance with both federal and state regulations is a physical impossibility

46. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting).

47. *San* Diego *Building Trades Council v. Garman,* 359 U.S. 236, 244 (1959).

48. *Silkwood,* 464 U.S. at 255.

49. Id. at 264 (Blackmun, J., dissenting); Tribe, *supra* note 4, at 788.

50. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 135, 162(1803).

51. *Silkwood,* 464 U.S. at 263 (Blackmun, J., dissenting).

52. Id. at 251.

53. *See United Const. Workers v. Laburnum Const. Corp.,* 347 U.S. 656, 663-64 (1954); *Chambers v. Baltimore and Ohio Railroad Co.,* 207 U.S. 142, 148(1907).

54. Tribe, *supra* note 4, at 790.

55. Quoted in Merhige, *Professionalism, Credibility and Public Trust,*Trial, October, 199 1, at 3 1.

56. *Chisom. v. Roemer 111* S. Ct. 2354, 115 L.Ed.2d 348 (199 1); *Gregory v. Ashcroft, 111* S. Ct. 2395, 115 L.Ed.2d 410 (199 1).

57. Tribe, *supra* note 4, at 788.

58. Rehnquist, 1991 *Year-End Report on the Federal Judiciary* (Sup. Ct. pub. 1991) at 3.

59. *See, e.g., Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529, 1542 (D.C. Cir.) (no implied preemption in Federal Insecticide, Fungicide, and Rodenticide Act, 7 .S.C. §§ 136-136y), *cert. denied,* 469 U.S. 1062 (1984); Cox v. *Velsicol Chemical Corp.,* 704 F. Supp. 85, 87 (E.D. Pa. 1989) (same); *Abbott v. American Cyanamid Co.,* 844 F.2d 1108, 1113-14 (4th Cir. 1988) (no implied preemption in DTP vaccine statutes), *cert. denied,* 488 U.S. 908 (1989); *United Ass'n of Journeymen, etc. v. Bechtel Power* Corp., 834 F.2d 884, 889 (10th Cir. 1987) (no implied preemption of invasion of privacy claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 30 1), *cert. denied,* 486 U.S. 1055 (1988); *Karl v. Burlington Northern Railroad Co.,* 880 F.2d 68, 76 (8th Cir. 1989) (no implied preemption in Federal Railroad Safety Act).

60. Hamilton to Robert Morris, April 30, 178 1, quoted in G. S. Wood, s*upra* note 1, at 360.

61. *Gregory,* 115 L.Ed.2d at 422.