

***Making Preemption Unpalatable: State Poison Pill Legislation***

Robert A. Mikos

November 2013

**Note to CSDI folks:** This is a *very* rough draft of a new federalism paper. I am eager to get your feedback on any facet on the paper, but I am particularly interested in getting your feedback on two key questions: 1) under what conditions would Congress respond favorably to state demands (i.e., pass legislation acceding to state demands); and 2) under what conditions would a state lawmaking body be willing to make this gambit. (I suspect the literature on wrecking amendments might be useful here.) I look forward to seeing you next month!

Congressional preemption is the bane of state power. Preemption negatives the operation of state law, leaving it without effect.

Nearly all state law is exposed to the threat of preemption. Indeed, Congress has already exercised this threat against thousands of state and local laws, blocking sub-national regulations of subjects ranging from consumer safety to immigration.

Not surprisingly, a veritable chorus of lawmakers, jurists, and scholars has called for curbs on preemption. The proposed reforms run the gamut but almost all depend upon the Court to intervene on behalf of the states. For example, several popular reform proposals require the Court to employ canons of statutory construction that disfavor preemption.

No one has seriously considered what the states themselves could do to forestall preemption. Most commentators simply assume the states are either too weak to help themselves, or that self-help is necessarily unlawful.<sup>1</sup> So the standard narrative depicts states as helpless victims, in need of rescue from the courts or some other federal institution.

This Article posits the states are not as helpless as the conventional wisdom suggests. The conventional wisdom overlooks a powerful source of leverage states could use to curb Congress's appetite for preempting state law. The leverage is, in fact, state law, but not the parts that Congress would ordinarily want to preempt. It is the far more common parts of state law that help to further congressional objectives.

---

<sup>1</sup> Even the head of the Cato Institute equates state self-help with nullification. Robert A. Levy, *The Limits of Nullification*, N.Y. Times, op-ed, Sept. 3, 2013. I share the view that nullification is an invalid form of resistance to federal law (and laud Cato's acknowledgement of same), but I suggest that we should not be so quick to describe all forms of state resistance to federal authority as "nullification." The Supreme Court, for example, has made a sharp distinction between active resistance (nullification) and passive resistance, condemning the former while approving the latter. A pair of pre-Civil War Supreme Court cases helps to illustrate the difference between passive and active resistance to federal law. The cases involved Personal Liberty Laws passed by northern states prior to the Civil War. To a large extent, these Personal Liberty Laws simply forbade state agents from taking any part in the recapture of fugitive slaves (e.g., by jailing them). In *Prigg v Pennsylvania*, 41 US 539 (1842), the Court approved of such laws on the theory that the States could not be forced to assist federal (or private) agents in rounding up or handling fugitive slaves. *Id.* at 615–16 (Story, J.) (“[The Fugitive Slave Clause] does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the constitution.”). At the same time, however, the Court indicated that the states could not obstruct federal (or private) efforts to round up fugitive slaves. *Id.* at 618–19. Hence, in *Ableman v Booth*, 62 US 506 (1858), the Supreme Court invalidated a very different type of Personal Liberty Law—a state court writ ordering federal officials to release a prisoner they were holding under the Fugitive Slave Act, on the grounds that states had no authority over federal officials.

I propose a novel way for states to exploit this leverage vis-à-vis Congress, what I call *poison pill legislation*. In such legislation, modeled on poison pills common to other areas of law, states would threaten to repeal one provision of law Congress favors unless Congress tolerates (i.e., doesn't preempt) another provision of law it disfavors and might otherwise preempt. In other words, the states would make Congress choose between preserving all of a state statute or blocking state law in its entirety.

When state law is viewed this way—i.e., more holistically, it seems apparent that states would have enough leverage to extract concessions from Congress, at least in some policy domains. And even if Congress itself would not respond directly to state poison pills, courts could do so in its stead. Indeed, upon closer examination, there is no strong reason for courts to ignore severability considerations when gauging Congress's preemptive intentions.

The Article develops the idea of the poison pill as a bargaining tactic between rival legislatures. It focuses on one type of threat – making undesirable portions of state law inseverable from desirable ones. By adopting an inseverability clause, for example, a state could make its continued prohibition on recreational marijuana hinge on Congress not preempting key provisions of the state's medical marijuana program. The poison pill should thus help protect state authority from federal preemption.

More broadly, the idea of the poison pill should help challenge the stereotypical depiction of states as helpless victims in federalism cases. States are not helpless victims, and courts, arguably, should stop treating them as such.

But the insights generated herein could be extended to other types of threats (say, suspension of cooperative enforcement agreements), or threats against other decision-makers (say, judges). Indeed, there is much more to be written about the influence of inseverability.<sup>2</sup>

No doubt, this device will generate controversy, as it has in other contexts. It is, after all, *poison*. But it is a type of poison the states have already begun to use, and one the Court itself has repeatedly endorsed. Any controversy over state poison pill legislation should thus serve to re-energize needed debates over judicial doctrines that authorize similar forms of passive resistance to federal authority. The Article takes no position on such debates; suffice to say, “What is food to one is bitter poison to others.”<sup>3</sup>

---

<sup>2</sup> Inseverability can be used to influence decision-making in many ways, but the idea has been largely unexplored in the scholarly literature. In a companion piece, I examine the many ways lawmakers can use inseverability to influence outsiders (courts, other legislative bodies, executive officials, and even litigants). Robert A. Mikos, *The Poison Pill of Inseverability* (2013) (rough draft on file with though still mostly in the head of author).

<sup>3</sup> Lucretius, *De Rerum Natura* (On the Nature of Things).

The Article proceeds as follows. It first discusses the leverage that state law gives states vis-à-vis Congress. Next, it illustrates how states could exploit this leverage via poison pill legislation. The Article then considers the risks entailed with such legislation, before considering how Congress would likely respond. Since Congress rarely addresses preemption directly, the Article also considers how courts should react to poison pill legislation in Congress's stead. It notes that courts have previously ignored severability considerations in preemption cases, but it suggests that this practice is unjustified and should be rethought because it disserves both state and congressional interests.

### *The State's Overlooked Leverage*

The standard preemption narrative has overlooked a powerful source of leverage the states have vis-à-vis Congress: state legislation<sup>4</sup> that furthers congressional policy objectives. I explain below how states could exploit this leverage to increase the cost of preemption and thereby deter Congress from preempting state law. For now, let me elaborate upon the nature of this leverage.

Across many policy domains, states have passed legislation that helps to further Congress's own policy objectives. To illustrate, consider how state laws help further national goals in two prominent policy domains.

*Drug regulations.* Congress and the states have long shared responsibility for ensuring the safety of pharmaceutical drugs.<sup>5</sup> For its part, Congress enacted the Food Drug and Cosmetic Act (FDCA), with the primary aim of protecting consumers. Among other things, the Act authorizes the Food and Drug Administration (FDA) to approve new drugs and to continuously monitor the safety of those drugs as new information comes to light.

But as many have suggested, the FDCA provides only partial protections for consumers. Most notably, it neglects to provide any remedy for consumers who have been injured by drugs. What is more, the FDA lacks the resources needed to monitor experiences with previously approved drugs, leaving consumers exposed to risks that, for various reasons, were not uncovered during the initial FDA approval process.<sup>6</sup>

---

<sup>4</sup> Here I use the term legislation loosely to include any law, including a state statute, ballot initiative, local ordinance, or common law.

<sup>5</sup> Bartlett (Sotomayor, J., dissenting) (noting that "state common law plays an important 'complementary' role to federal drug regulation").

<sup>6</sup> Bartlett (Sotomayor, J., dissenting) ("On its own, even rigorous preapproval clinical testing of drugs is 'generally . . . incapable of detecting adverse effects that occur infrequently, have long latency periods, or affect subpopulations not included or adequately represented in the studies.' . . . Moreover, the FDA, which is tasked with monitoring thousands of drugs on the market and considering new drug applications, faces significant resource constraints that limit its ability to protect the public from dangerous drugs".).

For these reasons, Congress has long depended upon the states to help it protect consumers from dangerous pharmaceuticals.<sup>7</sup> Every state has provided a products liability cause of action drug manufacturers, giving consumers who have been injured by drugs a remedy that is simply not found in federal law.<sup>8</sup> “Congress chose not to create a federal cause of action for damages precisely because it believed that state tort law would allow injured consumers to obtain compensation.”<sup>9</sup>

These state tort lawsuits also help the under-staffed FDA fulfill its responsibility to ensure that consumers are protected from risks that are discovered after the agency has approved a drug. As Justice Sotomayor explained in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, Tort suits can help fill the gap in federal regulation by ‘serv[ing] as a catalyst’ to identify previously unknown drug dangers.” Indeed, two former commissioners of the FDA candidly acknowledged that the “FDA cannot singlehandedly perform the Herculean job of monitoring the safety of every one of the 11,000 or so drugs on the market.”<sup>10</sup> For this reason, “State tort litigation plays an indispensable role in achieving the congressional goal” of protecting consumers from dangerous products.<sup>11</sup> “Time and time again, such litigation has uncovered problems with long-term use of drugs.”<sup>12</sup>

*Marijuana regulations.* Congress and the states have long shared responsibility for regulating marijuana. For its part, Congress has committed to eradicating the drug, based on its determination that marijuana is a dangerous substance with no redeeming qualities. To this end, Congress has criminalized the cultivation, distribution, and simple possession of marijuana, and it provides harsh sanctions for those who engage in such activities, including long prison terms, steep fines, and asset forfeiture.

---

<sup>7</sup> Bartlett, Amicus brief of Former FDA Commissioners Dr. Donald Kennedy and Dr. David Kessler, p. 5 (“State tort litigation . . . has been a complement to federal enforcement of drug safety laws throughout the history of FDA and its predecessor agencies. Congress’s unwillingness to cut off state tort claims is in keeping with FDA’s longstanding judgment that this litigation supplements the agency’s regulatory and enforcement activities. For decades, FDA consistently took the position that state tort claims were an important adjunct to federal regulation.”).

<sup>8</sup> Bartlett (Sotomayor, J., dissenting) (“Perhaps most significantly, state common law provides injured consumers . . . with an opportunity to seek redress that is not available under federal law.”).

<sup>9</sup> Bartlett (Sotomayor, J., dissenting).

<sup>10</sup> Bartlett, Amicus brief of Former FDA Commissioners Dr. Donald Kennedy and Dr. David Kessler, p. 12. *Id.* at p. 3 (“FDA does not have the resources or practical ability to serve as the sole guarantor of public safety and the statutory scheme has never operated under the assumption that FDA could successfully perform such a demanding role.”).

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 4.

But the federal ban, standing alone, doesn't have much impact on the marijuana market.<sup>13</sup> The main reason is the Drug Enforcement Agency (DEA), like the FDA, lacks the resources needed to fulfill its statutory obligations. The DEA bears primary responsibility for regulating and policing *all* controlled substances, not just marijuana, but it employs a mere 5,300 agents worldwide. Indeed, all federal law enforcement agencies combined make only about 6,000 marijuana-related arrests every year,<sup>14</sup> barely a drop in the bucket compared to the 18 *million* or so *regular* users of the drug.

Due to these resource constraints, Congress has depended on the states to fight the war on marijuana, and the states have largely obliged. With their comparatively large police forces, the states make more than 1,000,000 marijuana-related arrests annually (more than 99% of the combined state / federal total), and they contribute more than 60% of the \$8.8 billion expended annually to combat the drug.<sup>15</sup>

Importantly, the states are not required to help Congress accomplish its objectives. The anti-commandeering rule empowers them to deny Congress legislative or enforcement services (e.g., background checks) that Congress might want or even need them to perform.<sup>16</sup> To be sure, the states are often happy to pass and enforce regulations Congress favors, because those regulations also serve state policy objectives. But the point here is that the states have no obligation to do so. In the right circumstances, states could threaten to withhold these valuable services to extract concessions from Congress.

What is more, Congress can't easily replace state legislation. In theory, of course, Congress could fill most of the gaps created by the poison pill. For example, if a state repeals its tort action against drug manufacturers, Congress could create one under federal law, and if a state repealed its ban on recreational marijuana, Congress could bolster enforcement of the federal ban. In practice, however, replacing state services would not be easy. There are many barriers to passing new legislation in Congress.<sup>17</sup> Hence, there is no guarantee Congress

---

<sup>13</sup> Robert A. Mikos. On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime, 62 Vand. L. Rev. 1421 (2009).

<sup>14</sup> U.S. Department of Justice, Federal Drug-Related Arrests, United States, 2003–2008 (2009), <http://www.usdoj.gov/ndic/pubs31/31379/appendb.htm#TableB1> (detailing arrests).

<sup>15</sup> Jeffrey A. Miron & Ketherine Waldo, The Budgetary Impact of Ending Drug Prohibition (2010).

<sup>16</sup> See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>17</sup> See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321(2001); Mikos, Populist Safeguards, *supra* note \_\_; Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1609 (2000) (“[T]he ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia.”).

could muster the votes needed to create a federal tort cause of action against drug manufacturers or to boost funding for the DEA if state tort law or state marijuana prohibition is repealed.

In any event, replacing state services could prove more costly than simply conceding to state demands. Due to economies of scale and scope, it may be cheaper for state governments to perform some functions than it is for the federal government to do so. States, for example, already have larger police forces that patrol the streets in search of offenses ranging from simple traffic violations to more serious crimes like robbery and assault. The marginal cost of tasking state police with responsibility for spotting one additional crime (say, marijuana possession) would be low. The police could probably shoulder this responsibility in the course of performing their other duties (e.g., marijuana is often discovered in the course of a simple traffic stop). Similarly, states already handle large volumes of many types of government services. For example, New York City police make roughly 40,000 marijuana-related arrests, or 34,000 more than the DEA. Given its comparatively high volume of arrests, it seems reasonable to suppose that the cost of a given marijuana-related arrest to NYC is lower than the cost of a similar marijuana-related arrest to the DEA. These cost advantages are part of the reason why Congress commonly tries to “buy” enforcement services from the states, rather than providing such services “in-house.” For this reason, Congress might be inclined to grant concessions rather than terminate and replace state services.

This leverage has been overlooked in part because of the narrow way courts now frame the preemption inquiry. (More on this below.) In conflict preemption cases, for example, a court simply asks whether (or not) the challenged provision of state law hinders some congressional objective. It does not seek to gauge the extent of the hindrance, for the law will fall regardless of the degree of obstruction. Neither does the court care whether the law *advances* a congressional purpose, for it will survive so long as it does not *hinder* that purpose—i.e., so long as Congress is *indifferent* to it. Similarly, the court’s focus is on the effects of the challenged provision before it, but not related provisions of state law. Hence, a state cannot seek to compensate for the obstacle imposed by one law by aiding congressional objectives with another law. (As argued below, perhaps courts should allow states to do so—i.e., to bank “credits” for aiding congressional objectives that can later be used to pay off “debits” when it impedes them.<sup>18</sup> Courts engage in such balancing tests in other areas of law.<sup>19</sup>)

---

<sup>18</sup> Cf. Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L. J. 1131 (2002).

<sup>19</sup> E.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (instructing courts to weigh burden on interstate commerce against putative local benefits in evaluating state legislation under the dormant commerce clause). As now framed, the preemption resembles somewhat the increasingly disfavored irrebuttable per se rules in antitrust law. In the early days of the Sherman Act, the Court declared various practices to be per se illegal because of their uniformly anti-competitive

*How to Exploit this Leverage: State Poison Pill Legislation*

I propose one way states could exploit this leverage to increase the “cost” of preemption and thereby dissuade Congress from preempting their laws. I call it *poison pill legislation*. The idea is inspired by the surprisingly common use of poison pill in other areas of law.

The idea is most commonly associated with corporate law. In corporate law, a poison pill (or shareholder rights plan) is designed to thwart a hostile takeover. A potential takeover target adopts the pill as part of its bylaws. The pill could take many forms, but it commonly empowers management to issue new shares to existing shareholders (other than a hostile bidder), anytime the bidder acquires more than a stipulated portion of the firm’s stock, say, 15%. The issuance of the new shares would dilute the value and voting power of the bidder’s existing holdings, thereby increasing the cost of the acquisition.

The pill has been remarkably effective at deterring hostile takeovers. According to one account, *no* hostile bidder has ever been willing to swallow a poison pill.<sup>20</sup> Indeed, no one seems to doubt that poison pills work at blocking acquisitions.

Whether corporate poison pills are normatively desirable is, of course, a separate and hotly contested issue. Proponents of the pill suggest that it increases shareholder value by giving management more leverage vis-à-vis bidders. Opponents, by contrast, suggest that the pill simply entrenches current management, which reduces shareholder value.<sup>21</sup> Notwithstanding such misgivings, courts have generally upheld poison pill provisions in corporate

---

tendencies. This approach afforded defendants no opportunity to show their behavior had countervailing pro-competitive benefits. E.g., *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (declaring vertical price fixing to be per se illegal). In like fashion, the Court has declared that a provision of state law that hinders congressional objectives is per se preempted. This approach gives states no opportunity to rebut the conclusion, say, by showing that in its entirety, a broader state statute actually furthers congressional objectives. Due to criticisms over the accuracy of per se presumptions in anti-trust, the Court has recently abandoned them in some contexts, employing instead the “rule of reason” standard that requires courts to examine both the anti- and pro- competitive effects of challenged behavior. E.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling *Dr. Miles* and employing rule of reason to analyze vertical price fixing agreements).

<sup>20</sup> Paul H. Edelman & Randall S. Thomas, *Selectica Resets the Trigger on the Poison Pill: Where Should the Delaware Courts Go Next?*, 87 *Ind. L. J.* 1086, 1088 (2012) (“[N]o one doubts that poison pills are fatal and no acquirer in more than thirty-five years has dared to swallow one.”).

<sup>21</sup> For a brief review of the debate, see Eric Posner & Glen Weyl, *How to Make Poison Pills Palatable*, *New York Times* July 17, 2013 (suggesting reforms that would mollify concerns).

bylaws, subject only to relatively minor restrictions designed to protect shareholders of the target firm.<sup>22</sup>

The use of poison pills is not restricted to the corporate law realm. Indeed, there is a remarkably similar (and far older) tactic employed in the context of public law: federal conditional preemption and spending programs. When Congress conditionally preempts state law, it threatens to take away the state's power in some domain, i.e., to preempt state law in that domain, unless the state does something Congress wants. In *FERC v. Mississippi*, for example, Congress threatened to preempt state regulations of utilities (the poison pill) unless the states considered federal standards when formulating such regulations.<sup>23</sup> Similarly, when Congress conditionally funds state programs, it threatens to withhold federal money unless the state does something Congress wants. For example, in *South Dakota v. Dole*, Congress threatened to withhold a portion of federal highway transportation funds (the poison pill) unless states agreed to raise their minimum drinking age to 21 years.<sup>24</sup>

Like the shareholder rights plan, the use of conditional spending has been a remarkably, though perhaps not so uniformly, effective means by which to extract concessions. States rarely swallow the pill—i.e., decline funds or power. No state, for example, has proven willing to refuse federal highway grants in order to maintain a minimum drinking age of 18 or 19.<sup>25</sup>

Like the corporate variety of the poison pill, conditional spending and preemption is a normatively contested practice. Proponents suggest that conditional spending and preemption legislation helps stave off more aggressive form of federalization. Opponents, by contrast, suggest that such legislation simply enables Congress to sidestep substantive constraints on its Article I powers. But once again, the courts have upheld the practice, subject to various restrictions.<sup>26</sup>

Taking inspiration from these familiar practices, I suggest that states could design a poison pill that would deter Congress from preempting a locally favored law.

The “poison” in these pills would be the threat of repealing another state law Congress would not want to preempt. As discussed above, Congress positively values state laws that help to further its objectives. The poison pill would simply leverage these laws to extract preemption concessions from

---

<sup>22</sup> See Edelman & Thomas, *supra* note \_\_\_, at \_\_\_ (discussing limits).

<sup>23</sup> 456 U.S. 742, 765-66 (1982).

<sup>24</sup> 483 U.S. 203 (1987).

<sup>25</sup> *South Dakota v. Dole*.

<sup>26</sup> *NFIB v. Sebelius*; *South Dakota v. Dole*.

Congress.<sup>27</sup> Congress would be forced to choose between a package of state law—parts of which Congress favors, but other parts of which it disfavors—or no state law at all.

The way to tie the “poison” of repeal to preemption would be to make the congressionally disfavored provision of state law (call it provision X) *inseverable* from another congressionally favored provision (provision Y). In other words, a state would make it patently clear to Congress that preemption of X would automatically result in the invalidation of Y as well.

A state could threaten repeal of congressionally favored laws via other means (e.g., a simple legislative resolution), but using inseverability has some advantages. For one thing, inseverability makes the bad outcome automatic. It acts like a commitment device for the legislature, demonstrating its resolve to carry out a threat. In addition, inseverability also makes it easier for courts to consider the threat in deciding preemption cases. Congress oftentimes doesn’t bother to expressly address preemption in legislation, leaving it to the courts to figure out what Congress would have wanted had it considered the issue. If a state were to merely threaten to repeal legislation if one provision is deemed preempted, a court might ignore the threat as too probabilistic. But if the state were to pre-commit to repeal through inseverability, the court would be hard pressed to ignore the device.

Let me illustrate what poison pill legislation would look like using two simple hypothetical examples.

In the first, imagine that a state wants to ensure that residents injured by defective drugs can sue drug manufacturers. Suppose further that most state law claims against drug manufacturers would further congressional objectives as well. For example, Congress might share the state’s interest in protecting consumers, and it might value the information generated by state lawsuits (especially since they come at no charge to Congress). The state fears, however, that Congress might object to some types of claims, such as those based on a failure to warn of the dangers of a drug.<sup>28</sup> Imagine, for example, that Congress wants to relieve manufacturers of the headaches associated with formulating different warning labels in different states.

To dissuade Congress from preempting this subset of claims (e.g., failure to warn claims), the state could threaten to repeal all state products liability actions against drug manufacturers:

---

<sup>27</sup> To be sure, states have other leverage they could exploit, such as state law enforcement services. For example, hundreds of local governments now help enforce federal immigration laws pursuant to Section 287(g) agreements with ICE. But for ease of exposition, I focus on using state legislation to extract concessions from Congress.

<sup>28</sup> *Mutual Pharmaceutical Co., Inc. v. Bartlett*, \_\_\_ U.S. \_\_\_ (2012).

“If any otherwise viable state products liability claim against a drug manufacturer is deemed preempted by federal law, that cause of action shall be deemed inseverable from all other state products liability claims against drug manufacturers.”

The idea is that Congress would be unwilling to eliminate all state tort actions against drug manufacturers – i.e., to swallow the poison pill—just to block the subset of such claims it disfavors. In other words, Congress would prefer a mixed bag of state law remedies--to take the good with the bad—to no state remedies at all.

In the second example, imagine that a state wants to create a robust medical marijuana program for residents suffering from a limited set of illnesses. To that end, the state eliminates its long-standing criminal prohibition on marijuana, so long as it is used for medical purposes. By a slim margin the state remains committed to banning marijuana for recreational purposes. To police the boundary between medical and recreational marijuana and to protect patients, the state proposes a comprehensive body of regulations. Among other things, these regulations require marijuana distributors to obtain a license from the state and to have all marijuana supplies tested and labeled for potency. The state also bans private housing and employment discrimination against any qualified user of marijuana. The state knows that Congress cannot stop it from repealing its prohibition on marijuana (medicinal or otherwise). But it worries that Congress could preempt the aforementioned regulations,<sup>29</sup> and that Congress might be inclined to do so if the regulations undermine Congress’s goal of eradicating marijuana use.

To dissuade Congress from preempting these regulations, the state could threaten to do even greater damage to Congress’s objectives. Namely, the state could adopt the following provision:

“If any otherwise viable state medical marijuana regulation is deemed preempted by federal law, that provision shall be deemed inseverable from the state’s prohibition on recreational marijuana.”

This provision would be a particularly bitter pill for Congress to swallow. For reasons discussed above, Congress depends heavily on the states to police marijuana. Through this provision, the state would commit itself to abandoning prohibition altogether. Congress might not like state medical marijuana programs; but it might be willing to tolerate such programs and their attendant regulations in order to preserve state prohibitions on recreational marijuana, a much larger segment of the overall marijuana market.

---

<sup>29</sup> See Robert A. Mikos, Preemption Under the Controlled Substances Act, 16 J. Health C. L. & Pol’y 5 (2013) (identifying the types of state marijuana regulations that are preempted by the CSA).

*The Political Calculus of Poison Pill Legislation*

The state incurs some risk when it adopts a poison pill strategy: namely, the risk that Congress might actually swallow the pill. This is a risk to the state when it does not really want to abandon un-preempted provisions of its law—i.e., if the state is using the threat of inseverability only to extract concessions from Congress.

States appear to generally favor severability for their statutes.<sup>30</sup> That is, states normally prefer to sever invalidated provisions of laws from broader pieces of legislation, perhaps revealing a preference for cutting their losses and limiting the damage done by judgments that invalidate only part of their laws.

In addition to the risk to state policy interests, state lawmakers would also have to consider the political risks of making this gamble. They might be blamed and punished at the ballot box if the pill doesn't work as intended and ultimately dooms some popular state program. In other words, voters might blame them—not Congress—for the demise of the portions of the law Congress didn't preempt.

The risk, however, is hardly foreign to politics. Indeed, states already choose to make their laws inseverable more commonly than is recognized.<sup>31</sup> I suggest states would have two reasons to favor inseverability generally and in poison pill legislation in particular. The presence of either motivation would help to make poison pill legislation a politically viable strategy for a state. In fact, the strategy may spur states to choose inseverability even more commonly, once they recognize its potential value – and courts its validity – at staving off preemption.

First, as suggested here, a state might favor inseverability to influence the decisions of Congress. Indeed, state legislatures have already inserted inseverability provisions into statutes to pressure a *different* external decision-maker—*judges*—not to invalidate suspect provisions of statutes on constitutional grounds. In one example, Pennsylvania legislature passed legislation that raised the salaries of state employees, including state judges. The raises for state employees in general were not constitutionally suspect and were no doubt quite popular among the recipients. But the legislature did something else that raised eyebrows: it created a new \$12,000 unvouchered (i.e., no questions asked) expense account for each state legislator. The accounts were arguably tantamount to a salary increase for legislators, which *would* violate the state Constitution at least to the extent it applied to current legislators. But the legislature made these new accounts inseverable from the provisions of the law that raised salaries for other employees. It seems reasonable to suppose that the legislature thought the

---

<sup>30</sup> Singer, 2 Sutherland Statutes and Statutory Construction, Separability, § 44.1 (surveying state severability rules).

<sup>31</sup> I have uncovered more than 700 laws enacted by state legislatures that contain some form of inseverability clause.

inseverability provision would deter judges from invalidating the expense accounts. After all, a judge might hesitate to invalidate a legislative salary increase if she also had to cut her own salary in the process, not to mention that of every other state employee. Indeed, the ploy arguably worked; though it denied being influenced by inseverability, the Justices of the Pennsylvania Supreme Court found a way to uphold the legislative expense accounts. Though inseverability certainly carried some risk for the Pennsylvania legislature, lawmakers were willing to bear that risk because of the expected payout.

Second, a state legislature might favor inseverability to facilitate bargaining (log-rolling) within the legislature itself.<sup>32</sup> Indeed, this is the only rationale for inseverability clauses that courts now even acknowledge. That is, courts will now find a provision inseverable only when it is demonstrated that the provision constituted such an essential component of the legislative bargain that the legislature would not have passed the larger law but for the inclusion of that provision. To illustrate, consider an Oklahoma statute that created a new program to combat birth defects.<sup>33</sup> Among other things, the program provided state funding for services for families of children born with special needs. The legislature made the statute severable, but with one exception. It declared that if a provision barring the program from providing advice about abortions was ever deemed unconstitutional, that provision could not be severed from the remainder of the law; i.e., invalidation of the abortion-counseling restriction would kill the entire program. It is easy to imagine that abortion opponents would have been so concerned about funding abortion counseling that they would have opposed the overall measure without this limitation.

In this case, however, it is *severability*—not inseverability—that carries political risks for lawmakers. In other words, state lawmakers might be willing to adopt poison pill legislation regardless of its impact on Congress’s preemptive designs. Any impact the legislation might have in preserving state legislation would be a bonus.

For both reasons, it seems poison pill legislation would be a politically viable option for state lawmakers in at least some circumstances.<sup>34</sup>

---

<sup>32</sup> The two reasons lawmakers sometimes support inseverability clauses resemble somewhat the reasons lawmakers sometimes support “wrecking” amendments. See John D. Wilkerson, “Killer” Amendments in Congress, 93 *Am. Pol. Sci. Rev.* 535 (1999).

<sup>33</sup> 2004 South Carolina Laws Act 281 (H.B. 4115).

<sup>34</sup> Procedural rules in some states might impede adoption of poison pill legislation. Some states, for example, appear to limit the use of inseverability rules for some types of laws, such as voter referenda.

*The Congressional Response*

For most state lawmakers, the appeal of poison pill legislation will hinge in large part on how Congress would respond, namely, whether it would ever bow to the pressure and spare one law in order to preserve another. The primary motivation behind the pill is to make preemption so unpalatable that Congress would not be willing to swallow it. (As an added bonus, the pill could also deter the Executive branch from seeking to challenge state law as preempted.<sup>35</sup>) So would Congress ever be moved by the threat?

The poison pill greatly increases the “cost” of preemption to Congress. Indeed, it is hard to over-state the importance of severability and the influence it may wield over decision-making.<sup>36</sup>

The Supreme Court has acknowledged that Congress is sensitive to the cost of preempting state law. It has repeatedly cautioned that Congress does not preempt at all costs.

Indeed, it is revealing that Congress has so rarely been willing to preempt broad swaths of state law. When it does preempt, Congress typically targets narrow and discrete provisions of state law—i.e., part, but not all, of a broader state regulatory scheme.<sup>37</sup> Indeed, cases involving the broadest variety of preemption – field preemption – are exceedingly rare.

Congress’s reluctance to employ its nuclear option suggests it might accede to state inseverability threats.<sup>38</sup> After all, in many cases, inseverability

---

<sup>35</sup> Indeed, the Department of Justice recently announced that it would not seek to challenge state marijuana legalization measures as preempted. To be sure, the announcement was somewhat illusory, both because any such challenge would have been rebuffed, see Mikos, *On the Limits of Supremacy*, supra note \_\_, and because the DOJ can’t stop other parties from bringing preemption challenges, see Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 *Stan. L. & Pol’y Rev.* 633 (2011). But the announcement suggests that the Executive branch might be responsive to the political costs of preemption. Indeed, Professor David Schwartz has recently argued that the President may serve as another political safeguard of federalism, and he uses the DOJ’s acquiescence to state marijuana legalization to demonstrate his point. David S. Schwartz, *Presidential Politics as a Safeguard of Federalism*, 62 *Buff. L. Rev.* \_\_ (2014).

<sup>36</sup> E.g., Ryan Scoville, *The New General Common Law of Severability*, 91 *Tex. L. Rev.* 543 (2013) (highlighting influence of severability rules in constitutional cases).

<sup>37</sup> E.g., *Arizona v. United States*.

<sup>38</sup> Here, I emphasize the utilitarian rationale for congressional acquiescence—namely, a desire to preserve some state law because it furthers Congress’s policy objectives. But Congress might also abstain from preemption for other reasons as well, including a principled commitment to federalism—i.e., it might spare state law even when doing so damages Congress’s policy objectives. See Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 *Oh. St. L. J.* 1669 (2007) (demonstrating how Congress can be influenced by more abstract federalism principles); Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4

would transform a narrow conflict preemption rule into a much broader field preemption rule. At the very least, state inseverability threats would give Congress additional incentive to address preemption expressly, arguably a desirable impact regardless of whether Congress chooses to spare state law.<sup>39</sup>

Now, before moving on, I want to address two additional factors that would shape Congress's response to state poison pill legislation. First, of course, is the strength of Congress's opposition to the provision the pill is designed to protect. For Congress to accede, the cost of removing the beneficial provisions of state law must outweigh the cost of sparing the objectionable one(s). Imagine, for example, that a state wants to provide medical marijuana free of charge to all indigent residents.<sup>40</sup> To shield this law from preemption, suppose the state threatens to relax somewhat the eligibility requirements for its medical marijuana program if Congress preempts the subsidy. Congress might find the state-subsidized marijuana provision so objectionable that it would gladly swallow the pill; i.e., it would preempt the subsidy notwithstanding the possibility that doing so would legalize more federally proscribed conduct under state law.

Second, Congress would consider the credibility of the state's threat. As discussed above, the poison pill carries some risks for the state too. For example, a state might not really want to eliminate all tort lawsuits against drug manufacturers or legalize marijuana for all purposes. If Congress thinks a state wouldn't be willing to follow through on its threat, it might choose to ignore the threat, i.e., to call the state's bluff.

To a large extent, inseverability would enable the state to avoid this "red line" problem by directly linking the repeal of the remainder of its law to Congress's decision to preempt part of it. In other words, inseverability would commit state lawmakers to repeal, at least in the short run. To be sure, inseverability cannot commit the state forever. The state, for example, could proceed to re-enact a doomed provision sometime after Congress swallows the pill.<sup>41</sup> Still, it's not clear that Congress would be willing to take the chance a state might re-enact some provision, and a state could employ other legal devices to delay or make such re-enactment more difficult.

---

J. Emp. Leg. S. 589 (2007) (demonstrating that ordinary citizens can be influenced by abstract federalism principles).

<sup>39</sup> See Roderick M. Hills, 82 N.Y.U. L. Rev. 1, 17 (2007) (urging Court to force Congress to address preemption issues directly).

<sup>40</sup> Oregon proposed this. No, really.

<sup>41</sup> See *infra*, notes \_\_\_-\_\_\_, discussing the Illinois legislature's response to *Lebron v. Gottlieb Memorial Hosp.*, 930 N.E.2d 895 (Ill. 2010). Congress probably faces a similar problem following through on conditions in federal spending programs. Congress threatens to withhold funds from states that don't abide conditions, but it rarely asks states to return money even when they flout those conditions.

*The Judicial Response*

I demonstrated why Congress would acquiesce to state threats. Ideally, Congress would expressly address poison pill legislation in its own statutes, and the threat of the poison pill arguably gives it more incentive to do so. Historically, however, Congress has done a poor job of addressing preemption issues, and even when it does speak to preemption, its language is oftentimes garbled, leaving questions about the true extent of its desire to preempt.<sup>42</sup> It may be unrealistic to expect state poison pill legislation to change the settled congressional practice of leaving most preemption issues to the courts to decide.<sup>43</sup>

But this simply means that a court would have to decide what Congress would have wanted had it actually considered the poison pill. And since the court is supposed to focus on congressional intent, the analyses should be the same as above. Namely, a court should incorporate the poison pill into its preemption inquiry and decide whether Congress would preempt state law given the costs triggered by the pill.<sup>44</sup>

The judicial response, however, is complicated somewhat by the common though undefended practice of treating preemption and severability as entirely separate and unrelated issues. In current practice, courts assume *sub silentio* that questions about the validity of a challenged legal provision can be—and are—decided prior to and without regard to whether that provision can be severed from some broader piece of legislation.<sup>45</sup>

---

<sup>42</sup> See Hills, *supra* note \_\_, at \_\_.

<sup>43</sup> Cf. Philip P. Frickey & Steven S. Smith, Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique, 111 Yale L. J. 1707 (2002) (suggesting that Congress is incapable of responding to some demands imposed upon it by the Court).

<sup>44</sup> In some rare cases, a court might justifiably ignore the poison pill. For example, if Congress has employed clear language averring its intent to preempt some aspect of state law, the court would have no choice but to trigger the pill. Congress, of course, could then revisit the issue. Such clear expressions of congressional intent, however, are rare indeed.

<sup>45</sup> Consider the Supreme Court's reasoning in *Leavitt v. Jane L.*, a case involving a constitutional challenge to Utah abortion regulations. In the case, the district court found provisions of Utah law regulating abortions during the first 20 weeks of pregnancy unconstitutional. The district court then proceeded to find the invalidated regulations severable from related provisions regulating abortions more than 20 weeks into the pregnancy. The Tenth Circuit reversed the severability decision, finding the two regulations inseparable because they served a common legislative purpose (curbing abortions). In reversing this decision (i.e., upholding severability), the Supreme Court expressly stipulated that judgments about validity are necessarily made independent from judgments about severability and that the legislature has say over the latter but not the former:

Every legislature that adopts, in a single enactment, provision A plus provision B intends (A+B); and that enactment, which reads (A+B), is invariably a “unified expression of that

The organization of judicial decisions clearly demonstrates this practice. In cases involving challenges to one (or more) provisions of a larger body of state law, courts routinely decide the validity of the challenged provision of law first. It is only after finding a provision preempted that courts bother addressing the severability of that provision.<sup>46</sup> Indeed, in some instances, federal courts will decide that a state law is preempted but then certify the question of severability to a state court,<sup>47</sup> thus erecting a seemingly impermeable barrier between the resolutions of the two issues. In other words, courts assume that Congress would want to preempt some challenged provision, even if so doing would also remove related provisions of state law that further (or at least, do not hinder) congressional objectives.

Upon closer examination, however, it is difficult to find a convincing rationale for deciding preemption separately from (and prior to) severability. Indeed, it seems noteworthy that no one has actually bothered to try to justify the postponement of severability determinations in the specific context of preemption. Here I posit and discuss three possible though ultimately unsatisfying explanations for the current practice.

---

intent,” so that taking away A from (A+B), leaving only B, will invariably “clearly undermine the legislative purpose” to enact (A+B). But the fallacy in applying this reasoning to the severability question is that it is not the severing that will take away A from (A+B) and thus foil the legislature's intent; it is the invalidation of A (in this case, because of its unconstitutionality) which does so—*an invalidation that occurs whether or not the two provisions are severed*. The relevant question, in other words, is not whether the legislature would prefer (A+B) to B, because by reason of the invalidation of A that choice is no longer available. The relevant question is whether the legislature would prefer not to have B if it could not have A as well. Here, the Court of Appeals in effect said yes. It determined that a legislature bent on banning almost all abortions would prefer, if it could not have that desire, to ban no abortions at all rather than merely some. This notion is, at the very least, questionable when considered in isolation. But when it is put forward in the face of a statutory text that explicitly states the opposite, it is plainly error.

Leavitt v. Jane L., 518 U.S. 137 (1996) (emphasis added).

<sup>46</sup> American Bankers Ass'n v. Lockyer, 541 F.3d 1214, 1216 (9<sup>th</sup> Cir. 2008) (reasoning that since “Plaintiffs concede that SB1 has non-preempted applications. . . . the only remand question now in dispute is whether California law allows us to sever the preempted applications from the statute by narrowing the statute’s reach”). See also Singer, 2 Sutherland Statutes and Statutory Construction, Separability, § 44.1 (“Whether or not the judicial determination of partial invalidity will so affect the legislation that it must fall as a whole . . . is a question of importance second only to the *initial* determination of validity.”) (emphasis added).

<sup>47</sup> Local 514 Transport Workers Union of America v. Keating, 66 Fed. Appx. 768, 770 (10<sup>th</sup> Cir. 2003) (discussing court’s decision to certify to Oklahoma Supreme Court question whether preempted provisions of Oklahoma Constitution were severable from non-preempted provisions).

First, one could argue that preemption and severability must be decided separately because they depend upon different sources of law. Preemption is governed by federal law,<sup>48</sup> whereas severability is governed by state law.<sup>49</sup>

It is true, of course, that congressional intent is the crux of preemption and state legislative intent is the crux of severability. But that realization does not mean a court must decide the former while ignoring the latter. As discussed above, Congress has strong reasons to care about state severability rules. After all, Congress might be less inclined to preempt one provision of state law when doing so would result in the demise of other state provisions that actually further congressional objectives.<sup>50</sup> This realization suggests that courts should consider state severability rules when gauging Congress's preemptive intentions, rather than ignoring severability until the preemption determination is already made.

Second, the separation of preemption and severability inquiries might reflect the courts' desire to avoid deciding unnecessary issues. After all, a court wouldn't need to decide severability when it determines that the challenged provision of state law before would not be preempted in any event.

But this explanation fails for the same reason as the first. It simply ignores the possibility that state severability rules might be relevant for the preemption inquiry—i.e., that it might, in fact, be *necessary* to consider severability before (or simultaneously with) preemption. Namely, in any case where it appears Congress is inclined to preempt state law, it will be necessary for the court to determine first whether preemption would affect other, unchallenged provisions of state law and whether Congress would care enough to spare the challenged provision.

Third, the separation might simply reflect long-standing judicial practice in constitutional cases, cases where it arguably makes more sense. Judges generally deny that policy considerations do, or ever should, shape their interpretations of the Constitution. That a particular interpretation of the

---

<sup>48</sup> E.g., *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963) (noting that Congressional intent is the “ultimate touch-stone” for determining whether state laws are preempted).

<sup>49</sup> E.g., *Voting for America, Inc. v. Steen*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. 2013) (“Severability is a state law issue that binds federal courts.”) (citing *Leavitt*, *supra*). But see *Scoville*, *supra* note \_\_\_, at \_\_\_ (suggesting that the Supreme Court has more recently decided the severability of state statutes using a federal common law approach).

<sup>50</sup> Severability's influence on congressional decision-making should come as no great surprise. Some scholars have suggested that severability has a similar influence on judicial decision making in other contexts. See, e.g., Ryan Scoville, *The New General Common Law of Severability*, 91 *Tex. L. Rev.* 543 (2013) (highlighting influence of severability rules in constitutional cases). For example, some commentators have suggested that Chief Justice Roberts may have upheld that individual mandate provision of the Affordable Care Act to avoid having to invalidate larger portions of ACA or even the entire statute.

Constitution would invalidate some broader policy the judge deems “good” does not make that interpretation wrong.<sup>51</sup>

Hence, judges commonly claim to ignore severability when deciding upon the constitutional validity of parts of laws.<sup>52</sup> For example, in *Lebron v. Gottlieb Memorial Hospital*,<sup>53</sup> a tort plaintiff challenged a single provision of a larger package of medical malpractice reforms that had been adopted by the Illinois legislature. The challenged provision capped damages in medical malpractice claims, but because the reform statute contained an inseverability clause, the court would be forced to invalidate the reforms in their entirety if it ruled for the plaintiff. Nonetheless, the court did exactly that. It nowhere suggested that the inseverability rule should somehow color its judgment about the damages cap. Instead, it simply reminded lawmakers that “because the other provisions contained in [the Act] are deemed invalid solely on inseverability grounds, the legislature remains free to reenact any provisions it deems appropriate”<sup>54</sup> (which the legislature promptly did).<sup>55</sup> Similarly, in *Kennedy v. Pennsylvania*,<sup>56</sup> discussed above, state taxpayers challenged one provision of a broader state statute that, inter alia, provided pay raises for state employees, including state judges. The challenged provision created unvouchered expense accounts for state legislators, but because the spending bill contained an inseverability clause, the court would be forced to invalidate the salary increases that had been granted to all state employees if it found the expense accounts unconstitutional. To the chagrin of commentators, the court rejected the taxpayer challenge, raising suspicions it had been influenced (inappropriately) by the inseverability clause,<sup>57</sup> but along the way, the court took pains to deny it was being held “hostage” or otherwise influenced by inseverability. It opined (perhaps blithely) that “severability

---

<sup>51</sup> See also Bernard E. Harcourt & Tracey L. Meares, Randomization and the Fourth Amendment, 78 U. Chi. L. Rev. 809, 874 (“There is no necessary overlap of the Constitution on one hand and public policy on the other.”).

<sup>52</sup> Some commentators have suggested that severability doctrine could be relevant to Constitutional decision-making in important context—understanding the distinction between facial and as-applied challenges. See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1993); Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873 (2005).

<sup>53</sup> 930 N.E.2d 895 (Ill. 2010).

<sup>54</sup> Id. at 914.

<sup>55</sup> 2011 Ill. Legis. Serv. P.A. 97-622 (S.B. 664) (West) (re-enacting provisions of state law not deemed unconstitutional by *Lebron v. Gottlieb Memorial Hosp.*).

<sup>56</sup> 546 A.2d 733 (1988).

<sup>57</sup> See Kameny, Alb. L. Rev., Friedman, Note, U. Chi. L. Rev. Apart from these commentaries, the idea that severability rules might color judgments about validity – in the constitutional context or preemption -- has been woefully neglected.

becomes an issue only if a substantive portion of the legislation is held unconstitutional.”<sup>58</sup>

But when it comes to preemption, there’s no reason to deny that a state’s threat to kill broader legislation could or should influence Congress’s decision to preempt some component thereof. It is perfectly acceptable for a state to make and Congress to respond to such political threats. It may be unseemly and even unwise,<sup>59</sup> but that’s politics.

Indeed, such threats are the backbone of Congress’s conditional spending and conditional preemption authority (discussed above). That is, Congress commonly threatens to withhold money and regulatory powers from the states unless they agree to do its bidding. Yet the Court has never suggested that such measures are thus *per se* illegitimate. It stands to reason that states should be placed on an equal footing. In other words, states should be allowed to use the threat of legislative repeal in order to extract concessions from Congress, just like Congress is allowed to use the threat of preemption to extract concessions from the states.<sup>60</sup>

Apart from lacking any persuasive rationale, the current approach of ignoring severability until after deciding upon preemption has two serious drawbacks. First, it seriously undermines the states’ bargaining position vis-à-vis Congress, by denying states powerful leverage they could otherwise wield against Congress. As a practical matter, it enables Congress to excise only those provisions of state law it disfavors, leaving intact other provisions of state law it might positively value. This preemption scalpel is far easier to wield than a more blunt preemption instrument.<sup>61</sup> It minimizes Congress’s costs of preemption.

Ignoring a state’s response to Congress’s preemptive aspirations is also inconsistent with the Court’s ongoing efforts to give the states a voice in cooperative federalism. Ignoring severability considerations effectively silences the states. It allows Congress to unilaterally dictate the terms of preemption and of state participation in shared regulatory domains. For example, Congress can unilaterally veto (i.e., preempt) state laws that undermine its regulatory designs, and it can even banish states from participating in the regulatory enterprise altogether (so called field preemption). The states have no choice but to accede.

---

<sup>58</sup> *Id.* at 738.

<sup>59</sup> Think of the threats to shut down government / default on debts in order to gain votes needed to repeal or amend the Affordable Care Act.

<sup>60</sup> The courts might impose some limits on how states use such threats, comparable with the limits they now impose on Congress’s use of the conditional spending and preemption authority. See *NFIB v. Sebelius*; *South Dakota v. Dole*.

<sup>61</sup> In this respect, the preemption power is similar to the President’s (defunct) line-item veto power. *Clinton v. City of New York*, 524 U.S. 417 (1998) (Breyer, J., dissenting) (explaining that the line item veto can be far more palatable than the veto of an entire spending bill).

This lack of choice is, upon reflection, somewhat startling. In many other areas, the Court has demanded Congress give the states choices, for example, “Raise the minimum drinking age or lose \$5 million in federal highway funds.”<sup>62</sup> True, the options may seem limited or unpalatable. But they are still more than the states get with preemption, where Congress need not give them any choice at all: “Do not regulate the registration of immigrants. Period.”<sup>63</sup> Because Congress usually delegates to the courts the task of divining its preemptive intentions, the judicial approach to ignore severability effectively silences the states and prevents them from ever “negotiating” with Congress over preemption.

Second, the current separation arguably does not serve Congressional interests either. This is because Congress likely cares (or would, if it grappled with the issue) about the broader ramifications of preempting any given state law. As explained above, Congress puts positive value on state law. That is, Congress doesn’t just tolerate state law, it actually gains from it. Thus, there may be cases where the invalidation of one provision of state law – even one that clearly undermines congressional objectives – actually makes Congress worse off.

To be sure, a bold Congress might prefer to short-circuit the poison-pill strategy altogether. For example, Congress could presumably pass a statute instructing the courts to utterly ignore inseverability and other retaliatory threats found in state poison pill legislation. Doing so might deter states from making such threats in the first instance, thereby preserving Congress’s line-item veto power. But since Congress has never actually passed such legislation, courts would be taking liberties in assuming that Congress would necessarily commit to such a tough bargaining posture.<sup>64</sup> They would also be relieving Congress of the responsibility for making this choice itself through proper legislative procedures. Simply put, it seems reasonable to suppose that Congress would want courts to consider severability when making preemption judgments and that courts should honor this preference.

Incorporating poison pills into preemption inquiries would pose some practical challenges for the courts. Perhaps most importantly, it would complicate the preemption inquiry. Under the inquiry I envision, courts would be required to balance the negative effects of one provision of state law against the positive countervailing effects of other provisions that are expressly linked to it by a state.

---

<sup>62</sup> See *South Dakota v. Dole*.

<sup>63</sup> *Arizona v. United States*.

<sup>64</sup> In some cases, the hard-line strategy might backfire. For example, there will be times when a state genuinely prefers inseverability—i.e., times when the state is not motivated by a desire to influence Congress, but Congress prefers severability. See *infra*, Part VI. In these cases, Congress’s hard-line strategy wouldn’t stop the state from abandoning a statute only part of which had been preempted, and Congress might have been better off had the court considered severability before declaring part of the law preempted.

Critics of balancing tests might chafe at the idea,<sup>65</sup> but the realization that balancing tests may prove difficult to apply is not necessarily sufficient justification to eschew them. It bears mentioning that courts employ balancing tests that are similarly complex in other domains. In the dormant commerce clause arena, for example, courts must determine whether a given state law burdens interstate commerce more than it advances oftentimes hard-to-monetize local objectives. Likewise, in anti-trust, courts have shifted away from simplistic per se rules of illegality in favor of the balancing test embodied in the rule of reason, which requires them to consider both the pro- and anti-competitive effects of challenged business practices. In any event, even if a court were to reject consideration of poison pills due to administrability concerns, it might simply put more pressure on Congress to respond directly. After all, the poison pill will still kick in, regardless of whether a court takes notice of it.

Some limitations apply. As discussed above, courts impose some restrictions on the use of poison pills in other contexts. It stands to reason that courts might impose similar limitations on state poison pills. Namely, a court might refuse to enforce the inseverability clause if its finds limitations violated by the pill poison legislation.

What might these restrictions look like? Conditional spending and preemption laws provide the closest parallel to state poison pill legislation. Hence, doctrines governing those laws might suggest what sort of restrictions courts should impose on state poison pills. At first glance, however, only one restriction seems relevant to the context at hand: the prohibition on coercive conditions. The Court has held that Congress may not threaten the denial of federal grant funds in order to coerce states into passing legislation.<sup>66</sup> In *NFIB v. Sebelius*, the Court held that the conditional spending provisions of the Affordable Care Act (ACA) violated this limitation, because they effectively “dragooned” the states into agreeing to expand coverage under their Medicaid programs. In reaching this conclusion the Court noted that states stood to lose all of their federal Medicaid funding -- roughly 10% of their annual budgets -- if they declined to participate in the expansion. Though it hardly fits the Court’s standard narrative of states as the helpless victims of congressional oppression, one might imagine that states could use poison pill legislation to turn the tables and coerce Congress. Imagine, for example, if a state were to credibly threaten to repeal all of its vice laws – bans on underage smoking, prostitution, drugs, and the like – unless Congress allowed it to conduct state-sponsored sports-gambling businesses. Congress likely wouldn’t have any choice but to acquiesce and permit the sports-gambling businesses. In

---

<sup>65</sup> *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (Scalia, J., concurring) (remarking that applying the dormant commerce clause balancing test is “like judging whether a particular line is longer than a particular rock is heavy”). See also *Hills*, supra note \_\_\_\_ (emphasizing the courts’ limited capacity to engage in such tests).

<sup>66</sup> *NFIB v. Sebelius*; *South Dakota v. Dole*.

this rare situation, a court might be justified in protecting Congress and barring the execution of the state's inseverability clause.

*Conclusion*

To be completed . . .