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A Contract-Enhancing Norm Limiting Federal Preemption of Presumptively State Domains

*Nim Razook**

I. INTRODUCTION

Given the extensive federal regulation of areas as diverse as food and drug¹ and environmental² regulation, civil rights,³ and, more recently, product liability law,⁴ individuals and businesses predictably and rationally seek advantageous regulatory reform. Advocates seek national rules that provide them strategic advantages and challenge those that pose strategic problems.⁵ They have concluded, apparently, that relying on state-by-state reforms can be a long and tedious process, and that although cumbersome and complex, our national government can provide comprehensive regulatory relief that our diverse and often divided states cannot.

Generally unconstrained by constitutional limits,⁶ the debate over the propriety of these national regulations has remained principally within the extralegal realm of politics, a milieu which generally defies the prescriptions of academics. Several scholars have, nonetheless, proffered

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1. See DONNA J. WOOD, STRATEGIC USES OF PUBLIC POLICY: BUSINESS AND GOVERNMENT IN THE PROGRESSIVE ERA (1986) (analyzing the passage of the Pure Food Act of 1905).

2. See HARVEY LIEBER, FEDERALISM AND CLEAN WATERS (1975) (documenting the effect on federalism of national clean water laws); Samuel P. Hays, *Three Decades of Environmental Politics: The Historical Context in GOVERNMENT AND ENVIRONMENTAL POLITICS: ESSAYS ON HISTORICAL DEVELOPMENTS SINCE WORLD WAR TWO* 27 (Michael J. Lacey ed., 1991) (tracing history of forces leading to significant, federal environmental laws).

3. See, e.g., BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964) (examining the tensions between national civil rights legislation and federalism); THE CIVIL RIGHTS ACT OF 1964 (BNA) (1964) [hereinafter CIVIL RIGHTS ACT] (reviewing the scope and spirit of the CRA of 1964).

4. See, e.g., *Product Liability Fairness Act*, S. REP. NO. 215, 102d Cong., 1st Sess. (1992)

5. WOOD, *supra* note 1 (documenting this strategic activity in the passage of the Pure Food Act of 1906).

6. Most would agree that the U.S. Supreme Court has given virtual plenary power to Congress to act under the commerce clause. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (stating that for most of the last half century, the United States has had no law of federalism); *But see* United States v. Lopez, 115 S. Ct. 1624, U.S. (1995) (finding abuse of congressional authority under the commerce clause regarding a federal law banning possession of a gun in local school zone).

suggestions,⁷ perhaps revealing both a fidelity to the federal system and a faith that Congress or even the courts will listen.

This paper prescribes contract-based constraints on national preemptory regulations which are aimed at historically state-dominated areas such as product liability law. Part I examines the norms of federalism including "locus of control" and the presumption favoring state regulatory action in those common law areas in which states have enjoyed an historic regulatory monopoly. The locus of control norms discussed herein govern the appropriate level of regulation between the state and national governments. Noting the shortcomings of these norms which tend to perpetuate politicization, Part I suggests the need for an additional analytic layer. Part II contends that a "contract-enhancing norm" has been, since the Progressive Era, the implicit or explicit justification for the most significant national incursions into presumptively state domains. This is most evident in the application of the contract-enhancing norm in the elimination or reduction of information and/or power asymmetries in contract and contract-like settings. Part II suggests that such a norm has four effects: first, it provides a defensible analytic tool for reducing the influence of politics in federal preemption decisions; second, it synthesizes the norms of federalism and contract into a simple model for evaluating the appropriateness of Congressional preemption of historic and comprehensive state regulation; third, it develops an argument against national product liability reform based upon this model; fourth and finally, it contends that the differences in mobility patterns between individuals and businesses reinforce these conclusions.

II. THE NORMS OF FEDERALISM

A political relic to some,⁸ federalism nonetheless attracts works from a variety of academic fields.⁹ These include both claims that federalism

7. See, e.g., THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990) (favoring state over national public policy for most areas); Susan Bartlett Foote, *Beyond the Politics of Federalism: An Alternative Model*, 1 *YALE J. ON REG.* 217 (1984); C. Boyden Gray, *Regulation and Federalism*, 1 *YALE J. ON REG.* 93 (1983).

8. See, e.g., CHRISTOPHER HAMILTON & DONALD T. WELLS, *FEDERALISM, POWER, AND POLITICAL ECONOMY: A NEW THEORY OF FEDERALISM'S IMPACT ON AMERICAN LIFE* 3 (1990) (claiming that liberals and conservatives view "federalism as a cumbersome dinosaur, blocking policies they wish to see implemented."); PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* 6 (1986) (labeling federalism a "buzzword"); Powell, *supra* note 6.

9. These include, but are not limited to, economics, history, law and political science. See, e.g., DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (1966) (demonstrating positive political science perspective); William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform, in GROWTH OF THE REGULATORY STATE, 1900-1917*, at 102-26 (Robert F. Himmelberg ed., 1994) (giving an historical account of state-federal tensions during progressive reforms); JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* (1992) (describing evolution of and reasons for federalism

must recapture its constitutional stature,¹⁰ as well as others that make no such assumption.¹¹ This paper takes the latter position. It acknowledges the former works and their importance and depends on many of their stated norms of federalism, but does not assume that federalism must retain its legal substance to be worthy of review and analysis. Its only assumption is that one or more of our great legal or political institutions must decide between the states and the federal government as the appropriate locus of control over historically state domains. The next subsection addresses the criteria influencing these "locus of control" decisions.

A. *Locus of Control Norms*

Normative federalism falls into two general categories: first, prescriptions embracing or subordinating federalism compared to other governmental forms (such as a unitary state¹²); and second, locus of control prescriptions. Locus of control prescriptions concern the appropriate division of powers and responsibilities between the central and local governments in a federal state. The norms most often cited favoring local and central control follow.

Six major arguments supporting local control have been promulgated:

1. Local units are more responsive to local tastes and conditions.¹³
2. Local regulation encourages a common market of states competing with one another for citizens through differential offerings of public goods.¹⁴

movement toward more national power); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (advocating legal work favoring re-legalization of federalism); Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 HARV. J.L. & PUB. POL'Y 119 (1982) (favoring economic competition among states as preferable to federal preemption in most cases); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994) (justifying federal intervention into areas of commerce only where state regulation would be inefficient because of excessive externalities); Richard A. Posner, *Toward An Economic Theory of Federalism*, 6 HARV. J.L. & PUB. POL'Y 41 (1982) (basic economic treatment of federalism).

10. *E.g.*, Calabresi and LeBoeuf, *supra* note 9.

11. *E.g.*, Foote and Gray, *supra* note 7.

12. A unitary state or system has only one governing unit. *See* Susan Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152 (1981) (comparing unitary and federal state structures using social choice theory).

13. Calabresi, *supra* note 9, at 775; Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210 (1977).

14. Calabresi, *supra* note 9, at 775-76; LeBoeuf, *supra* note 9, at 559. Both authors cite the seminal work on point. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (providing an economic analysis of the benefits of local over central governance).

3. Local governments are laboratories experimenting with the optimal provision of public goods and services.¹⁵
4. Local control encourages a greater awareness of the social costs of legislation.¹⁶
5. Decentralization diffuses power so that no coalition can easily acquire control over national affairs.¹⁷
6. Local governments, because they are smaller than the central government, are more efficient regulators.¹⁸

Four arguments supporting central control oppose the above arguments in favor of local control:

1. Centrally-made rules encourage economies of scale so that interstate and international markets are not encumbered by local regulations.¹⁹
2. Central regulation reduces the social costs of governance through standardization (i.e., currency).²⁰
3. Central government intervention may control the problem of externalities arising from the states' unwillingness to internalize the social costs of their local rules.²¹
4. A central government must intervene when local governments are denying residents fundamental rights.²²

Of course, these same norms might be used either to defend a federal over a unitary state or to prescribe central over local regulation. For example, one may defend federalism based upon its tolerance for and preservation of local tastes and conditions. Decentralizing the authority to manage these local preferences might further both the premises of tolerance and preservation as well as the local control norm. However, if local tastes and conditions are both worthy of protection, perhaps because they

15. See LeBoeuf, *supra* note 9, at 561-62 (citing local experimentation as a benefit of decentralization).

16. *Id.* at 563.

17. ZIMMERMAN, *supra* note 9, at 6.

18. DYE, *supra* note 7, at 106 (claiming that arguments for national intervention are rarely based on more efficient governing).

19. Calabresi, *supra* note 9, at 780.

20. *Id.*

21. Externalities created by state regulations can be positive or negative. For example, rigorous clean water rules in an upstream state inure to the benefit of downstream states with less rigorous rules, thus creating positive externalities. If the upstream state has the less-than-rigorous rules, then this creates negative externalities for its downstream neighbors. See LeBoeuf, *supra* note 9, at 570.

22. The obvious example is civil rights. MARSHALL, *supra* note 3, at 2-4 (calling the civil rights problem a "moral dilemma").

represent fundamental rights, and in peril *because of local government*, then centralizing control may be an appropriate prescription.

Three norms are mentioned most often in the debate concerning Congress' nationalization of product liability law. State product liability laws further the *local laboratory* and *competition-among-states* norms because they embellish local regulatory or public policy schemes. However, these same liability laws can also pit states against each other. The laws also vary among the states, are quite complex, and arguably pose regulatory problems for manufacturers, insurers and other companies.²³ When these local laboratories adopt rules that disproportionately affect interstate firms, some will argue that these state rules create *negative externalities* which in turn encourage national intervention.²⁴

1. A Competition-Among-States Model

Thomas R. Dye champions both the competition-among-states and state-over-national-regulation models.²⁵ Dye's notion of "competitive federalism" envisions a "marketplace" for state governments "where consumer-taxpayers can voluntarily choose the public goods and services they prefer, at costs they wish to pay, *by locating in the [state] that best fits their policy preference.*"²⁶ Although he does not address directly product liability or state common law issues, Dye's conception of federalism suggests that those affected by these state regimes will know and understand the variety of rules offered by the states, be sufficiently mobile to take advantage of those regimes that further their utilities (and avoid those that do not), and respond accordingly. According to Dye, state law, even in this complex regulatory environment, is preferable to national regulation.

As applied to state product liability and other common law regimes, Dye's theory falls short. If his assertions are correct, then the principals in product liability litigation — manufacturers and other sellers, insurers and consumers — will make both location and operation decisions based upon their rational response to each state's regulatory environment. However, while it is true that we are among the most mobile societies in the

23. See Victor R. Schwartz, *Finally a Chance to Reform Product Liability Law*, WALL ST. J., Sept. 9, 1992, at A15 (lamenting the negative effects of state product liability laws on such businesses).

24. See RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* (1988); LeBoeuf, *supra* note 9, at 584-85 (finding persuasive the argument that product liability rules may impose "substantial costs" on out-of-state entities).

25. DYE, *supra* note 7.

26. *Id.* at 14 (emphasis added).

world,²⁷ there is scant evidence that state public policies are important variables influencing interstate relocation by individuals.²⁸ Interstate movement is more closely tied to employment opportunities and local amenities.²⁹ Additionally, making the assumption that individuals are knowledgeable, sensitive, or concerned about the arcane world of state common law rules defies both logic and the modest empirical evidence on point.³⁰

Businesses, on the other hand, are knowledgeable about and sensitive to competing public policies, particularly state and local fiscal incentives which encourage relocation.³¹ Businesses might also have the financial incentives and means to stay abreast of state regulatory regimes, including state common law. Edmund Kitch states that businesses have both the incentive and ability to acquire information about state product liability regimes and to fold this information into their marketing and pricing decisions.³² Kitch's theory suggests that Dye's model might be normatively suitable for firms that are in the business of operating within the standards established by state common law regimes, but appears to have little normative appeal when applied to individuals, whose immersion into the realm of product liability law represents an *ex post facto* response to a failed transaction or other negative occurrence. Any theory of federal preemption of state product liability or other common law regimes must necessarily consider the relative differences between the relocation reasons of individuals versus those for businesses.

2. *A Negative Externality Response*

Judge Richard Neely harbors a decidedly different view from that of Dye.³³ Neely suggests that state product liability rules create significant

27. Between 1990 and 1991, seventeen percent of U.S. citizens moved from one address to another. See Patricia Gober, *Americans On the Move*, POPULATION BULL. Nov. 1993, at 1. By international standards, this places the United States with Canada, Australia, and New Zealand as one of the most mobile societies. *Id.*

28. In fact, there is little research indicating a link between state public policy decisions, especially those generated by the common law, and citizen location. One study does link Canadian provincial location and provincial fiscal policies. See Kathleen M. Day, *Interprovincial Migration and Local Public Goods*, 25 CANADIAN J. ECON. 123 (1992).

29. Gober, *supra* note 27, at 28-32 (linking interstate relocation primarily to jobs and quality of life amenities).

30. See ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 144-45 (1991) ("Ordinary people know little of the private substantive law applicable to decisions in everyday life.").

31. See David Cay Johnston, *Boom Seen in State and Local Tax Aid to Business*, N.Y. TIMES, Sept. 21, 1995, at D4 (citing survey of companies, including comments that state and local tax incentives continued to be effective means of attracting businesses).

32. Kitch, *supra* note 9, at 124-25.

33. NEELY, *supra* note 24.

negative externalities because states are competing among themselves for the assets (in the form of damages) of out-of-state citizens.³⁴ States use their product liability regimes as wealth creators at the expense of nonlocals. This “race to the bottom” mentality, is, in Neely’s view, both a rational response by the states to their control over product liability law and a compelling reason for federal intervention.³⁵ If states could jointly enact meaningful reforms to combat this race to the bottom, then they might overcome the negative externalities wrought by their current regimes. Jacques LeBoeuf, however, suggests that the transaction costs associated with such interstate cooperation are too high, thus eliminating a Coasian solution.³⁶ He also finds Neely’s conclusions about product liability law to be persuasive, noting that a product liability system “generous to plaintiffs can result in the imposition of substantial costs on out-of-state interests.”³⁷

As comprehensive solutions for product liability, Neely’s and LeBoeuf’s views, like Dye’s, have their shortcomings. Their theories remind us that identical criteria can yield virtually irreconcilable conclusions, common in normative discussion and their arguments do not regard the numerous product liability reform efforts by the states as antithetical. The adoption by the states of damage limits, statutes of repose, and other reforms certainly does not square with Neely’s “race to the bottom” and LeBoeuf’s “insurmountable-transaction-costs” theses.³⁸

What the opposing but ostensibly reasonable views of Dye, Kitch, Neely, LeBoeuf and others suggest is that the norms of federalism are instructive rather than dispositive, probabilistic rather than deterministic, and potentially emotive³⁹ rather than rational. In sum, they are quite amenable to a political debate in which the key issue of federalism — locus of control — becomes subsumed by underlying issues such as product liability law. Those who benefit or suffer from the nationalization of product liability or other state-dominated regimes will likely invoke the norms based on the goal of nationalization rather than a genuine fidelity to the federal system. They will do so notwithstanding over two hundred

34. *Id.* at 57-79.

35. *Id.*

36. LeBoeuf, *supra* note 9, at 574 (citing insurmountable transaction costs as a major reason why the Coase Theorem does not solve the negative externality problem among states).

37. *Id.* at 585.

38. For a compilation of such laws, see 2 Prod. Liab. Rep. (CCH) ¶90, 110-195, 295 (1995) (compilation of state product liability laws, including reform measures).

39. Emotivism suggests that “all evaluative judgments are nothing but expressions of preference, expressions of attitude or feeling.” Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1318 (1982) (distinguishing emotivism from factual judgments in constitutional theory).

years of national and state activity and as if every locus of control decision can be made de novo.

An intellectually incomplete but useful method of reducing the prospects of a de novo analysis is to recognize a presumption favoring state regulatory authority over historically state-dominated areas. The next subsection addresses this presumption.

B. Presumptively State Domains

Several commentators support a broad presumption favoring state over federal law. C. Boyden Gray, an official in the Reagan administration, advocated such a presumption and identified four situations in which national action may be preferable to state action. These include situations in which state actions unduly burden interstate commerce, federal accommodations are necessary, the costs occasioned by interstate competition become too high, or the advantages of national expertise mandate federal action.⁴⁰

Providing a thoughtful alternative, Susan Bartlett Foote first identified the shortcomings of Gray's prescriptions. These include the "absence of specific criteria" signalling the need for national action, despite the presumption favoring state law, and the "stark choice between state and federal control suggested by that framework."⁴¹ Foote claimed that the obvious product of these shortcomings is the continued politicization of federalism.⁴² Foote's alternative offered five categories ("stages") — the product, production, the process of exchange, conditions of sales and service, and conditions of use — providing "discrete" regulatory boundaries within which "the legitimate interests of both the states and the federal government" might be accommodated.⁴³

Applying these authors' criteria to product liability appears to yield similar results. Addressing product liability directly, Gray contended that this is an appropriate area for federal preemption because state regimes are unduly burdening interstate commerce, and states have demonstrated no desire to adopt uniform reform measures.⁴⁴ Although not addressing product liability directly, Foote suggested such preemption, maintaining that nationally uniform standards are appropriate for product design and

40. Gray, *supra* note 7, at 94.

41. Foote, *supra* note 7.

42. *Id.* (claiming that, "in the absence of specific criteria, politics, rather than guiding principles, often determines when the presumption [favoring state-level regulation] will be overcome." *Id.*).

43. *Id.* at 219-21.

44. Gray, *supra* note 7, at 98 ("[I]n this substantive area the federalist process of state experimentation and testing of alternative approaches has already had a full opportunity to develop the issues.").

performance. These national standards would apparently supplant state product liability regimes to the extent that state legislation, regulations, or interpretations, impose higher or lower product standards.⁴⁵ Otherwise, she claimed, states with more rigorous standards will impose costs on interstate firms which assume they must comply with these higher standards.⁴⁶

Both of these models are useful, but each is also incomplete and vague in its application. First, neither model is clear about the breadth of this presumption. It is probably inappropriate to presume in favor of state activity when such activity is nominal, nonexistent, or falls within an historically federal domain. Second, embracing a presumption favoring state action merely defers the locus of control question unless the criteria for overcoming that presumption are rigorous and unambiguous. Because they either restate the traditional norms or add little to overcome the presumption, *de novo* and politicization problems raised in the previous subsection, Gray's criteria fail this test. Foote's model adds fairly observable criteria and more rigorous standards to the debate and is preferable to Gray's. However, like Gray, Foote largely ignores the level of state activity over which her federal preemptive standards might lay. One might differentiate, for example, between comprehensive, national environmental laws which preempt diverse, often infantile or nonexistent state regimes,⁴⁷ from common law regimes such as tort and contract. These common law areas and their statutory embellishments fall uniquely within the realm of state regulation.⁴⁸ In fact, Congress, reluctant to preempt these well-developed common law rules, has often included "saving clauses" intended to insulate the common law from national legislation.⁴⁹

Foote's application of her model to chemical labeling cases⁵⁰ suggests an additional problem with her locus of control criteria. She pos-

45. Foote, *supra* note 7, at 219-20.

46. *Id.*

47. See LIEBER, *supra* note 2, at 191-94 (describing the application of the 1972 Clean Water Act amendments as uneven because of the "disunited" efforts made by the states in dealing with clean water issues); Hays, *supra* note 2 (claiming that environmental values and regulations varied measurably among states and regions).

48. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (placing the common law squarely and uniquely within the province of the state courts).

49. A saving clause in a federal statute "saves" state common law from "the annihilation which would result from an unrestricted repeal" [or preemption]. BLACK'S LAW DICTIONARY 1510 (4th ed. 1968). An example of a saving clause appears in 15 U.S.C. § 1397(k) (1988) (repealed) ("Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.")

An example of a saving clause, applied to citizens' actions against polluters, appears in 33 U.S.C. § 1365(e) (1988): "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . ." *Id.*

50. See Foote, *supra* note 7, at 221-24 (applying her model to chemical labeling regulation).

its that federal law should govern product design and performance but that states should retain at least some regulatory powers over production and process of exchange issues, which include those involving information flow.⁵¹ Extending these criteria to chemical labeling, she asserts that OSHA labeling standards should preempt state regulation because "state labeling rules mandating that specific language be affixed to containers prior to shipping will increase manufacturers' costs."⁵² Although Foote does not expressly state that such preemption should also preempt state common law duties to provide information, she implies exactly that, since labeling represents the single best method of conveying all relevant information to the product's ultimate users.⁵³

The problem here lies in distinguishing product design, performance, packaging and labeling from the plethora of information issues in product cases. For example, Ford Motor Company complied with federal rear impact standards but possessed material information about their Pinto's ability to withstand such impact.⁵⁴ It is difficult to discern whether Foote's model would have preempted those state court decisions which held Ford accountable for this ethical lapse.⁵⁵ In general, product producers may comply with preemptive national design, performance, packaging or labeling standards, but they also may possess measurably more information about product design, performance and potential problems than anyone else. If manufacturers possess information concerning product shortcomings that reasonable consumers need, but comply with federal standards, then whether such compliance preempts state courts from reviewing, *ex post facto*, a producer's product design and performance decisions is unanswered by Foote's model.

The foregoing discussion demonstrates that a presumption favoring state over national action and Foote's more rigorous model for overcoming such presumption offer direction but lack coherency and a moral underpinning. Part III contends that contract adds an historically-based, simple, yet powerful analytic layer to these locus of control decisions.

51. *Id.* at 220-21.

52. *Id.* at 223.

53. Foote maintains that her standards may allow state information requirements that do not affect the product's package, but does not include state common laws among these requirements. Although one might reasonably infer that common law rules would be included, one may also reason that imposing additional information requirements upon manufacturers, which use their packaging and labeling as primary information-conveying devices, imposes undue burdens on national markets. *Id.* at 221.

54. See Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379 (1992) (recounting the company culture and decision-making that went into the decision not to spend \$11.00 per car to upgrade the Pinto's ability to withstand a rear-end collision).

55. *E.g.*, *Grimshaw v. Ford Motor. Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

III. CONTRACT AND LOCUS OF CONTROL DECISIONS

Still very much alive⁵⁶ and despite its limits,⁵⁷ contract provides philosophic and ethical direction when Congress or the courts must decide between national preemption or continued state control of state common law domains. Rather than contradicting previous models, contract adds an additional and useful layer of reasoning to the calculus. Its central theme is that the choices by rational, autonomous actors, cloaked with sufficient information⁵⁸ and relatively equal bargaining power are worthy of legal protection. This theme has played an important role in the works of ethicists and legal commentators⁵⁹ who have applied these tenets to areas as diverse as corporate ethics⁶⁰ and regulation of drug treatments for HIV positive patients.⁶¹

Unlike these cases, contract norms applied to federalism emphasize contract's functional elements such as information and choice: conditions precedent for contract norms to apply. Rather than suggesting a contract-type relationship or a social contract theory of federalism, I will offer a simple locus of control model that depends on whether the substantive or procedural rights created by a rule increase or decrease these functional elements of contract. I will also argue that contract has, historically, been an implicit but important factor in federal preemption decisions.

56. See GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); see also Symposium, *Reconsidering Grant Gilmore's The Death of Contract*, 90 NW. U. L. REV. 1 (1995) (reviewing Gilmore's famous work).

57. See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (both discussing the breadth and reach of contract, its limits and their reasons).

58. I chose to use the adjective "sufficient," instead of the economic term "full" to measure the relevant information necessary to comply with the contract thesis. Sufficient information is just that: each party has sufficient information to make a voluntary exchange. This term, therefore, may represent a less ambitious requirement than full information. See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 48, 235-36 (1988) (citing lack of information as a cause of market failure).

59. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Thomas W. Dunfee & Thomas Donaldson, *Contractarian Business Ethics: Current Status and Next Steps*, 5 BUS. ETHICS Q. 173 (1995); Steven R. Salbu, *Regulation of Drug Treatments for HIV and AIDS: A Contractarian Model of Access*, 11 YALE J. ON REG. 401 (1994).

60. Dunfee & Donaldson, *supra* note 59 (applying contract ideas of rational consent to justify corporate existence, "principles, policies and structures").

61. Salbu, *supra* note 59 (applying a rational consent model to new and experimental HIV drug access).

A. *Functional Elements of Contract*

Contracts in competitive markets are efficient,⁶² assuming the actors within that market are rational, that there are no or only modest negative externalities,⁶³ that these actors have full information concerning their choices and their consequences,⁶⁴ and that the parties are of equal or nearly equal bargaining power.⁶⁵ This ideal setting describes very few actual market environments, but is instructive both for economists who wish to compare empirically actual and idealized markets and for others who use the essential components of contract to critique actual or proposed norms. Those who choose the latter strategy attempt to analyze actual or proposed relationships based on the presence of these contract components. Both they and economists will agree that actors prefer more information over less and that evenly distributed bargaining power diminishes the probability of market failure occasioned by coercion or similar problems.⁶⁶

Information and power are also important components of moral, sociological, and political theories of contract. The assumption of informed and empowered actors is central to a stakeholder theory of corporate conduct,⁶⁷ constituting a "noncontractual" but cooperative understanding between manufacturers and suppliers,⁶⁸ an informal, but accepted and enforced norm among ranchers and farmers in Shasta County, California,⁶⁹ and a reinforcement through constitutional theory of minority representation.⁷⁰

62. COOTER & ULEN, *supra* note 58, at 230.

63. Externalities, especially negative externalities, often play a significant role in contract and market failure because they impose costs on non-consenting third parties. ELLICKSON, *supra* note 30, at 58-77 (citing negative externalities as problematic in the exchange process); COOTER & ULEN, *supra* note 58, at 230.

64. See COOTER & ULEN, *supra* note 58, at 235-36 (citing "full" information as a prerequisite for an efficient contract).

65. Trebilcock dedicates an entire chapter to the threat posed by coercion, including unequal bargaining power, to individual autonomy in contracts. See TREBILCOCK, *supra* note 57, at 78-101.

66. Trebilcock cites the highwayman's admonition, "Your money or your life," as an example of a case in which a fully rational actor, cloaked with sufficient information, lacks the autonomy necessary to make a voluntary decision. This threat of physical violence creates an asymmetry in bargaining power and results in a breakdown of contract. *Id.* at 84-85.

67. The seminal work on point is R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984) (in which the firm's existence and obligations depend on its relationships with those affected by its decisions); Dunfee & Donaldson, *supra* note 59 (arguing that a firm's moral obligation depends on an implicit social contract with society).

68. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (citing extra-legal norms as more descriptive of long-term contract relations than formal contract rules).

69. See ELLICKSON, *supra* note 30, at 177-78 (citing information obtained within informal, close knit groups as essential to the non-legal methods of resolving potential disputes as used by the ranchers and farmers in Shasta County, California).

70. See JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (applying a theory of

Of course, both information and power distribution play particularly important roles in tort and product liability law. Information asymmetry often provokes duties to warn, create or expand product instructions, and provide sufficient, reliable information for potential investors. Congress, state legislatures, and courts have often placed on the possessors of relevant market information the burden of providing that information to those for whom the costs and probability of discovery were respectively too high and too low. At common law, coercion in the form of fraud, duress, and undue influence provoked rescission rights for the victims. Statutory theories such as unconscionability⁷¹ represented public policy responses to power asymmetries.

The common element among these legislative, judicial and moral responses is the allegiance to contract theory and its functional elements. For example, leveling the information and power fields for contracting parties is no panacea but usually leads to lower transaction costs,⁷² better commercial and consumer choices, and a more stable commercial environment. These are all worthy goals, but, by themselves, provide no answer to the locus of control question. The next subsection addresses this issue.

B. *Contract Elements and Locus of Control*

An appropriate next step in determining whether a compelling case for federal preemption exists is to ask whether the existing or proposed federal law enhances contract by providing its beneficiaries with necessary information or power. Unlike previous models which furnish ammunition to both sides of the federalism argument, a contracting model posits that the only compelling cases amenable to federal intervention or preemption are those in which federal action furthers contract by eliminating or reducing information and/or power asymmetries. If it does, then federal preemption *might*⁷³ be an appropriate response. If it does not, then preemption is simply not appropriate, and the deciding institution — be it Congress or the courts — should defer such regulation to the states.

constitutional interpretation based upon the expansion of citizens' ability to participate in their government).

71. U.C.C. § 2-302 (1977).

72. Transaction costs arise from the formation, performance and enforcement of contracts. See COOTER & ULEN, *supra* note 58, at 236. One might argue that leveling information and power availability might cost more; however, in the long run such leveling will tend to reduce the costs associated with obtaining information or acquiring contracting power from other sources.

73. This paper does not prescribe national intervention in such cases. In fact, the federal government might view the states as appropriate contract-enhancing governments. See *infra* text accompanying notes 91-98.

It should be noted that using contract in this manner is not novel; contract or contract-like reasoning has been the explicit or implicit justification for most significant federal preemptive legislation passed since the beginning of the Progressive Era.⁷⁴ Anti-trust and pure food and drug laws during the Progressive Era addressed both information and power asymmetries. These laws delimited the monopolistic power of holding companies,⁷⁵ and mandated safer products and more accessible information.⁷⁶ Labor legislation during the thirties and forties, responding to power asymmetries between management and workers, had a decidedly contract underpinning. Such early twentieth century reforms were the result of a conscious decision by labor leaders to embrace freedom of contract as the "gospel" of the labor movement.⁷⁷ National securities laws sought both to deliver relevant information to investors and to control those cases where insiders and others may appropriate this information at the expense of other investors.⁷⁸ Civil rights laws preempted contrary, discriminatory state laws which not only deprived their own citizens of important political power but also imposed discriminatory laws on the citizens of other states who happened to be within their borders.⁷⁹ Product liability certainly cannot claim the moral imperative of civil rights nor can its preemption compare with the sweeping changes created by national labor, anti-trust, or even securities laws. It does, however, compare favorably to two recent national incursions into historically state domains such as the Federal Consumer Credit Protection Act (FCCPA)⁸⁰ and the Magnuson-Moss Warranty Act.⁸¹ Both of these statutes preempted presumptively state domains,⁸² but with contract-enhancing rules.

74. The Progressive Era includes roughly the last two decades of the nineteenth and the first two decades of the twentieth century. During this time, reformers were instrumental in convincing both states and the national government to adopt many of their proposed reforms, including pure food and drug laws, antitrust legislation, and worker compensation laws. See WOOD, *supra* note 1; Graebner, *supra* note 9.

75. C.F. Taeush attributes Congressional passage of the Sherman Act to a fear of "a new power on the social horizon: Business." *Business and the Sherman Act*, in ANTI-TRUST AND REGULATION 52 (Giles H. Burgess, Jr. ed., 1992). Taeush labeled corporations "a new kind of social energy, comparable in size and strength and value with state and church." *Id.*

76. See WOOD, *supra* note 1, at 143-46 (citing proper labeling as central part of Pure Food Act).

77. See WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 128-166 (1991) (asserting that labor's adoption of a contract theme displaced more radical and less tolerated themes).

78. See Federal Bar Association, FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1982, at 20 (1983) (citing full publicity and information as essential elements of the 1933 law).

79. See MARSHALL, *supra* note 3, at 2 (commenting on President Kennedy's commitment to address this "moral dilemma" through preemptive legislation).

80. 15 U.S.C. §§ 1601-1691(f) (1994).

81. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 (1994).

82. Prior to the FCCPA, virtually all consumer credit transactions were governed by state

The FCCPA cloaked consumers with the right to credit information in consumer transactions,⁸³ equal credit opportunities,⁸⁴ garnishment protection laws,⁸⁵ and a limited right of rescission in residential home mortgage cases.⁸⁶ Although the preponderance of the FCCPA's provisions are aimed at disclosure of credit terms to consumers, the equal credit opportunity, garnishment, and rescission rules attempt to correct the power asymmetries which often exist in consumer credit transactions.

Magnuson-Moss was aimed primarily at product suppliers who make written warranties to their customers. The law requires such suppliers to label their warranties as "full" or "limited,"⁸⁷ creates minimum standards for all written, product warranties directed at consumers,⁸⁸ and applies disclosure rules to product service warranties.⁸⁹ It also prohibits providers of written warranties from disclaiming implied warranty liability.⁹⁰

The areas preempted by these two laws were extensively regulated by the states and were therefore presumptively state domains. However, because both of these national rules responded to potential market failures and were contract-enhancing, they were appropriate actions. By enhancing contractual elements, they overcame the presumption favoring state action.

Rather than indicting current state regimes or subjecting them to comprehensive federal preemption, the application of a contract-enhancing norm to locus of control issues represents both a reasoned extrapolation of one hundred years of federal activity and a knowable and usable moral underpinning for invoking federal action. This model allows states to retain virtually unfettered discretion over their common law regimes and leaves untouched those fields for which state activity has been uneven, modest, or nonexistent.⁹¹ The model, however, does allow federal intervention in those cases implicating both the traditional norms of federalism and these contract-enhancing norms. It is important to restate that

common and statutory law. For the regulatory environment that preceded the FCCPA, see 1968 U.S.C.A.N. 1962, 1984-2025 (reprinting H.R.Rep. No. 90-1040 (1967)). Likewise, the Magnuson-Moss Act partially preempted state common law and the Uniform Commercial Code. See 1974 U.S.C.A.N. 7702, 7706 (reprinting H.R.Rep. No. 93-1107 (1974)).

83. 15 U.S.C. §§ 1604, 1637-38 (1994).

84. *Id.* §§ 1691-1691(f).

85. *Id.* §§ 1671-74.

86. *Id.* § 1635.

87. *Id.* §§ 2302-03.

88. 15 U.S.C. § 2304 (1994).

89. *Id.* § 2306.

90. *Id.* § 2308.

91. Historic examples might be civil rights or environmental regulation. See LIEBER, *supra* note 2, at 72 (identifying diverse levels of environmental regulation by the states prior to the 1972 amendments); CIVIL RIGHTS ACT, *supra* note 3, at 7 (twenty-five states had laws similar to the Civil Rights Act at the time of its passage).

this model does not prescribe federal intervention in such cases. States are eminently capable of managing and correcting their common law regimes through legislation or judicial decisions. Rather, contract is a useful "acid test" to determine whether federal action is an appropriate alternative to state action in these presumptively state domains. To restate yet another important point: neither Congress nor the courts should encroach on these domains unless such action fosters both locus of control and contract norms.

The following matrix models the operation of these norms.

	Enhances Contract	Does Not Enhance Contract
State Action	i. X	ii. X
Federal Action	iii. X	iv. O

The "X"s in cells i - iii identify appropriate state or federal actions, while the O in cell iv. indicates the one case where federal action is inappropriate. The following subsections develop each cell's contents more fully.

1. State Adoption of Contract-Enhancing Rules.

In cell i, a state has adopted a contract-enhancing rule, i.e. a rule that attempts to correct or improve situations involving information and/or power asymmetries. Examples include state consumer laws, such as the Uniform Consumer Credit Code, which contain rules similar to those in the FCCPA,⁹² and rules governing unconscionability.⁹³ These are certainly appropriate actions within presumptively state domains. They further both contract and federalism.

2. State Adoption of Rules Which Do Not Enhance Contract.

Examples of state rules that do not enhance contract include those that limit a product liability plaintiff's ability to acquire relevant, proprietary information possessed by the defendant, place ceilings on damages in such cases, or create repose periods for product liability actions. Such

92. See, e.g., OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 6-510 (West 1983).

93. U.C.C. § 2-302 (1977).

rules may or may not be good policy, but because they do not make information more accessible nor level the power of the parties involved, they are not contract-enhancing. Although they further federalism, but not contract, these rules are appropriate state actions in presumptively state domains.

3. *Federal Adoption of Contract-Enhancing Rules.*

In cell iii, federal judicial or legislative action culminates in a contract-enhancing rule. As previously stated, the national government has significantly encroached into the presumptively state domain of contract-enhancing norms. If, over time, state rules like those in cell ii create information or power asymmetries, then Congress might require those who have relevant and usable information to provide it to those who do not or may provide political or commercial power to those needing additional powers to make rational choices. These federal preemptive actions further contract, square with historic national incursions, and therefore protect federalism.

Detractors may claim that if contract-enhancing norms must precede national preemption of presumptively state domains, then contract, like a gas, will expand to fill this analytic volume. Thus, anyone may arguably find a contract rationale for action. Although I believe such claims are tenuous, I suggest that those wishing to make these contract-enhancing assertions be given a forum in which to do so and that if the weight of public, legislative or judicial opinion supports their argument, then perhaps such arguments merit consideration under the auspices of public policy.

4. *Federal Adoption of a Rule Which Does Not Enhance Contract.*

Examples of inappropriate actual or proposed federal actions falling within cell iv include recent product liability reform efforts by Congress, assertions by some manufacturers that federal product safety standards should preempt state common law theories of recovery⁹⁴, and Congress' decision not to include a saving clause in its Cigarette Packaging and Labeling legislation.⁹⁵ The first presents a case of possibly appropriate re-

94. See W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. REG. 65, 100 (1989) (supporting manufacturers desire for a regulatory compliance defense).

95. In fact, such legislation has strong preemptive language. See 15 U.S.C. § 1334 (1988):

(a) No statement relating to smoking and health, other than the

forms violating presumptively state domains. Statutes of repose, more rigorous requirements for prima facie cases, expanded defenses, and limits on damages may or may not be appropriate responses to current state product liability regimes; however, these rules neither pass the contract-enhancing test nor possess any other ethical or moral underpinning provoking national involvement. Therefore, advocates of such changes should confine their quest to state legislatures.

Similarly, attempts by product liability defendants to avoid state product liability recovery theories can have precarious moral foundations, as when defendants attempt to avoid liability by demonstrating compliance with federal safety standards which include a saving clause. In a recent example,⁹⁶ Ford Motor Company claimed that federal motor vehicle safety standards preempted New Hampshire common law to the extent that such law might conclude that the absence of an air bag creates a defectively designed car. The New Hampshire Supreme Court justified its denial of federal preemption in this case because of the saving clause.⁹⁷ Although Ford's theory furthered neither federalism nor contract, both the New Hampshire Supreme Court and Congress furthered both, recognizing the importance of preserving historically, state-dominated domains. While most would agree that federal motor vehicle safety standards represent appropriate Congressional activity, it would be a grave violation of a presumptively state domain to attribute preemptive force to these standards. They further neither contract nor federalism. Those who wish to challenge state court decisions like this one must necessarily confine their arguments to the states.

As with cigarette labeling, Congress' failure to include a saving clause has wrought inappropriate national incursions into presumptively state domains. The preemptive force of the national labeling law has eliminated potential state common law theories, including the duty to warn,⁹⁸ in cigarette cases. Like the Pinto cases discussed earlier,⁹⁹ many of the cigarette cases revolve around the manufacturers having relevant and important information that actual or potential smokers need to make

statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id.

96. *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995).

97. *Id.* at 347.

98. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992).

99. *See supra* text accompanying notes 54-55.

rational choices.¹⁰⁰ Whether the common law should develop duties to provide such information is an important question, one better left to the states. In any case, it is difficult to fathom what, other than politics, motivated Congress not to protect the common law from the labeling law. Such a decision furthered neither federalism nor contract.

C. *Competition Among States and Mobility Revisited*

One might argue that by yielding to state law in all but contract-enhancing cases, this contract-based model unfairly places the burden on product producers and sellers because the resulting beneficiaries of information and power asymmetry reforms tend to be consumers. While contract-enhancing norms might encourage national correction of these asymmetries, changes in rules that do not further contract are, according to the model, relegated to the states. The net effect is that product producers and sellers will be arguing their cases for reform before state, not national forums.

This is an appropriate outcome which is consistent with Dye's assertions about the benefits and costs of competition among states; that is, we can fold state public policy decisions into our utility analyses and make relocation decisions based upon these analyses.¹⁰¹ In Part II, however, I suggested that this type of analysis is more consistent with the location decisions of businesses than those of individuals.¹⁰² Seeking uniformity through federally preemptive legislation certainly furthers the strategic goals of producers and insurers but, according to Edmund Kitch, also "portrays a short-term perspective of management" and trades "short-run simplicity of uniform standards" for "the natural protection afforded by competition."¹⁰³ Addressing product liability law, Kitch argues that states should retain control over this regulatory area but that voters within a state be apprised and pay the costs of that state's rigorous product liability rules.¹⁰⁴ A federal law that "permits manufacturers to sell their products in states at prices which can take into account their differential liability exposure" might preserve state product liability regimes.¹⁰⁵

100. What the tobacco companies knew but did not share with others appears to be grist for many of our leading publications. Philip J. Hilts & Glenn Collins, *Records Show Philip Morris Studied Influence of Nicotine*, N.Y. TIMES, June 8, 1995, at A1; Jon Weiner, *The Cigarette Papers*, THE NATION, Jan. 1, 1996, at 11; Dan Zegart, *Buried Evidence: The Damaging Secret Documents and Testimony Tobacco Companies Tried to Suppress*, THE NATION, March 4, 1996, at 11.

101. DYE, *supra* note 7, at 14.

102. See *supra* text accompanying notes 30-32.

103. Kitch, *supra* note 9, at 124.

104. *Id.*

105. Kitch, *supra* note 9, at 125.

Lawmakers would be incorrect to assume that the Kitch's assertion regarding businesses describes individual behavior. Individuals may be somewhat conscious of their public policy environments; however, they likely know little about disparate state common law regimes. More importantly, a locus of control model applied to these regimes should not include as an important component an assumption or requirement that individuals are or should be aware of this esoteric body of law.

IV. CONCLUSION

It is undeniably difficult to separate the underlying reasons for product liability or any reform from the issue of locus of control. Too often, however, these reasons have subsumed federalism, rendering the institution a political relic. Traditional norms, including those favoring presumptively state domains, furnish little direction in these cases; rather they tend to encourage both the politicization and subsumption of federalism. Contract provides a defensible and historical basis for deciding these locus of control questions. Its underpinning, that federal preemption decisions be based on contract-enhancing norms, provides a useful, additional analytic tool to locus of control cases. A contract-enhancing norm allows Congress or the courts to preempt state domain only in those cases in which such preemption can effectively level the information or power asymmetries arising under current state laws. In all other cases, states should retain full regulatory control over such domains.