

**THE FEDERALIST SOCIETY
FOR LAW AND PUBLIC POLICY**

PRESENTS ITS

2006 NATIONAL LAWYERS CONVENTION

**CORPORATIONS:
REGULATORY DOUBLE-DIPPING***

PANELISTS:

Hon. Paul S. Atkins, Commissioner, Securities & Exchange Commission

Dr. Michael S. Greve, American Enterprise Institute

Hon. Deborah Platt Majoras, Chairman, Federal Trade Commission

Hon. Eugene Scalia, Gibson, Dunn & Crutcher and Former Solicitor, United
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Moderator: Hon. Jerry E. Smith, United States Court of Appeals, Fifth Circuit

* The following is a transcript of a panel discussion held on November 18, 2006 in Washington, DC.

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CORPORATIONS: REGULATORY DOUBLE-DIPPING**

JUDGE SMITH: Good morning. I'm Jerry Smith, a judge in the Circuit Court of Appeals. It's my privilege to moderate today's panel discussion entitled "Regulatory Double-Dipping," a panel sponsored by the Federalist Society's Corporations, Antitrust, and Securities Practice Group. I'll introduce our distinguished panelists in just a minute.

First, just a moment of discussion on what we'll be covering today. In a world of globalization, whether we like it or not, businesses and individuals operate in a regional and international environment. Once able to operate exclusively under a single locally imposed regulatory regime, they must now comply oftentimes not only with that regime but must also comply with a statewide regime, a national regime, and an international regime of regulation. Of course, there are typically 50 statewide regimes, often more than one national regime with competing agencies, and predictably several international regulatory regimes as well.

In this environment, individuals and businesses are in the first instance faced with the challenge of determining who is regulating their proposed activity. Once those regulators are identified, only then can individuals and corporations begin the labor-intensive and time-consuming process of sorting through the applicable treatises, laws, regulations, guidelines, et cetera, to which they're subject. It's become a very complicated world with multiple layers of regulation and enforcement and, I might add, permanent employment for lots of attorneys.

So, what is the effect of these multiple layers of regulation on businesses? Does or should the answer differ from one field to the next—from antitrust, to securities regulation, to labor issues? Do these multiple layers of regulation result in what we might call a race to the bottom, whereby the most restrictive regulatory regime, for all practical purposes, becomes the one that's effective? If so, does that create an incentive for over-regulation? And are there some helpful principles that can be illuminated to try to resolve this situation? These and other questions will be addressed by our distinguished group of panelists, whom I will now introduce to you briefly in the order in which they'll appear.

Paul Atkins was appointed by President George W. Bush to be Commissioner of the Securities and Exchange Commission in 2002, with a term expiring in 2008. Commissioner Atkins' twenty-two year career has focused on the financial services industry in securities regulation. Before his appointment as Commissioner he assisted financial services firms in improving their compliance with SEC regulations and worked with law enforcement agencies to investigate and rectify

situations where investors had been harmed. He began his career in New York, focusing on a wide range of corporate transactions for U.S. and foreign clients, including public and private securities offerings and mergers and acquisitions. He's a member of the New York and Florida Bar, received his J.D. from Vanderbilt, and was a senior student writing editor of the *Vanderbilt Law Review*. He received his A.B. from Wofford College and was a member of Phi Beta Kappa.

Deborah Majoras is Chairman of the Federal Trade Commission. She was sworn in in 2004, and her tenure has been marked by strong efforts to protect consumers from emerging frauds such as identity theft, spyware, and spam, with increased focus on businesses' failure to implement adequate information security safeguards. In May 2006, she was appointed by the President to be Co-Chair of the Federal Identity Theft Taskforce. She joined the FTC after having been with the Jones Day firm here in Washington, where she served as a partner in the firm's antitrust section and worked on a variety of antitrust counseling in civil and criminal litigation matters. In 2001, she was appointed Deputy Assistant Attorney General in the Antitrust Division and was named Principal Deputy in 2002. She's a graduate of Westminister College in Pennsylvania and of the University of Virginia Law School.

Eugene Scalia is a partner in the D.C. office of Gibson, Dunn & Crutcher, Co-Chair of the firm's labor and employment practice group, and Chair of the administrative law and regulatory practice group. He's a member of the firm's appellate and constitutional law practice group. He returned to Gibson Dunn in 2003 after a distinguished service as Solicitor of the U.S. Department of Labor. Matters for which he had substantial responsibility there included investigation of the Enron pension plans, amendment of the white collar overtime regulations, and implementation of the whistleblower provisions of Sarbanes-Oxley. At Gibson Dunn, Mr. Scalia has a national labor and employment practice, and he's a leading authority on Sarbanes-Oxley. He's a graduate of the University of Chicago Law School, where he was editor-in-chief, and got his undergraduate degree from the University of Virginia.

Finally, Michael Greve is the John G. Searle Scholar at the American Enterprise Institute in Washington, where he directs the AEI Federalism Project. His research and writing cover American federalism in its legal, political, and economic dimensions. He earned his Ph.D. in government from Cornell and co-founded and directed the Center for Individual Rights. From 1989 to 2000, he served on the board of directors of the Competitive Enterprise Institute. He has written extensively on federalism and other aspects of American law. Dr. Greve's current project is a book on the constitutional foundations of competitive federalism.

It's my privilege to begin with Paul Atkins.

COMMISSIONER ATKINS: Thank you, Judge Smith, for that kind introduction. It's a pleasure to be here today to talk about this topic.

Globalization, of course, is an inescapable reality. As Judge Smith said, there are many causes: trade, better communications, the whole IT revolution, competition for investment, and the ending of exchange controls and many foreign ownership restrictions in the past couple of decades. Of course, too, the collapse of the Berlin Wall and the opening of China have all contributed to the globalization boom as well.

John Donne, a 17th century poet, wrote the famous *Meditation XVII*, that says, "No man is an island, entire of itself. Every man is a piece of the continent, a part of the main." That's an increasing realization around the world—not the least in Britain itself—among regulators, certainly. We've seen an international backlash against parts of the Sarbanes-Oxley Act, even though many countries have adopted large parts of the Act. Public securities markets are now looking abroad for merger partners. The New York Stock Exchange has demutualized and will team up with Euronext through an acquisition which will be voted on next month, and NASDAQ is looking to acquire the London Stock Exchange.

The SEC experienced the ill-fated hedge fund rule, which required registration of hedge funds, only to see that encourage domestic hedge funds to flee abroad and foreign hedge funds to close themselves to U.S. investors to keep regulation away. Next month, the SEC will consider finalization of a long-standing proposal to make it easier for foreign companies to deregister from the United States. I think that might well operate in the future as a sort of safety valve. When regulations become too burdensome, we might see a flight of foreign companies abroad, and that might tell us when we have twisted the buttons a little bit too tightly.

In Europe, there is a similar sort of recognition that barriers to free movement of capital are problematic. There have been, over the past 15 to 20 years, moves to reduce barriers to competition in their own internal market. They have a number of different proposals outstanding, which will kick in next year.

Last, but not least, the United States needs to recognize International Financial Reporting Standards. It needs to recognize that U.S. GAAP is no longer the only game in town. If we don't recognize IFRS eventually (our goal is 2009), we may well find that we will have a trade war between the U.S. and Europe, with respect to our accounting standards. Europeans are a bit chafed that we don't

recognize their standards and instead require companies to follow U.S. GAAP standards, even though they believe that IFRS has become a robust set of accounting principles.

The response to these challenges has been a call for increased harmonization. Compare the situation in the securities regulatory sphere to, say, the tax sphere, where you have the pariah status of various tax havens and the pressure on other low-tax regimes to conform. Even in Europe itself, some European politicians comment that jurisdictions like Ireland, for example, which have lower taxes than others, should harmonize their tax rates. In the securities regulatory world, we see similar comments. The International Organization of Securities Commissions—which has over the years come out with a number of high-level working papers, consultation reports, and model codes of ethics, with respect to some of these issues—threatens expulsion if its member regulatory regimes do not adhere to these common standards. The SEC itself has entered into a number of memoranda of understanding with various countries to encourage co-operation. Fifteen years ago, insider trading was not necessarily illegal in many jurisdictions, including Switzerland and others. Now, virtually every major market in the world has insider trading prohibitions. The United States led the way in that realm. Countries adopted these standards with a view towards being part of what they view as the international developed-market club.

Nonetheless, despite the convergence, competition is an important element. The City of London, for example, has thrived on competition and on setting itself apart from, for example, the United States. After World War II, the United States capital markets dwarfed all other markets. But, besides global economic and trade developments, a number of unilateral steps by the U.S. over the years have increased the ability of other folks to compete with us. The first was in the Kennedy administration back in 1963. There was what was called the Interest Equalization Tax, imposed on borrowing by U.S. companies and foreign companies in the U.S. The goal was to keep U.S. capital in this country and to equalize the costs between selling debt and equity securities. It basically backfired and resulted in a flight of offerings to London because of the differential in yields resulting from the tax. Likewise, the Federal Reserve had what were called “rate caps,” which placed a cap on the interest banks could pay on bank accounts. We had a high interest rate environment in the late ‘60s and early ‘70s. Banks responded by expanding operations and products abroad in order to be able to offer the higher interest rates that their customers were demanding on their money.

Now, we have Sarbanes-Oxley, which has itself, according to many people, resulted in some companies looking to list securities abroad and foreign companies

looking to stay out of the United States. The London Stock Exchange, for example, is even trying to get smaller U.S. companies to list on their Alternative Investment Market with some success. We've seen the amount of initial public offerings in the United States relative to the rest of the world decline. Ten years ago, nine out of ten dollars worldwide raised through initial public offerings were raised in the United States. Today, nine out of ten dollars raised globally through IPOs are raised abroad, mostly in London.

Some people are saying, or charging, that this is a race to the bottom. I'd say not. In many cases, competition is good. And there are differences in markets between the United States and the rest of the world. Our market is essentially half-retail, half-institutional. Abroad, it's about 85 percent institutional and only 15 percent retail. So, should we really say that investors ought to be able to decide what sort of regulatory regime they want to put their money into? The fear of regulatory arbitrage—of the race to the bottom—presupposes that government knows best, that investors cannot decide for themselves, that they're just chumps in the game. I think investors will continue to invest abroad, absent any sort of exchange controls or restrictions, and that's probably a good thing. It will help to keep us honest. Consider our banking regulation, for example. It is a mixture of federal and state regulation. You have the Fed, the Comptroller of the Currency, the OTS for thrifts, and the states all competing to a certain extent over products. Much of the innovation—a lot of new products—developed through that competition, which I would call healthy.

Of course, regulatory competition can also be bad. Our aspiring governors, AGs, have overlapping jurisdiction, especially with respect to securities, and we see how that has been used—not, I think, always to the best effect. It has created market uncertainty. We have seen in some cases what I would term “regulation by press release”—a lack of due process in many cases. In fact, in some of these cases, a state has been able to impose substantive regulatory requirements on international market participants—securities firms, mutual funds, whatever they may be—even though at the same time the market itself was working to punish the offending firms. The miscreant firms were finding that they had huge capital outflows or were losing business in favor of funds that were not implicated in some of these scandals.

You also see, with respect to plaintiff's attorneys at the trial bar, a bit of regulatory competition in a different sense. We have potentially overlapping jurisdiction between the antitrust regulatory regime and the securities laws. In fact, there's a case pending before the Supreme Court, for which I hope they take *cert.*, called *Billing v. Credit Suisse*. The plaintiffs in this case are alleging that the IPO bubble of the late 1990s was caused by manipulation and other things, which, they charge, implicates antitrust problems. If all of the allegations in their complaint are

true, they also implicate the securities laws. So, there's this overlap, and how will that be resolved? Hopefully, the Court will take this case in hand and help resolve it. Essentially, it is an end run around the Public Securities Litigation Reform Act, which required high pleading standards in securities cases. It was passed by Congress over the President's veto in 1995.

Finally, I want to say that the SEC itself is being rather schizophrenic in respect to competition versus regulation. In some cases, we've followed a good disclosure policy: letting investors choose where they want to invest their money. In other cases, we have imposed a one-size-fits-all type of regime. Recently, with our mutual fund independent chair rule, our hedge fund registration rule, and our national market system rules, we have decided for the marketplace. But, the courts have stepped in, with help from some people on the panel here, to put us back in our place and vacate these rules, which I think were not productive. What this has shown—and how market participants have viewed these rules—is that, if your neighbor's townhouse is on fire, you had better help your neighbor put out his fire. We have seen the Chamber of Commerce step in to challenge the mutual fund independent chairman rule for fear that that approach might find its way eventually into corporate America, with the SEC or others imposing that one-size-fits-all regime. The National Venture Capital Association and private equity funds stepped in with respect to our hedge fund rule because that same philosophy underlying the rule, although not immediately applied, could be applied to them later. Foreigners and others have stepped in with respect to some of the statutory provisions of Sarbanes-Oxley, to help us learn how those provisions adversely affected them. Thankfully, we took steps to straighten that out. And with respect to some of the ongoing problems with Sarbanes-Oxley, particularly section 404, we are taking steps—I hope we will start next month—to make it better.

So, returning to John Donne, our 17th century firebrand poet, whose injunction is pertinent to today's capital markets—we need to be ever-vigilant to safeguard market freedoms and investor choice versus government fiat. Donne's meditation began, "No man is an island, entire of itself," and ended with, "therefore never send to know for whom the bell tolls; it tolls for thee." Likewise, we should realize that when government usurps market freedoms, we all lose.

Thanks.

CHAIRMAN MARJORAS: Good morning, everyone. In antitrust, mere double-dipping would be wishful thinking. In the United States alone, we have two federal antitrust agencies. We have federal agencies that have responsibilities for competition issues, such as when the FCC reviews telecom mergers or the DOT

reviews airline mergers. We have 56 states, territories, and the District of Columbia, all with their own antitrust statutes. And we have an active system of private antitrust enforcement fostered by the prospect of treble damages. But while this domestic web of enforcement presents a lot of challenges, it is not even, I think, our greatest challenge today.

In 1990, there were roughly 25 competition agencies around the world, some of which were not particularly active. After the Berlin Wall came down, nations in Eastern Europe and other parts of the world began the arduous process of trying to convert from state-run to market economies. Aid organizations and financial institutions made it very clear to these countries that establishment of a competition agency was a prerequisite to their assistance. The European Union made it clear that countries which wished to be part of the Union must have an antitrust agency. And the developed countries made it clear to developing countries that this was important, too—that it would show that they were serious about moving to a market economy.

So, now, just over 15 years later, we have more than 100 competition agencies around the world. Russia recently passed a new competition law, and China has been working on one for about ten years. That law had its first reading in the National People's Congress. Unquestionably, this movement away from state-controlled economies is a victory. Nonetheless, we have to deal with the fact that we have competition enforcers with little or no experience with, or faith in, markets—few or no experienced staff, including economists. In fact, in some places, the staff from the old State Monopoly Office now is the competition staff, with no real supportive outside infrastructure, like a highly functioning judicial system.

Even with regards to developed nations and agencies with years of experience, some define the level playing field as one in which a successful multinational firm must share intellectual property or other assets with weaker local firms—maybe often weaker because in fact they have never had to compete before—so that all have the chance to succeed, never mind the investments that the stronger firm has made. The greatest danger, of course, in this global regulatory maze is that it will deter precisely the type of aggressive competitive conduct on which markets thrive, the very competition that we enforcers are supposed to be protecting. Antitrust is an area in which over-enforcement and promotion of multiple divergent enforcement views and requirements can cause affirmative harm because, in fact, businesses may have to tailor their behavior so that they pass muster with the most restrictive of enforcers. It is no secret that even officials in developed nations often disdain what they refer to as our form of cowboy capitalism. I was reminded of this early in my tenure at the FTC when reading remarks by President Jacques Chirac of France. He was talking about the passage of a new law that was to

benefit consumers. I believe actually it was some sort of a class action statute. And he said this: “Let us favor competition—not wild competition that destabilizes whole fields and endangers economic sectors, but rather regulated competition.”

The McKinsey Global Institute recently completed a twelve-year study in which its researchers set out to determine the reasons for vast economic disparities between rich countries and poor, by studying the economic reforms of 13 nations including the United States. And in the book explaining the results, *The Power of Productivity*, by the Institute’s founding director William Lewis, Lewis dispels much of the sacred cow wisdom on the subject. He finds that productivity provides the answer. And the United States has such a high level of productivity, he says, because it has such a high level of competitive intensity. But, the study concludes, the United States was able to develop its economy without the heavy burdens of regulation that developing countries today are saddled with as a result of the OECD nations’ exporting regulation and big government. Mr. Lewis says, “The rich countries today have given the poor countries a curse. That curse is not globalization. It is big government.”

To give you a live example I heard about recently: U.S. companies in a dynamic industry proposed to merge. The Department of Justice’s Antitrust Division engaged an investigation, which took less than two months, and cleared the deal. But the parties also had to file a merger notification in another foreign jurisdiction because the buyer had a subsidiary in that jurisdiction—even though that subsidiary did not manufacture the only product that was of competitive significance, the only product with a competitive overlap. For the product, the two companies combined had less than ten million dollars in sales in that particular country. But the parties had to file this notification, which they did. But the jurisdiction wanted more time. They requested that the parties pull the filing and restart the clock, which they did. They then received the equivalent of a second request issued by the FTC or DOJ. The parties made a number of divestiture offers, all of which were rejected by the jurisdiction, and after several months the deal cratered.

We and everyone else around the world will never know how that deal would have benefited our consumers because the market in the United States for these products was much larger. This unfortunately is not atypical today. The fact is that U.S. and other multinational firms routinely must make merger notification filings in a dozen or more jurisdictions even for relatively small deals. One large U.S. company has told us that it routinely makes merger filings in countries where the cost of the filing far exceeds the total sales and assets of the acquired entity in the jurisdiction. So mergers provide easy examples, given their requisite regulatory filings, but an equally if not more serious problem that the proliferation of

competition regimes may be producing is monopolization. Just ask Microsoft about its experience in dealing with divergences between the United States and Europe and Korea, and Microsoft is not the only one.

What are we doing about this? How are we preventing a complete disaster? Well, the FTC and the Antitrust Division have an agreement through which we allocate matters on the civil side of antitrust. It works well most of the time, but when it does not it can be costly. There is no recent experience I can think of in which each agency has investigated the same matter, except in the 1990s. The FTC deadlocked two to two on whether to bring a case against Microsoft. Then the DOJ took it up. And the rest is history, of course. In addition, we and the Antitrust Division cooperate with the states. We have a 1998 protocol for coordination in merger investigations, and a federal-state working group that meets either by telephone or in person on a monthly basis to talk about issues and sort out any differences. This process works very well, I would say, most of the time. But again, consider the *Microsoft* case. The federal government ultimately settled that case. Ten states and the District of Columbia decided the settlement was not, in their view, adequate, went forward, continued in the district court at great cost, and ultimately lost on the remedy that they wanted.

As for private enforcement, the FTC and DOJ have been active before the Supreme Court to ensure that development of antitrust law does not take a wrong turn as a result of private antitrust litigation. This advocacy's been very important and effective, but there is no denying the fact that most companies will settle large private class action antitrust lawsuits rather than face a jury with the prospect of treble damages. At the FTC, we have had a class action project in which we at times examined proposed antitrust class action settlements and filed the occasional *amicus* brief to let the judge know that we think the lawyers are making out quite nicely, while consumers are getting absolutely nothing.

In the international arena, we have built very strong relationships with our major trading partners like Japan and Europe, Canada, Australia. Our staff, particularly with the Europeans, works on a daily basis on overlapping antitrust matters, mostly in the merger arena, and in the cartel arena for the Justice Department. We have been successful in avoiding divergences in that realm. The last major divergence we had was in 2001 in the GE-Honeywell matter. We also work directly with countries like India and China in the process of developing their competition laws, and we have had extensive discussions with these and other countries. We have a very active technical assistance program. In the last two years the FTC and the Antitrust Division have worked with competition agencies in 20 developing countries, including Vietnam, where the President has been this week, to explain how we do things in the United States. This is not easy, but it is very

important. And we work, of course, with multilateral organizations, including one that the two antitrust agencies helped start in 2001 called the International Competition Network. The ICN started with 16 agencies and it now has 99 member agencies. We will see who is going to be number 100. We work on a project basis—no bureaucracy, no secretariat. We just work within our agencies with some help from the outside, and build practices which officials can then implement back in their countries. That has really started to demonstrate success, particularly in the area of merger process, where many countries have taken the best practice principles back to their own countries and literally changed the way they are doing merger process. So we are making some progress there.

The problem, of course, is that you can never know the extent to which the global maze is chilling the aggressive competitive conduct that economies really need to thrive. I will leave you with two suggestions about how we can get help from the private community in this country. First, the line of complainants at the door of the European Commission is loaded with U.S. firms who are there to complain about the practices of U.S. firms that have significant market shares. They know that the EC's rules require it to open an investigation whenever a complaint is lodged. And, we are told, they believe that the EC will be more sympathetic to complaints from competitors. Some of those same companies do not bother to come into the FTC or to the DOJ, even though they are U.S. companies, apparently because, while we welcome all antitrust complaints—we would like to hear about them—we do show a healthy skepticism toward complaints about competitors, given the clear incentives. So, while forum shopping is a fact of life, I wonder whether it is a wise move in the long run for U.S. companies to encourage the adoption of a more regulatory approach toward successful firms.

Second, I'm detecting some of the "I'm okay, you're okay" school of dealing with other jurisdictions on these issues is starting to creep into even our own antitrust bar, when dealing with other jurisdictions. When lawyers are representing clients, of course, they have to do this to the best of their ability. But suggestions that standing up for the U.S. system when you are in policy discussions and conferences abroad makes you an ugly American are complete nonsense, and all players would do well in the business community to support a system that holds companies to the rules but that does not preach undue intervention.

Thank you very much.

HON. MR. SCALIA: Judge Smith, thank you for the introduction. It's a pleasure to be here today.

We can consider this the "Federalism Stinks" panel. We do these occasionally at the Federalist Society, just to confirm that we're prepared to follow the truth wherever it may lead. These panels tend to include people like me, private practitioners who spend a lot of time advising companies how to achieve legal compliance nationwide, which can be an increasingly aggravating project but also (and it's some consolation) can be good for revenues.

I'll speak, then, from the perspective, first, of a labor and employment lawyer currently in private practice representing companies in these circumstances, and, second, someone who's held a federal prosecutorial position and thought about these issues a bit in that capacity. Third, but a distant third, I'll speak from the perspective of someone who's been involved in some recent SEC regulatory matters, including a couple that Commissioner Atkins adverted to.

In the labor and employment area particularly, the challenge confronting companies is not merely double-dipping, it's a matter of managing legal compliance and risk on three fronts: federal regulation, state regulation, and private litigation. I should say, by the way, that the problem we're talking about here—which within U.S. borders is closely related to questions of preemption—is an area where labor and employment law has a somewhat rich history, if not an altogether coherent philosophy. ERISA is highly preemptive of state and local regulation, although within ERISA preemption jurisprudence there is some inconsistency and lack of clarity. The National Labor Relations Act is another bedrock law in the labor and employment area that is highly preemptive of state and local law. Yet, there are other very important labor and employment laws at the federal level that are not preemptive. The result is a system in which there is some measure of unclarity as to the degree to which ERISA and the NLRA preempt state and local law, and also—and to a greater degree—a desire for the greater clarity and ease of ascertaining legal obligations that would exist if other federal employment laws also preempted state and local regulation.

The challenges people representing corporations see in this area, I think, come from two principal sources. One is private litigation under the state wage-hour laws, which for a long time were quiescent. Until recently there was very little state wage-hour litigation; litigation in the area was overwhelming under the federal law. But anybody following California litigation trends knows, for example, that there are now hundreds of wage-hour cases filed in California per year, some of them with enormous stakes. According to reports, one company, Farmers, paid approximately 200 million dollars in a state wage-hour case. Smith Barney reportedly paid about

100 million dollars. There have been other cases of similar magnitude. These cases typically involve the question whether the employer properly classified its employees—assistant managers, for example—as exempt from the overtime requirements. They weren't paid overtime, and the jury finds that they should have been. The result is overtime liability going back a couple of years at least. This is an area, by the way, where you would not consider there to be a particularly strong local interest: with respect to the minimum wage, you can expect the appropriate wage to vary by locale and therefore can understand a regime where legal obligations may not be uniform nationally. But whether an assistant manager is an exempt executive or an administrative employee we would not regard as a matter of peculiarly local concern that could not yield to a common, national definition.

The consequences of this state law wage-hour litigation are, first, sizable monetary payments and, second, as I've suggested, great difficulty administering nationwide compensation plans. Under ERISA, that's cause for preemption—one of the principal grounds for ERISA preemption is employers' need to uniformly, nationally administer their benefit plans. But there's not, at this point, the same ability to uniformly nationally administer monetary compensation plans.

A second source of pressure that we see in the area of uniform national employment policies is unions' increasing resort to state and local legislatures to achieve results that they're not able to achieve at the federal level. Federal labor law has essentially been legislatively static for decades now. Attempts to amend the National Labor Relations Act have failed both when advanced by employers and also, and more prominently, when advanced by labor unions. As a consequence we see labor unions going more frequently to other legislative bodies to advance their agenda.

I'll mention two examples. First is the so-called anti-Wal-Mart law that Maryland enacted earlier this year, forcing Wal-Mart to spend more on employee health benefits. That was a law that my firm was involved in challenging, and that was invalidated on ERISA preemption grounds earlier this year by Judge Motz of the District Court for Maryland. The case is now on appeal in the Fourth Circuit. [Editor's note: After the date of this presentation, Judge Motz's decision was affirmed by the Fourth Circuit.] There are as many as 30 similar laws that have been introduced in other state legislatures, and at least two that have been enacted locally by counties or municipalities. A second prominent example of unions' recourse to state and local legislative bodies is laws enacted by California and other states that prohibit state contractors from using revenues derived from state contracts for purposes of opposing union organizing. These laws are being challenged on NLRA preemption grounds; the Ninth Circuit initially affirmed a ruling that the California

law was preempted, but then—*en banc* and by a fairly lopsided margin—held that the law was not preempted. Supreme Court review in this or a subsequent, similar case is certainly possible.

This, then, is how the problem is perceived by regulated entities in the labor and employment area and how it's manifesting itself to some extent in litigation today. Let me turn to the question of how to address the challenges presented by what this panel is calling regulatory double- or triple-dipping. I'm not going to attempt to propose a legislative solution, for two reasons. First, as I said, federal labor and employment law is fairly static and it's quite hard to make any significant changes—even through regulation, let alone through legislation. Second, the last panelist today is Dr. Greve, and I understand he's going to propose an overarching uniform resolution of the difficulties we're discussing, a solution that, at the same time, is consistent with the values that are important to members of the Federalist Society. So, out of respect, I will leave it to Dr. Greve to unveil a global resolution, and for my part will offer some thoughts on how federal regulators can go about their business with some of these difficulties in mind.

First, they can simply aim to bring clarity to their own programs. That was one of the reasons that, at the Solicitor's Office in the Labor Department, we thought the Department's program of filing *amicus* briefs on important unsettled legal issues was valuable; ideally, it reduces administrative burdens by making the law more clear and uniform. Secretary Chao has similarly placed emphasis on what she calls "compliance assistance" intended to bring greater clarity to departmental positions and programs.

Second, federal litigators and regulators can stop and ask themselves, "Where are our resources truly needed?" When I was at the Labor Department, I thought that some of the smaller wage-hour cases—involving quite low-paid employees, and not necessarily large numbers of them—were often the most deserving of our attention because cases involving highly paid employees were more likely to attract capable plaintiffs' attorneys in light of the potentially substantial monetary returns involved. It seemed sensible to me to focus our resources on legal violations that we thought others might not address, and that influenced our choice of cases to pursue.

Federal regulators and prosecutors, then, should deploy their resources mindful of what other resources there are that may also be brought to bear. A related point for federal prosecutors, don't pile on. You can garner favorable publicity by bringing a lawsuit or charges against a widely vilified company or individual that already is subject to other litigation and prosecution. But at some point, if other enforcement authorities and private litigation appear to be providing remedies to those who have been wronged and ensuring appropriate punishment, then

the better use of resources is to focus efforts elsewhere—recognizing that this sometimes can be a hard decision to make and to defend to those who exercise political oversight.

Put differently, it is counterproductive when regulators view themselves as competing with one another. The fact that somebody else got there first is not a reason that you ought to get there too; on the contrary, in a federal system it's a sign of function rather than dysfunction that once one regulator is involved, another occasionally concludes, "The system's working, I don't have any need to go there as well." When now-former SEC Chairman William Donaldson came into office, the prevailing wisdom was that the SEC had been embarrassed by Eliot Spitzer's aggressive enforcement in the mutual fund area, among others. And the perception was that Chairman Donaldson felt that part of his mandate was to "redeem" the SEC's reputation by regulating aggressively in areas where Spitzer had been active. Now, there may have been some failures there; there may have been gaps in the SEC's program to be filled and addressed. But what's become clear is that Chairman Donaldson over-reached: he overstepped the bounds of his authority and, I think to some extent, brought embarrassment on the agency by pushing through the new mutual fund rule and hedge fund regulation that were both thrown out by the D.C. Circuit. The mutual fund regulation was thrown out twice, as Commissioner Atkins knows—he was an extremely articulate dissenter in both of those rulemakings. But my point, again, is that if a particular form of misconduct is being vigorously prosecuted by another authority, in a federal system that's not necessarily a sign of dysfunction at all (assuming that other authority is acting within the bounds of its own legal mandate). The dysfunction, instead, can be in believing that the public interest is served by a competition among regulators to address a matter already being pursued by another regulatory authority.

The last thing I'll suggest that government actors can do to minimize the regulatory triple-dipping we've been discussing is, at least in some areas, to defer to private arbitration. When I was at the Labor Department, I issued a memorandum to the lawyers in the Solicitor's Office instructing them to defer to the arbitration process in certain instances where private individuals had entered arbitration agreements. The Supreme Court has ruled that the EEOC, the Labor Department, and other employment agencies can bring suit in federal court for the benefit of an individual even when the individual has signed a binding arbitration agreement. The fact that the government *can* do this, however, doesn't mean that it always *should*. As the Supreme Court has said elsewhere, federal policy favors arbitration, and deferring to legitimate binding pre-dispute arbitration agreements furthers that policy, reduces the burden on the federal courts, often can result in a more expeditious resolution of employment disputes, and of course respects private contractual commitments. So,

the Labor Department has a program—on paper, at least—for deferring to arbitration in at least some circumstances. It's a policy the EEOC and other agencies should consider as well.

I'll conclude with a couple thoughts on what can be done by those in the private sector who are concerned about the issue we've been discussing. The Labor and Employment Practice Group of the Federalist Society had a panel last year where one of our speakers, Professor Amy Wax of the University of Pennsylvania Law School, discussed the literature on the degree to which employers take account of state employment laws in deciding where to locate their operations. There's a lot of sort of anecdotal surmise that aggressive state regulation of the employment relationship will cause corporations to flee the state and locate elsewhere. But Amy found very little empirical examination of this purported phenomenon. This is something that it would be valuable to have those in the academy take a look at, and research that the private sector might be interested in sponsoring to a degree. If it is true, as one can reasonably expect, that excessive state regulation in the labor and employment area will drive out business, cost jobs, raise prices for consumers, deplete available services to residents, and the like, then these are things state legislators ought to know and consider when deciding how to vote on the laws put before them.

In addition to research of this nature, it would be useful to have a ranking of states according to the degree of regulation—worst-to-best states to locate your business, based on the labor and employment regulatory environment. I'm speaking specifically of labor and employment law, but of course the idea can be transposed to other areas as well. This is something that companies could use in making their decisions, and it's something that could discipline states as they consider what further laws to enact or—we should never forget—to repeal. That, at least, is one sort of market-based idea to address the difficulties in regulation we're discussing today.

Thank you.

DR. GREVE: In some areas, the multiplication of regulatory regimes that hit a single firm result from the increased scale and scope of economic production. I think international antitrust is an example of that. You really don't want one worldwide regulator. At the same time, firms operate in many markets, and the price effects rattle all over the place. At the end of the day, if you want to sort this out, you'll have to talk to the Europeans. If you don't think that's a problem, you've never met a European.

Here at home, I think the opportunity for regulatory double-, triple-, or quadruple-dipping, the multiplication of regulatory agencies and access points, is a deliberate result of a political program. That program is commonly known as the New Deal. Prior to the New Deal, you had a regime of exclusive federal jurisdiction and exclusive state jurisdiction. Moreover, that regime made it very clear which of the individual states had authority over any given transaction or firm, under what circumstances. In those circumstances, regulatory double-dipping (or whatever you want to call it) was relatively rare.

The New Deal had three interlocking commitments that cut against that exclusive regime. First, the New Deal's overriding program was a cartel at every level—not just the national level but also in the states. The classic case in that area is *Parker v. Brown*. Second, a political program of cartels at every level demands concurrent state and federal powers over the entire range of economic transactions. Otherwise, regulated firms will sort themselves into one or the other regime. That's the last thing you want. Third, the New Deal ensured that the strictest regulator will always dominate the universe. So, cartels at every level—concurrent powers everywhere—make sure the strictest regulator always wins. Welcome to Felix Frankfurter's constitution. That is the system we have. That is the system we live with.

A system that is consciously made and designed can be consciously unmade and undesigned. The *New York Times* accuses me of wanting to overrule the New Deal. Actually, that is not my program. I want to undermine the New Deal by means of underhanded quasi-constitutional doctrines, and I yield to no one in my endorsement of such doctrines. There is any number of them, but the one I want to talk about today is preemption doctrine, which I think is actually quite instructive. Prior to the New Deal, the Supreme Court's doctrine was what we now call "field preemption." As soon as Congress spoke at all, regardless of intent, states were completely blocked from that area. When the New Deal greatly expanded the scope of the Commerce Clause, the New Dealers asked themselves: "What does that leave of the states? Nothing at all." So, the New Deal tried to compensate for the expansion of the Commerce Clause by throttling back on the preemptive effect of federal statutes. That is called the "presumption against preemption." It is the core of preemption doctrine to this day.

The origin of that doctrine is a case called *Rice v. Santa Fe*, which said that the historic police powers of the states are not supposed to be preempted unless Congress has clearly indicated its intent to do so. Out of the case came the modern preemption doctrines. But it would be useful if people who cite *Rice v. Santa Fe* actually read it on occasion. I have done so, and it turns out it's not a preemption

case all. The statute at issue in that case was the Federal Warehouse Act (as in grain warehouses), which had to be regulated because they were a bottleneck between farms and food processors. They had been regulated at the state level. In 1931, Congress passed the Warehouse Act and said, “Dear warehouse operator, if you want a federal license, you can have one on the following conditions,” and, in that case, state regulation ends; federal regulation is exclusive. With respect to state-regulated warehouses, we don’t preempt anything at all. The Act sought to establish a dual warehousing system, like the dual banking system we now have. The federal law operated only at the operator’s own choice. Nothing at all was preempted. Look at what the Supreme Court did to that statute in this case: despite the fact that the statute said that the federal license would be exclusive, the Court ruled that the states can in some areas still regulate federally licensed operators. Felix Frankfurter, in dissent, would have granted states an even broader scope. His concern was not that Congress was trampling on the states; obviously, it wasn’t. His concern was that the federal regulators had not created a rate-making regime—which is what he really wanted. A regulatory statute without rate-making can’t be a real serious federal regime, and therefore the states had to be allowed to operate on top of the federal statute, even though it said it was exclusive. In short, *Rice* was a desperate attempt to squeeze a perfectly fine pre-New Deal statute into a curious powers framework.

If that’s not the preemption doctrine you want—and I think it isn’t—then what is it? I’ll give you a few guideposts to what I think preemption law ought to look like, and then apply it to two cases. The first principle you want to start with is an anti-circumvention principle. If the direct offense of the statute is prohibited, states shouldn’t be allowed to evade and regulate around it. Second, you want to construe preemption doctrine consistent with the dormant Commerce Clause, or rather with the federalism risks against which the dormant Commerce Clause was supposed to guard. There are three of them. The first is balkanization of the economy. The second is the risk of state discrimination against out-of-state commerce. And the third is the states’ tendency to export the costs of their regimes. If any of those risks are present, I think you ought to read the statute to imply preemption. And if none of these risks are present, you want to cut the states some slack. I think that’s the good sense of this presumption against preemption in historic state powers areas.

I can’t go into the details here, but I’ll give you two quick examples of how I think this shakes out. My first example is antitrust. If you look at cases dealing with preemption in that area, the courts always say, “Well, the Sherman Act is supposed to be supplemental to state regulation.” That’s kind of true. But what the courts meant in the ‘20s when the supplemental language came up was that the Sherman Act regulates interstate conspiracies and the states regulate conspiracies with only in-state effects. (How do I know that? Well, that’s what the Sherman Act says.) What

“supplemental” meant *after* the New Deal is that the states regulate the full range of private commerce and the feds regulate the full range of private conduct. At the end of the day, the feds noodle around with the local taxicab commission and the state of West Virginia regulates Microsoft. Isn’t that a great regime?

Nothing in the statute commands that kind of outcome. If you take seriously the preemption regime of the federalism analysis I’ve sketched, it turns out *Parker v. Brown* is wrong—and that, I think, is the right result. It also turns out that *California v. ARC* is wrongly decided—and I think that’s also true. My second example is securities regulation. The way I read the Securities Act—and I don’t care what the Enforcement Division says—is that there’s already plenty of authority to preempt Eliot Spitzer. Anything that interferes with the national markets—with functioning national capital markets—ought to be preempted, I think, because otherwise the balkanization and cost exploitation risks are just too serious.

I could go on at length, but I won’t. I just will end on this note. Double-dipping in regulatory conflicts in the United States is not a force of nature. It is a deliberate creation, and I think the obstacles to getting rid or curbing it are not at all legal; they’re political. So, we have an Antitrust Modernization Commission which is supposed to study what’s wrong with antitrust. The preemption issue is the big elephant in their lavish quarters, and they’re just ignoring it. Similarly the SEC—and Paul Atkins knows much, much more about this than I do—in the early 1990s looked at the preemption of state Blue Sky laws. Richard Breeden thought that he had the authority to preempt those laws but then didn’t do it. The SEC needlessly waited around until Congress mercifully got around to preempting the states as least in some respects.

My strong suspicion is that there are more things that federal agencies can and ought to preempt now. My advice is to say, once there’s a regulatory crisis and Eliot Spitzer is on the warpath, it’s too late. Under those circumstances, it’s really hard to do. You really have to lay the groundwork for preemptive moves when there’s a little quiet and nobody notices. But when there’s quiet, by all means go ahead and do it.

Thank you.