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ment not to compete) to get around the fact of their desires. We could eliminate the effects of those desires only if there were a duty by firms to invest, with a corresponding government right to require investment. Such a duty would be very difficult to justify. Even then, it probably would not eliminate the effects of these desires completely, because forced investment would doubtless not be as productive, and therefore as job- or welfare-enhancing, as investment undertaken voluntarily.

The key question, then, is whether businesses have a right in any particular instance

to behave as they like. If they do not, the simple fact that they happen to possess certain skills that might lead others reluctantly to let them realize their desires is irrelevant; it does not make the desires any more ethically acceptable. The proper method for determining what acts are right is debate and argument. It is not negotiation. To resolve these arguments—and thus to determine when competition among the states is desirable or reprehensible—the tools of ethical theory that philosophers use are the most appropriate ones. Economic theory is not enough. ■

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## Competition among the States

# A Response

Walter Olson

**S**TEVEN KELMAN BELONGS to the honorable tradition of writers who are eager to convince, but even more eager not to convince for the wrong reasons. He spends most of his article knocking down, after first setting up, one of the leading arguments for his own position. Having cleared the decks, as it were, of the specious reasons for agreeing with him, he unveils what he thinks are the true and good reasons.

WHEN HE DESCRIBES the usual case against competition between the states, Kelman is unflinching in facing its necessary underlying assumption: that businesses should be treated as “outsiders,” whose welfare need not be taken into account in toting up the (mythical) general welfare. Even the most zealous advocates of anti-business measures, although they might regard stockholders as virtual non-persons, might hesitate before putting it that baldly, especially since it is so widely agreed nowadays

that businesses pass most regulatory costs forward to consumers or back to workers. Whether for this or other reasons, Kelman is uncomfortable with this assumption, and eventually abandons it in favor of the view that only the immoral wishes of business ought to be ignored.

Once the proponents of the usual case for preemptive federal regulation have accomplished the spiritual task of achieving complete disregard for the interests of business, they turn to the highly practical task of depriving business of as much of the gains from trade as possible. Kelman acknowledges that everyone agrees business should continue to invest in new plants; the really irritating problem is that many investors receive more than would be absolutely necessary to keep them from giving up the game altogether. As Kelman describes it, the states’ effort to nab every bit of the gains from trade for themselves, and thus deny it to the investor, takes on an ennobling and solemn tone of high moral purpose. That is curious, since so many ethical systems hold that the gains from trade should be shared between

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both traders, and since many, including Marxism, hold one side's denial of all gains from trade to the other side to be a virtual definition of exploitation.

Kelman's example of the drowning man and the buoy-thrower is designed to enlist our sympathy for just such exploitation. Most readers will sympathize with the drowner and say that the buoy-thrower deserves at most a token reward, perhaps a little plaque or newspaper citation, for his extremely valuable service. But several aspects of this hypothetical example are stacked: the unseemliness of haggling over price during an emergency, the ease of throwing a buoy, the presumed innocence of drowners. Changing just a few of these aspects also changes our intuition about denying any of the gains from trade to the buoy-thrower. What if the standard beach rules specified a five-dollar reward for rescues, but the drowner himself held up the rescue to haggle the price down to twenty-five cents? What if the buoy-thrower had crossed the Sahara Desert to reach the drowner's beach, although, having already sunk the effort into coming this far, he would settle for a twenty-five cent reward for actually throwing the buoy? What if the drowner had gotten into the water for some foolish or nasty reason? What if—to drop the drowner example—an inventor had spent long and weary decades perfecting a device that would bring untold benefit to the world, and all the potential buyers conspired to pay him only so much as would barely compensate him for not having pursued the next most advantageous possible career—say, as a day-laborer?

In his buoy-thrower example, and later with his example of talented baby-killers, Kelman makes it clear that the real adversaries from whom the gains from trade must be squeezed and whose interests are to be excluded from the social welfare calculus are not businesses but talented individuals—in a word, producers. This, too, is refreshingly candid. The instant we put producers' interests on a par with everyone else's, it becomes apparent that state governments can benefit from an agreement not to compete only by exploiting their monopoly power over some groups of citizens, whether their own or someone else's. Once we re-import the interests of the pariah producer class into the overall calculus of social welfare, in other words, the states' agreement not to

compete does, indeed, begin to look something like a cartel.

Confiscating business's gains from trade would look less disreputable if it turned out that businesses themselves exercised monopoly power in plant location decisions, and Kelman goes on to suggest that this is the case. There might be something to this view if there were only fifty employers and thousands of states, rather than the reverse, and if those employers had some method (like federal preemption) by which they could bind themselves not to deal with recalcitrant states. But as it is, the only piece of evidence Kelman offers—the extensive face-to-face bargaining between states and businesses over new plant location decisions—can much more plausibly be seen as an example of the states' monopoly power, specifically of the states' successful use of the techniques of price discrimination that Kelman says are “difficult” for them.

### Diverse States Make Bad Cartels

Although Kelman makes no sustained effort to refute the cartel analysis of federal preemption on its own terms, preferring instead to dismiss it as irrelevant to his real concerns, he does take a shot at another argument against federal preemption, the one that cites differing state tastes. States, he admits, do have differing preferences as to the mix of jobs and environmental protection. These “preferences” only in part reflect actual citizen preferences; in part they reflect physical factors like a potential polluter's proximity to vulnerable populations or scenic vistas, or whether the prevailing winds blow pollution out to sea. Still, he says, a cartel agreement among states can give all the states a better deal.

This is not so economically provable as he hopes, if all the states must adopt the *same* standard; it depends, in fact, on just how much their tastes differ. Like OPEC and other cartels, the cartel of states will find that the pricing strategies that suit its high-cost producers do not suit its low-cost producers, and vice versa. In this case, a “high-cost producer” of regulatory laxity, the equivalent of Algeria in OPEC, might be Oregon, which suffers intense trauma at the very thought of a smokestack, while a “low-cost producer,” the equivalent of Saudi

Arabia, might be New Jersey. If Oregon and New Jersey must accept the same level of "cartel output," or national air quality standard, it will be either too lax for Oregon or too strict for New Jersey. The gains from the cartel's monopoly power will then have to be very great to compensate the discontented cartel members for what they see as the "wrong" choice of output level. Otherwise the cartel will not be able to make all its members better off, and it will fly apart. (The cartel among the states, however, can, unlike OPEC, invoke federal power to prevent its members from defecting.)

Cartels whose members have widely varying costs of production can best hold together if they bow to economic reality and have their low-cost producers pay their high-cost producers to shut down. This would mean abandoning the effort to hold Oregon and New Jersey to the same standard, letting industry flow to or stay in the areas where it does the least perceived damage (perhaps the Northeast), and having the latter states pay the rest of the states for their agreement not to compete. The Clean Air Act already maintains such a split standard through its "prevention of significant deterioration" provisions, which keep Oregon from allowing its air to get anywhere near as dirty as New Jersey's. Of course, New Jersey does not pay Oregon to stay out of the competition for industry; that is where the coercive power of the federal government comes in.

Environmentalists are quite willing to maintain a split standard in practice, as embodied in "prevention of significant deterioration," but highly reluctant to admit it in theory. They believe, as Kelman puts it in his introduction, that pollution questions should be decided "on their own merits," but that these "merits" do not include the ways the actual effects of pollution vary according to location. Since states would take those questions into account, on this view, they should not be entrusted with the decisions. It is as if the law were to hold that the location of blasting quarries ought to be decided "on its own merits," that the proximity of music schools was not among those merits, and then that all blasting quarries should have to be quiet enough not to disturb any music schools they might happen to adjoin.

It is not clear whether Kelman considers locational effects, as expressed in states' preferences, to be "merits" of the case. If they are

not, the merits on which he wants us to decide had better be good. It turns out that he wants us to ignore material merits entirely, as being things corruptible and of this world, and focus our minds solely on ethical truths.

### Oranges Sí, Cigarettes No?

At this point the hypothetical examples get even less cheery, as Kelman begins to talk about baby-killers, whom he uses as prototypical rights violators. Kelman's formulation of rights takes in practically no rights to be left alone by the government, but all sorts of rights to the cooperation of one's neighbors. You are a rights violator, it seems, if you contribute to the pollution problem by igniting combustible material, probably even a cigarette. Nor will it help if you have the consent of those upwind at the next desk, since their "right to a safe and healthy workplace" in practice means that they may not agree to work in any other kind. Nor will it even help for you to give up social intercourse of any kind, since you are also violating rights if you are reluctant to shell out your money to equalize the funding levels for old people's services from here to Katmandu.

Kelman ingenuously declares that he has not demonstrated the existence of these rights, that they are all subject to future debate. They certainly are. At least he does not fudge the question of who is to pay for them: citizens and businesses, he announces, will have a "duty" to do so.

Right about here you may begin to suspect that Kelman, like certain medieval monks, believes there is no action so trivial as not to be super-charged with ethical content. In practice, this belief tends to abet the politicization, and resulting government control, of everything whatsoever; society gets barnacled with ersatz "rights," and eventually sinks of their weight. Hence it is not reassuring when, searching for an example of what *is* to escape politicization, what producers *will* be allowed to distribute on the market, Kelman selects the humble orange. What step of the process of bringing oranges to market, exactly, does he intend to leave free of political interference? Hiring migrant workers to pick them? Spraying them for medflies? In order to posit that "producers are doing nothing ethically wrong in growing and offer-

ing oranges for sale," he has to start by "[a]ssuming away for the purposes of the discussion external effects on third parties"—which assumes away practically everything anyway. But if he does not mind disrupting other consenting economic relations, such as the relation between employers and employee, it is hard to see why he sticks at disrupting that between buyer and seller. Why this unwonted concession to voluntary trade?

### Federalism and Government Failure

Yet it is not his statist objectives, but his choice of the level of government to carry them out, that is at issue here. When Kelman sees something he thinks is bad, he wants to fling the nearest and biggest government at it, for fear it will go unpunished otherwise. This is not the common view. Generally we entrust the punishment of those crimes that we fear most to state government, in the evident belief that it does a better job of punishing them than the federal government would. There are no overall federal statutes against murder or mayhem, for example, only statutes covering some special cases like political assassinations. (This may also indicate that the questions on which there is a great moral consensus are *less* likely to be federally preempted than those on which there are differences of opinion; in other words, that federal preemption is resorted to mostly by those who do *not* have a societal consensus behind them.)

Kelman has only partly escaped the old "barking cat" fallacy—the belief that we can make government do any particular set of things we see fit, just as if we could have cats that barked if we really wanted them. The whole theory of "government failure," explored with such great success by scholars these last two decades, is devoted to exploding this fallacy. In fact governments, like domestic animals, have an internal logic of their own, not to be defied by mere force of will. Kelman has overcome the fallacy with respect to state governments: he is not sure he can prevail on Massachusetts to do the right thing, even when it is something as basic as banning baby-killing. But he does believe he can shape the *federal* government to his exact wishes—that he can make it use its power of overriding the states to do

good, without setting in motion forces that will also lead it to do bad. Someday Kelman may encounter a case where he thinks most of the states are trying to do the right thing, but where the federal government is using its preemptive powers, acquired in earlier controversies, on what he considers the wrong side. At that point he may cease to identify so strongly with the federal government's point of view, and may even regret the eagerness with which he helped build up its power.

It could also be, of course, that he does not find it very satisfying to stamp out some practice merely in Massachusetts if it continues elsewhere; the thought that it is going on elsewhere bothers him so much that he is willing, by supporting federal preemption, to risk losing his right to stamp it out even in Massachusetts. (Much of this sort of urge to stamp out faraway practices seems to be at the heart of a lot of support for regulation by international bodies like the United Nations, and many of the arguments Kelman uses will recur in the upcoming battles on those issues.) Most curious, in this respect, is his worry that the baby-eaters will leave his state to abide in another one, even if all the other state is offering is some innocent inducement, rather than the chance to indulge their vice. Shouldn't he bid them good riddance? Wouldn't Massachusetts be better off without them? Or is he less concerned about their vices than he is about his right to go on profiting from the fruits of their labors?

RIGHTS OF EMIGRATION—of persons and, especially, of property—are low down on the list of "human rights" nowadays, when they are acknowledged at all. And probably it is those who favor substantively free and non-coercive arrangements who are most likely to prize the opportunity to "choose laws" by moving from one jurisdiction to another. But emigration rights are the miner's canary of rights in general; they are the first to go when the atmosphere becomes suffocating, and conversely if they are in good health the other rights are probably not in mortal danger. Competition between the states provides content and substance to our right to move ourselves and our property from one state to another. That is why it should be praised as much for its moral as for its practical virtues. ■