

Patent and Other Preemption of Pharmaceutical Price Controls

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As prescription drug prices continue to skyrocket, states across the country are stepping into the regulatory void left by federal inaction. Yet a little-known 2007 Federal Circuit decision—*Biotechnology Industry Organization v. District of Columbia*—casts a long shadow over these efforts. In that case, the court interpreted the Patent Act to preempt state attempts to regulate the prices of patented pharmaceuticals. If read broadly, the ruling could render state drug pricing laws unconstitutional whenever they implicate federally granted patent rights—even in times of emergency or in response to egregious price gouging.

This Article argues that *BIO v. DC* was wrongly decided and that the time is ripe for states to both legislate boldly and challenge the decision's continued validity. It examines how the logic of that decision conflicts with foundational principles of federalism and misconstrues the nature of patents as public franchises—rights granted by the federal government subject to reasonable regulation in the public interest. Viewing the issue through the lens of property theory and constitutional federalism, the Article makes three key contributions. First, it challenges the idea that the Patent Act creates a zone of absolute exclusivity immune from state intervention, especially when states act to protect public health and consumer welfare. Second, it argues that recent Supreme Court decisions, including *National Pork Producers Council v. Ross*, weaken dormant commerce clause objections to state drug pricing laws. Third, it explains why regulatory takings arguments—often invoked in opposition to price controls—fail when applied to patent rights, which are not traditional property but limited-duration government franchises.

Finally, the Article proposes a complementary role for federal legislation: to curb abusive patent practices like evergreening and thicketing, while also preserving room for states to act. Reclaiming state authority in this space is not just constitutionally permissible—it is essential for restoring balance in pharmaceutical markets and reining in excessive drug costs.