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# Empowering States: The Need to Limit Federal Preemption

Erwin Chemerinsky\*

- I. INTRODUCTION
- II. THE REHNQUIST COURT'S INCONSISTENT APPROACH TO FEDERALISM
- III. AN ALTERNATE APPROACH: FEDERALISM AS EMPOWERMENT

## I. INTRODUCTION

My thesis this morning is a simple one. Conservatives are hypocrites when it comes to federalism. On the one hand, throughout American history, they have advocated the need to protect and advance states' rights. On the other hand, conservatives are quick to abandon their commitment to states' rights when it gets in the way of their ideological objectives. Just this year, a conservative Congress took class action suits away from the state courts and put them in federal courts because they like the results they get in federal courts better.<sup>1</sup> It was the most conservative wing of the Republican Party that tried to get federal courts to overrule a single state court's decision in the Terri Schiavo case.<sup>2</sup>

The same hypocrisy is evident in the Bush Administration. The Bush Administration is arguing this term in the Supreme Court that the Federal Insecticide, Fungicide, and Rodenticide Act precludes state law claims with regards to harms from pesticides.<sup>3</sup> The Office of the Comptroller of the

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1. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

2. See Charles Babington & Mike Allen, *Congress Passes Schiavo Measure*, WASH. POST, Mar. 21, 2005, at A01; see also *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005) (denying plaintiffs' motion for a temporary restraining order based upon its holding that a state judge's order to withhold nutrition and hydration did not violate federal statutes or Terri Schiavo's constitutional rights).

3. See *Bates v. Dow Agrosciences L.L.C.*, 125 S. Ct. 1788, 1793 (2005) (citing 7 U.S.C. § 136 (2000)). In a 7-2 decision, the Court vacated and remanded the Fifth Circuit decision that the Act

Currency is trying to take the position that federal law preempts state consumer laws being used in claims against national banks.<sup>4</sup>

I want to focus my remarks on how the Rehnquist Court has treated federalism in preemption cases. I want to argue the same hypocrisies are present there. And I want to make two points. First, I am going to argue the Rehnquist Court has been inconsistent with regard to federalism, using states' rights to narrow Congress's power, but not using a concern over states' rights to narrow preemption. One would think that a Supreme Court that cared about states' rights would want a narrowed preemption doctrine. One way of empowering the states is by restricting the scope of federal preemption. But that has not happened at all. In almost every preemption case, the Rehnquist Court has come down on the side of preemption.<sup>5</sup> And second, I want to offer an alternate vision with regard to federalism that is about empowering government at all levels. One that sees the genius of federalism is having multiple levels of government to deal with social problems. This view broadly construes the scope of federal power, but it greatly narrows the reach of preemption.

## II. THE REHNQUIST COURT'S INCONSISTENT APPROACH TO FEDERALISM

As to my first point, the Rehnquist Court has been inconsistent with regard to federalism. We are all familiar with how in the last decade the Rehnquist Court has used federalism and its concern over states' rights to greatly narrow the scope of Congress's powers. It has done this in many ways. It has narrowed the scope of Congress's commerce power in cases like *United States v. Lopez*,<sup>6</sup> and *United States v. Morrison*.<sup>7</sup> As you know, in *United States v. Lopez*, it was the first time in almost sixty years the Supreme Court found that a federal law exceeded the scope of Congress's commerce law of authority, declaring unconstitutional a federal law that made it a crime to have guns within a thousand feet of a school.<sup>8</sup> In *United States v. Morrison*, the Supreme Court struck down the civil damages provision in the Violence Against Women Act.<sup>9</sup> The provision authorized victims of gender-motivated violence to sue under federal law.<sup>10</sup>

The Supreme Court has similarly greatly narrowed the scope of Congress's power under Section 5 of the 14th Amendment. In *City of Boerne v. Flores*, in 1997, the Supreme Court said Congress, under Section 5 of the 14th Amendment, cannot expand the scope of rights or create new

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preempted state common law actions that are covered under the scope of the act. *Id.* at 1804. The Court held that the Act did not preempt state causes of action. *Id.*

4. Preservation of Federalism in Banking Act, S. 2973, 108th Cong. (2004).

5. See Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1304 (2002).

6. 514 U.S. 549 (1995).

7. 529 U.S. 598 (2000).

8. *Lopez*, 514 U.S. at 561-62.

9. *Morrison*, 529 U.S. at 627.

10. 42 U.S.C. § 13981 (2005); see *Morrison*, 529 U.S. at 627.

rights.<sup>11</sup> Congress only can act to remedy or prevent the violation of rights already recognized by the Court.<sup>12</sup> And such laws have to be narrowly tailored; in the words of the Court, they must be “proportionate” and “congruent” to remedying proven constitutional violations.<sup>13</sup>

The Rehnquist Court has revived the 10th Amendment as a limit on federal power. In *New York v. United States*, the Supreme Court declared unconstitutional the federal Low-Level Radioactive Waste Policy Amendments Act of 1985, which required that every state clean up its nuclear waste.<sup>14</sup> In *Printz v. United States*, the Supreme Court struck down a key provision of the Brady Handgun Violence Prevention Act that required state and local law enforcement personnel to do background checks before issuing permits for firearms.<sup>15</sup>

The Supreme Court in the last decade has tremendously expanded the scope of state sovereign immunity. In *Alden v. Maine*, in 1999, the Court said that the states cannot be sued in state court without their consent, even on federal claims.<sup>16</sup> The Court has tremendously narrowed the ability of Congress to authorize suits against state governments. In *Seminole Tribe v. Florida*, in 1996, the Supreme Court overruled a seven-year-old precedent and held that Congress can authorize suits against state governments only when legislating pursuant to Section 5 of the 14th Amendment.<sup>17</sup> Based on this, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Supreme Court said that state governments cannot be sued for patent infringement.<sup>18</sup> In *Kimel v. Florida Board of Regents*, the Supreme Court said that state governments cannot be sued under the Age Discrimination in Employment Act.<sup>19</sup> In *University of Alabama v. Garrett*, the Court held that state governments cannot be sued under Title I of the Americans with Disabilities Act, which prohibits employment discrimination against people with disabilities.<sup>20</sup>

I recite all these cases quickly to show that the Rehnquist Court’s attention to protecting states’ rights and federalism has not been occasional. It has not been incidental to the Rehnquist Court’s overall agenda. I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that its greatest changes in constitutional law were through the cases that I just mentioned concerning federalism.

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11. 521 U.S. 507, 519 (1997) (holding that Congress exceeded the scope of its authority when it enacted the Religious Freedom Restoration Act of 1993).

12. *Id.* at 519-20.

13. *Id.* at 533.

14. 505 U.S. 114, 149 (1992).

15. 521 U.S. 898, 935 (1997).

16. 527 U.S. 706, 754 (1999).

17. 517 U.S. 44, 72 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

18. 527 U.S. 627, 647-48 (2001).

19. 528 U.S. 62, 82-83 (2000).

20. 531 U.S. 356, 364 (2001).

And so as I said a moment ago, one would think that a Court that really cares about federalism and states' rights would want to narrow the scope of federal preemption. One way of empowering the states is by restricting the preemptive scope of federal law. But that has not happened at all. In case after case, the Rehnquist Court has gone out of its way to broadly construe preemption to strike down state laws. Let me give you several examples of this. One is the case that Dean Starr<sup>21</sup> mentioned in his introductory remarks: *Geier v. American Honda Motor Co.*<sup>22</sup> Alexis Geier bought a 1987 model Honda Accord.<sup>23</sup> She was in an accident and was severely injured.<sup>24</sup> She brought a lawsuit against Honda and argued that the absence of air bags in her car significantly contributed to her injuries.<sup>25</sup>

Honda made that car under a statute and regulations adopted by the Department of Transportation that gave car manufacturers three options with regard to safety devices.<sup>26</sup> One was a passive restraint system that her car contained.<sup>27</sup> Another was air bags that it didn't contain.<sup>28</sup> Honda said that her claim was preempted because it had complied with the requirements of the federal law.<sup>29</sup> But there was a problem with Honda's argument. There was another provision in that same 1987 statute that said, and I quote, "[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under the common law.'"<sup>30</sup> Hard to imagine a clearer savings provision than that, or a clearer statement that a lawsuit such as Geier's should be able to go forward.

But the Supreme Court, in a 5-4 decision, said that Geier's suit was preempted.<sup>31</sup> The Court focused on conflict preemption here.<sup>32</sup> The only possible way of coming to a conclusion of preemption here, is for the Supreme Court to place a strong presumption in favor of preemption, something that seems quite at odds with the commitment of federal and states' rights.

A second case where this is evident is *Lorillard Tobacco Co. v. Reilly*.<sup>33</sup> The State of Massachusetts adopted regulations concerning the placement of tobacco ads.<sup>34</sup> One said that there could not be billboards for tobacco ads within a thousand feet of a school or a playground.<sup>35</sup> Another regulated the

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21. Kenneth W. Starr, Dean and Professor of Law at Pepperdine University School of Law.

22. 529 U.S. 861 (2000).

23. *Id.* at 865.

24. *Id.*

25. *Id.*

26. *Id.* at 874-76.

27. *Id.* at 875.

28. *Id.*

29. *Id.* at 867.

30. *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988)).

31. *Id.* at 866.

32. *See id.* at 874-86.

33. 533 U.S. 525 (2001).

34. *Id.* at 532.

35. *Id.* at 534-35.

height of tobacco ads in stores selling tobacco products.<sup>36</sup> Advertisements in stores had to be a certain number of feet above ground level so as not to be at the eye level of children.<sup>37</sup> Congress adopted regulations with regard to the content of cigarette ads.<sup>38</sup> Specifically, as we all know, any advertisement for cigarettes has to have a warning label about the health harms of cigarettes.<sup>39</sup> The question is, whether that federal law requiring certain content, warnings with regard to cigarette ads, preempts the Massachusetts regulation.<sup>40</sup> The answer to this should be easy. Congress was regulating the contents of warning labels on cigarette ads. Congress was concerned that tobacco companies would confront inconsistent state regulations with regard to warning labels.<sup>41</sup> There is nothing in that federal statute, or any of its legislative history with regard to the placement of tobacco ads. But the Supreme Court in a 5-4 decision concluded that the federal statute preempted the Massachusetts law.<sup>42</sup> Thus, Massachusetts was kept from being able to regulate the placement of ads.

Another example of a case broadly interpreting preemption was the decision a couple of years ago in *American Insurance Ass'n v. Garamendi*.<sup>43</sup> The State of California adopted a law that required that insurance companies doing business in California make disclosures about policies they sold in Europe to Holocaust victims.<sup>44</sup> The California legislature found that insurance companies had 'stonewalled' and failed to provide information about money that they owed under policies issued at the time.<sup>45</sup> The California law was quite limited in its scope, applying only to insurance companies doing business in California now.<sup>46</sup> And all it required was that they make disclosures of the policies they sold between 1920 and 1945.<sup>47</sup> This doesn't conflict with any federal law. It is not preempted under any of the preemption doctrine articulated by the Supreme Court. But the Supreme Court, in a 5-4 decision, found preemption.<sup>48</sup>

The Court found that the California law conflicted with the implied dormant foreign affairs power of the President.<sup>49</sup> I have been a law professor for twenty-five years, teaching constitutional law. I have never

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36. *Id.* at 535.

37. *See id.*

38. *Id.* at 536.

39. *Id.* at 537.

40. *Id.* at 537, 540.

41. *See id.* at 543.

42. *Id.* at 551.

43. 539 U.S. 396 (2003).

44. *Id.* at 401.

45. *Id.* at 408-09.

46. *See id.* at 409.

47. *Id.*

48. *Id.* at 420.

49. *Id.*

heard of the implied dormant foreign affairs powers of the President. The Supreme Court went out of its way here to create a new basis for preemption.

I could give many other examples of the Supreme Court broadly finding preemption, but I think that these three are typical in showing a court that has gone out of its way to broadly construe preemption and limit state authority. In fact, if you put together all of these cases involving federalism, you might come to a cynical conclusion. If it is a business challenge to a federal civil rights law, business wins and the civil rights law loses. Think of how many of the Supreme Court cases dealing with narrowing congressional power have done this in the context of striking down civil rights laws. The Violence Against Women Act, the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, have all been the focus of Supreme Court decisions limiting Congress's powers based on federalism.

On the other hand, if it is a business challenge to a state regulation, business wins. This was the case in all of the preemption cases I mentioned that fit this description. So the pattern is that when there is a challenge to a civil rights statute, civil rights usually loses. But when business challenges state regulations, business wins. It doesn't seem that there is any overarching principle of federalism. This is just a conservative court exercising traditional conservative hostility to civil rights laws and traditional conservative preference for business.

### III. AN ALTERNATE APPROACH: FEDERALISM AS EMPOWERMENT

But what I want to do in my second point is advance an alternative thesis with regards to preemption and federalism. It is an approach that would be much more consistent and much more desirable. This theory is federalism as empowerment. We should change the doctrines of federalism so as to empower government at all levels. The genius in having multiple levels of government is that if one fails to act, another can step in to solve the problem. If one level of government fails to clean up nuclear waste, another is there to make sure that it is done. If one level of government is failing to provide adequate remedies for the victims of gender-motivated violence, another level of government can do so. If one level of government isn't providing an adequate deterrent from unsafe products, another level of government can step in and do this.

What does federalism as empowerment mean? It would mean broadly construing the powers of the federal government, exactly as was done from the mid-1930s until the 1990s. I am not arguing for anything radical here. I am arguing that the approach to the Commerce Clause of the Supreme Court from 1937 to 1995 should again triumph. I am arguing that the view of the 10th Amendment followed from 1937 until 1992 should again be followed. I am arguing that the limits on sovereign immunity that the Court embraced as recently as 1989 should be followed.

With regard to preemption, I think there should be only two situations when there is preemption of state law. One is express preemption. The

other is when federal law and state law are mutually exclusive, so it is not possible for somebody to comply with both. This would then eliminate preemption based on states interfering with the achievement of the federal objective. It would eliminate implied preemption based on the intent of Congress. Even as to express preemption, provisions of federal law that expressly preempt state law should be narrowly construed unless Congress has indicated otherwise.

Narrowing preemption means that in all other instances the state and local governments may regulate as they see fit. If Congress doesn't like what state and local governments are doing, Congress can always step in and expressly preempt state and local laws. But absent such congressional action, state and local governments should be empowered to act. In this way, I think we achieve the optimal level of federalism, empowering government at all levels to deal with society's serious social problems.



