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Empowering States: A Rebuttal to Dr. Greve

Erwin Chemerinsky*

At the abstract level, I think we agree to a large extent; but with regard to specifics, we disagree. I argue overall that we should have government empowered at all levels to deal with social problems. The response is that this limits the ability to restrict government power. I agree with that. That is why I believe that individual rights, and the Constitution's protection of them, are so important. It is why the institution of the judiciary is crucial in enforcing the limits of the Constitution.

I made two points concerning preemption. First, the Rehnquist Court has been inconsistent with regard to federalism. On the one hand, the Rehnquist Court, in the name of federalism, has greatly narrowed the scope of Congress's power. On the other hand, the Rehnquist Court has also narrowed the scope of state power by broadly interpreting preemption.

Dr. Greve had several responses. First, he said that there have been 105 preemption decisions by the Rehnquist Court, and they haven't followed ideology. To the contrary, many of them have been divided exactly along predictable ideological lines. I will just give you an example. *Lorillard Tobacco Co. v. Reilly* was a 5-4 decision that was split along familiar ideological lines,¹ the same split that we saw in *Bush v. Gore*.²

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1. See 533 U.S. 525 (2001). Justice O'Connor delivered the opinion of the Court, Parts I, II-C, and II-D of which were unanimous. See *id.* Parts III-A, III-C, and III-D were joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, Souter, and Thomas. See *id.* Part III-B-1 was joined by Chief Justice Rehnquist, and Justices Stevens, Souter, Ginsburg, and Breyer. See *id.* Parts II-A, II-B, III-B-2, and IV were joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas. See *id.* Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which Justice Scalia joined. See *id.* Justice Thomas filed an opinion concurring in part and concurring in the judgment. See *id.* Justice Souter filed an opinion concurring in part and dissenting in part. See *id.* Justice Stevens filed an opinion concurring in part, concurring in the

But it doesn't really get to my point. My overall point is that the Rehnquist Court has used federalism to strike down many laws, but at the same time the Rehnquist Court has been very sympathetic to business challenges to state regulations. Overall, the Rehnquist Court has been very sympathetic to states' rights when it has been a challenge to a federal law, and not at all sympathetic to states' rights when there has been a preemption issue.

Second, Dr. Greve says that eighty percent of the Rehnquist Court's preemption decisions have been unanimous. But their being unanimous really doesn't tell you anything. Let me give you an example as to why. There was a case called *Crosby v. National Foreign Trade Council* from just a few years ago.³ Massachusetts adopted a law saying that it did not want to have any of the state's money being used to contract with companies that were doing business in Burma.⁴ Burma is a country with a horrible record with regard to human rights. This is the State of Massachusetts deciding how it wants to spend its taxpayers' money. It's hard to think of something more integral to states' rights than that. The Supreme Court unanimously found this unconstitutional.⁵ Is it because the Massachusetts law conflicted with a specific federal statute or treaty? No. Instead, the Court said it was preempted by the general authority of the federal government with regard to foreign policy.⁶ It may have been a unanimous decision, but I still think it was wrong to find preemption in the absence of an express provision in some federal statute or treaty keeping Massachusetts from doing this.

Third, Dr. Greve says that preemption is all about statutory interpretation. Of course we agree that preemption is about statutory interpretation. But what we are talking about here throughout today is how statutes should be interpreted when it comes to preemption. Should we broadly interpret statutes to preempt state and local laws, or should we narrowly interpret statutes to avoid preemption of state and local laws? We would both agree that when there is an express preemption provision that clearly applies, there is preemption. But beyond that, the issue is where do you put the presumption? How do you determine if there is preemption? Just saying that it is about statutory interpretation does not help.

Indeed, my central criticism of the Rehnquist Court's preemption decisions is that they have placed a presumption in favor of preemption and against state authority. This was evident in the cases I mentioned in my opening remarks. For example, it is not possible to reconcile the *Geier* case

judgment in part, and dissenting in part, in which Justices Ginsburg and Breyer joined, and in Part I of which Justice Souter joined. *See id.*

2. *See* 531 U.S. 98 (2000) (per curiam). Chief Justice Rehnquist, with whom Justices Scalia and Thomas joined, concurred in the judgment. *See id.* Justice Stevens, with whom Justices Ginsburg and Breyer joined, dissented. *See id.*

3. 530 U.S. 363 (2000).

4. *Id.* at 366-68; *see also* MASS. GEN. LAWS ANN. ch. 7, §§ 22H, 22J (West 2002).

5. *Crosby*, 530 U.S. at 388.

6. *See id.* at 386.

with a presumption in favor of state authority.⁷ The federal statute specifically said nothing here preempts any common law action.⁸ Notwithstanding that provision, the Rehnquist Court found preemption.⁹ In *Lorillard Tobacco*, the preemption provision was just about the content of warning labels on cigarette ads.¹⁰ The Supreme Court broadly interpreted the law to find preemption with regard to placement of cigarette ads.¹¹ And in the *Garamendi* case, the only way the Supreme Court could find preemption was by creating the implied dormant foreign affairs power of the President.¹²

Dr. Greve argues that there is a real difference between Congress commanding the states and Congress limiting the states. Here, I very much disagree. If Congress is commanding or if Congress is limiting, both are restricting state authority; both have to be looked at from the same perspective. The easiest way to see this is that almost anything can be phrased either as a command or a limit depending on what words you want to choose. Take *New York v. United States*, where Congress commanded the states to clean up their nuclear waste.¹³ But that could just as easily be phrased as a prohibition than as a command. Congress prohibited states from leaving nuclear waste around that was not cleaned up.¹⁴ Command or prohibition; it just depends on the label you want to choose.

Another example is *Printz v. United States*.¹⁵ Dr. Greve says that it is a command. Congress was compelling states to do background checks before issuing permits for firearms.¹⁶ I think it can just as easily be phrased as a prohibition. Congress was prohibiting states from issuing permits unless they did background checks.¹⁷

Similarly, in *Reno v. Condon*, it seems that it is a prohibition against states from releasing driver's license information.¹⁸ The Driver's Privacy Protection Act of 1994 says that state Departments of Motor Vehicles cannot release certain information, such as home addresses, Social Security numbers, and driver's license information.¹⁹ Dr. Greve said that is a

7. See generally *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (limiting state authority).

8. *Id.* at 868.

9. *Id.* at 866.

10. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001).

11. *Id.* at 550-51.

12. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003).

13. 505 U.S. 144, 150-51 (1992).

14. See *id.*

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

16. *Id.* at 902.

17. See *id.*

18. 528 U.S. 141, 144 (2000).

19. *Id.*

prohibition. I think it just as easily can be understood as a command. Congress commanded the states to keep this information secret. Command or prohibition, I think they are interchangeable. To me, what is important is when do allow the states to make the choices, and when not. And I think that we should empower the states to make choices unless there is clear congressional prohibition.

And that goes directly to my second point where I argue for an alternative vision of federalism based on empowerment. I argue that we should give Congress the authority that it had from the mid-1930s to the 1990s with regard to the Commerce Clause, Section 5 of the 14th Amendment, sovereign immunity, and so on. We should allow preemption only if there is express preemption or a conflict between federal and state law. And even that should be restrictively interpreted to situations where federal law and state law are mutually exclusive. Here I think we generally agree. I believe in the dormant Commerce Clause as well. I think that *Marbury v. Madison* basically got it right here.²⁰ I think that, however, what we have to do is interpret the Constitution in light of all American history in the world that we live in today. The world we live in today needs federal authority far greater than anybody could have imagined in 1787. It needs government regulation with regard to health and safety far more than anybody could have imagined in 1787. And I think it is absurd to say, what would the Framers have intended with regard to federal or state relations for car safety or with regard to medical devices? The world was so radically different then. My conclusion is, let us achieve the overall wisdom of the Framers, let us empower all levels of government. If Congress doesn't like what a state and local government has done, Congress has the authority to preempt it. But the absence of express preemption, absent mutual exclusivities, does not preempt state and local laws. Let state and local governments regulate state health and safety.

20. See 5 U.S. 137, 180 (1803) (holding that any law that is in conflict with the United States Constitution is void).