Redefining Federalism

Douglas T. Kendall
Executive Director, Community Rights Counsel

> [T]he true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, *United States v. Morrison*, 529 U.S. 598 (2000), or to protect a State's treasury from a private damages action, *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 160-161 (2001) (Breyer, J., dissenting) (citation omitted).

Federalism, as it is currently debated, focuses almost entirely on a small handful of constitutional doctrines recently revived by the Supreme Court. The Justices have invoked federalist principles to justify the imposition of limits on Congress's authority under the Commerce Clause. *E.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001) (a narrow construction of the federal Clean Water Act avoids concerns regarding federal encroachment on a traditional state power over land and water resources); *United States v. Morrison*, 529 U.S. 610 (2000) (limits on Congress's commerce power is inherent in our federal system); *United States v. Lopez*, 514 U.S. 549 (1995) (Kennedy, J. concurring) (recognizing limits on Congress's commerce power promotes federalism). The Court likewise has relied on federalism to justify its newly restrictive view of Congress's authority under the Fourteenth Amendment. *E.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court also has cited first principles of federalism to justify its resurging state sovereign immunity jurisprudence under the Eleventh Amendment. *Alden v. Maine*, 527 U.S. 706, 730 (1999) (federalism implicit in the constitutional design helps to demarcate the scope of Eleventh Amendment immunity; *College Saving v. Florida Prepaid*, 527 U.S. 666, 690 (1999) (same); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64 (1996) (previously recognized power of Congress to abrogate Eleventh Amendment immunity under the Commerce Clause impaired federalism).

The state and local government community has been deeply skeptical about the wisdom of the Court's narrowing of federal constitutional authority. For example, in *United States v. Morrison*, 529 U.S. 598 (2000), thirty-six state Attorneys General advocated in favor of federal power under the Violence Against Women Act (VAWA). Only Alabama Attorney General William Pryor advocated against federal authority. There is a similar pattern in other recent Commerce Clause cases.[1] Even more remarkably, in the recent Eleventh Amendment case, *Department of Human Resources of*

[1] In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* 531 U.S. 159 (2001), a Clean Water Act case challenging the federal government's authority to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds, eight states filed a brief supporting federal regulation, even though a local government was challenging the rule. Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington as Amici Curiae in Support of Respondents, *SWANCC*, 531 U.S. 159 (2001), *available at* 2000 WL 1369438. Again, only Alabama supported a narrowing of federal power. *See* Brief of the State of Alabama, *SWANCC*, 531 U.S. 159 (2001), *available at*, 2000 WL 1052159 [hereinafter *SWANCC* Brief]. The Court in *SWANCC* ultimately interpreted the Clean Water Act narrowly to avoid the Commerce Clause question. *See SWANCC*, 531 U.S. at 173.

Nevada v. Hibbs,[2] six Attorneys General actually advocated against a claim of state immunity, arguing that states should be held liable for damages actions filed under the Family and Medical Leave Act (FMLA).[3]

This deep ambivalence about the Court's federalism from the purported beneficiaries of these rulings represents a stunning critique of the Court's Commerce Clause and Eleventh Amendment rulings. While supporters of these rulings have denounced the lack of "courage" of state and local officials in pursuing a federalist agenda,[4] this ambivalence, instead, illustrates the wisdom of Justice Breyer's statement in *Egelhoff* (which is quoted at the very beginning of this paper). According to Justice Breyer, the test of a Supreme Court justice's committment to federalism lies not in their willingness to limit federal authority in areas where a federal role is important. Rather, the test of federalist principles lies in the "ordinary diet" of cases that challenge the ability of state and local governments to play an important role in solving the great problems this country faces. Specifically, the test lies in the framework and application of rules that govern the invalidation of state and local laws under the Supremacy Clause and the so-called "dormant" Commerce Clause. Support for this proposition comes from the universal opposition of the local government community to expansive rulings under these doctrines.

Federalism, in other words, needs to be redefined. Federalism is more about protecting local initiatives than it is about limiting federal power. Government power is not a zero sum game, with each level of government fighting against one another over exclusive spheres of operation. Many areas demand action by every level of government. The Supreme Court's most important role in policing federalism lies in its decisions about when and whether the federal government expressly or impliedly has displaced local officials from playing a policy making role.

It is this vision of federalism that is animating a new initiative of Community Rights Counsel (CRC) called "Redefining Federalism." CRC is a non-profit law firm that was formed to help local governments defend local health, safety, and environmental protections from constitutional challenge. Our nearly-exclusive focus over the past 6 years has been defending land use controls from takings challenges. We have recently expanded our focus to include constitutional challenges under the Supremacy and dormant Commerce Clauses. We are optimistic that, with an intensive focus on these issues, the local government community can win important victories in these areas that enable an expanded and more vibrant role for local governments in our federalist system.

Preemption of Local Initiatives Pursuant to the Supremacy Clause

Federal preemption of local initiatives is the quintessential test of federalism. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption cases "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") However the Supreme Court's recent recommitment to federalism principles in other areas has not yet translated into favorable preemption rulings.

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[2] Brief of Alabama, et al., *Dep't of Human Resources v. Hibbs*, No. 01-1368, (*available at* 2002 WL 1974391).
[3] See Brief of the States of New York, Connecticut, Illinois, Minnesota, New Mexico, and Washington as amici curiae, *Dep't of Human Resources v. Hibbs*, 123 S.Ct. 1972 (2003), (*available at* 2002 WL 31427565).
[4] See, Jeffrey Sutton, *Federalism Revived? The Printz and City of Boerne Decisions*, Oct. 17, 1997, *available at* www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fd020103.htm, (arguing that state and local officials need to "develop a little more courage when it comes to litigating these structural issues").

Indeed, states and local governments have lost the majority of preemption cases decided over the last decade and the Court's opinions have given rise to question about whether the presumption against preemption exerts any force on the Court. See e.g. Jeffery A. Berger, *Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 297 Nw. U. L. Rev. 941, 962 (2003) (asserting that in recent cases "the Supreme Court watered down the presumption against preemption to the point that any power it may have had no longer exists.")

However, recent rulings and statements by individual justices suggest strongly that the Court might well be receptive to creative, aggressive arguments that would reshape preemption law in ways that would greatly benefit municipalities. For instance, just a few months ago in *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), an odd coalition of Justices (Ginsburg, joined by Stevens, Scalia, and Thomas) signed on to a dissenting opinion that suggests some receptivity to the notion of revisiting so-called "obstacle preemption." The state laws at issue required disclosure of information regarding Holocaust-era insurance policies, directly touching upon the President's primacy in foreign affairs. Nevertheless, the dissent asserted that it would find no preemption without a clear statement by the federal government disapproving such disclosure requirements. The *Garamendi* dissent harkened back to a similar four-Justice dissent in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), where Justices Stevens, Souter, Thomas, and Ginsburg described the entire doctrine of implied preemption "potentially boundless (and perhaps inadequately considered)." *Id.* at 907.

Recognizing the critical importance of preemption law to local officials, Community Rights Counsel has taken a leading role in advocating against preemption in *amicus* briefs before the U.S. Supreme Court. For example, in *Eyl v. Ciba-Geigy Corp.*, No. 02-1500, we filed an *amicus* brief in support of a petition for a writ of certiorari after the Supreme Court of Nebraska ruled that federal pesticides law, which preempts certain state labeling "requirements," eviscerates state common law protections for victims of certain torts by pesticide manufacturers. Harold Eyl, a municipal employee, was a completely innocent victim exposed to a pesticide called "Total Kill" as he put down gravel on a local playground. The pesticide had been applied the day before and due to puddling from an overnight rain, the pesticide soaked through Eyl's workboots and rendered him permanently unable to walk. He sued the manufacturer for negligent failure to warn. The jury agreed and awarded him compensation for his injuries, but the state high court vacated the award. The court so ruled notwithstanding clear evidence in the legislative history that the federal pesticide statute was not designed or intended to affect state tort liabilty. U.S. Supreme Court intervention was especially appropriate because the Court has sent conflicting signals on whether the term "requirements" as used in express preemption provisions applies to common law claims. Unfortunately, the Court declined to hear the case, leaving in place not only the conflicting signals but also conflicting lower court rulings on the extent to which the federal pesticide laws preempt common law actions.

Similarly, Community Rights Counsel filed an *amicus* brief on behalf of IMLA and the National League of Cities in support of certiorari in *City of Lodi v. Fireman's Fund Insurance Co.*, No. 02-1169. *City of Lodi* presented the question of whether the federal hazardous waste cleanup statute -- the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) -- preempted a municipal ordinance that authorized more protective cleanup standards where CERCLA expressly preserves state and local authority to "impos[e] any additional liability or requirements with respect to the release of hazardous substances." The case involved cleanup of a

toxic contamination site in Lodi described by the California Supreme Court as "an environmental public nuisance" that posed a "tremendous and serious groundwater contamination problem." We argued that the Ninth Circuit's ruling, which found preemption notwithstanding the savings clause, constituted the rawest form of judicial policymaking under the guise of preemption analysis. To our knowledge, no other court had so ruled in CERCLA's twenty-year history. Unfortunately again, the Court declined to review the case, perhaps deciding to wait until other federal appeals courts have a chance to consider and rule on the issue.

In contrast to *Eyl* and *Lodi*, the U.S. Supreme Court recently has agreed to hear a preemption case that raises the question of whether the federal Clean Air Act preempts state and local requirements that motor vehicle fleets purchase clean cars certified for sale in California. *Engine Mfrs. Ass'n v. South Coast Air Quality Management District*, No. 02-1343. Community Rights Counsel is preparing an *amicus* brief with the State and Local Legal Center on behalf of IMLA and a broad coalition of national groups that represent state and local officials. Among other things, we hope to impress upon the Court the important implications the case raises for federalism and the preservation of appropriate state and local officials to protect the health and welfare of our communties from environmental threats.

Invalidation of Local Initiatives Pursuant to the dormant Commerce Clause

A similarly promising outlook lies in cases where local initiatives are invalidated under the "dormant" or "negative" Commerce Clause. The Constitution's Commerce Clause is an express grant of power to the federal government to regulate commerce. The Court has long, however, interpreted the clause to also contain a negative command prohibiting certain state and local legislation even where Congress has failed to legislate on the subject. The core concern of the dormant Commerce Clause is economic protectionism: prohibiting states and local government from imposing burdens on out-of-state companies that do not apply to those companies that reside within state borders. But the doctrine in recent years has gone far beyond this core concern, preempting non-discriminatory regulation that is perceived to impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. See *C & A Carbone, Inc., v. Town of Clarkstown*, 511 U.S. 383 (1994).

While the Justices' votes in dormant Commerce Clause cases are all over the map, the Court's most conservative justices have emerged, curiously perhaps, as the Court's most adamant opponents of the doctrine. In a recent dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* for example, Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, advocated strongly for the entire doctrine to be jettisoned, arguing that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." See 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). In that same case, Justice Ginsburg joined those same three justices in a separate dissent written by Justice Scalia that argues that "the Court's negative Commerce Clause jurisprudence has drifted far from its moorings."[5]

Plainly, there is a constitutuency on the Supreme Court for a reexamination of some of the Court's more aggressive recent cases that use the doctrine to preempt state and local

[5] See also C & A Carbone, Inc, v. Clarkstown, 511 U.S. 383, 410 (1994) (Souter J. dissenting joined by Rehnquist, C.J. & Blackmun, J).

ordinances that, for example, protect family farms and ensure the proper disposal of local wastes. The wisdom of doing so is captured effectively by the closing passage of Chief Justice Rehnquist's dissent in *West Lynn Creamery, Inc., v. Healy,* where he recalls Justice Brandeis' description of states as the "laboratories" of democracy and declares that Brandeis' "observation bears heeding today, as it did when he made it. The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence." 512 U.S. 186, 212 (1994).

This is another area where Community Rights Counsel is becoming active. For example, we are closely monitoring a case called *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), where, in August, a panel of the Eighth Circuit struck down a provision of South Dakota's constitution which prevents corporations from owning farm land as a way of protecting the family farmer. Rehearing has been requested in this case. Assuming it is denied, CRC will likely file a brief in support of Supreme Court review.

Conclusion

The Supreme Court's emphasis on federalism principles in recent decisions is a very hopeful development for local officials, but not because it portends a dramatic reduction in the power of the federal government. While a bare majority of the Court has been willing to establish some limits on the federal Commerce Clause authority, the Court's swing justices appear unlikely to support a radical revision to existing interpretations of federal power. See *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy J., concurring) ("the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."). The Court's commitment to federalism is most important for its potential to trigger a reevaluation of Supreme Court rulings under the Supremacy Clause and the dormant Commerce Clause that have inappropriately stifled local initiatives.