States, Citizens, and Corporations: Do the Justices Care?

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Among the questions raised by the Supreme Court's Term is this: is federalism dead? If you don't think the Court's decisions don't actually raise the question, let's just say I raised it. Either way, the correct answer to the question ("Is federalism dead?") is, we should be so lucky. Federalism has reached its outer limits in areas where it would do some good. Federalism—in the Supreme Court's primitive understanding—is flourishing in areas where it not only does no good but is in fact an absolute menace to the republic. I'll spend the remainder of my time on explaining, as best I can, these incendiary remarks.

Federalism presupposes some distinction between what's national and what's local—between stuff that spills across state borders and stuff that is "purely internal to each state." Judicial federalism means that the Supreme Court has to police the boundary—*both ways*: it has to limit national overreach into internal state affairs, and it has to prevent states from infringing on each other's rights, or on inherently national concerns. If the Court fails to police the boundary either way, you're going to have two federalism problems: national overreach, which this Court occasionally recognizes as a federalism problem; and state overreach, to which this Court is almost entirely obtuse. In fact, the Court's so-called "federalism" posture affirmatively encourages states to exploit each other. If you have trouble envisioning what I mean, think liability crisis—the systematic

expropriation of out-of-state manufacturers by state courts and juries. That, in a nutshell, is out federalism problem.

First, consider the judicial policing against national overreach. The issue has two dimensions: overreach by the Court, and overreach by the Congress. As for the former, the Court has shown zero restraint. In enumerated powers decisions (such as *Lopez* or *Morrison*), the Court routinely describes criminal law and family law as the "traditional province" of the states. I don't much like the "traditional powers" language, but it corresponds roughly to federalism's logic: by and large, the exercise of those powers doesn't affect anyone outside a given state. At the same time, nothing is to be gained from yanking those issues on to the national level.

However: when the states exercise those powers in a way that offends Tony Kennedy's or Barbra Streisand's sensibilities, the Court will cast its federalism concerns aside. Of course, you might say that that comes with the Supreme Court's job of protecting fundamental rights. But the Court will regiment the states even when *no* fundamental rights are at stake; that is the explicit holding of yesterday's decision in *Lawrence*, the Texas sodomy case. We don't have a moral federalism; what we have is judicial imperialism.

Occasionally, the Court deploys that imperialist impulse against the Congress; whatever policing of national power we have is attributable to that inclination. This, of course, is the core field of "federalism," as that term is commonly understood. But I think the

Rehnquist Court's doctrines have played themselves out—not because of any constitutional impediment, but because they bump up against elementary political constraints. Two examples:

- On the Commerce Clause, the Court has settled on the formula that Congress may enact any and all "economic" statutes, meaning statutes that obviously regulate voluntary economic transactions (either in-state, or across state lines). With respect to non-economic statutes, the Court applies a "show-me" test: they will withstand constitutional scrutiny so long as Congress can demonstrate a plausible and reasonably direct effect on interstate commerce. The Court will not back away from this test. But it won't significantly extend it, either. A few statutes—the Endangered Species Act, perhaps, or the Child Support Recovery Act—may present hard cases. But regardless of how those cases turn out, the Court will leave the regulatory state intact.

- In cases dealing with the protecting of states "as states" against federal impositions, the Court has drawn a similarly sharp line. (I include Eleventh Amendment cases, Section 5 cases, and statutory "clear statement" cases in this category.) The Court will protect states—in the name of federalism—against suits by purportedly disadvantaged but "non-suspect" groups, such as the elderly, the handicapped, and the religious. (That was clear even before this past Term.) The Court will permit such lawsuits, and set states' rights concerns aside, when highly "suspect" classifications are involved.

We know, of course, that racial minorities are a "suspect" class. A harder question is, or was, whether women are comparably suspect. Personally, I've always thought that women are extremely suspect, especially when they show up on the Supreme Court. And sure enough: *Nevada v. Hibbs* held that states can be sued for money under the Family and Medical Leave Act, on the theory that the act is a Fourteenth Amendment statute to combat sexual "stereotypes." Chief Justice Rehnquist in that case wrote a completely content-free opinion—which is what he always does when he wants an issue of the table. The true meaning of *Hibbs* is the articulation of a hard line: women and minorities into the Fourteenth Amendment lifeboat, everyone else out. (There is actually a third suspect class under the Fourteenth Amendment, which you'll never guess. If you care to ask me during Q&A, I'll give you the answer to this trivia question.) You can have a long discussion about the constitutional merits of this line. What I think is obvious is the political calculus: the Court has concluded that it shouldn't burden its federalism with allegations that it might be bad for women, let alone blacks.

On balance, that is probably right. It does mean, though, that the Court's states' rights jurisprudence has run its course. With the possible exception of a few mop-up cases, the law is clear. Everyone knows what the rules are on both sides of the line.

In short: in terms of limiting national overreach, federalism has reached an equilibrium point. The next step over the line would embroil the Supreme Court in a big debate over the integrity of the regulatory state or the legacy of the civil rights era. There are no votes for any such enterprise, and there's no constituency.

Now look at the second issue, protection against state overreach into national or sister state concerns: here, there's no equilibrium point. Last year in this forum, I predicted that the preemption of state law—under federal statutes, or directly under the Constitution—would become federalism's frontier and most fertile field. Lo and behold, that has come to pass. But there's no easily discernible pattern or theoretical coherence. For example, *Hillside Dairy v. Lyons* brought a somewhat surprising re-affirmation of the dormant Commerce Clause—which, interestingly, had not appeared in a Supreme Court case since 1997, and which at least two Justices (Scalia and Thomas) have denounced as a nationalist invention.

The Term also brought a rather remarkable preemption of state punitive damages verdicts. In *State Farm v. Campbell*, the Court held that punis may not exceed compensatory damages when the latter are substantial; that the ratio between punis and compensatory damages may not exceed single digits in some other, unspecified set of cases; and that cases of personal injury or egregious corporate conduct may warrant a multiple digit ratio. In case you wonder where that corporate trimester solution came from, it's right there in the due process clause. The Term also brought a reaffirmation of the so-called "complete preemption" doctrine (*Beneficial National Bank v. Anderson*); and, in the *Garamendi* case decided earlier this week, the preemption of a California insurance regulation by a mere executive agreement with foreign nations.

For every one of these nationalist, pro-business rulings, though, there's a pro-states, pro-trial lawyer preemption ruling. In *Kentucky v. Miller*, the Court re-empowered states to

regulate vast segments of the health insurance market. (It's an ERISA case, so nobody paid attention; but the practical impact is actually quite significant.) In *Sprietsma v. Mercury Marine*, the Court allowed a state product liability lawsuit to go forward and rejected the corporate defendants' claim that administrative actions under the Federal Boat Safety Act preempted such lawsuits. The *Norfolk & Western Railroad* case brought a startling expansion of asbestos liabilities under the Federal Employers Liability Act. And in *Pharma v. Walsh*, the Court sustained a Maine statute under which the state threatens to exclude pharmaceutical products from the sizeable Medicaid market unless the manufacturers agree to make price concessions for drugs sold to *non*-Medicaid patients. The Court rejected both a dormant Commerce Clause challenge and what it thought of, albeit wrongly to my mind, as a statutory preemption challenge.

Now of course, you want to be careful in inferring all too much from the mere results—pro- or anti-business, pro- or anti-state—in these cases. Statutory preemption cases in particular hang on—well, the statutory language. One would want to examine that language, and the judicial reasoning, before jumping to the conclusion that the Court as a whole, or any individual justice, is being hopelessly inconsistent. My sense, though, is that there is a emerging pattern—not stable yet, but emerging, and perhaps cementing.

Look at the 5-4 voting pattern in *Garamendi,* the case concerning the Holocaust Victim Relief Act: the four dissenters were Scalia, Thomas, Ginsburg, and Stevens. In other words, the hard right and the hard left. The center voted for preemption. You find almost the same coalition (plus Justices Breyer and Souter) in *Pharma,* the Medicaid preemption

case. You also find it in the *State Farm* punitive damages cases and its precursor, *BMW v. Gore*—with the important proviso that Justice Stevens will consistently vote against statutory preemption but *for* judicial preemption under the due process or dormant Commerce Clause. In *Norfolk & Western Railroad*, the hard right/hard left quartet was joined by Justice Souter, thus eking out a narrow pro-liability majority over the four centrists. Again: it's not a consistent pattern, but it happens more and more frequently.

Why this hard left, hard right coalition? Justice Ginsburg and Justice Stevens have rarely met a trial lawyer they didn't like, and so they vote against federal preemption (at least when Congress has the gall). Justice Thomas and Justice Scalia, on the other hand, more and more often vote their constitutional and pro-federalist intuitions or principles—even if a vote against preemption turns the Constitution into a trial lawyers' bill of rights.

I predict that the center cannot hold—because part of the center is about to retire sooner or later, and because the center really has only one defense of its broad preemption position: we can't hand the trial lawyers the keys to the national economy. That's true. But it's not a credible constitutional argument, and it will crumble under the rhetorical force of the Court's own federalism rhetoric. Put differently: "federalism" will increasingly serve to expand the states' rights to exploit each others' citizens and businesses—through liability lawsuits that redistribute wealth from out-of-state defendants to in-state plaintiffs; through settlements among attorneys general that have the same logic and effect; and by taxing and regulating transactions in other states or, for that matter, foreign countries—all, again, to beggar neighbors.

Now why is it that Justice Thomas and Justice Scalia, of all people, are driving us into this unappetizing mess? They confront a problem not entirely of their own making. Of course, the modern doctrines that limit state exploitation—expansive doctrines of implied preemption, the creative due process theory in *State Farm*, and so on—are basically made up. But we have and need something like those doctrines because they serve as a functional substitute for the actual constitutional doctrines that used to restrain state aggression—but which were wiped out by the New Deal. Let me explain.

In 1842, the Supreme Court heard an unassuming little case, involving parties and transactions in different states, that eventually turned on the question of what constitutes a "negotiable instrument." There was uniform agreement on two points. First, cases involving parties from different states belong in federal court, because state courts would invariably be biased against out-of-state citizens. Second—and this was the holding in the case—federal courts can't simply follow state law (on "negotiable instruments" or anything else), because citizens need protection not only against the personal bias of state judges but also against the doctrinal bias of state law. So interstate disputes would have to be governed by what later came to be known as federal common law.

The 1842 decision, of course, was *Swift v. Tyson*, and it bears emphasis that it was unanimous. It was written by Justice Story, a rabid nationalist; but it was signed by all others, including Justice Daniel—a cotton planter and nutcase Calhounist. Absolutely

everyone understood that the protection of states and their citizens against sister-state aggression, bias, and exploitation was federalism's irreducible baseline.

Over time, *Swift v. Tyson* sprouted constitutional doctrines to back up that basic intuition—a dormant Commerce Clause as a subject-matter limitation against state legislation; a Full Faith and Credit Clause that compelled states to recognize sister-state law; an equal protection clause that protected business against rank state discrimination; and so forth. The details of those doctrines need not concern us. What matters is this: under the old regime, the Holocaust Victims Relief Act would be dead, fifteen different ways, before the preemption question even arises. The *State Farm* punitive damages case or the *Sprietsma* case would never have be litigated under state law, let alone before a state court. Least of all would the Supreme Court look to state law in construing a federal liability statute, as this Court did in *Norfolk & Western*. Under those rules, business lobbies and lawyers wouldn't have to dream up creative preemption doctrines. They wouldn't have to.

Of course, *Swift* was overruled in 1938 in *Erie Railroad*—the heart and soul of the New Deal revolution, and the source of all rot in American law. There, Justice Brandeis staked out a states' rights position that would have given John C. Calhoun an absolute fit. But it's the unquestioned basis of modern public law. Federal courts are now bound by state law and state courts, which operate extraterritorially and with the rankest, uncontrolled bias. But not one of the sitting justices is willing to re-visit the New Deal revolution. I doubt that they even recognize the problem of state aggression as a constitutional

problem. In fact, I'm positive that the Justices, one and all, are dead-set to deny the problem. They did so in the *Hyatt* case Dan Schweitzer mentioned earlier.

But of course, the rot in the foundation doesn't go away simply because you choose to look the other way. And so, what the Supreme Court does when state courts go bad and state aggression rears its head in a particularly ugly way—when the Florida Supreme Court elects its very own president, when Utah threatens to lay waste to the insurance industry, when California starts regulating transactions between German insurers and German citizens, in Germany, in 1942—is to yank in some made-up doctrine.

So long as a return to the actual Constitution is foreclosed, or is thought to be foreclosed, the choice is this: preserve the doctrines that substitute for the real thing, even if they're completely ad hoc; or else, denounce those doctrines as pure nationalist inventions—even at the risk of fomenting a state of mutual aggression that is the precise opposite of the Founders' design. Justice Scalia and Justice Thomas have chosen the latter path. The result is the ultimate paradox: a federalism that turns the original federalism on its head.

To be fair, the alternative seems equally unattractive: enforce phony doctrines, just to protect favored constituencies (in this case, business)? On balance, though, that course seems preferable. It would enhance national welfare; if we can preempt Iraq, we ought to be able to preempt the trial lawyers. By virtue of being completely unprincipled, opportunistic, and constituency-oriented, it would bring the Court's preemption law in line with the rest of its so-called jurisprudence.