Federalism Spring: Evolution of the Federal-State Balance of Power

John F. Cooney, Venable LLP

In recent months, both the Supreme Court and the Obama Administration have taken actions that have recognized the important role the states play in our political system. In four cases, including three decided by a liberal majority, the Court discussed the circumstances in which it is appropriate for a state to act independently of federal control. The Administration also showed, through its policy statements and actions, an interest in promoting state authority, at least when a state is prepared to exceed the level of protection provided by the federal government. These reinforcing impulses might signal a generational shift in views about the benefits and consequences of permitting the states to play more active part in addressing the nation's problems.

In discussing the proper role of the states, four considerations are paramount. On the one hand, the states are closer to the people and might be able to develop laws that better respond to local conditions. Moreover, the sheer number of states permits a greater degree of experimentation than is possible at the federal level. This might lead to the discovery of solutions for national problems - for example, Massachusetts' requirement that all adults purchase health insurance, which underlies the same element in the Administration's health care proposal. On the other hand, in some circumstances a uniform national rule is important to the effective operation of the economy. In addition, some states have a long history of discrimination, which raises concerns that recognition of state authority might in practice result in further denial of rights to racial and ethnic minorities.

The fact that liberal members of the Supreme Court and a liberal Administration have been matter of fact about their willingness to apply federalism principles suggests, for starters, that the states have made substantial progress in overcoming their legacy of discrimination. Under current circumstances, the potential benefits from autonomous state action might appear more attractive than in prior decades because they are not offset by such a counterweight. In particular, in an environment where state legislatures have been more willing to adopt broader consumer protections than Congress, the Administration appears concerned that opponents may utilize the doctrine of conflict preemption as a vehicle to attack the constitutionality of these state measures in federal court. It, therefore, has directed the Executive agencies to proceed cautiously to avoid reinforcing such an initiative.

Actions by the Supreme Court

Since the spring, the Supreme Court has issued four decisions that recognize the authority of the states in our political system. Two cases held that states were not

preempted from applying their own laws to provide consumers with a greater degree of protection than is available under federal law. In each decision, the Court recognized the benefits that might result from a determination that the Congress had permitted the states to play a role, despite efforts by the responsible federal agency to prohibit state involvement. In two other cases, the Court addressed the appropriate lifespan of a federal remedy to cure prior state violations of constitutional or statutory law, and the circumstances under which federal controls must be revised or rescinded because of changes in the underlying facts.

Rejection of Preemption Challenges to State Action

In *Wyeth v. Levine*,[1] the Supreme Court considered whether the preemption doctrine precluded a state common law products liability claim by a consumer who lost her forearm because of administration of a drug through a technique the risks for which were not disclosed on a label approved by the Food and Drug Administration. The manufacturer argued the Food and Drug Act preempted the lawsuit. The manufacturer relied heavily on the FDA's position, set forth in the preamble (but not the text) of a rule, that Congress had granted the agency exclusive authority to determine the risks that must be disclosed on a drug label, and that state courts therefore could not consider damages actions based on other risks not addressed on the label.

Justice Kennedy joined the four liberal members of the Court in rejecting the preemption claim. The majority held that state courts may entertain common law failure-to-warn claims of the type that the FDA had sought to preclude. It found that Congress had long been aware that injured consumers frequently sought redress from drug manufacturers through state court damages actions, and that if Congress had intended to prevent patients from relying on such state lawsuits and recovering damages for their injuries, it would have done so explicitly. In reaching this conclusion, the Court gave no weight to the FDA's contrary interpretation of its own statute, because a statement in a preamble to a rule does not purport to have the force of law.

Cuomo v. Clearing House Association[2] considered the constitutionality of an effort by the New York State Attorney General to investigate several national banks for alleged racial discrimination in mortgage lending. The issue before the Supreme Court was whether Congress had explicitly prohibited the states from enforcing their general consumer protection laws against federally-chartered banks through a provision in the National Bank Act that states, "[n]o national bank shall be subject to any visitorial powers except as authorized by federal law."[3] The Comptroller of the Currency argued that in adopting this provision in 1864, Congress had categorically prohibited the states from enforcing their consumer protection laws against national banks. The Comptroller also argued that the Court should defer to an explicit agency rule that interpreted the law as prohibiting independent state enforcement actions under any circumstances.

The four liberal Justices joined Justice Scalia in holding that, although granting the Comptroller exclusive "visitorial powers," Congress had not expressly preempted the

states from enforcing against a national bank an anti-discrimination law whose substantive terms were identical to the counterpart federal law, or from inspecting bank documents in its enforcement action that the Comptroller might otherwise review in assessing the bank's safety and soundness. The majority distinguished between the "sovereign-as-supervisor," where the government exercises administrative powers to inspect bank records without obtaining a court order; and the "sovereign-as-law-enforcer," where the government exercises compulsory process through formal court procedures. Based on this difference, the majority held that New York could obtain compulsory process and enforce its fair lending law against the national banks in its capacity as "sovereign-as-law-enforcer," provided it acted through a lawsuit and not through the administrative subpoena that former Attorney General Spitzer had employed. In reaching this decision, the Court refused to defer to the Comptroller's interpretation of the National Bank Act. Although recognizing that there was "some uncertainty" in the law, the majority found that it could "discern the outer limits" of the term "visitorial powers" even through "the clouded lens of history."

Limits on the Lifespan of Federal Controls over State Functions

Some of the most significant disputes within the Supreme Court over the meaning of federalism have occurred in the context of federal remedies that control core state activities in order to ensure compliance with federal laws that prohibit discrimination. In June 2009, the Court issued two decisions that addressed whether federal restrictions over state functions had outlived their justification, and whether the courts should order authority returned to the states.

In *Horne v. Flores*,[4] the Court considered when changes in the underlying facts require revision of federal injunctions in "institutional reform litigation" - lawsuits that attack a state or local government's failure to comply with federal laws governing public services, such as education or health care. Federal court decrees had long governed the English language-learner program in Arizona's public schools. These decrees, rather than elections and the legislative process, effectively established the state's educational policy and budget allocations. One faction of Arizona officials, including the leaders of the state legislature, sought relief from the court orders, arguing that circumstances had changed, and that continued implementation of the decrees was not warranted and adversely affected the public interest. Another group of officials, including the governor, defended continued enforcement of the federal orders and the educational policies embodied in them. With the four liberal Justices dissenting on the facts, the majority held the lower courts could not restrict their inquiry to whether the state had complied with the precise terms of the existing orders, but rather were required to consider whether the injunctions should be modified because of changed circumstances.

The Court's decision was based on the core principle that the continuing enforcement of an injunction must be justified by an existing violation of federal law. The majority noted judicial control over the delivery of state governmental services trumps the democratic electoral process and displaces the legislative policy function of allocating appropriations among competing programs. It also emphasized the disagreement

among elected Arizona officials to illustrate the risk that a federal injunction could be used by one faction to lock its policy views into law, and to prevent successors from changing those decisions.

Northwest Austin Municipal Utility District v. Holder[5] considered whether a critically important federal statutory remedy may continue to be imposed after the underlying facts have changed. The Supreme Court was asked to consider the continuing constitutionality of Section 5 of the Voting Rights Act of 1965. Section 5 requires prior federal approval for all changes in election procedures by every jurisdiction in a covered state with a history of racial discrimination in voting. As reauthorized in 2006, Section 5 applies to any state that used a forbidden test or device to disenfranchise voters in 1972 or had less than 50% voter registration or turnout in the Nixon-McGovern presidential election. Under this coverage formula, nine states, primarily in the south, and parts of five other states are required to obtain federal preclearance for any changes in electoral districts or voting procedures.

Eight Justices, including the four liberals, agreed that the burdens imposed on the states by Section 5 must be justified by current evidence of discrimination. While recognizing the invaluable role that Section 5 played in combating racial discrimination and by finally vindicating minorities' right to vote a century after adoption of the Fifteenth Amendment, the Court expressed concern that the statute's coverage formula was based on facts that were nearly four decades old. In particular, the current version of the law does not take into account significant changes that have occurred in the south since 1972. This year also antedates the subsequent surge in Hispanic immigration, which means the acts of discrimination that Section 5 is intended to redress might not be concentrated in the jurisdictions subject to the preclearance requirement, but might occur in unregulated jurisdictions.

Since the Court cannot itself update the coverage formula, it faced a difficult choice between holding Section 5 unconstitutional or sustaining a federal remedy that intrudes upon state sovereignty based on relatively little evidence of current discrimination. Rather than resolving that momentous issue, the eight Justices found an obscure statutory pathway that allowed the Court to avoid the constitutional issue at this time, and thereby gave Congress an opportunity to revise Section 5 to eliminate the need for a constitutional decision. The majority opinion put Congress on notice, however, that what was previously unthinkable might happen, and that this foundation stone of the civil rights revolution might be found unconstitutional in a subsequent case if the coverage formula is not amended to conform to more current evidence of continuing discrimination.

Steps by the Obama Administration To Promote State Authority

As the Supreme Court was issuing its decisions, the Obama Administration took parallel actions to protect the states' authority to enforce their own laws and to reduce future claims by federal agencies that the states were constitutionally prohibited from acting independently. On May 20th, the President issued to the Heads of all Executive Agencies a Memorandum entitled "Preemption," which

recognized, "[t]hroughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government."[6] He instructed his appointees not to adopt rules purporting to preempt state actions absent clear statutory authority, and to review all rules with preemptive effects issued in the last 10 years to ensure they were lawful.

To date, the Administration has taken two highly visible actions to avoid preemption objections and promote the ability of the states to adopt more aggressive laws to protect their residents. On June 30, 2009, the Environmental Protection Agency granted California's request for a waiver of preemption that otherwise would occur under the Clean Air Act. That waiver will permit California and 13 other states to apply more stringent greenhouse gas emissions standards to new motor vehicles than those that apply in the other states.[7] This decision will impose substantial costs on automobile manufacturers, by requiring them to both modify their production plans to produce vehicles that meet different emissions standards and develop new technologies so that higher fuel economy cars will be safe.

Further, in late June, the Administration submitted to Congress proposed legislation to create a Consumer Financial Protection Agency. The bill would repeal existing laws under which federal bank regulatory agencies have asserted that states are expressly preempted from enforcing their consumer protection laws against federally-chartered institutions. The proposal also would eliminate application of the doctrine of conflict preemption to state consumer protection laws, by providing that a state law would not be deemed preempted where it affords consumers a greater degree of protection than is provided under the counterpart federal law. The Administration thereby supported the principle of independent state enforcement authority, as long as the level of protection exceeds that provided by the federal agency with jurisdiction. In reaching this conclusion, the Administration rejected industry arguments that this approach would balkanize national financial markets by subjecting their lending decisions to 51 different sets of laws.

Conclusion

Events in the spring of 2009 suggest that something important has happened concerning perceptions of the appropriate role of the states in our system of government. The four Supreme Court decisions show that after a half century of concern that recognition of state authority might in practice give a green light to racial and ethnic discrimination, members of the Court, liberal and conservative alike, are reconsidering the benefits that might result if the states play a more active role in our political system. As the states have built a record of non-discriminatory application of their laws in recent decades, the potential advantages of innovation at the state level, and the tailoring of laws to local needs rather than reliance on a one-size-fits-all system, have emerged from the shadows and obtained greater recognition.

In parallel with the Court, the Executive Branch has taken actions that promote more vigorous participation by the states in solving policy problems, most notably by its decision to grant California a waiver of conflict preemption that will allow the state to

force development of technology for fuel-efficient, low-emission motor vehicles. In the Progressive era, the Supreme Court applied the doctrine of substantive due process to invalidate state laws that provided consumers and workers with a greater degree of protection than was provided at the federal level. It thereby frustrated the principle that, in Justice Brandeis' words, "a single courageous state may . . . try novel social and economic experiments without risk to the rest of the country."[8] The Obama Administration apparently has concluded that the country is again in a period in which some states, left to their own devices, would adopt laws that provide a greater degree of consumer protection than the federal government. Congress has discretion to waive conflict preemption when it chooses. To obtain the benefits of state experimentation, the Administration has internalized Justice Brandeis' aphorism, and moved proactively to reduce, to the extent it can, the degree to which conflict preemption may be invoked to seek invalidation of the forthcoming generation of state laws.

John F. Cooney is a partner with Venable LLP in Washington, D.C. and formerly served as Deputy General Counsel of the White House Office of Management & Budget.

---

[1] *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). In December 2008, the same five-Justice majority held in *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), that a state law prohibiting deceptive advertising for cigarettes was not preempted by the Federal Cigarette Labeling and Advertising Act, which the Court interpreted to prohibit only state court lawsuits alleging that tobacco advertising did not properly warn consumers of the adverse health effects of smoking. *Altria* is consistent with the thrust of the four Supreme Court decisions discussed in the text that address a greater degree of state autonomy. *Altria* breaks little new ground, however, because the decision largely involved interpretation of language in prior Supreme Court opinions that already had discussed the preemptive effect of federal cigarette labeling statutes.

[2] *Cuomo v. Clearing House Association*, 129 S. Ct. 2710 (2009).

[3] 12 U.S.C. § 484(a).

[4] *Horne v. Flores*, 129 S. Ct. 2579 (2009).

[5] *Northwest Austin Municipal Utility District No. One v. Holder*, 129 S. Ct. 2504 (2009).

[6] "Preemption," Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 22, 2009).

[7] California State Motor Vehicle Pollution Control Standards, Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009). *See Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that EPA has authority to regulate greenhouse gases as air pollutants under the Clean Air Act).

[8] Memorandum on" Preemption," quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Justice Brandeis dissenting).