

SPEECH

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KEYNOTE ADDRESS[†]

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I am very, very grateful to be able to participate this way. I hope that Willamette will invite me back sometime in the future, and I promise I will be there in person and look forward to the chance to get to know you then in person.

What I've been asked to do is to talk for about 45 minutes and then take questions concerning the Rehnquist Court's federalism revolution. I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that its greatest changes in constitutional law have been with regard to federalism. And yet I'd suggest that there've really been three Rehnquist courts with regard to federalism, each quite different, and it's not at all clear which of these will triumph in the long term.

The first Rehnquist Court I would date from its inception in 1986 to perhaps 1992 and 1995, when the first federalism cases came down. In the first years of the Rehnquist Court, there wasn't any significant protection of federalism. There were no federal laws struck

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down for infringing states' rights; no laws were invalidated as exceeding the scope of Congress's power or as violating the Tenth Amendment. In fact, during this era, the major sovereign immunity case, *Pennsylvania v. Union Gas*, in 1989, expanded the ability of Congress to authorize suits against states. So I think the first years of the Rehnquist Court were marked by a lack of protection of states' rights.

The next era of the Rehnquist Court might begin in 1992 with *New York v. United States*, or even in a more pronounced manner in 1995 with *United States v. Lopez*. It continues until a couple years ago, I'd say until a few years ago, around 2002, 2003, and this is the period we most think of when we focus on the Rehnquist Court's federalism revolution. As I'm going to talk about in detail, during this time period, the Supreme Court significantly limited the scope of Congress's authority under the Commerce Clause under Section 5 of the Fourteenth Amendment. The Court revived the Tenth Amendment as a limit on federal power, and the Court dramatically expanded the scope of state sovereign immunity.

Yet, even during this era, at the height of the federalism revolution, not all of the Rehnquist decisions were in favor of states' rights. One would think that a Supreme Court that cared about states' rights would narrow the scope of the federal preemption doctrine. But in case after case, even during this period, the Supreme Court was finding federal laws to preempt state laws. The Supreme Court was broadly interpreting federal preemption doctrines, seemingly at odds with a court that professed to be concerned about federalism and states' rights.

The third era of the Rehnquist Court I would date in 2003 and 2004, perhaps continuing into 2005, when the Rehnquist Court has not extended its federalism rulings. Now, I'm not saying the pendulum has swung back in the last couple of years; none of the earlier decisions have been overruled or limited in any way. But what is evident is that at least in the last couple of years, the Supreme Court has not extended these decisions any further. So what I'd like to do is to trace these three eras of the Rehnquist Court over the places where the Court has considered federalism.

And there are four places that I've already alluded to where the Court has considered federalism. One is the scope of Congress's powers. The second is the Tenth Amendment as a limit on federal powers. The third is sovereign immunity. The fourth is preemption. What I want to do is look at each of these four areas and show how the Rehnquist Court has varied over time as to each of them. Then I

want to conclude by just offering some final thoughts as to where we may be going in the future with regard to federalism.

Well the first theme of the Rehnquist Court's federalism revolution has been a significant limit in the scope of Congress's powers. This is been particularly evident with regard to Congress's powers under the Commerce Clause and Congress's power under Section 5 of the Fourteenth Amendment. With regard to the Commerce Clause, the most famous case, of course, is *United States v. Lopez*. In *Lopez*, in 1995, the Supreme Court declared unconstitutional the federal Gun-Free School Zones Act. Federal law made it a federal crime to have a firearm within 1,000 feet of a school. Alfonzo Lopez was an 11th-grader who took a gun with him to school in San Antonio. He was convicted for violating the law. The Supreme Court, in a 5-4 decision, declared the Gun-Free School Zones Act unconstitutional. Chief Justice Rehnquist wrote the opinion for the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. It's worth pausing for just a moment, noting that almost all of the pro-states' rights cases with regard to the Rehnquist Court were the same five justices in the majority, and almost all of them were 5-4 decisions, with the same four justices—Justices Stevens, Souter, Ginsberg, and Breyer—dissenting. Chief Justice Rehnquist writing for the Court said, "It's axiomatic under the Constitution that our Congress has limited powers. Therefore, the Commerce Clause has to be interpreted so that it's limited, so it doesn't give Congress unrestricted authority."

Chief Justice Rehnquist said Congress can regulate under the Commerce Clause in any one of three situations: First, Congress can regulate the channels of interstate commerce. I think of the channels of interstate commerce as the places where commerce goes on—the highways, the waterways, the Internet. Obviously, that wasn't at stake in *United States v. Lopez*. Second, Chief Justice Rehnquist said that Congress can regulate the instrumentalities of interstate commerce and persons or things in interstate commerce. The instrumentalities of interstate commerce are obviously the things that facilitate commerce—trucks, and planes, telephones, and the Internet. Congress can regulate persons or things in interstate commerce. Chief Justice Rehnquist pointed out that there is no requirement of proof that the gun traveled in interstate commerce in order for the Gun-Free School Zones Act to apply. He implied, of course, that if Congress created such a jurisdictional element, then the law would be constitutional. Then third, he said, Congress can regulate activities that have a substantial effect on interstate commerce. Only your decisions post-

1937 Supreme Court rulings at times said that Congress can regulate if there's a substantial effect on interstate commerce, but other times the Court said that Congress can regulate so long there's an effect on interstate commerce. Chief Justice Rehnquist noted the differences in the formulations and then said, "We choose substantial effect as the test." Now for those of you who are law students in the room, don't write exam answers like that. You get a low grade if you simply give a conclusion without reasons, which was all that Chief Justice Rehnquist did.

The paradigm example I think of Congress being able to regulate based on a substantial effect on interstate commerce is a case called *Wickard v. Filburn*, from the early 1940s. Congress passed a law that regulated the amount of wheat that farmers could grow for their own home consumption. A farmer challenged the law and said that what he grew for his family to eat didn't have any effect on interstate commerce. The Supreme Court though upheld the law and ruled against the farmer. The Supreme Court said when it looked at all of the wheat that all of the farmers grew for home consumption, cumulatively there was a substantial effect on interstate commerce and thus Congress could regulate it.

I am sure you remember that the Supreme Court upheld key provisions of the 1964 Civil Rights Act, based on the same reasoning. Title 2 of the 1964 Civil Rights Act that prohibits discrimination on the basis of race by hotels or restaurants was adopted by Congress in its Commerce Clause authority. The Court in cases like *Heart of Atlanta Motel, v. United States*, *Katzenbach v. McClung*, the Ollie's Barbeque case, upheld the federal law saying that if they looked at all the discrimination on the basis of race across the country, cumulatively there was a substantial effect on interstate commerce.

Well the Chief Justice in *Lopez* said that none of these requirements were met by the Gun-Free School Zones Act. The Court rejected the argument that guns near schools taken cumulatively have a substantial effect on commerce to justify Congress to regulate, and thus the law was declared unconstitutional.

It's hard to describe how much this dramatic change imposed in 1937 on constitutional law. It was immediately and widely recognized. From 1937 until April 26, 1995, until April 26, 1995, when *Lopez* was decided, not a single federal law was declared unconstitutional as exceeding the scope of Congress's commerce power. Then when *Lopez* was decided, it opened the door to literally dozens of federal laws being challenged. Not many federal laws have since

been struck down based on *Lopez*. The most significant case of that sort was *United States v. Morrison* in 2000. *Morrison* involved the civil damages provision of the Violence Against Women Act. It is a statutory provision that allowed victims of gender-motivated violence to sue their assailants under federal law. Congress had found that violence against women cost the American economy billions of dollars each year. Congress said that cumulatively there was a substantial effect on interstate commerce. The Supreme Court in a 5-4 decision declared this unconstitutional. Again, Chief Justice Rehnquist wrote for the Court, again joined by the same justices with the same as in dissent in *Lopez*.

Now, the difference between *Morrison* and *Lopez* is that there was an exhaustive legislative history with the Violence Against Women Act. It did show that, taken cumulatively, violence against women has a substantial effect on the American economy. But Chief Justice Rehnquist said that when Congress is regulating noneconomic activity, like sexual assaults, then substantially that cannot be based on cumulative impact. The Court said that if the cumulative impact is enough, then Congress can literally regulate anything.

Since *Morrison* in 2000, no federal law has been struck down. But that doesn't mean that the Court has ignored the Commerce Clause during this time. In a couple of cases, the Supreme Court narrowly interpreted federal statutes to avoid Commerce Clause issues. In *United States v. Jones* in 2000, the Court said that the federal Arson Act could not be applied to arson of a dwelling because to do so would raise serious constitutional doubts, and the statute should be interpreted to avoid constitutional doubts. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, a year later, the Supreme Court said they would not allow the federal Water Pollution Control Act to be applied to intrastate land solely because of the presence of migratory birds. The Court said that to do so would raise serious questions, serious constitutional doubts under the Commerce Clause, and to avoid these, the law was seen as not applying.

So those are what I would describe as the second era of the Rehnquist Court, the period from 1995 until 2001, when the Court was very much limiting the scope of Congress's Commerce Power. But if you looked at what I called in my introduction the third era of the Rehnquist Court, the Court hasn't been imposing these limits. I point you to two cases—one about the Commerce Clause and one about the spending power. The Commerce Clause case is one from

two years ago, *Pierce County v. Guillen*. There's a federal statute that says that if a local government does a traffic survey as part of seeking federal highway funds for traffic improvement, whatever the local government learns is protected from discovery. To make this more specific, there were a couple of tragic accidents at intersections in the state of Washington. By coincidence, as to both of these intersections, the local governments have recently done traffic surveys as part of applying for federal funds for traffic improvements: new stoplights; widening the roads; and the like. The individuals who were injured at the intersections and the estates of those who had been killed brought a lawsuit against the local government for its failure to properly maintain the intersections in a safe manner. The plaintiffs then sought from the local government, in discovery, the traffic surveys that they'd just done. The local governments invoked the federal statute that said that the traffic surveys were exempt from discovery. And it's obvious why Congress passed this law. Congress didn't want there to be a disincentive to the local governments from doing such traffic surveys. Congress worried that if the surveys were available in discovery, then local governments might not do it at all, rather than apply for federal highway money.

The Washington State Supreme Court declared the federal law unconstitutional. It's not that often that state supreme courts declare federal statutes unconstitutional. The Washington State Supreme Court here said that Congress had no authority to tell Washington State courts what was discoverable or not discoverable in state court litigation. The Washington State Supreme Court said that this exceeds the scope of Congress's powers. The Supreme Court two years ago in 2003 unanimously reversed the Washington State Supreme Court. The Supreme Court in *Pierce County v. Guillen* said that the law was within the scope of Congress's Commerce Clause authority.

Justice Clarence Thomas wrote the opinion for the Court. He said Congress under the Commerce Clause has the authority to regulate the channels of interstate commerce. He said roads and highways are the classic channel of interstate commerce, so Congress can regulate them.

One more example I would give for what I'm calling this third era of the Rehnquist Court, the last couple years, isn't about the commerce power but of the spending power. It's a case called *Sabri v. United States*, from just the spring of 2004. Many commentators have predicted that just as the Supreme Court has limited the scope of Congress's commerce power and Congress's Section 5 power, so will

it limit the scope of Congress's spending power. Well, it hasn't happened, at least not yet. *Sabri* involves a federal law that says that if an entity receives federal funds, bribery of its officials is a federal crime. Bribery of government officials at the local level and state level is a federal crime, so long as the government gets federal money, even if the bribery has nothing whatsoever to do with the federal program.

Well, that's exactly what went on in the *Sabri* case. Some individuals worked for a local government. They had no contact at all with federal money. But the entity they worked for had federal funds for some of its other operations. The individuals took bribes. They were convicted under the federal law. They brought a challenge, and they said Congress under the spending power can't extend its authority so far as to say that even individuals having nothing to do with federal money are covered by federal criminal statutes. The defendants said that the "necessary and proper" clause of Article I of the Constitution just doesn't stretch that far. The Supreme Court unanimously upheld the federal statute and its application and ruled against the criminal defendants.

Justice David Souter wrote for the court. He said that when Congress gives money, it can protect that money. The "necessary and proper" clause gives Congress the authority to do so. Justice Souter said that dollars are fungible. If the local government loses money in one part of its operation, then that's going to affect the parts of the operation that are receiving federal funds.

Now, it's striking that the Supreme Court upheld this federal law, even more striking that the Court did so 9-0. Not in any way imposing a limit on the spending power. And so, you see the pendulum not swinging back, but swinging no further in the states' rights direction.

The other area that I want to talk about with regard to Congress's powers being limited concerns itself with the authority under Section 5 of the Fourteenth Amendment. But I want to put that off for a moment to when I get to the sovereign immunity cases, because that's really where the Court has dealt with defining Congress's authority under Section 5 of the Fourteenth Amendment.

So I said I wanted to look at four areas with regard to federalism. The first was limits on Congress's power, and I think I've shown you how the Court has at least had these different approaches or different results over the varying times. The second area I want to look at con-

cerns the Tenth Amendment. In the first third of the twentieth century, the Supreme Court used the Tenth Amendment to reserve the zoning activities to the states. Those who have studied Constitutional Law will remember cases like *Hammer v. Dagenhart*, the Child Labor case, in which the Supreme Court struck down a federal law clearly within the scope of Congress's commerce power that prohibited the shipment in interstate commerce of goods made by child labor. The Court said it violated the Tenth Amendment. The Court said the Tenth Amendment left production for the exclusive control of the state governments.

From 1937 until 1992, only one federal law was found to violate the Tenth Amendment, that was in *National League of Cities v. Usery*, in 1976. But that decision was overruled less than a decade later, in 1985, in *Garcia v. San Antonio Metropolitan Transportation Authority*. The Rehnquist Court did not return to the Tenth Amendment in its first few years of existence. *Garcia* was in 1985, and William Rehnquist became Chief Justice in 1986. The Tenth Amendment does not re-emerge until 1992, in the first major states' rights decision of the Rehnquist Court, a case called *New York v. United States*.

Congress, at the urging of the National Conference of Governors, adopted the federal Low-Level Radioactive Waste Disposal Act. Federal law required that every state clean up its nuclear waste by 1996. Any state that failed to do so in that time would take title to the nuclear waste, and then would be liable for any harms that they caused. A challenge was brought to this, and the Supreme Court in a 6-3 decision declared the Low-Level Radioactive Waste Disposal Act take-title provision unconstitutional. Justice Sandra Day O'Connor wrote for the Court. She said Congress here is conscripting, commandeering the states, forcing them to adopt laws and enact regulations to clean up nuclear waste. The Supreme Court said it violates the Tenth Amendment for Congress to do this. Justice O'Connor said expressly, it doesn't matter how compelling the reason is; Congress cannot conscript or compel state governments.

The Court followed this up in 1997 in a case called *Prince v. United States*, which involved the constitutionality of the key provision of the Brady Handgun Control Act. The Brady Act required state and local law enforcement personnel to do background checks before issuing permits for firearms. Two sheriffs in the state of Arizona brought a challenge to this, and they won in the Supreme Court, this time in a 5-4 decision, Justice Scalia wrote for the Court, joined

by Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Thomas. Justice Scalia repeated what *New York v. United States* had said—that it violates the Tenth Amendment for Congress to conscript or commandeer the states; the Supreme Court said that's what Congress is doing in the Brady Handgun Control Act, and that's unconstitutional.

What is interesting is that if you think about the laws declared unconstitutional, they're all so unquestionably socially desirable—keeping ex-felons from having guns, doing background checks, requiring states to clean up their nuclear waste, preventing guns near schools, creating a civil cause of action for violence against women. Could anyone deny the desirability of these statutes? And yet, the Supreme Court invalidated each of these.

Interestingly, *Printz* in 1997, which is now eight years ago, was the last Supreme Court case to find a federal law to violate the Tenth Amendment. The only other Tenth Amendment case found no violation, and it was from 2000; it was well before I've dated this last phase of the Rehnquist court, though it would fit well with the decisions. The case is *Reno v. Condon*. It involved the federal statute, the Driver's Privacy Protection Act, to prohibit the state department of motor vehicles from releasing personal information about individuals, such as home addresses or social security numbers. It turns out that many state DMV's were releasing this information; many were selling the information. The inspiration for the law came when a disturbed individual in California, by the name of Robert Bardo, got the home address of an actress, Rebecca Schaeffer, and stalked and ultimately murdered her. Bardo got the home address through the California Department of Motor Vehicles.

Congress passed the Driver's Privacy Protection Act, a bill sponsored by California Senator Barbara Boxer, to deal with this situation. The state of South Dakota argued that it violated the Tenth Amendment. The United States Court of Appeals for the Fourth Circuit agreed and struck down the law. The Supreme Court unanimously reversed and upheld the law. Chief Justice Rehnquist wrote the opinion for the Court. He said this is different from *New York* and *Prince*. In those cases, Congress was putting an affirmative duty on state and local governments. Here, Congress is prohibiting harmful commercial behavior. He said besides, this is a law that does not apply only to the states; it applies to any private entity that has this DMV information.

These distinctions do not seem very persuasive to me. Whether something is an affirmative duty or prohibition just seems to be a matter of characterization. In *New York v. United States*, it could have been characterized just as a prohibition of states having nuclear wastes that were not properly cleaned up. In the context of *Printz*, it was a prohibition of states issuing firearms without background checks. In the context of *Reno v. Condon*, it could be put as an affirmative duty; you could say that Congress was putting an affirmative mandate on the states to keep the drivers' license information secret.

And as to the latter distinction, does it really matter that the law applies a bit to private entities? The purpose of the Driver's Privacy Protection Act was to regulate the *state* department of motor vehicles. The fact that it also had some effect on private entities seems incidental at best. And yet, you see with regard to the Tenth Amendment, the last case, *Reno v. Condon*, did not overrule the earlier ones but it did not extend it, either.

The third area that I want to talk about and trace what's happened with the Rehnquist Court concerns sovereign immunity. And here we see perhaps the most dramatic changes in the law. One way in which the Rehnquist Court has significantly expanded sovereign immunity is with regard to forums in which it can be invoked. The Eleventh Amendment provides sovereign immunity for states in federal court. But what about if a state government is sued in some other forum? The Eleventh Amendment surely does not apply there. Well the Court considered in *Alden v. Maine* whether state governments can be sued in state court without their consent. You might remember this case. Probation officers in the state of Maine claimed that there was overtime pay for the state of Maine under the federal Fair Labor Standards Act. They sued the state to get the overtime pay they were owed and the suit was filed in federal court. The case was thrown out by the federal district court based on the Eleventh Amendment. So the probation officers then sued in the Maine state court. State courts have concurrent jurisdiction with federal courts through claims in the federal Fair Labor Standards Act. But the Supreme Court, in a 5-4 decision, ruled that state governments have sovereign immunity and cannot be sued in state court without their consent. Familiar split among the justices. Justice Anthony Kennedy wrote for the court here, joined by Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas. Justice Kennedy's opinion began by acknowledging that there is no provision in the Constitution which be-

stows sovereign immunity in state governments, but Justice Kennedy said that it is unthinkable that the states would have ratified the Constitution if they thought they would be consenting to suits in state court whenever there is a federal law violation. Justice Kennedy says that the silence of the Framers is because they assumed that states could not be sued.

I always find arguments on silence unpersuasive. Maybe Justice Kennedy is right, that the Framers did not discuss at the constitutional convention, the state ratifying conventions that states could be sued in state court because they just assumed the states could not be sued. Maybe, though, they were silent because they assumed that states *could* be sued. They assumed that the Constitution was the supreme law of the land and trumps all other law. Or maybe, as I believe, the Framers were silent because the issue of suing states in state court just did not come up. And since it did not come up, they did not discuss it. Justice Kennedy says though that state governments have sovereign immunity, and sovereign immunity means that a state court cannot hear a claim against the state government, even based on federal law.

At the oral argument in the Supreme Court the Solicitor General of the United States, Seth Waxman, said to the court, how can we ensure the supremacy of federal law, if states cannot be held accountable in any forum, federal or state? The Supreme Court, in Justice Kennedy's opinion, addresses that. Roman numeral three of the opinion focuses on it. In Justice Kennedy's exact words, and this is almost a verbatim quote is that "the protection of states from suit in state court does not carry with it the concomitant right to violate federal law." He stressed that states do have the duty to obey federal law. But he then said that trust in the states provides an adequate assurance that states will comply with federal law. He says trust in the good faith of states provides the assurance that the constitutional laws in that state will be the supreme law of the land.

Can you imagine in the 1950s or 1960s, at the height of the Civil Rights movement, the Supreme Court saying, "Well, we don't need federal court enforcement of desegregation orders; we'll just trust the good faith of the state governments." James Madison said that if people were angels, there would be no need for a constitution. There'd be no need for a government, either. There are times when state governments will violate federal law, intentionally or otherwise. And to say that there is no forum available that gives them license to do so with impunity. I think *Alden v. Maine*, especially this para-

graph in it, is one of the most revealing of the Rehnquist Court's federalism decisions.

Just a few years later, in 2002, in *Federal Maritime Commission v. South Carolina State Port Authority*, the Supreme Court said state governments cannot be sued in federal administrative agencies without their consent. Again, the court faced this on the broad principle of sovereign immunity.

The other way in which the Court has expanded sovereign immunity is lessening the ability of Congress to authorize suits against state governments. Here I want to show you how there really have been three different eras of the Rehnquist Court. Before we get to the Rehnquist Court, I want to point out that the initial case in this era was a case called *Fitzpatrick v. Bitzer*, in 1976. There the Supreme Court said that state governments may be sued for violating Title 7 of the 1964 Civil Rights Act, which prohibits employment discrimination on the basis of race or gender or religion. Then, Justice Rehnquist wrote the opinion for the Court. He said Congress applied Title 7 to the states through its power under Section 5 of the Fourteenth Amendment. He said since the Fourteenth Amendment was meant to limit state sovereignty, since the Fourteenth Amendment came after the other amendments, if Congress legislates under Section 5 of the Fourteenth Amendment it can then authorize suits against state governments.

Well, in the first era of the Rehnquist Court, and again I date this from 1986 to the mid-1990s, the Supreme Court expanded the ability to sue state governments, increased Congress's authority to permit suits against states, but didn't protect state sovereign immunity. A key case I mentioned in my introduction was *Pennsylvania v. Union Gas*. There, in a 5-4 decision, the Supreme Court ruled that Congress, under any of its powers—like the Commerce Clause, or spending power—could authorize suits against state governments so long as the law in its text was clear in doing so. In that case, the Court said that a federal environmental statute could be used to sue state governments.

But in the middle era of the Rehnquist Court, between 1996 and 2002, the Supreme Court greatly narrowed the ability of Congress to authorize suits against state governments. In *Seminole Tribe v. Florida* in 1996, the Supreme Court explicitly overruled *Pennsylvania v. Union Gas*. The Court said that Congress can only authorize suits against states when acting under Section 5 of the Fourteenth Amendment, and not under any other congressional powers. You might wonder, what happened between 1989 and 1996 that caused the Court

to reverse itself? Did the Court in those seven years find some musty history of the Eleventh Amendment that showed that it had gone wrong? Did the Court see that *Pennsylvania v. Union Gas* did not work well in practice? No, the difference was the change in the composition of the court. As I mentioned, *Pennsylvania v. Union Gas* was a 5-4 decision; the five in the majority were Justices Brennan, Marshall, Blackmun, White, and Stevens. The four in dissent in that case were Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. Between 1989 and 1996, Justices Brennan, Marshall, Blackmun, and White left the Court. Most significantly, Justice Marshall was replaced by Justice Thomas, and Clarence Thomas cast the fifth vote along with the four dissenters from *Pennsylvania v. Union Gas* in *Seminole Tribe* to overrule *Pennsylvania v. Union Gas*.

So the Court says in *Seminole Tribe*, Congress can authorize suits against states only when it's acting under Section 5 of the Fourteenth Amendment. A year later, in *City of Boerne v. Flores*, the Supreme Court significantly narrows the scope of Congress's authority under Section 5 of the Fourteenth Amendment. Section 5, as I am sure you know, is a provision that authorizes Congress to adopt laws to enforce the Fourteenth Amendment. In *City of Boerne v. Flores*, the Supreme Court dramatically restricted the scope of Congress's powers under Section 5. *City of Boerne* involved a federal statute, the Religious Freedom Restoration Act. In 1990, the Supreme Court had narrowly interpreted the scope of the Free Exercise Clause in the First Amendment.

In a case coming from Oregon, a case called *Employment Division v. Smith*, the Supreme Court very restrictively interpreted what is protected under the Free Exercise Clause of the First Amendment. Congress in 1993 almost unanimously adopted the Religious Freedom Restoration Act. It sought to restore by statute religious freedom that had previously been under the First Amendment. In *City of Boerne v. Flores*, in a 6-3 decision, the Supreme Court declared the Religious Freedom Restoration Act unconstitutional. Justice Kennedy, writing for the Court, said that Congress, under Section 5 of the Fourteenth Amendment, cannot create new rights or expand the scope of rights. All Congress can do is act to remedy or prevent violations to rights already recognized by the Courts. Such laws have to be narrowly tailored; in the words of the Court, the laws have to be proportionate and congruent to any proven constitutional violations. The Court said that the Religious Freedom Restoration Act was Congress expanding the scope of rights, creating new rights; it was Congress in essence trying

to overturn a Supreme Court decision. The Court said under *Marbury v. Madison*, this isn't permissible.

Well, I and other commentators in 1997 immediately noted the intersection of *City of Boerne v. Flores* and the decision from a year earlier, *Seminole Tribe v. Florida*. *Seminole Tribe* says that Congress can only authorize suits against states if it is acting pursuant to Section 5 of the Fourteenth Amendment, and then *City of Boerne* narrows the scope of Congress's powers under Section 5. The intersection of these two decisions became evident within a couple of years. In 1999, in *Florida Prepaid v. College Savings Bank*, the Supreme Court said that state governments cannot be sued for patent infringements. Congress in the early 1990s had amended the patent laws to be explicit that states could be sued for violations, but the Supreme Court, 5-4, declared this unconstitutional. Chief Justice Rehnquist writing for the Court said that Congress had not proven pervasive patent violations by state governments so states cannot sue. I think of this in very concrete terms. Imagine a hypothetical law professor who has recently joined the faculty, say, of Duke Law School. Imagine that this professor writes some books that law students sometimes use. Imagine that the state university copies these books and sells them to the students at less than publishers' price. Imagine that this professor is saving the royalties for his hypothetical four children's college education. He can't sue the state, can't get his royalties. He can sue the officers for an injunction to stop the violation in the future, but he cannot sue the state government.

The next year, in 2000, in *Kimel v. Florida Board of Regents*, the Supreme Court said that state governments cannot be sued for violating the federal Age Discrimination and Employment Act. Justice O'Connor writing for the Court said that the statute prohibits much that would not violate the Constitution, therefore, it exceeds the scope of Congress's power under Section 5 of the Fourteenth Amendment.

In the next year, in 2001, in *University of Alabama v. Garrett*, the Supreme Court said that state governments can't be sued for violating Title 1 of the Americans With Disabilities Act. Title 1 prohibits employment discrimination against people with disabilities. There was a voluminous history to the Americans With Disabilities Act. Justice Breyer attached to his dissent a 36-page Appendix listing all the references in the Appendix to discrimination against people with disabilities. But Chief Justice Rehnquist's majority opinion says it's not good enough. He says a lot of it is anecdotal. Some is about local governments and they are not protected by sovereign immunity. He

said that besides that, these are not instances of unconstitutional state behavior, and unless Congress demonstrates pervasive unconstitutional behavior Congress is not going to be able to act.

Well, those cases certainly indicate broad sovereign immunity, limited constitutional authority to permit suits against states, but in the last two years, the Rehnquist Court has upheld the ability of Congress to authorize suits against states governments. In May 2003, in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court said that state governments can be sued for violating the family leave provisions of the Family Medical Leave Act. The family leave provisions of the Family Medical Leave Act required that employers give employees unpaid leave time for family care purposes. The Supreme Court, in a surprising 6-3 decision, said state governments can be sued under this provision. Chief Justice Rehnquist wrote the opinion for the Court. He said Congress was concerned about gender discrimination when it adopted this law. Congress was concerned that because of social roles, women more than men would suffer from the lack of family care in the workplace. He said gender discrimination gets intermediate scrutiny under the Constitution. He said that this is different from age or disability, that get only rational basis review. He said that since there is more exacting judicial review as to gender, Congress has more latitude to act.

In many ways this is puzzling. The Family Medical Leave Act is gender-neutral; it applies to both men and women. Hibbs in this case is male. There is little mention by Congress of gender discrimination as the rationale for this lawsuit. There is certainly no proof whatsoever, on the part of Congress, of unconstitutional state discrimination based on gender because of the lack of family leave. And that was the requirement the Court has articulated in *Garrett*. It seems that when one looks at *Hibbs* compared to the earlier cases, if it is a kind of discrimination, that gets heightened scrutiny, congress can authorize suits against states without needing proof of constitutional violations. If it's a kind of discrimination that gets only rational basis review, then almost no amount of proof is enough.

In May 2004, in *Tennessee v. Lane*, the Supreme Court said that state governments could be sued under Title 2 of the Americans With Disabilities Act when the fundamental right of access to the courts is implicated. Title 2 of the ADA says that state and local governments cannot discriminate against people with disabilities in government programs, services, and activities. You might remember that Lane is a paraplegic who was a criminal defendant. He had to literally crawl

on his knees and hands to get to a second-floor courtroom because it wasn't accessible to those with disabilities. Justice Stevens said that there is a fundamental right of access to the courts that, when it is implicated, state governments can be sued based on *Hibbs*. So, the Court says in *Hibbs* and *Lane*, when it is a type of discrimination or a right that gets heightened scrutiny, Congress has more latitude to act.

But this is puzzling. Why should Congress's power under Section 5 of the Fourteenth Amendment be determined by the level of scrutiny that the Court uses? Moreover, what about other applications of Title 2 of the Americans With Disabilities Act? What if a prisoner suffers on the basis of disability? Usually it is only rational basis review in prison. Can prisoners sue? There is already a split in the Ninth Circuit and the Eleventh Circuit on that question. And what about other federal statutes? For instance, there is now a case pending en banc in the Second Circuit, as to whether state governments can be sued for violating a 1982 amendment to Section 2 of the Voting Rights Act, that prohibits election practices that have a disparate impact against minorities. Now, *Hibbs* and *Lane* did not overrule the earlier cases, but they did not extend sovereign immunity. The pendulum did not swing back, but did not swing any further, either.

The fourth and final area that I want to talk about—and I'll do so briefly—concerns preemption. I think it is interesting that when scholars and judges talk about federalism, they focus on the first three aspects that I've paid attention to—Congress's power, the Tenth Amendment, sovereign immunity. But there is another aspect of federalism that should be, but really is part of these conversations. That's preemption. As I said in my introduction, one would think that a court that cares about states' rights would want to narrow federal preemption, to leave more latitude for state and local governments. But that has not been the Rehnquist Court throughout its history. And here I would not draw a distinction among phases of the Rehnquist Court.

I'll give just a few examples. You might remember *American Honda v. Geyer*. Alexis Geyer bought a 1986 model Honda Accord. She got in an accident and was seriously injured. She sued Honda and said that the absence of airbags was responsible for her serious injuries. Honda argued that her claim was preempted, that there were regulations for the 1986 model year that said that manufacturers had a choice as to safety measures. They could choose airbags, but they could choose passive restraint systems as well. Honda said they had a passive restraint system. Well, the law that Honda was invoking had

a savings clause, and it said that “nothing in this law should be seen as preempting any other claim that anyone has.” That would seem, then, to say that Geyer should be able to go forward, no preemption. But the Supreme Court in a 5-4 decision, with a majority opinion by Justice Breyer, said that Geyer’s claim was preempted. The Court, in essence, read the savings clause out of the Constitution.

Lorillard Tobacco v. Reilly involved the placement of tobacco ads. It said, for instance, that tobacco ads could not be within 1000 feet of a school or playground; that places that sold tobacco products had to put point-of-sale ads at least 5 feet above ground level, to not be at eye-level with children. There’s a question though: Was this preempted by the federal law that required that cigarette advertising have warning labels? The Supreme Court 5-4, with the same split we’ve seen throughout the federalism cases, found that the Massachusetts law was preempted. The Supreme Court said that the federal regulation that requires that all ads have warning labels was meant to stop states from regulating cigarette ads in any way.

But just as Justice Stevens said in his dissent, the purpose of this federal statute was to make sure that there weren’t conflicting requirements as to the *content* of the warning labels. There’s no indication whatsoever that Congress meant to preclude the states from regulating *location* of tobacco ads. That wasn’t what the federal law was about; it was just the content of the warning labels. Nonetheless, the Supreme Court found preemption.

One more example with regard to preemption, and I could give many, is a case two years ago, *American Insurance v. Garimendi*. The State of California passed a law that said, “Insurance companies doing business in California that issued policies during the holocaust must disclose what those policies were.” The European insurance companies have stonewalled, refusing to disclose the policies they had during the holocaust, or refusing to pay up on them. So California adopted a law applicable only California companies, only those doing business in California, and all it required was disclosure. The Supreme Court in a 5-4 decision declared the California law preempted. The court relied on the implied dormant foreign-affairs power of the President. I’ve been teaching Constitutional Law for 25 years. I’d never heard of the implied dormant foreign-affairs power of the President. But based on this, even in the absence of any federal regulation, the court found the state law preempted. Again, one would think that a court that cares about states’ rights would want to narrow the scope of federal preemption.

Now, what's interesting is, why have there been three different eras of the Rehnquist court? What explains the rulings of the last couple of years, especially with regard to the commerce power or Congress's authority to permit suits against state governments?

Maybe I'm making too much of just two years of decisions. Maybe we'll see that the Court is going to go back to enforcing the commerce power. This term the Supreme Court has before it a case called *Ashcroft v. Raich*. It involves whether the Congress can criminally prohibit and punish cultivation and possession of small amounts of marijuana for medicinal purposes. A challenge is brought that this law exceeds the scope of Congress's commerce power authority. The case was argued in December 2004, and I predict we'll get a decision sometime in the next couple of months.

Now, will the Court follow the decisions of the last couple of years, or will it again be limiting the scope of Congress's commerce clause authority? Now, it may be that I'm right, that there is a shift in the Rehnquist Court. Perhaps it's because this group of justices has gone as far as it wants with regard to limiting Congress's power and invoking the Tenth Amendment or expanding sovereign immunity. Maybe it's that the scholarly criticism of these decisions had some effect. I've heard some suggest that *Bush v. Gore* might be responsible, that the sharp criticism of *Bush v. Gore* has caused the Court to perhaps retreat a bit, especially in these very conservative areas.

In conclusion, what's the future likely to bring here? Well, I think that the November 2004 election is likely to be quite important. Had John Kerry won on November 2, then the prospect is that he would have replaced one or two or three justices, and certainly if Chief Justice Rehnquist steps down, as many predict. Had John Kerry replaced Rehnquist, with someone of the views of say—Breyer, or Ginsburg, or for that matter Souter or Stevens—then we might have seen 5-4 decisions just overruling all of the restrictive Rehnquist Court pro-federalism, pro-states' rights decisions. Justices such as Stevens and Souter say they're ready and willing to overrule the sovereign immunity cases as soon as they get a fifth vote. But of course, it's not going to be John Kerry who picks the replacements for William Rehnquist, or if John Paul Stevens, or Sandra Day O'Connor leaves, the replacements either in the next four years. It is going to be George W. Bush.

Now, replacing William Rehnquist with another conservative jurist isn't going to change the direction of the Court, but it might mean that the Court will be even more aggressive in protecting states' rights

and certainly means that this seat will be occupied by a conservative for the next two or three decades.

If Justice O'Connor is replaced by a pro-states' rights justice, I think again you will see that seat occupied for twenty or thirty years by one who shares the pro-federalism concept. If Justice Stevens was replaced by such a justice, you will see the growing majority on the Court for advancing federalism. It may be that it is even more conservative justices appointed in the years ahead; we will see greater limits on Congress' power to the Commerce Clause and spending power, under Section 5 of the Fourteenth Amendment. We'll see a reinvigoration of the Tenth Amendment as a limit on Congress's power. We'll see an ever-growing expansion of state sovereign immunity and limits on the ability of states to be sued in federal state courts. And this will signal a dramatic change in the very nature of government, because when we talk about federalism we're really talking about, how should our government be organized? What should our government be doing? I don't think we can forget that most all the laws that have been struck down in the name of federalism were laws that were socially desirable.

I've talked a little more than the 45 minutes I was allotted, and I'm glad now to take questions if you want to call me.

Q: Could Congress pass laws using their spending power to abrogate state sovereign immunity and would those laws be upheld?

A: In the mid-1980s, in a case called *Atascadero State Hospital v. Scanlon*, the Supreme Court said that Congress can condition money on waiver of sovereign immunity, but Congress has to make this an explicit criterion; Congress has to clearly say that it is doing so. Now the underlying question here is to what extent can Congress put conditions, strings on federal grants? The last case to directly consider it was *South Dakota v. Dole* in 1987. In that case, the Supreme Court upheld a federal law that said states could get highway money only if they set a 21 year-old drinking age. Many conservative commentators have criticized that; many have predicted that the court might cut-back on Congress's ability to put strings on grants. If the Court does, that would obviously limit the ability of congress to tie federal money to a waiver of sovereign immunity. I'd say the answer at this point is, yes, Congress can condition federal funds to the spending power on a waiver of sovereign immunity, but it has to do so expressly. And the cases where this is being seen most now, is with regard to what is called the Rehabilitation Act. The Rehabilitation Act says that entities that receive federal funds cannot discrimi-

nate on the basis of disability. And a number of circuits around the country have said that states can be sued under the Rehabilitation Act because by taking federal money, knowing of this condition, they waived their sovereign immunity.