Slate

Writing Lessons

THE SUPREME COURT PLAYS SIX DEGREES OF KEVIN BACON.

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Everyone who has studied ecology or played the game Six Degrees of Kevin Bacon knows that everything is related to everything else, however tenuously. That's what makes cases in which the dispute is over whether a federal law pre-empts a state law such a challenge for courts. When writing a statute, the only guidance Congress often gives is that it intends to pre-empt state laws that are "related to" a particular federal provision. But it's not clear from those two words how forcefully Congress wants to elbow out the states. And that vagueness is a headache for the Supreme Court, which has heard more than 100 pre-emption cases in the last 20 years and, despite the sustained attention, is left with a muddle in this area of law.

Last Wednesday, in *Rowe v. New Hampshire Motor Transport Association*, the court heard a case that will decide the fate of many state laws that prevent the sale of tobacco products to kids. Tuesday, in a case called *Riegel v. Medtronics*, the justices will debate the future of state-court rulings that hold companies accountable for defective medical devices that injure patients, rather than curing them. The problem for the court in these cases begins with Congress' addiction to broad and indeterminate language, like *related to*. *Related to* has almost become congressional code for: "We don't want to do the hard work of figuring out the correct balance of state and federal power in this particular area, so we'll just let the courts do it for us."

But courts aren't any better at this task than Congress, as the court showed again at oral argument in *Rowe*. The case involved a Maine law that permits tobacco companies to sell over the Internet to customers in Maine only if they hire shipping companies that agree to check the IDs of the person receiving the product. The shipping companies challenged this restriction, saying that, in essence, it was a requirement that they change their "service" in Maine, which is prohibited by federal law. Using the standard pre-emption language, the FAA Authorization Act pre-empts state and local laws "related to a rate, route, or service" of shippers such as FedEx.

Maine responded that the challenged provision was directed at tobacco sellers, not shipping companies, and that shippers had no obligation whatsoever to comply with the specific provisions of Maine law: If they didn't want to check IDs, they should simply stop agreeing to deliver tobacco in Maine. But this and Maine's other arguments seem unlikely to pass muster given the Supreme Court's prior interpretations of what *related to* means. The court has generally given this broad language an expansive interpretation, and, in particular, the court has often looked askance at what could be a state effort to get around a pre-emption provision by targeting another link in the manufacturing and distribution chain. The court may conclude that is what is going on here: that while the Maine law being challenged applies to sellers, it effectively requires shippers in Maine to change their services, and, according to precedent at least, federal law pre-empts this.

But last week's argument took a strange (if "related to") turn. Justice Antonin Scalia wondered out loud why a provision of a Maine law that was not before the court and a settlement reached several years ago between shippers and then-New York Attorney General Eliot Spitzer (which even more clearly wasn't before the court) weren't also pre-empted. Chief Justice John Roberts and Justice Anthony Kennedy joined this line of questioning and pressed the lawyers for the shippers and the United States (which supported the shipper) for a response.

Scalia's tangent focused on state laws that hold shippers liable for knowingly distributing tobacco products to minors (the New York settlement was a deal cut between New York, other states, and the shippers to resolve claims of rampant violations by shippers of these state laws). These laws apply the same restraints to FedEx drivers as to every other person or business that sells or distributes tobacco products—they are, in other words, a classic example of a law that applies across the board. But *related to* is a mighty broad concept. Scalia is right that, to some extent, these laws relate to the FedEx service of delivering tobacco products. But by the same token, states would be pre-empted from enforcing speeding or double-parking laws against FedEx delivery trucks. Just as surely, these laws also *relate to* FedEx *services* in Maine. That can't be what Congress intended.

That's the peril of playing the Kevin Bacon game in pre-emption cases. You start asking, "Isn't this also related?" and soon imperil important and popular state laws that Congress had no intention of pre-empting. Scalia himself recognized this a decade ago in another pre-emption case, when he stated that "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."

But recognizing the problem doesn't solve it. Related-to provisions give the court enormous discretion to uphold or strike down state laws. A justice's view of the wisdom of the state law inevitably colors

this calculus. At the *Rowe* argument, Justice Scalia was openly contemptuous of the aggressive tactics used by Eliot Spitzer in combating youth tobacco use. Correspondingly, he and other conservatives on the court seemed eager to reach the conclusion that these tactics must be pre-empted.

Just about every member of the Supreme Court has at some point bemoaned Congress' abdication of guidance to the court in pre-emption cases. The question is whether the justices are ready to do something about it. *Rowe* and *Riegel* present an opportunity for the court to push back on Congress and demand that it state clearly the extent to which it wants to displace state law. (If Congress is not clear, the state law would stand.) In *Riegel*, there is no clear statement and no evidence that Congress intended to block the state remedies at issue.

Congress should welcome a clear rule from the court about clear statements. At judicial confirmation hearings, senators of both parties like to bemoan judges who they say take it upon themselves to make law. But by using legislative language that grants virtually unfettered discretion to the courts, Congress is not just inviting this lawmaking, it's requiring it.