

FEATURE STORY

Listening to the States in Shaping “Our Federalism”

In January, CRC announced its expanded focus on a broader range of constitutional threats to health, safety, and environmental safeguards. As *Community Rights Report* readers now know, CRC is no longer only about takings. We also assist in defending against preemption challenges to state and local protections, as well as challenges under the Commerce Clause to federal protections that provide minimum safeguards for all communities. Now we're delighted to announce a new book co-authored by CRC, *Redefining Federalism: Listening to the States in Shaping “Our Federalism,”* published this month by the Environmental Law Institute, which explains the unifying vision behind this expanded focus.

The book provides the first comprehensive analysis of the briefs filed by state attorneys general in federalism cases over the past decade. These briefs tell a compelling story about what the States believe federalism is, and is not. The Supreme Court, according to the States, is protecting federalism too much and too little. Too much, by striking down federal law where even the States recognize that a federal role is necessary to address a national problem, and too little, by inappropriately limiting state experimentation.

For example, in *United States v. Morrison*, (U.S. 2000), the Court struck down important portions of the federal Violence Against Women Act over the strong objections of 36 state attorneys general, leading Justice Souter to quip in dissent that it is “not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not.”

The States have also been clamoring for the Court to reconsider its standard for determining when a federal law preempts state and local governments from legislating on the same subject. The States have asked the Court to find preemption only when Congress says explicitly that it wants to eliminate state policymaking. The Court has often turned a deaf ear to these requests.

In sum, the States are asking the Supreme Court to redefine federalism. Federalism as explained by the States is not a zero sum game in which every expansion of the national government's power is an intrusion into the power of the States. Federalism instead is about allocating government power in a manner that improves the way government serves its citizens.

If federalism is about protecting the States, the Court should listen to them. *Redefining Federalism* can be ordered at www.eli.org.

EYE ON WASHINGTON

Pot in the Supreme Court

As discussed above, States, in briefs filed over the past decade, have argued that the Court is misfiring in its federalism jurisprudence for two reasons. First, the Court has been too quick to stamp out state experimentation. Second, the Court has been too aggressive in striking down federal laws as beyond Congress's authority under the Commerce Clause, despite arguments by States about the need for a federal role to address national problems.

This second issue is front and center in a battle this term over medical marijuana. In *Ashcroft v. Raich*, No. 03-1454, argued on November 29th, the Court is considering whether the Commerce Clause allows Congress to regulate the cultivation and distribution of drugs in a comprehensive manner that sweeps into its purview intra-state drug production.

Angel Raich is a very sick woman who makes a sympathetic spokesperson for the need for medical marijuana. But her legal claim, pressed by Randy Barnett, a law professor with extreme anti-government views, is meritless. More than 60 years ago in *Wickard v. Filburn*, the Supreme Court ruled that the federal government could regulate the production of small amounts of wheat grown for personal consumption as a part of a comprehensive effort to regulate the interstate wheat market. If *Wickard* is still good law, *Raich* is easy. If *Raich* wins, on the other hand, the floodgates will open to claims that health, safety, and environmental protections are beyond federal power.

CRC filed an amicus brief in *Raich* in support of the federal government.

OUTRAGE OF THE MONTH

Doing the Berger Flip-Flop

Lawyers sometimes argue in the alternative, but this is ridiculous.

In September 2004, CRC wrote an op-ed for the *L.A. Daily Journal* recommending that the Supreme Court grant review in *Lingle v. Chevron*, which raises the issue of whether a regulatory taking occurs when government action does not substantially advance a legitimate government interest. The Ninth Circuit ruled that a Hawaii law designed to preserve competition in the retail gasoline market worked a taking. In so ruling, the Court applied heightened means-end scrutiny and gave no deference to the State's legislative judgment. Scholars and judges have long questioned whether this kind of means-end inquiry is a legitimate takings test, or whether it is more appropriately conducted under the Due Process Clause's rational basis test.

The op-ed sparked an over-the-top response by Michael Berger, who accused CRC of "not caring" about the Constitution, having "disdain" for property rights, and being filled with "ire." Mr. Berger's column concluded that Supreme Court review was unnecessary because the Ninth Circuit ruling "is merely a current application of a long-standing rule."

As we reported last month, the Supreme Court granted review on October 12, putting us in mind of the adage: "He who laughs last, ..."

But Mr. Berger evidently has had a change of heart. In his November column, Berger now writes that *Lingle* "presents a fascinating issue that has piqued the interest of courts, litigants and commentators since the dawn of the Supreme Court's modern regulatory-taking era."

We couldn't say it better ourselves, Michael. Thanks for your support.

QUOTE OF THE MONTH

The Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.

United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., joined by O'Connor, J., concurring).

ON THE HORIZON

Oregon's Measure 37

Oregon has long been recognized for its progressive land use regulations, which restrain urban sprawl, protect the environment, and preserve farmland. But things changed on November 2nd.

On Election Day, Oregon voters passed Measure 37, a ballot measure requiring state and local governments to compensate property owners when their land loses value due to regulations enacted after their purchase of the property.

Fortunately, Measure 37 is narrower than its predecessor, Measure 7, an amendment to the state constitution that the Oregon Supreme Court ultimately invalidated on procedural grounds. Measure 37 contains key exceptions to its compensation mandate, including a nuisance exception and a provision that limits compensation to those who purchased their land before enactment of the challenged regulation. For successful claims, government will have the choice of either paying compensation or waiving application of the challenged regulation to the claimant. And unlike Measure 7, Measure 37 is statutory, not constitutional.

It remains to be seen exactly how Measure 37 plays out in court. It has been estimated, however, that the costs to local governments could be substantial.

Property owners can start filing claims December 2nd, and all claims must be answered within 180 days. Property owners have until late 2006 to file claims based on existing regulations, but if a new land use regulation is enacted, the affected property owners have two years from the enactment date to file a claim.

It will be interesting, if not nerve-wracking, to see what Measure 37 brings in the months ahead. Because the Measure requires compensation only for those who owned affected land before the challenged regulation was enacted, it remains unclear just how much land is covered. At a minimum, state and local officials might well be gun-shy about enacting new community protections for fear of triggering compensation claims.

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