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

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

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

cerns the Tenth Amendment. In the first third of the twentieth century, the Supreme Court used the Tenth Amendment to reserve the

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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

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

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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, 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

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 4.9(Supre6emawels. hey]TJ0 -1.1302 TD-0.7009

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.