WHOSE FALSE FEDERALISM?: THE CONSTITUTIONALITY OF STATE ATTORNEYS GENERAL CIVIL LAW ENFORCEMENT AND CORPORATE WRONGDOER'S LONGING FOR *LOCHNER*

Introduction

Over the past several years, state attorneys general have significantly stepped-up civil law enforcement efforts against national and multi-national corporate wrongdoers. Proponents of this trend suggest it is a healthy exercise of state police power, while critics suggest it violates fundamental constitutional principles of federalism. This paper introduces and analyzes the several constitutional arguments made against state attorneys general use of civil litigation and concludes the criticism amounts to little more than overheated rhetoric.

I. Attorneys General Civil Law Enforcement is Federalism in Action

A. What is Federalism?

At its core, federalism is the allocation of governmental authority to the level of government best suited to address the problem at hand. There are two sides of federalism: one is protecting state authority when appropriate, and the other is ensuring the federal government has power where national rules are necessary. The question posed by attorneys general use of multi-state litigation is whether the practice impermissibly encroaches upon the sphere of federal authority.

The Constitution and decisions of the Supreme Court have recognized two types of federalism limits on state action: permanent limits and contingent limits. Permanent limits on state action include those which are expressly stated in the text of the Constitution and those that have been inferred by the Supreme Court from the structure of the constitutional plan. Contingent limits on state action include constitutional prohibitions on state action which may be waived by Congress and limits on state action, such as preemption and the Dormant Commerce Clause doctrine, in areas where there is concurrent federal and state authority. The remainder of this section illustrates how none of these limitations are implicated by multi-state attorney general action.

B. Prohibitions and Limitations of State Action

1. Express Prohibitions on State Action

Article I, Section 10, Clause 1 of the United States Constitution specifies certain activities in which the states may never engage, such as certain fiscal, foreign affairs, military and lawmaking activities. Simply put, these explicit prohibitions apply only to narrow categories of state action and are not implicated by attorney general civil law enforcement actions.

2. Limits on State Action Inferred from the Constitutional Plan

In the seminal case of *M'Culloch v. Maryland*, the Court considered whether Congress has the power to incorporate a national bank and whether a state may tax the branches of such bank within its borders. The Court struck down Maryland's power to tax the Bank of the United States, relying upon the underlying constitutional structural principle that political power cannot be wielded over those not represented in the government wielding it.

While a state's inability to impose burdens directly upon the federal government is an important constitutional principle, this principle is inapplicable to attorney general civil litigation because these actions involve an application of state powers onto private persons and entities. Thus, despite the cries of "regulation by litigation" and "government by indictment," concerns of extra-territorial taxation are a non-issue. State attorneys general do not levy taxes on anyone, and a corporate wrongdoer's decision to increase prices on prospective consumers is not compulsory.

Actions of state attorneys general which seek to enforce federal law are a bit different, but nonetheless constitutionally acceptable. Federal law allows the states and federal government to pursue anti-trust actions. Thus, a circumstance may arise when several states pursue action against a corporate defendant the Department of Justice refuses to prosecute. Similarly, state and federal anti-trust cases against the same corporate defendant may be consolidated in a federal multi-district litigation proceeding, where disputes over trial strategy and even settlement may arise. Disputes of this nature do not rise to a constitutional interference with state sovereignty because Congress expressly has given the states the power to enforce federal anti-trust law.

C. Waivable Prohibitions on State Action

While the second and third clauses of Article I, Section 10 contain several additional limitations on state authority which may be waived by Congress, only one limitation contained therein may provide the basis for a substantive attack on attorneys general use of multi-state litigation. Clause 3 of Section 10 states that "no State shall, without the Consent of Congress... enter into any Agreement or Compact with another State...." This provision, known as the Compact Clause, is designed to prevent the states from usurping the power of the federal government.

1. The Scope of Compact Clause Doctrine

a. Does the Agreement Encroach Upon or Interfere with the Supremacy of the United States?

Analysis of state cooperation under the Compact Clause requires three inquiries. The first is whether the interstate cooperation at issue encroaches upon or interferes "with the just supremacy of the United States." The leading modern Compact Clause case is *United States Steel Corp. v. Multistate Tax Commission*. In that case, the Court reviewed an agreement among twenty-one states designed, among other things, to facilitate the determination of tax liability for multistate business taxpayers and promote uniformity and compatibility among state tax systems. The compact resulted from model legislation adopted by the legislatures of the participating states, which created the Multistate Tax Commission (MTC) composed of the tax administrators from all the member states. The MTC was authorized to study local and state tax systems, develop recommendations for greater uniformity in state tax laws, and conduct audits of businesses for member states.

After an extensive review, the Supreme Court rejected the Compact Clause challenge to the MTC. The Court acknowledged that the MTC and its creation its creation of a multistate administrative authority increased the power of member states over corporations subject to their respective taxing jurisdictions, but noted "the test is whether the Compact enhances state power quoad the National Government." According to the Court, the MTC did not impermissibly enhance state power because it did not "purport to authorize the member States to exercise any powers they could not

exercise in its absence," there was no "delegation of sovereign power to the Commission[,] each State retained complete freedom to adopt or reject the rules and regulations of the Commission," and each state could "withdraw at any time."

b. Has Congress Approved the Agreement?

The second inquiry of a Compact Clause analysis is whether Congress has consented to the interstate agreement. The Supreme Court has recognized that "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." Congress may also condition its approval on acceptance by the states of a modified compact or agreement.

c. Is the Compact Invalid Despite Congressional Approval?

The final consideration is whether the states have engaged in activities in areas in which they are expressly excluded. It is worth noting that in such areas even Congress "cannot authorize a state to disregard an explicit constitutional prohibition."

2. The Compact Clause and Attorney General Multi-District Litigation

Opponents of interstate cooperation among attorneys general contend "multistate settlements directly regulate interstate commerce" without congressional approval. Courts and commentators reject this contention on several grounds:

First, as with the MTC, interstate cooperation among state attorneys general is nonbinding- "each State is free to withdraw at any time." Moreover, multi-state litigation compacts do nothing more than increase "the bargaining power of the ... States quoad corporations subject to their respective ... jurisdictions." Accordingly, numerous federal courts have found that state attorneys general are free to join together in joint litigation efforts (no matter whether exercising prosecutorial authority pursuant to NAAG guidelines) without offending the Compact Clause of the United States Constitution.

Secondly, the suggestion that multi-state settlements regulate interstate commerce conveniently overlooks one important point: Coordinated law enforcement actions among state attorneys general are not acts of national legislation. Instead, multi-state legislation is a collection of individual lawsuits, each of which seeks to enforce existing laws passed by each respective state's legislature. Thus, when state attorneys general bring action under existing law, they are simply giving life to the policies enacted by their state legislatures. This is not a usurpation of legislative power. To the contrary, the state attorneys general are performing a "quintessentially executive function the execution of the law by prosecuting and settling lawsuits against those believed to be in violation of it."

D. Limits on State Action in Areas of Concurrent Authority

The dual sovereignties of federal and state power can best be imagined as two partially overlapping circles which create three areas of authority: an area of exclusive federal sovereignty, an area of exclusive state sovereignty and an area where federal and state sovereignty is concurrent.

Federal and state sovereignty is not equal within the area of concurrent authority. The Constitution makes federal law supreme. Thus, areas which are typically thought to be within state sovereignty can be transformed into areas of exclusive federal control through the preemptive effect of federal legislation or the application of the Dormant Commerce Clause.

Neither the various preemption doctrines nor the Dormant Commerce Clause are particularly instructive when examining the constitutionality of attorneys general multistate litigation compacts because these doctrines address attacks on specific state laws, not the cooperative actions of state executive officials. Nevertheless, given the regularity with which these challenges are made by critics who allege "[e]xtraterritorial regulation is the true source of AG activism," we will briefly address these doctrines and the manner in which they arise and are rejected within attorneys general multidistrict litigation.

1. Federal Preemption

Two sorts of attacks have been made on coordinated attorneys general actions:

First, critics have suggested that attorneys general utilization of NAAG guidelines is preempted by federal law in areas such as anti-trust and air travel advertising. These arguments have been rejected because NAAG encourages all states to follow its prosecution guidelines; thus, leading to greater interstate consistency than individual states employment of their separately-derived prosecutorial considerations. Moreover, there is no clearly defined congressional intent to preempt NAAG guidelines in either field. In fact, in the case of anti-trust law, Congress has expressly recognized the role of state anti-trust enforcement.

Secondly, tobacco companies and think tanks have made several coordinated and unsuccessful attacks on specific state laws resulting from the tobacco litigation Master Settlement Agreement, such as the Model Act and Qualifying Statute. Courts have regularly found that there has been no expression of clear Congressional intent to preempt state tobacco regulation, nor is scheme of federal regulation of tobacco sufficient to preempt the entire field.

Opponents suggest their challenges have been unsuccessful because the federal judiciary is not activist enough. In fact, one commentator goes so far as to oppose the "clear statement rule," which allows preemption only when Congress clearly expresses an intent to preempt, and argues federal courts should strike down state laws that interfere with the free market whenever they get a chance. Yet, this same commentator simultaneously suggests states should be free to prohibit affirmative action, regulate abortion and prevent localities from enacting anti-discrimination laws that protect homosexuals. This constitutional dichotomy (pro-preemption of state laws which govern the safety or health of the citizenry, such as product liability laws, and anti-preemption of state laws which enforce an ultra-conservative social agenda) finds no support in the constitution and harkens the fully discredited *Lochner* era in which an activist Supreme Court invented a fundamental right to economic liberty and property.

2. Dormant Commerce Clause

Similar to their attacks on attorneys general cooperative lawsuits, critics of the tobacco settlement argue the Qualifying Statute violated the Dormant Commerce Clause because it allegedly regulated tobacco transactions beyond the boundaries of the State enacting the Qualifying statute. Courts

have rejected this argument because the Qualifying State only regulated commerce within the State. A Louisiana federal magistrate judge recently noted with regard to this argument that "[t]o the extent the statutes may affect prices charged by out-of-state distributors, the situation is no different from when any business incurs higher expenses as a result of regulations imposed by one or more states. The business is free to pass those expenses on to its customers, including customers in other states. The business's decision to choose the latter course does not render the state's regulation unconstitutional."

CONCLUSION

Opponents of state attorneys general civil law enforcement strongly desire a marriage of the Constitution and *laissez faire* economics in order to insulate national and multinational corporate wrongdoers from the highly effective civil law enforcement efforts of state attorneys general. The United States Supreme Court long-ago recognized this exercise is improper; and, the Court's decision remains true today, no matter whether one dresses his desire for such as a fundamental right or a "real federalism" pipe-dream.

This is not to say, however, that federalism and free markets cannot co-exist effectively. Attorney General civil law enforcement is a prime example of such: Federalism reserves to the states the ability to enforce laws which protect their citizenry and to band together in doing so if they so choose, even when the offender is a multi-state or multi-national corporation which may opt to pass its losses on to consumers. If successful in their lawsuit, the offending company may opt to pass the cost of the law enforcement effort on to consumers in the form of inflated prices for the goods it offers. If it does, the consumer will determine whether to purchase the product with an inflated price, or purchase another fairly-priced product. This is the proper relationship of federalism and the free market - separate and powerful forces which, when allowed to operate independently, jointly serve the ends of justice.

[internal citations omitted from original article]