The Conflict Between Federalism and Corporate Interests

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I want to start by telling you a couple of facts about myself that may differ from the current light in which you see me. First, I have been a member of the Federalist Society for many years. The reason I have been a member is not to be some spy in your midst. It is because I actually believe in federalism, which I view as a process for how we should govern ourselves in this country regardless of the substantive results of that system.

Second, I am a trial lawyer; I am also an appellate lawyer. That gives me an unusual perspective on the system. Third, I am a public interest lawyer. So I have not been doing the "Willy Sutton job" referred to by Ted Olson.[1] One of the benefits of my job is that I spend most of my time thinking about, and working on, cases where I believe that I am doing the right thing. This, in turn, has led me to ponder about what the right thing is, what the law should be, and what justice really is.

I do not have heated rhetoric to use to advance a position. I cannot react to Ted Olson's admittedly one-sided argument because I do not do any lobbying. It is one of the true blessings of my job that, although I had to work in Washington, D.C. for many, many years, I rarely had to go to Capitol Hill. The couple of times that I did go to Capitol Hill, I found myself thanking God that I did not have to be there more often, because it seemed very hard to find people on Capitol Hill who really were interested in right and wrong as their guiding principles.

I am here today to talk to you about those basic concepts, because I see, through my exposure to the Federalist Society and my fellow members, that the area of tort law really does present a basic conflict at the heart of the Federalist Society. This conflict is between a belief in federalism as a method for governing ourselves, and the conservative or

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[1] Theodore B. Olson, *Comment*, 31 SETON HALL L. REV. 745, 745 (2001).

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"corporatist" goals that are advocated, for political reasons, by many of the members of the Federalist Society.

Let me be clear: I understand that Federalist Society documents say that the Federalist Society is a group of conservatives and libertarians. I do not think however, that belief in federalism is limited to those groups. In fact, in this particular area, there is a conflict between at least some conservatives, those who favor the interests of corporate defendants in litigation, and federalism itself.

First, I think there is a fundamental conflict, at least in this area, between the interests of multi-national or national corporations and the basic principles of federalism. I think Ted Olson laid it out beautifully: Corporations want one set of laws because they provide uniformity, predictability, and reliability. Federalism promises a lot more than that; in theory, it promises up to fifty-one different sets of laws. It is plain to see that there is a basic conflict between those two desires. Obviously the conflict is not as marked as this example would suggest. In reality, many states have very similar laws, and uniform statutes have been adopted by many states. Yet, fundamentally, a conflict exists between the goals of each group.

In addition to the conflict over the uniformity of law, I believe that another related conflict exists due to the fact that corporations do not want to be sued. It is not just that they do not want to be subjected to complex payment programs, such as being held liable in Alabama to pay someone in Montana, Oregon, or Rhode Island. They do not want to be held liable in Alabama to pay someone in *Alabama*. It is not about where they are held liable, or where they have to pay—they do not want to pay anyone, anywhere. This is not because they are "bad;" it is what you would expect from an entity such as a corporation, the sole purpose of which is to maximize its profits for its shareholders. That is its goal, and damage payments thwart that goal.

But one of the things that we as members of the Federalist Society are supposed to believe in is that the State exists to preserve freedom. Part of the idea of freedom is that some company or anybody else cannot come in, harm us, and get away scot-free. And that is, of course, what the companies would like to do if they end up hurting us—because they do not want to pay.

The reason the issue of these conflicts is so central here is because the efforts to federalize tort law—both via a federal substantive tort law and by the federal class action removal statutes—are not neutral in terms of federalist principles. In fact, they are directly contrary to federalist principles. They are efforts to eliminate the powers of the states and concentrate power in the federal government. They are efforts to advance

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corporate interests by creating a uniform law that applies nationwide, either substantively or by advocating the removal of multistate class actions from state court to federal court. Corporations want this solution for two basic reasons.

First, because the federal courts are already clogged to death. If you think there are delays in the state courts, the federal courts are worse. Therefore, if you bring all the class actions in the federal courts, so the idea goes, no class actions will ever get to trial, and the corporation will not have to pay (or at least pay as much). Second, corporations know that the federal courts are presently far more resistant to certifying class actions than are many state courts, and absent class actions the corporation will be liable only to individual litigants and therefore will pay less.

We should stop kidding ourselves. Corporations want class actions removed to federal court, not because they care about where the cases are tried, but because they care about the results—measured in terms of how much they are required to pay. Of course, most of the trial lawyers who represent the classes in these battles also care about the results. They are not dedicated to federalism any more than the corporate advocates are. But, for those of us who do care about federalism, it is a fundamental conflict and these statutes are contrary to what federalism principles are all about. I think this goes to the core of this organization and I urge you to think about what you believe in and what the Federalist Society believes in.

I want to give you an example from my own experience, an occasion where I had to struggle with this conflict. The group Trial Lawyers for Public Justice was created almost twenty years ago with the idea that it would be a public interest law firm that used trial lawyers' skills to advance the public good. We brought all sorts of cases: toxic tort, product liability, civil rights, consumer rights, workers rights—you name it. We brought cases lawyers normally would not accept because they would not generate much money; we brought them because we thought they were in the public interest.

However, when we started watching what was happening in the class action arena, we got nervous. We saw companies and trial lawyers getting together to enter into settlements that benefited companies and the trial lawyers, but harmed class members, a result that was antithetical to our purpose. The class members and future victims were being bound by bad settlements negotiated between lawyers for the class and the corporations. "Class action abuse" was taking place and it presented a conflict for the Board of Trial Lawyers for Public Justice. When we sat down to talk about it, some of the Board members, while they had the notion that we were a public interest organization, really thought we were a trial lawyer organization, not a public advocacy group.

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The characterization of our group was debated because some of us proposed to create a special project to go after class action abuse and challenge settlements that we thought were not fair to the members of the class. The Board debated this idea and some of the members said we ought to do it, but some Board members were afraid to push forward, saying, "We get our funding from trial lawyer contributions, including the people who are settling these cases and we shouldn't be doing anything that gets in the way of a fee for a plaintiff's trial lawyer." What finally resolved the discussion was when one of our Board members said that class members were being treated wrongly and that everyone on the Board knew that class action abuse was wrong. He said that we had to decide whether we were a public interest organization or whether we were a trial lawyer support organization. If we were the former, we pursued the project. If we were the latter, we did not.

I am proud to say that we made the right decision.

I propose to you that the Federalist Society has the same core decision to make. Is federalism your guiding light or is corporate interest your guiding light?

Now, I do not think that a concern over choice-of-law issues is driving this debate, but the issue has been raised by other speakers and it is a serious one. I want to give you a couple of examples because there are indeed choice-of-law problems bound-up within this conflict.

For example, there was a class action against State Farm in Illinois for forcing State Farm policyholders to take replacement auto parts that were not the same as the original factory auto parts.[2] It was a huge, national class action, and resulted in a multi-million dollar verdict. Yet despite its national character, the court applied Illinois law on behalf of everyone in the nation. It was argued that Illinois law applied because State Farm is headquartered in Illinois, and Illinois has an interest in making sure that companies incorporated and headquartered there do not mistreat anyone in any state. I can understand that argument, but I can also understand, for example, the Florida State government asserting that it did not have a problem with the corporation's policies. Choice-of-law can be complex, but we need a choice-of-law regime that respects federalist principles.

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[2] Keith Bradsher, *Judge Assesses State Farm $70 Million in Fraud Case*, N.Y. TIMES, Oct. 9, 1999, at A10. An Illinois jury required State Farm to pay $456.1 million after it found that the insurance company breached its contract with policyholders when it required automobile repair shops to use generic replacement parts, rather than parts that were approved by automobile manufacturers, to repair automobiles that were damaged in accidents. *Id.* Furthermore, an Illinois State Court judge ordered State Farm to pay $730 million in compensatory and punitive damages because the insurer's actions constituted fraud. *Id.* The matter is presently on appeal. Maureen McDonald, *Crash Parts Issue Rages in Legislature, Courts*, AUTO. NEWS, Feb. 5, 2001, at 28.

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Another example involves Trial Lawyers for Public Justice. Our group is presently involved in a case in Maryland where Chevy Chase Bank issued credit cards to people in Maryland and the cardholder agreement (which most people never read) promised that Chevy Chase Bank would never charge cardholders more than twenty-four percent interest (a nice generous low rate, twenty-four percent).[3] The reason the Chevy Chase promised this, which it did not disclose in the cardholder agreement, is that Maryland usury law prohibits any lender from charging more than twenty-four percent interest. The problem is, however, that several months later, the Bank moved its corporate headquarters to Virginia. Why? Because Virginia law has no limit on interest rates chargeable by lenders. Not surprisingly, Chevy Chase proceeded to jack-up the interest on its credit cards far beyond twenty-four percent, and even tried to do so *retroactively* for debts incurred by cardholders when the promise of the earlier cardholder agreement was clearly in effect. We filed a lawsuit on behalf of these cardholders.

A similar case called *Smiley v. Citibank*[4] was decided by the United States Supreme Court in 1996. In *Smiley*, which involved California cardholders, the bank was headquartered in South Dakota. Why South Dakota? What is it about South Dakota that would attract one of the largest credit card issuers in the nation? The answer is that the federal law that applies to these credit card companies has a choice-of-law provision. This choice-of-law rule looks to the law of the state where the company is headquartered and incorporated. This applies to everyone in the country, no matter where an alleged wrong occurred. Therefore, Citibank moved its headquarters where there are no limits whatsoever on late fees, interest charges, or penalties, and it did not matter what they told the people in California. They had abided by South Dakota law.

In our case in Maryland, the Chevy Chase Bank is arguing that because it is now headquartered in Virginia, under the federal choice-of-law rules it should be governed by Virginia law—even though it sought out the plaintiff customers while it was located in Maryland and subject to the twenty-four percent interest cap. This issue demonstrates how a federal choice-of-law rule has the potential to violate the horizontal federalism concerns discussed by Professor Baker just as much as do state choice-of-law rules.

Now all of that is bad enough, but things actually get worse. I want to read you one of the questions posed in the Federalist Society's brochure for

[3] Wells v. Chevy Chase Bank, No. 24-C-99000202, 2001 Md. LEXIS 91, at *3-5 (Md. Mar. 8, 2001).

[4] 535 U.S. 735 (1996).

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this panel: "Is the Supreme Court bypassing Congress and imposing the ultimate federal tort reform, the elimination of state tort liability without due consideration of state interest and federalism concerns?"

Let me answer this question in a word: Yes.

I gave you the example of *Smiley*, but I want to talk for a moment about what has just happened in another, more recent, Supreme Court case. In *Geier v. American Honda Motor Co*,[5] an individual who was injured in a automobile accident sued Honda. Under Washington, D.C., law (and under virtually every state law), a plaintiff can sue based on the theory that a car was defectively designed because it lacked an airbag. Honda argued that it could not be sued because it had complied with federal motor vehicle safety standards, which made the installation of air bags *optional*. I understand the arguments on that issue, but the federal statute expressly states: "Compliance with *any* federal motor vehicle safety standard does *not* exempt *any* person from *any* liability under common law.[6] Nonetheless, in this case, the Supreme Court held five to four that Honda's compliance with *this* federal safety standard did exempt *this* defendant from *this* liability at common law.[7]

I submit to you that the Supreme Court's decision may be justifiable on principles of protection of corporate interests. It may be justifiable on protection of government regulatory interests. But it certainly is *not* an appropriate federalism decision and, even worse, it is a fundamental violation of the concept of separation of powers: Congress could not have been much clearer regarding the continued validity of common law actions, but the Court said, in effect, "we don't care."

I think what really brings it all home to me is how the Court split on the question. Justice Antonin Scalia was among the five and Justice Clarence Thomas was among the four. I believe that the split occurred this way because the Justices, too, are determining whether they are really committed to federalism, or whether corporate interests come first. Members of the Federalist Society should be concerned when five Supreme Court Justices can simply do away with state law and say that Congress' intent does not matter. This is not the system we thought we lived in.

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[5] 529 U.S. 861 (2000).

[6] 15 U.S.C. § 1392(d) (1999), *recodified at* 49 U.S.C. § 30103(e) (1999) (emphasis added).

[7] *Id.* at 874, 881. The Court held that under 49 U.S.C. § 30103(b), the state law was preempted because it "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

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