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Section 4: Federalism

Institute of Bill of Rights Law, William & Mary Law School

FEDERALISM

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Supreme Court of the United States

Decided June 23, 1999

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v.
FLORIDA Prepaid Postsecondary Education Expense Board, *et al.*

No. 98-149

Supreme Court of the United States

Decided June 23, 1999

FLORIDA Prepaid Postsecondary Education Expense Board, Petitioner,
v.
COLLEGE SAVINGS BANK and United States

No. 98-531

Supreme Court of the United States

Decided June 23, 1999

THE QUIET REVOLUTION

Conservatives Continue Federalism Resurgence by Expanding State Immunity

Legal Times

Monday, July 12, 1999

Curt A. Levey

The highlight of the Supreme Court's just-ended term may well have come on its last day, June 23, when a trio of decisions expanded the boundaries of state sovereign immunity and prompted talk of a constitutional sea change. The cases cap a decade of resurgent federalism, which former Solicitor General Walter Dellinger has described as "one of the three or four major shifts in constitutionalism we've seen in two centuries." While such talk may well be premature, it is now clear that the Court is unabashedly pursuing a federalism agenda.

The three cases--each involving state immunity from federal claims brought by private parties--were decided by identical 5-4 votes. Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas formed the majority in each decision.

In Alden v. Maine, 67 U.S.L.W. 4601, the issue was whether Maine could be sued in its own courts under the Fair Labor Standards Act (FLSA). The suit by state probation officers seeking overtime pay was filed in state court after a federal court dismissed it on sovereign immunity grounds. But the state court route is now blocked as well after the Supreme Court ruled that sovereign immunity from federal claims extends to state courts. Writing for the majority, Justice Kennedy noted that "were the rule to be different here, the National Government would wield greater power in the state courts than in its own judicial instrumentalities."

The other two cases – Florida v. College Savings Bank, 67 U.S.L.W. 4580, and College Savings Bank v. Florida, 67 U.S.L.W. 4590 – involved federal litigation between a savings bank and the state of Florida concerning the bank's patented college investment plan. The bank claimed violations of federal patent and trademark law. The Supreme Court threw out both claims, ruling that Congress exceeded its constitutional authority when it authorized private suits against states for patent infringement and Lanham Act violations.

The sharpest point of debate in the three decisions was the majority's contention, summarized in Alden, that "the scope of the States' immunity from suit is demarcated not by the text of the 11th Amendment alone but by fundamental postulates implicit in the constitutional design."

The more liberal justices, who have been known to find a constitutional penumbra or two of their own, nonetheless complained bitterly about this extratextual interpretation. Dissenting in Alden, Justice David Souter accused the majority of inventing "a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution." Souter called the majority view "unrealistic," "indefensible," and probably "fleeting."

The significance of Alden and the College Savings cases may well lie more with their relationship to other recent federalism decisions than with the substance of the decisions themselves. In particular, the three cases clearly demonstrate that the Supreme Court meant what it said in Seminole Tribe v. Florida, 517 U.S. 44 (1996), and City of Boerne v. Flores, 521 U.S. 507 (1997) . In Seminole, the Court said that Congress cannot abrogate state immunity under its Article I powers, but the justices reiterated that explicit abrogation is permitted under the enforcement clause (Section 5) of the 14th Amendment. After Alden, the Seminole analysis clearly applies to federal claims in both state and federal court.

With the Article I route to abrogation of state immunity blocked by Seminole, and the state court option blocked by Alden, Congress and sympathetic courts will be tempted to characterize federal statutes as enforcement clause enactments. Yet that route is narrower after City of Boerne, which restricted Congress' ability to legislate under the enforcement clause by demanding" congruence and proportionality" between 14th Amendment violations by the states and Congress' chosen remedy.

The Supreme Court presumed in the Alden and decided in the College Savings cases that Congress could not rely on its enforcement clause authority to abrogate state sovereignty under the applicable federal statutes. The Court explored the City of Boerne congruence and proportionality requirement at length in the context of patent law, but ultimately concluded that the requirement had not been met, because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."

The Court's continued use of the City of Boerne test this term, in combination with Seminole, suggests that sovereign immunity stands as a meaningful limit on federal power. This calls into question the viability of private claims against states under federal accommodation statutes--like the Family and Medical Leave Act and the Americans with Disabilities Act (ADA). The problem those statutes seek to remedy is not one of similarly situated persons being treated differently, the hallmark of an equal protection violation. Thus, there is arguably no 14th Amendment violation for Congress to remedy, causing the statute to fail City of Boerne's congruence and proportionality test. Harvard Law School Professor Laurence Tribe, who once dismissed the congruence and proportionality test as "rhetoric," now concludes that it is "very clear that even when there is a 14th Amendment right at stake, the Court will scrutinize very closely whether congressional legislation is really necessary."

Alden and the College Savings cases confirm and strengthen a decade-long resurgence of federalism, guided by the same five justices who prevailed last month. The Court has come a long way since Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), declared that the states would have to depend on the political process to protect their sovereignty.

This rebirth of federalism began rather humbly with the Court's 1992 decision in New York v. United States, 505 U.S. 144. Together, New York and Printz v. United States, 521 U.S. 898 (1997), prohibit Congress from commandeering a state's legislative or executive branches to administer or enact federal regulations. Seminole, along with Alden and the College Savings cases, represent another facet of protecting state sovereignty.

Specifically, they constrain Congress' ability to impose federal mandates on the states by way of private lawsuits, a favorite Congressional technique. The boldest of the decade's federalism decisions are certainly City of Boerne and United States v. Lopez, 514 U.S. 549 (1995), which resurrected the enumerated powers doctrine by setting limits on Congress' authority to legislate under the enforcement and commerce clauses.

Although the rebirth of federalism in the 1990s has been remarkable, the hysterical reaction from critics of last month's trio of decisions seems exaggerated. Tribe warns of "pernicious consequences for the enforcement of federal statutes across the board," while other analysts see a return to antebellum days or even the Articles of Confederation.

If the critics' reaction is exaggerated, it's largely because the impact of the federalism revival has so far been muted by the cases the Court has used to make its statements about state sovereignty and the limits on federal power. The Court has steered clear of hot-button issues, refraining from invalidating any popular statute or angering the potent civil rights constituencies most likely to force a constitutional showdown. Only tribes were angry when Seminole limited suits under the Indian Gaming Regulatory Act. Lopez and Printz, both involving federal gun control, were decided in the halcyon days before Littleton, when the National Rifle Association still dominated the issue. The usual supporters of plenary federal authority were predictably silent when City of Boerne struck down the Religious Freedom Restoration Act, a favorite of the religious right. And who ever heard of the Low-Level Radioactive Waste Policy Act at issue in New York?

This term was no different. Sure, organized labor has an interest in seeing the FLSA enforced against state employers, but that interest was apparently not great enough to prompt any amicus briefs in Alden from traditional labor organizations. And while elements of the business community might be concerned about holes in patent and trademark protection, business leaders were noticeably silent when the College Savings decisions came down. Compare the muted reaction of business to the outcry generated last month by the disabled when the Supreme Court interpreted the ADA to exclude correctable impairments. No wonder the Court sidestepped the federalism issue raised below when it decided Olmstead v. L.C., 67 U.S.L.W. 4567, another of this term's ADA cases.

Observers are left to wonder whether the Supreme Court will continue to advance its federalism agenda, even when that means striking down statutes supported by politically potent groups like the National Association for the Advancement of Colored People, the National Organization for Women, and the Sierra Club? If the Court ultimately shrinks back from the implications of its agenda and declines to tackle the volatile issues at the forefront of the American political debate, the rebirth of federalism will have limited impact. But perhaps, the conservative coalition on the Court is methodically laying the groundwork for a true federalism revolution, using precedents that won't set off a political counterattack until it's too late. Then again, the pro- federalism justices may simply be content to push their agenda up to, but not over, the water's edge.

In the short term, feminist advocacy groups appear most likely to disturb the quiet march of federalism. In contrast to the noticeable absence of traditional labor

groups among the Alden amici, the leading feminist advocacy groups have been involved directly and as amici in two high-profile cases this year that pitted federalism against feminism. In Davis v. Monroe County Board of Education, 119 S. Ct. 1661 (1999), a quasi-federalism case decided in May, the Court avoided a showdown with feminist groups when it ruled 5-4 that schools are liable under Title IX for student-on-student sexual harassment if they fail to take appropriate measures to stop it.

On the other hand, the U.S. Court of Appeals for the 4th Circuit, braved an outcry from women's groups when it struck down the civil remedy provision of the federal Violence Against Women Act in Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820 (1999) (en banc). The court held that the provision, which allows victims of gender-motivated violence to seek damages and other relief, was not authorized under either the commerce clause or the 14th Amendment's enforcement clause. Supreme Court watchers predict that this enumerated powers case will reach the Court's docket in the coming term.

Swing Vote

The importance of Davis lies primarily in the vote of Justice O'Connor, who wrote the majority opinion. She was clearly the swing vote in that case, abandoning the five-justice coalition that prevailed in the Alden and College Savings decisions. Her switch was all the more notable because of the Kennedy concurrence she joined four years earlier in Lopez. Their concurring opinion emphasized that "education is a traditional concern of the States," and as such, the Court has "a particular duty to insure that the federal-state balance is not destroyed." Yet caught between her commitment to federalism and her feminist sympathies, O'Connor sided with the latter in Davis, making federal judges and bureaucrats the final arbiters of what constitutes appropriate discipline in the classroom.

Although Lopez and City of Boerne suggest that the Supreme Court would affirm Brzonkala, O'Connor's choice of feminism over federalism in Davis suggests just the opposite. Should the Court affirm Brzonkala, it will cast grave doubt on Congress' power to enact hate crime statutes and send a strong signal that the Court meant what it said in Lopez – Congress' commerce clause authority really is limited to those activities that substantially affect interstate commerce. Thus, Brzonkala could do for Lopez what Alden and the College Savings cases have done for Seminole and City of Boerne. On the other hand, if the Court is determined to build its federalism jurisprudence without touching volatile issues, it may surprise observers and refuse to hear the case.

In the end, the outlook for federalism depends more on future appointments than on the Court's caseload. The survival of the decade's modest federalism gains may hinge on a single appointment. The four dissenters in last month's trio of cases--Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer--can be counted on to dismantle those gains the first chance they get. And they will very likely get that chance if a Democrat wins the White House in 2000--after all, Rehnquist is 74 and O'Connor is 69.

Regardless of future appointments, there is little doubt that Alden and College Savings will be remembered for their contribution to the cause of state sovereignty and the broader federalism agenda. And if the modest advance of federalism in the 1990s ultimately grows into a full-fledged constitutional

revolution, last month's trio of decisions may loom even larger in retrospect than they appear today.

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STATES 3, FEDS 0 IN KEY COURT DECISIONS

Fulton County Daily Report

Wednesday, June 30, 1999

Marcia Coyle, American Lawyer News Service

WASHINGTON – Will the state of Illinois post the Nike swoosh on billboards along its border, welcoming visitors with the inviting slogan: "Illinois: Just Do It!"?

Could the state of New York seek to soothe its surly Department of Motor Vehicles employees by providing them with Prozac it manufactures itself-in violation of the corporate patent-holder's rights?

Might the state of Maine refuse to pay its probation officers the federally required time and a half for overtime work?

In each case, the answer is "no" - the state cannot, because federal laws prohibit such infringements of patent-holder, trademark-holder and employee rights. But if a reprobate state does engage in some such illegal activity, what can the individuals or corporations whose federal rights are infringed do about it?

According to a trio of 5-4 decisions the U.S. Supreme Court delivered on the final day of its 1998-99 term, the answer may well be: little or nothing.

The answer is definitely nothing in the example concerning the application of federal wage and labor laws to state-government employers, if state employees are seeking a monetary remedy in state courts.

That was precisely the issue posed in Alden v. Maine, No. 98-436. The court's ruling: The Framers' concept of dual sovereignty between state and federal governments extends much further than a strict construction of the 11th Amendment's wording would suggest. The concept of dual control and autonomy is exemplified by the 11th Amendment's grant of state sovereign immunity, which shields states against suits by other states' citizens.

"The Supreme Court has experienced Y2K problems six months early and they've returned to 1900" when it comes to federal regulation of wages and hours, says labor law scholar Charles Craver of George Washington University School of Law.

Or, other scholars suggest, to antebellum America-given the potential sweep of the three federalism rulings.

But are these decisions really a radical reordering of federal-state relationships, or are they simply another step in the Rehnquist Court's effort to remind federal lawmakers that the Constitution not only grants them vast power, but limits that power as well?

"This is a continuation of a debate that began in the summer of 1787 and has never been fully resolved-the debate between a state-centered view of the American Constitution and a nationalist view," says constitutional law scholar and former Solicitor General Walter Dellinger, head of the Supreme Court practice for O'Melveny & Myers LLP.

"The losers, favoring a states'-rights approach, have continued to be an

authentic voice throughout history, and at least for now, are in the ascendancy."

Riding the Wave

The three cases arrived at the high court on a wave of federalism that began in 1992 with New York v. United States, 505 U.S. 144, where the justices held that the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutionally coerced states into administering a federal program.

Since that decision, the justices have issued a handful of opinions striking federal laws that, they held, exceeded Congress' authority at the expense of the states, including congressional attempts to nullify states' 11th Amendment immunity from suit in federal courts. It has been a "structural" judicial activism, engaging a sharply divided court in a battle over how best to preserve the constitutional guarantees of dual sovereignty.

The high court's three 1999 federalism decisions turned on two of its most recent forays into the subject. In Seminole Tribe v. Florida, 517 U.S. 44 (1996), the court held that Congress lacked power under the commerce clause of Article I (a major source of Congress' lawmaking authority) to abrogate a state's 11th Amendment immunity from suit in federal court.

And in City of Boerne v. Flores, 117 S.Ct. 2365 (1997), the high court struck the federal Religious Freedom Restoration Act under Section 5 of the 14th Amendment (another major source of congressional authority), saying that lawmakers exceeded their power by redefining-instead of merely enforcing-14th Amendment religious freedom guarantees.

The linchpin of this year's triptych was Alden v. Maine, in which state probation officers-locked out of federal court by Seminole Tribe-sued in state court to recover overtime pay allegedly owed them by the state under the Federal Labor Standards Act of 1938.

But the conservative high court majority, led by Justice Anthony M. Kennedy, held that the officers could not sue in state courts. The reason: Congress lacks the power under Article 1 of the Constitution to subject nonconsenting states to private suits for damages in not only federal courts but in state courts as well.

After a lengthy exposition of the Constitution's structure and history, and the high court's own federalism precedents-disputed in an equally lengthy dissent-Justice Kennedy explained that the 11th Amendment "confirmed rather than established" states' immunity from suit. State sovereign immunity preceded the Constitution's ratification, he said, and is "implicit in the constitutional design."

In the two other cases-both involving a dispute between a bank and Florida over a patented college savings plan-the high court, led separately by Chief Justice William H. Rehnquist and Justice Antonin Scalia, held that neither companies nor individuals can sue nonconsenting states for patent infringement or false advertising in violation of federal law. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, No. 98-531, and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, No. 98-149.

Relying on City of Boerne in the patent-infringement case, Chief Justice Rehnquist said that Congress identified no pattern of patent infringement by the states, "let alone a pattern of constitutional violations," that justified using Section 5 of the 14th Amendment in order to abrogate state immunity from suit under the Patent Remedy Act.

Strict Scrutiny

One outstanding question is just how carefully the high court will review future attempts by Congress to abrogate state immunity with the 14th Amendment's Section 5.

"I'd hoped when the court began talking about the need for federal legislation that enforces Section 5 to be proportional to and congruent with the problem addressed, that that was just rhetoric and did not portend strict scrutiny," says Professor Laurence Tribe of Harvard Law School. "But the patent case makes it very clear that even when there is a 14th Amendment right at stake, the court will scrutinize very closely whether congressional legislation is really necessary."

Cases the court has already accepted for next term-involving the Age Discrimination in Employment Act and the Motor Vehicle Information Privacy Act-will help answer that question, says Professor Douglas Kmiec of Pepperdine University School of Law.

"I don't think any constitutional right to equality or due process is in jeopardy, but what is open to question is whether the expansion of protections under civil rights statutes-beyond what the Constitution requires-falls within Congress' Section 5 authority, at least insofar as authorizing private actions against states," Kmiec says.

But even if their federalism scrutiny turns out to be something less than strict, the justices' rulings thus far threaten "pernicious consequences for the enforcement of federal statutes across the board," Tribe warns.

That's because, he explains, the federal government simply doesn't have sufficient personnel to bring actions for every violation, which is why statutes explicitly permit private citizens to sue.

In fact, the decisions could have the "perverse effect" of actually increasing the federal bureaucracy, according to veteran high court litigator and former Justice Department official Mark Levy of Washington's Howrey and Simon. In the federal wage and hours arena, he explains, "you'd have to set up a whole division with the Department of Labor that does nothing but monitor the states."

Scholars and litigators say the recent decisions endanger the private enforcement of rights under such federal laws as the Violence Against Women Act, the Family and Medical Leave Act, the Americans with Disabilities Act and perhaps federal copyright laws.

But Thomas E. Baker, director of the Constitutional Law Resource Center at Drake University Law School, believes that the court's concern for its own institutional authority will limit its tilt toward the states.

"My instinct is they would back off before there was a kind of constitutional showdown, having learned the lesson of the Lochner era debacle when the court thwarted state regulation of business," he says. "They feel a sense of institutional loyalty not to go so far out that they bring harm to the Supreme Court as an institution."

Indeed, despite the fact that they are blocking the courthouse to individuals and companies seeking monetary damages from states for violations of federal law, the majority did note that other means remain in place for making recalcitrant states follow federal obligations that are imposed on them by the existence of the Supremacy Clause of the Constitution.

There Is Help Out There

Private businesses and individuals can seek injunctive and declaratory relief to terminate state violations of their federal rights, and the federal government itself can sue in state courts on behalf of wronged plaintiffs and can employ the power of the purse, conditioning funding of state programs on the states' relinquishing their immunity.

Even in the patent area, there is hope for meaningful recourse, says Bruce Wexler of New York's Fitzpatrick, Cella, Harper & Scinto. He explains that "the opinion puts some pressure on states to have an available forum for infringement claims and remedies, or else we'll be back in Congress showing a deprivation of due process."

Just how long the court's states' rights efforts will last may well depend on the longevity of its proponents. The federalism decisions tend to be 5-4, with the dissenters explicitly expressing a refusal to consent to their defeat in an area that has proven historically volatile.

"Is this still in flux? That all depends on the American electorate in November 2000," says Yale Law School Professor Akhil Reed Amar.

Whatever the ultimate fate of the federalism rulings, says former Solicitor General Dellinger, the decisions deserve to be seen as "the capstone of the Rehnquist Court.

"Although he lost the battle in National League of Cities exempting state governments from federal regulation, the position he set out as associate justice has effectively come to be the law," Dellinger says. "That makes him, more than anyone else, responsible for one of the three or four major shifts in constitutionalism we've seen in two centuries of American history."

CIVIL WARS
Supreme Court Puts States First

Legal Times

Monday, June 28, 1999

Jenna Greene

The increasingly dicey balance of legal authority between the federal and state governments got a jolt last week. The Supreme Court issued three decisions on June 23 curbing congressional power. The votes in each case were 5-4. In one of the cases, Alden v. Maine, the majority ruled against 64 Maine parole and probation officers who had been denied overtime and had sued under the federal Fair Labor Standards Act, a 1938 statute meant to apply uniform wage laws throughout the nation. The opinion--coming as just the latest and perhaps most forceful statement in a string of Supreme Court rulings in recent years reining in Congress and the power of Washington--will likely reverberate for years. Below is a roundup of commentary on the case and its meaning, reported by Legal Times staff reporter Jenna Greene, as well as excerpts from the decision.

Tim Masanz
Group Director for Economic Policy and Commerce, National Governors' Association

"The important thing to note is the difference between monetary and injunctive relief. The court is simply saying states are immune from suits for monetary damages. States are not free from having to comply with federal law. What they are immune from is suits that threaten their sovereign immunity, and those are damage suits."

Statement by Robert Scully
Executive Director, National Association of Police Organizations Inc.

"State employees throughout the United States, including law enforcement officers, will be denied any remedy to vindicate their rights under the Fair Labor Standards Act or any other Federal statute enacted under Congress' Article 1 powers, laws which usually protect workers or members of the public. Now the Supreme Court is willing to sacrifice the officers' rights on the altar of a glorified and exulted version of States Rights.' The ability of states to nullify Federal laws by refusing to enforce them, an issue prior to the Civil War and during desegregation in the 1950s and 1960s, is once again at the forefront."

Charles Tiefer
Acting Counsel, House of Representatives, 1993-94; Associate Professor, University of Baltimore Law School

"The Alden decision makes the U.S. sound more like the European Community, with a weak overall higher government and the states as sovereign as France or Germany. The decision threatens statutes like the qui tam portion of the False Claims Act, where the federal government creates causes of action to keep the states from defrauding the

Treasury. States like to get hundreds of billions of dollars of federal tax money without accountability. Justice Kennedy might find immunity for states from accountability for fraud."

Richard Parker
Professor, Harvard Law School

"It seems to me the dismayed reaction to the opinion is characteristic of the inflated, hysterical alarmism typical of our legal culture. Everything depends for us lawyers not on what a particular decision actually decides, which in this case is not much, but what direction the court is going, which is yet to be determined. It's the typical bias of the media. Since the majority is conservative, the media adopts the dissent's description of what the majority did. It's disgraceful. I got a call yesterday from the editor of a children's magazine who was doing a story on how this decision will allow child labor."

Brian Wolfman
Staff Attorney, Public Citizen Litigation Group

"If a law cannot be enforced against a state as an employer in any court, state or federal, it loses its deterrent effect. Regardless of what you think about the historical underpinnings of the decision, the practical responses from the majority are, one, states will obey the law anyway, and, two, the federal government can do the enforcement job on its own. Both responses utterly overlook the purpose of the enforcement mechanism to begin with, which is compensation and deterrence, and the acknowledgement that private enforcement is needed because the federal government cannot do it all on its own, because the job is far too big."

Department of Labor Official,
Speaking on Condition of Anonymity

"The general scheme for many laws is to allow for enforcement by both the department and private parties. This decision carves out an exception for state employees, leaving them without a private remedy and putting extra enforcement responsibility on the Department of Labor."

Paul Rothstein
Professor of Law, Georgetown University

"This will reinvigorate the utility of state laws because people can still sue states in state court under state law. In the past, state legislators have said, Why pass laws in areas like food and drug and antitrust and environment? Federal law sweeps the field.' Now it's important they pass these laws or expressly waive sovereign immunity so state courts can be used to enforce federal laws against the state government."

Ray Aragon
Litigation Partner, McKenna & Cuneo

"The Alden decision continues the Court's recent trend of placing sharp limits on the ability of Congress to make laws binding on the states. That trend became very clear with the Court's rejection of the Gun-Free School Zones Act in 1995 in United States v. Lopez, and became even more pronounced in the Seminole Tribe and Printz cases. For the

first time since the New Deal, these recent decisions place real limits on the right of Congress to regulate interstate commerce.

The 10th Amendment, which for most of its history has been a constitutional curiosity, is now a powerful, if uncertain, brake on federal authority. Alden, which depends on novel interpretations of the 11th and 10th Amendments, continues this trend into a new and uncertain area. Alden and the Court's other recent federalism decisions challenge Congress to make laws with a new federalist vision in mind. In the view of the Court's current conservative majority, the federal government is not the only sovereign in town. Congress doesn't have the states to kick around anymore."

Congress' Power Is Limited

"This case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance. Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States. . . .

Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept. . . . The Framers of the Constitution did not share our dissenting colleagues' belief that the Congress may circumvent the federal design by regulating the States directly when it pleases to do so, including by a proxy in which individual citizens are authorized to levy upon the state treasuries absent the States' consent to jurisdiction. . . .

The State of Maine has not questioned Congress' power to prescribe substantive rules of federal law to which it must comply. . . . The Solicitor General of the United States has appeared before this Court, however, and asserted that the federal interest in compensating the States' employees for alleged past violations of federal law is so compelling that the sovereign State of Maine must be stripped of its immunity and subjected to suit in its own courts by its own employees. Yet, despite specific statutory authorization, the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation. The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second."

– Justice Anthony Kennedy, for the Court

Rights Require Remedies

"The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth

Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law. . . . The Court's federalism ignores the accepted authority of Congress to bind States under the Fair Labor Standards Act of 1938 and to provide for enforcement of federal rights in state court. The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding.

On each point the Court has raised it is mistaken, and I respectfully dissent from its judgment.

Unless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and Seminole Tribe, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy. . . .

The point is not that difficulties of enforcement should drive the Court's decision, but simply that where Congress has created a private right to damages, it is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditionally adequate remedy. . . .

So there is much irony in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: That where there is a right, there must be a remedy."

– Justice David Souter, for the dissenters

KIMEL v. FLORIDA BOARD OF REGENTS
&
UNITED STATES v. FLORIDA BOARD OF REGENTS

The States Take on Congress – Again

Matthew Frey *

The Supreme Court will hear arguments this term in related cases that will test whether Congress may hold states responsible for violations of the Age Discrimination in Employment Act (ADEA), a federal law passed in 1967 aimed at safeguarding the rights of older workers. Because it will examine Congress's power over states under the Fourteenth Amendment, the Court's ruling in this case may prove one of the Supreme Court's most important opinions yet concerning federalism, the Constitutional balance of state and federal power, an issue that has taken center stage in the Rehnquist Court's jurisprudence.

The cases before the Court arise out of a suit filed by 35 former faculty members at two Florida public universities. The plaintiffs claimed that the universities fired them in violation of ADEA guidelines. Florida defended itself in part by arguing that it was immune to the plaintiffs' suit under the Eleventh Amendment, which protects a state from being sued in federal court by private citizens without its consent. The discharged faculty countered with the assertion that, in passing the ADEA, Congress had abrogated the states' Eleventh Amendment immunity from suits by private citizens alleging ADEA violations. The Court of Appeals for the Eleventh Circuit disagreed, holding that "nothing in the ADEA indicates a truly clear intent by Congress to abrogate Eleventh Amendment immunity."

"No unequivocal expression of an intent to abrogate immunity is unmistakably clear in the ADEA," Judge J. L. Edmondson further wrote for the court. "No reference to the Eleventh Amendment or to States' sovereign immunity is included. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court." Instead, the court noted, one was forced to piece together Congress' intent from a patchwork of sections within the law, and this fell far short of the clarity required. "For abrogation to be unmistakably clear," the court held, "it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate."

The court went on to reject the argument that Congress, in a 1974 amendment to the ADEA, made plain its intent to abrogate states' immunity by classifying states as employers subject to lawsuit. "To include the States as employers under the ADEA . . . does not show an intent that the States be sued by private citizens in federal court," Judge Edmonson wrote. In fact, the court noted, Congress may very well have had other means of redress in mind. "The ADEA is enforceable against the States, despite sovereign immunity, through forms of relief other than direct suits by citizens in federal court. . . . Congress may have had these other forms of enforcement in mind when it amended the statute to include States

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as employers." The court concluded that engaging in such speculation merely reinforced the view that the amendment to the ADEA also lacked a statement of clear congressional intent.

The Supreme Court, in deciding this case, will be heavily influenced by its opinions in Alden v. Maine, College Savings Bank v. Florida, and Florida v. College Savings Bank, the trio of federalism decisions it issued late last term. In particular, in *Alden* the Court held that Congress did not have authority pursuant to its power to regulate interstate commerce to hold states liable under the federal Fair Labor Standard Act (FLSA) for their failure to pay workers overtime. The Court held that state governments, prior to the ratification of the Constitution, enjoyed sovereign immunity from suit, and that the Constitution did not abrogate this immunity. Thus, the Court concluded, the State of Maine could not be sued under the FLSA unless Maine had specifically waived its sovereign immunity, which it had not.

Kimel, however, presents a different issue. In this case, the Court will need to decide whether Section 5 of the Fourteenth Amendment, ratified in 1868, constituted a limited abrogation of the states' sovereign immunity and, if so, whether the ADEA was enacted pursuant to Section 5. Section 5 grants Congress the authority to pass legislation intended to enforce the other sections of the Fourteenth Amendment, including the Section 1 provision that no state shall deny to any person the equal protection of the laws.

In *Kimel*, the Court will need to determine whether Congress promulgated the ADEA pursuant to its Section 5 power and, if so, whether the prohibition of age discrimination is a proper exercise of that power. This will lead the Court into an analysis of age discrimination, with the aim of deciding whether protection against age discrimination is a proper concern of the Fourteenth Amendment.

Were the Court to strike down the ADEA on Fourteenth Amendment grounds, it would represent an exclamation point at the end of a long history of federalism jurisprudence in the twentieth century.

98-791 Kimel v. Fla. Board of Regents

Ruling below (11th Cir., 139 F.3d 1426, 66 U.S.L.W. 1679, 76 Fair Empl. Prac. Cas. 1201):

Age Discrimination in Employment Act provision adding states to definition of "employer" does not abrogate states' 11th Amendment immunity from suit in federal court.

Question presented: Does 11th Amendment bar private suit in federal court against state for violation of ADEA?

98-796 United States v. Fla. Board of Regents

Ruling below (11th Cir., 139 F.3d 1426, 66 U.S.L.W. 1679, 76 Fair Empl. Prac. Cas. 1201):

Age Discrimination in Employment Act provision adding states to definition of "employer" does not abrogate states' 11th Amendment immunity from suit in federal court.

Questions presented: (1) Does ADEA contain clear abrogation of states' 11th Amendment immunity from suit by individuals? (2) Was extension of ADEA to states proper exercise of Congress's power under Section 5 of 14th Amendment, thereby constituting valid exercise of congressional power to abrogate states' 11th Amendment immunity from suit by individuals?

J. Daniel KIMEL, *et al.*, Plaintiffs-Appellees,
v.
STATE OF FLORIDA BOARD OF REGENTS, Defendant-Appellant

United States Court of Appeals
for the Eleventh Circuit

Decided April 30, 1998

EDMONDSON, Circuit Judge.

Three cases presenting the same or similar issues of Eleventh Amendment immunity were consolidated and are addressed in this appeal. In all three cases, the States, or their agencies, submitted motions to dismiss based on Eleventh Amendment immunity. The issues in this appeal are whether Congress abrogated States' Eleventh Amendment immunity for suits under the Age Discrimination in Employment Act ("ADEA") and under the Americans with Disabilities Act ("ADA").

* * *

Discussion

* * *

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This provision not only prohibits suits against States in federal court by citizens of other States, but also prohibits suits brought against a State in federal court by its own citizens. * * *

In Seminole Tribe of Florida v. Florida * * *, the Supreme Court recently considered the issue of when Congress can properly abrogate States' Eleventh Amendment immunity. The Court's decision in *Seminole* overruled Pennsylvania v. Union Gas Co. * * *, which held that acts taken by Congress pursuant to the Commerce Clause could, if sufficiently clear, abrogate Eleventh Amendment immunity. In *Seminole*, the Court specifically held that Congress had no authority to abrogate State sovereign immunity under the Eleventh Amendment when Congress acted pursuant to the Commerce Clause; the power to abrogate only exists under Section 5 of the Fourteenth Amendment. * * * In addition, the Court set out precisely what Congress must do to abrogate the States' immunity.

> Two requirements must be satisfied before Eleventh Amendment immunity can be successfully abrogated by Congress. * * * First, Congress must have intended to abrogate that immunity by providing "a clear legislative statement" of its intent–"making its intention unmistakably clear in the language of the statute." * * * Second, Congress must have attempted to abrogate this immunity under proper constitutional authority. In other words, Congress must have enacted the statute at issue using its

Fourteenth Amendment, Section 5, enforcement powers. * * *

I. Age Discrimination in Employment Act of 1967

Although I believe good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment, I will not decide that question today; * * * questions of constitutional power should be decided only as a last resort. Instead, I focus on the ADEA's words and rest my decision on the lack of unmistakably clear legislative intent.

In searching the ADEA for an unequivocal statement of intent to abrogate, courts look only to the language of the statute itself. * * * A court's guess about Congress's political will and subjective intentions—past, present, or future—is without consequence; only the statute and its language are to be considered. As directed by the Supreme Court, I do not go beyond the text of the ADEA in deciding whether it contains the requisite, unmistakably clear statement of intent to abrogate.

This requirement—that the intent to abrogate be found in an unmistakably clear statement in the language of the statute—necessitates a high level of clarity by Congress. But, as the Supreme Court has observed, such a requirement of Congress is not too high when considering the important interests protected by the Eleventh Amendment. The Eleventh Amendment recognizes that States, as a matter of constitutional law, are special entities—still possessing attributes of sovereignty. The Amendment strikes a balance between the federal government and the States. To alter that balance, Congress must be unmistakably clear in its intent. * * *

No unequivocal expression of an intent to abrogate immunity is unmistakably clear in the ADEA. No reference to the Eleventh Amendment or to States' sovereign immunity is included. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court. To me, an intent on the part of Congress to abrogate the States' constitutional right to immunity is not sufficiently clear to be effective under Eleventh Amendment jurisprudence. * * *

In one section, 29 U.S.C. § 630, the ADEA defines employers to include States. In a different section, 29 U.S.C. § 626(b), which never mentions employers much less mentions States as defendants, the ADEA separately provides for enforcement by means of suits for legal or equitable relief in courts of competent jurisdiction. This statutory structure does not provide the clarity needed to abrogate States' constitutional right to sovereign immunity. For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate. Although we make no definite rule about it, the need to construe one section with another, by its very nature, hints that no unmistakable or unequivocal declaration is present. More important, when we do construe the various ADEA sections together, abrogation never becomes "as clear as is the summer's sun." * * *

* * *

Still, Plaintiffs argue, and all three district courts seemed to agree, that Congress's amendments to the ADEA in 1974—adding States, their agencies, and political subdivisions to the definition of "employer" (along with the original portions of the ADEA providing that the statute may be enforced in courts of competent jurisdiction)—represents the unmistakably clear legislative statement required to abrogate the Eleventh Amendment. This view (which is opposed by the State in *Dickson*) seems to clash with the Supreme Court's precedents.

In Employees of the Dep't of Public Health and Welfare v. Missouri * * *, the Supreme Court held that the Fair Labor Standards Act ("FLSA") did not provide a sufficiently clear statement of intent to abrogate the Eleventh Amendment. As initially enacted, the FLSA (like the ADEA) did not apply at all to States. In 1966, the FLSA was amended to include certain State agencies in the definition of employer. This amendment, the Court held, did not provide the clear statement of intent to abrogate immunity, despite the provisions allowing suits in courts of "competent jurisdiction" against employers who violated the FLSA. * * * "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State." * * * Like the ADEA, there was no dispute that the FLSA applied to the State agencies set out in the FLSA; the dispute was only about what kinds of enforcement were available when dealing with States as defendant-employers.

In a later decision, Dellmuth v. Muth, the Supreme Court held that the Education of the Handicapped Act (EHA) did not abrogate Eleventh Amendment immunity despite provisions allowing suit in federal district court and many provisions referring to the States as parties in suits of enforcement. * * * That the pertinent statute (like the ADEA) never mentioned either "the Eleventh Amendment or the States' sovereign immunity" was given weight. * * * Abrogation was not sufficiently clear. * * *

To include the States as employers under the ADEA, as in the FLSA, does not show an intent that the States be sued by private citizens in federal court—the kind of suit prohibited under the Eleventh Amendment. * * * The ADEA is enforceable against the States, despite sovereign immunity, through forms of relief other than direct suits by citizens in federal court. * * * Congress may have had these other forms of enforcement in mind when it amended the statute to include States as employers. Thus, the general application of the law to the States does not make the requisite clear statement that Congress also intended the ADEA to abrogate the Eleventh Amendment specifically.

I do not dispute that some provisions of the ADEA make States look like possible defendants in suits alleging violations of the ADEA. I accept that these provisions could support an "inference that the States were intended to be subject to damages actions for violations of the [ADEA]." * * * But, as the Supreme Court stressed in *Dellmuth*, a permissible inference is not "the unequivocal declaration" that is required to show Congress's intent to exercise its powers of abrogation. * * *

I conclude that nothing in the ADEA indicates a truly clear intent by Congress to abrogate Eleventh Amendment immunity and, thus, States are entitled to immunity from suits by private citizens in federal court under the ADEA.

II. Americans With Disabilities Act

In sharp contrast to the ADEA, the ADA does include a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment . . ." * * * Thus, the only argument that Eleventh Amendment immunity still exists is that the ADA was not enacted pursuant to the Fourteenth Amendment. We are not persuaded by this argument.

Unlike the ADEA, it is plain that Congress was invoking its Fourteenth Amendment enforcement powers when it enacted the ADA. * * * Congress specifically found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment." * * * We accept Congress's analysis of the situation addressed by the ADA and agree with the courts that have addressed the issue: the ADA was properly enacted under Congress's Fourteenth Amendment enforcement powers.

Conclusion

The Eleventh Amendment is an important part of the Constitution. It stands for the constitutional principle that State sovereign immunity limits the federal courts' jurisdiction under Article III. As such, Congress must make an unmistakably clear statement of its intent before a federal court can accept that States have been stripped of their constitutionally granted sovereign immunity. For me, the ADEA contains no unequivocally clear statement of such intent. The ADA does. And the ADA was enacted under the authority of the Fourteenth Amendment.

For the reasons stated in our combined opinions, we hold that the ADEA does not abrogate States' Eleventh Amendment immunity but that the ADA does do so. Therefore, in *Kimel*, we REVERSE and REMAND for dismissal. In Dickson, we AFFIRM in part and REVERSE in part and REMAND for further proceedings. In MacPherson, we AFFIRM the district court's decision.

COURTS TO DECIDE STATE IMMUNITY, CAMPAIGN REFORM, PRIVACY ISSUES

The Legal Intelligencer

January 26, 1999 Tuesday

Richard Carelli, Associated Press

WASHINGTON – Entering a titanic constitutional struggle between Congress and the states, the Supreme Court yesterday agreed to decide whether state employees who say they are victims of age discrimination can make a federal case of it.

At issue is whether a federal anti-bias law, the Age Discrimination in Employment Act of 1967, wiped out the 11th Amendment immunity states and state agencies enjoy against being sued in federal courts. The justices set the stage for an important ruling, probably sometime in 2000, as it granted a Clinton administration appeal stemming from three separate disputes in Florida and Alabama. Ruling on those three cases in one decision, the 11th U.S. Circuit Court of Appeals said the 1967 law cannot be invoked in federal lawsuits against states or state agencies. In that same ruling, the appeals court said states and their agencies could be forced to defend themselves against federal lawsuits involving another anti-bias law, the Americans with Disabilities Act. Florida officials appealed from that aspect of the 11th Circuit court's ruling, but the justices took no action on the state's appeal yesterday. In a decision two years ago, the court said Congress may wipe out a state's 11th Amendment immunity only when it is going after some specific discriminatory harm and when it unequivocally says it is targeting that immunity. In the government appeal acted on yesterday, Justice Department lawyers noted that federal appeals courts are split in deciding whether to allow lawsuits under the age-discrimination act against the states in federal courts. Two have disallowed them; five have not. The cases are Kimel v Florida Board of Regents, 98-791, and U.S. v. Florida Board of Regents, 98-796.

Campaign Finance Laws

The court also set the stage yesterday for a significant campaign-finance ruling as it agreed to consider reviving Missouri's restrictions on contributions to political candidates. The justices said they will review a ruling that struck down the money limits as free-speech violations. In their appeal, state officials contend that the limits deter "efforts to pollute the political process." "There is a real fear, which may be stronger yesterday than at any time in recent memory, that money is harmfully distorting the nation's political process," the state's appeal contended. "There is strong political pressure on legislators at all levels of government to adopt restrictions." A 1994 Missouri law set limits on the contributions people can make to candidates. Those limits were enforced in 1996 and 1998 elections until the 8th U.S. Circuit Court of Appeals blocked future enforcement in its decision Nov. 30. A political action committee, Shrink Missouri Government, had challenged the limits early last year but a federal judge upheld them. A three-judge panel of the 8th Circuit court voted 2-1 to reverse the judge's ruling after concluding that the state's interest in preventing

corruption did not justify the "such a heavy-handed restriction of protected speech. "The case acted on yesterday is Nixon v. Shrink Missouri Government PAC, 98-963.

Sale of Police Records

Also yesterday, the high court agreed to decide whether states may block release of police records and other government documents to those who would sell the information even when the records routinely are released to the news media and others. The justices said they will review rulings that struck down such a California law as a violation of commercial free-speech rights. Elsewhere around the country, courts have reached conflicting rulings on the legitimacy of laws aimed at protecting the privacy of people arrested by police. California lawmakers amended the state's public records law in 1996 to limit the release of information on arrested suspects and crime victims to those with "a scholarly, journalistic, political or governmental purpose or . . . a licensed private investigator." Anyone given such records had to certify that the information would "not be used directly or indirectly to sell a product or service." Union Reporting Publishing Corp., which had sold lists of names and addresses of arrested people to lawyers, insurance companies and driving schools, sued the Los Angeles Police Department over its enforcement of the law. The case is Los Angeles Police Department v. Union Reporting Publishing, 98-678.

COURTS STRUGGLE WITH IMMUNITY ISSUES IN EMPLOYMENT DISCRIMINATION SUITS

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Robert P. Lewis

TWO NEW YORK federal courts recently issued conflicting opinions concerning one of the most vexing issues in employment law—whether states are immune under the Eleventh Amendment from federal statutory employment discrimination claims brought in federal court.[1]

In three consolidated cases, Cooper v. New York State Office of Mental Health, Mete v. New York State Office of Mental Retardation; and Davis v. Board of Trustees of the University of Connecticut (collectively, the Cooper cases), the Second U.S. Circuit Court of Appeals held that states are not immune under the Eleventh Amendment from federal court actions alleging violations of the Age Discrimination in Employment Act.

By contrast, in Kilcullen v. New York State Department of Transportation, a federal district judge in the Northern District of New York held that states are immune under the Eleventh Amendment from federal court actions alleging violations of the Americans With Disabilities Act.

Moreover, both courts recognized that their decisions conflict with those of other courts. For example, in the *Cooper* cases, the Second Circuit expressly disagreed with the Eleventh Circuit's decision in Kimel v. State of Fla. Bd. of Regents and the Eighth Circuit's decision in Humenansky v. Regents of University of Minnesota, both of which held that states do have immunity from ADEA. actions in federal court. Similarly, in Kilcullen, the court expressly disagreed not only with decisions from several other circuits, but with a decision recently issued by another judge in the Northern District of New York.

These conflicting opinions highlight a long-simmering split in the courts over states' immunity from federal employment discrimination suits. Like so many other issues arising under the federal employment discrimination statutes, state agencies and their employees will have to wait until the Supreme Court settles these issues before they can be certain that their discrimination action can be brought in federal court. Indeed, the Supreme Court recently granted certiorari in the *Kimel* case, which will be heard during the Court's next term.

The stakes are extremely high. In Alden v. State, also set for Supreme Court review, Maine's Supreme Judicial Court held that the Eleventh Amendment immunizes states from suits under the Fair Labor Standards Act in state court as well as federal court.

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[1] The 11th Amendment provides: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Consequently, if the Supreme Court upholds *Alden* and *Kimel*, thus ejecting the Second Circuit's opinion in the Cooper cases, then aggrieved state employees will find themselves stranded in a twilight zone in which they are barred from asserting their federal statutory rights in any court.

Basis of Immunity

In Seminole Tribe of Florida v. Florida, the Supreme Court held that Congress may abrogate states' Eleventh Amendment immunity by statute, but only where it: (1) unequivocally expresses its intent to abrogate immunity and (2) acts pursuant to a valid exercise of its power. To satisfy the first requirement, Congress's intent must be obvious from a "clear legislative statement." To satisfy the second requirement, Congress must act pursuant to the power vested in it under the Equal Protection Clause of the Fourteenth Amendment.

In the *Cooper* cases, the Second Circuit found that the ADEA met the first prong of the *Seminole Tribe* test. The court found the requisite "unequivocal expression" of Congressional intent to abrogate Eleventh Amendment immunity in a 1974 Amendment to the ADEA that extended its scope by adding "a State or political subdivision of a State and any agency or instrumentality of a State" to the definition of a covered "employer" and by adding "employees subject to civil service laws of a State government" to the definition of "employee."

In *Kimel*, the Eleventh Circuit focused on the absence, in the ADEA, of any express reference to the Eleventh Amendment or of a declaratory statement that states can be sued in federal court. In *Humenansky*, the Eighth Circuit focused on the ADEA's enforcement mechanism, set forth in 29 U.S.C. §626(b) and (c), which authorizes aggrieved persons to sue "in any court of competent jurisdiction," and which provides that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in" the Fair Labor Standards Act. Among the cross-referenced FLSA enforcement statutes is 29 U.S.C. §216(b), which authorizes aggrieved employees to sue for damages "in any Federal or State court of competent jurisdiction."

The Eighth Circuit found the ADEA's cross-reference to the FLSA's enforcement mechanism to be decisive. The court explained that, as originally enacted, neither the FLSA nor the ADEA included states in its definitions of covered employers. In 1966, Congress amended the FLSA definition to include certain state employers. The Supreme Court, however, in Employees of the Dep't of Public Health & Welfare v. Missouri, held that the amendment did not evidence sufficiently clear intent to abrogate Eleventh Amendment immunity because Congress did not enact a corresponding amendment to the FLSA's aforementioned enforcement provision, 29 U.S.C. §216(b), expressly allowing those state employers to be sued in federal court.

Congress responded in 1974 by amending 29 U.S.C. §216(b) to permit actions "against any employer (including a public agency) in any Federal or State Court of competent jurisdiction." Many courts have held this to evidence Congress's unmistakably clear intent to abrogate Eleventh Amendment immunity under the FLSA.

At the same time that Congress amended 29 U.S.C. §216(b) of the FLSA in 1974, it enacted the aforementioned amendment to the ADEA's definition of "employer" to include states. Because

29 U.S.C. §626(b) incorporates 29 U.S.C. §216(b), the 1974 Amendments amended part of the ADEA enforcement mechanism. Congress, however, did not amend the other prong of the ADEA enforcement mechanism, 29 U.S.C. §626(c), which still contains only a general authorization to enforce the ADEA "in any court of competent jurisdiction."

The result, noted the Eighth Circuit, was that the 1974 ADEA Amendments could be viewed as virtually identical to the 1966 FLSA Amendment that the Supreme Court, in the Employers opinion, found to be insufficient evidence of Congress's intent to abrogate Eleventh Amendment immunity because they did not expressly provide that state employers could be sued in federal court.

Thus, the Eighth Circuit held, Congress's failure to amend the ADEA's enforcement mechanism was evidence either (1) that Congress did not intend to abrogate Eleventh Amendment immunity under the ADEA or (2) of Congressional oversight. The court concluded that, because legislative oversight could not possibly constitute the requisite "unequivocal expression" of an intent to abrogate, states were immune from ADEA suits in federal court.

The Second Circuit, in the *Cooper* decisions, disagreed with the Eighth Circuit's analysis. It held that the 1974 amendments to the ADEA were sufficiently explicit to evidence Congress's intent to abrogate immunity. The court distinguished the ADEA from the version of the FLSA considered by the Supreme Court in Employers on the grounds that the FLSA defined "employers" to exclude "any State or political subdivision of a state" except for certain state-run hospitals and schools. The court found this to be a sufficient demonstration of Congressional hesitancy to subject states to FLSA coverage to conclude that it could not be assumed that Congress intended to subject states to the FLSA's enforcement mechanisms without explicit guidance in the text of the FLSA.

Unlike the FLSA, noted the Second Circuit, the ADEA does not exclude certain state employees from its coverage. Instead, the ADEA explicitly includes states and their employees within its scope by naming them–without limitation–in its definitions of "employer" and "employee," respectively.

The Second Circuit, in the *Cooper* cases, held that the ADEA satisfied the second prong of the *Seminole Tribe* test–that Congress validly exercised its power under the Equal Protection Clause in enacting it. By contrast, the Northern District Court, in the *Kilcullen* case, held that the ADA did not satisfy the second prong.

Both cases analyzed the second prong under the test recently enunciated by the Supreme Court in City of Boerne v. Flores, in which the Court held that, for a statute to be properly remedial (as is proper under the Equal Protection Clause) rather than substantive (which is not), there must be a congruence and proportionality between the injury prevented or remedied and the means adopted by Congress to that end.

In the *Cooper* cases, the Second Circuit, citing the Seventh Circuit's opinion in Goshtasby v. Bd. of Trustees of Univ. of Ill., held that the ADEA was a proper exercise of Congress's power under the Equal Protection Clause. Noting that the Supreme Court, in two prior cases, Massachusetts Bd. of Retirement v. Murgia and Vance v. Bradley, refused to recognize age as a suspect classification entitled to strict scrutiny by the courts, the court

nevertheless found the ADEA to be a proper exercise of Congress's power under the Equal Protection Clause because the clause grants to Congress the power to legislate a stricter standard of conduct than the Supreme Court has. In fact, the Second Circuit found support for its holding in *Murgia* and *Bradle*, holding that, because the Supreme Court determined the standard of review applicable to the alleged violations and addressing the merits of the allegations rather than dismissing the suits as beyond the scope of the Fourteenth Amendment, the Court conceded sub silento that the Equal Protection Clause protects against age discrimination.

The Second Circuit's decision in the *Cooper* cases expressly disagreed with *Humenansky* and *Kimel* on this point. Those courts held that, because the Supreme Court, in *Murgia* and *Bradley*, as well as in Gregory v. Ashcroft, held that certain mandatory retirement policies were lawful because they had a rational relation to legitimate governmental interests, and thus refused to recognize age as a suspect class entitled to a heightened level of equal protection scrutiny, the ADEA, which subject all age-based employment decisions to a suspect classification test, provides more protection than does the Equal Protection Clause. Thus, concluded those courts, Congress improperly determined the substance of the constitutional rights of the elderly.

The Eleventh Circuit, in *Kimel*, also held that the ADEA failed the *City of Boerne* test because there was no congruence or proportionality between the injury prevented or remedied and the means adopted by Congress to that end. The court noted that Congress amended the ADEA to subject states to its provisions not for any concern for the Constitution, but because its supporters "simply thought it was a good idea."

ADA Immunity

In *Kilcullen*, the court's analysis of the first prong of the *Seminole Tribe* test was much simpler because, unlike the ADEA, the ADA contains a clear expression of Congress's intent. The ADA provides that a "state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."

With respect to the second *Seminole Tribe* prong, however, the court, agreeing with a minority of courts, including the Eighth Circuit in *Kimel* (which also dealt with the ADA), held that the ADA is an invalid exercise of Congress's power under the Equal Protection Clause because the ADA (like the ADEA, according to *Kimel*), provides more protection than does the Equal Protection Clause. Consequently, the court held, in enacting the ADA, Congress improperly defined the substance of the Constitutional rights of the disabled.

The court based its holding on the Supreme Court's opinion in City of Cleburne v. Cleburne Living Ctr., which held that state action involving mental disabilities should be reviewed under a rational basis test rather under than under a strict scrutiny standard, and on subsequent decisions in Coolbaugh v. State of Louisiana and Lussier v. Dugger, applying City of Cleburne to both physical and mental disabilities.

The court also held that the ADA failed to satisfy the *City of Boerne* test because the ADA is not a congruent and proportional response to violations of the Fourteenth Amendment. The court focused on the ADA's prohibition against failing to make "reasonable accommodations to the known physical

or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . . ." The court held that, because a disabled person needing accommodation imposes costs on employers which are not attendant to employment of non-disabled persons, and because a government has a legitimate interest in performing its functions in a cost-efficient manner, a state's decision not to accommodate is rationally related to its legitimate interest in cost-efficiency.

Because the failure to accommodate survives a rational basis review, there is no significant likelihood evident that the accommodation requirement will prevent or remedy many instances of unconstitutional behavior. Thus, on its face, the ADA's reasonable accommodation requirement was not a congruent and proportional response to unconstitutional discrimination under *Boerne*. Instead, held the court, the ADA's imposition of an entitlement to reasonable accommodation created a new substantive right outside the scope of the Equal Protection Clause.

The court also based its finding on the lack of evidence in the legislative history of the ADA from which Congress could have reason to believe that the failure to accommodate, though facially constitutional, was unconstitutional in practice. According to the court, this required evidence from which Congress could have reason to believe that the failure to accommodate will often have no rational relation to any legitimate purpose, which evidence did not exist in the record.

Conclusion

The case law clearly indicates that both federal and state courts, including New York's courts, are struggling to define the scope of states' Eleventh Amendment immunity from federal employment discrimination suits. At some point during its upcoming term, the Supreme Court will provide guidance, in *Kimel* in connection with Eleventh Amendment immunity under the ADEA, and in *Alden*, as to whether Eleventh Amendment immunity extends to suits filed in state courts as well as federal courts.

Until then, the ability of employment attorneys and their clients to litigate their employment discrimination claims in federal and state court will depend largely on the federal circuit or state in which they reside.

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RENO v. CONDON

Will Driver Privacy Take a Back Seat to States' Rights?

Matthew Frey *

Do you care who sees your State motor vehicle records? The federal government does, and it's taking its case to the Supreme Court.

The United States will this term appeal a Fourth Circuit ruling issued last September that blocked federal authorities from enforcing the Driver Privacy Protection Act (DPPA). No doubt adding to its other high-profile rulings this decade concerning federalism, the Court in this case will determine whether the federal government may regulate state policies regarding the disclosure of driver information.

Congress enacted the DPPA in 1994 in response to widespread concern over lax control of personal information contained in state motor vehicle records. Legislative testimony revealed that as many as 34 states allowed easy access to personal driver information and that in some cases, such as the 1989 killing of actress Rebecca Shaeffer, criminals had targeted their victims based on information gleaned from the victim's driver information records. Congress also found alarming the common state practice of selling or releasing driver information to companies for use in direct-marketing campaigns.

In striking down the DPPA, the Fourth Circuit, in an usually forthright opinion, faulted Congress for outstripping its power under the Commerce Clause and for construing a right to privacy where none exists.

"The DPPA exclusively regulates the disclosure of personal information contained in state motor vehicle records," Judge Karen J. Williams wrote for the majority. "Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress passed a law that, for all intents and purposes, applies only to the States."

Speaking to the privacy issue, Judge Williams noted that the assertion that the DPPA enforced individuals "Fourteenth Amendment right to privacy in their names, addresses, and phone numbers" was out of step with the Supreme Court's established privacy doctrine, not to mention the purely remedial powers granted Congress under the Fourteenth Amendment. Ridiculing the idea of a right to privacy in one's personal information, Judge Williams pointed out that a state-issued driver's license already "is often needed to cash a check, use a credit card, board an airplane, or purchase alcohol." "We seriously doubt that an individual has a constitutional right to privacy in information routinely shared with strangers," she concluded.

In dissent, Judge J. Dickson Phillips Jr. disagreed with the majority's Commerce Clause analysis. "To assume that Congress could only regulate the states' conduct directly if it also equally regulated comparable private conduct (even where none in fact exists) seems to me to bear no relationship to any concept of federalism implicit in the Tenth Amendment as interpreted by the Supreme Court," he wrote.

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Judge Phillips also pointed out that the only difference between the DPPA and other legislation approved by the Supreme Court aimed at regulating state conduct was Congress' decision to eschew its usual means of ensuring state compliance. "Congress could have, had it desired, made receipt of federal highway funds contingent on accepting DPPA's provisions," he wrote. "Similarly, Congress could almost assuredly have completely preempted the field of motor vehicle information disclosure" by enacting its own disclosure policy, a "drastic move," Judge Phillips noted, which in another context had nonetheless met with Supreme Court approval.

Crucial to Judge Phillips's reasoning was the way he characterized the DPPA's effect on the states. "[T]he DPPA does not require that states act at all," he wrote. "Its provisions only apply once a state makes the voluntary choice to enter the interstate market created by the release of personal information in its files." Because it regulates state activities only, not state regulation of private parties, Judge Phillips concluded, the DPPA should be allowed to stand.

98-1464 Reno v. Condon

Ruling below (4th Cir., 155 F.3d 453, 67 U.S.L.W. 1139, 26 Media L. Rep. 2185):

1994 Driver's Privacy Protection Act, which bars state motor vehicle departments from disclosing "personal information" contained in motor vehicle records and bars individuals from obtaining or disclosing such information for uses not permitted by statute, is not valid exercise of Congress's powers under commerce clause or Section 5 of 14th Amendment but, instead, violated 10th Amendment.

Question presented: Does 1994 Driver's Privacy Protection Act contravene constitutional principles of federalism?

Charlie CONDON, Attorney General for the State of South Carolina, *et al.*, Plaintiffs-Appellees,
v.
Janet RENO, Attorney General of the United States, *et al.*, Defendants-Appellants

United States Court of Appeals
for the Fourth Circuit

Decided September 3, 1998

WILLIAMS, Circuit Judge.

The Attorney General of the State of South Carolina (the State) challenged the constitutionality of the Driver's Privacy Protection Act (DPPA) * * * in the United States District Court for the District of South Carolina on the grounds that it violated the Tenth and Eleventh Amendments to the United States Constitution. * * * The United States defended the DPPA, arguing that it was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. After reviewing the parties' arguments, the district court held that the DPPA violated the Tenth Amendment and permanently enjoined its enforcement in the State of South Carolina. * * *

On appeal, the United States first contends that the DPPA was lawfully enacted pursuant to Congress's power under the Commerce Clause. Although Congress may regulate entities engaged in interstate commerce, Congress is constrained in the exercise of that power by the Tenth Amendment. As a result, when exercising its Commerce Clause power, Congress may only "subject state governments to generally applicable laws." * * * The DPPA exclusively regulates the disclosure of personal information contained in state motor vehicle records. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress passed a law that, for all intents and purposes, applies only to the States. Accordingly, the DPPA is simply not a valid exercise of Congress's Commerce Clause power.

In the alternative, the United States contends that the DPPA was lawfully enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. When enacting legislation under Section 5 of the Fourteenth Amendment, however, Congress's power "extends only to enforc[ing] the provisions of the Fourteenth Amendment." * * * The United States asserts that individuals possess a Fourteenth Amendment right to privacy in their names, addresses, and phone numbers, and that the DPPA enforces that constitutional right. Neither the Supreme Court nor this Court, however, has ever recognized a constitutional right to privacy with respect to such information. Congress is granted a remedial power under Section 5 of the Fourteenth Amendment, not a substantive power. As a consequence, the DPPA is not a valid exercise of Congress's Enforcement Clause power.

Under our system of dual sovereignty, "[t]he powers not delegated to the United States by the Constitution, nor prohibited

by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Because Congress lacked the authority to enact the DPPA under either the Commerce Clause or Section 5 of the Fourteenth Amendment, we affirm the judgment of the district court.

* * *

AFFIRMED.

PHILLIPS, Senior Circuit Judge, dissenting.

Adopted in 1994 as part of larger omnibus crime legislation, the Driver's Privacy Protection Act (DPPA) *** is a unique federal enactment designed to address the privacy and safety concerns flowing from the unfettered disclosure of personal information contained in drivers' license files maintained by state motor vehicle departments. Pigeonholing the Act into one of two narrow legal constructs that it apparently believes exclusively define the Tenth Amendment's constraints on federal power, the majority concludes that the Act is unconstitutional because it impermissibly regulates States as States and because it is not a law of general applicability to both State and private actors. I dissent, believing that the unique structure and internal operation of the DPPA, considered in light of the harm generated by the States' own actions at which it is aimed, distinguish this case from those upon which the majority relies and compels the conclusion that the Act is consistent with both substantive and structural limitations on the exercise of federal power. * * *

* * *

Because the DPPA regulates the flow of personal information—information that is consistently in the stream of commerce and for which States receive substantial reimbursement—the only issue in this case is whether Congress may, consistent with the Tenth Amendment, impose its will on States respecting conduct uniquely engaged in by States and state actors. * * * It follows that, in exercise of its Commerce Clause powers, Congress could have, had it desired, made receipt of federal highway funds contingent on accepting DPPA's provisions. * * * Similarly, Congress could almost assuredly have completely preempted the field of motor vehicle information disclosure, a drastic move that States would undoubtedly resist but on which, in an analogous setting, the Court has placed its seal of approval. * * * Instead, Congress chose to regulate the States directly, without offering the "incentive" of public funds or threatening to preempt the field.

The majority concedes, as it must, that the end object of the Act is the direct regulation of state conduct. It is not the indirect regulation of private conduct–here information use—by forcing the states directly to regulate that conduct, in the way that the states were held impermissibly compelled to regulate the waste-handling conduct of private parties in New York v. United States * * *. Nor does the Act make South Carolina an executive instrument of the federal government in the way the Brady Act was held impermissibly to have conscripted local law enforcement officials to enforce federal law in Printz v. United States * * *.

It is the direct regulation of the State activity here which distinguishes the DPPA, in the most fundamental of ways, from the federal legislation struck down

respectively in *New York* and *Printz*.

Unlike the *New York* legislation, the DPPA does not "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." * * * It is true that states that choose to disclose motor vehicle information must take steps to administer their programs in conformity with federal guidelines. But that administration will be of their own choosing and will not in any way be a "federal regulatory program." And it is settled that not every kind of federally forced state administration to comply with federal law violates the Tenth Amendment. In South Carolina v. Baker, * * * the Court upheld a federally imposed requirement that public bonds issue only in registered form. Although the Tax Equity and Fiscal Responsibility Act of 1982 required States to abandon their previous bearer systems and install completely different administrative programs, the Baker Court dismissed South Carolina's argument that this burden unconstitutionally coerced state officials. The undoubted burden was, explained the Court, simply "an inevitable consequence of regulating a state activity." * * * The Court went on to say that a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. * * *

* * *

The DPPA does not require that states prohibit private individuals from obtaining information in violation of its provisions. Section 2723(a) prohibits this directly by making violation of the DPPA a federal offense. In fact, the DPPA does not require that states act at all. Its provisions only apply once a State makes the voluntary choice to enter the interstate market created by the release of personal information in its files. As did the compelled adoption by the states of a registered bond system, the DPPA only "regulates state activities: it does not . . . seek to control or influence the manner in which States regulate private parties." * * * For this reason, *New York* and *Printz* do not require invalidating this Act.

Nor do I believe that any other constitutionally-based federalism principle, perhaps underlying *Printz* and *New York* at a deeper level, requires its invalidation. This congressional enactment requires only that states choosing to regulate the release of particular information in their possession into the stream of interstate commerce do so in a way Congress deems appropriate. Elected federal officials have made a considered policy determination that unfettered release of this information is not in the public interest because of privacy concerns and because it would be injurious to the interstate market in information. Whether Congress is right or not in that determination is irrelevant. It is sufficient for our purposes that Congress deems injurious a specific state activity in which by definition private actors do not engage. To assume that Congress could only regulate the states' conduct directly if it also equally regulated comparable private conduct (even where none in fact exists) seems to me to bear no relationship to any concept of federalism implicit in the Tenth Amendment as interpreted by the Supreme Court.

* * *

I would reverse the judgment holding the DPPA unconstitutional as a violation of the Tenth Amendment.

HIGH COURT TO HEAR DRIVER PRIVACY CASE

The Washington Post

Tuesday, May 18, 1999

Joan Biskupic, Washington Post *Staff Writer*

The Supreme Court agreed yesterday to take up a challenge to a federal law that forbids states from disclosing the personal information motorists provide to obtain a driver's license.

The dispute, to be heard next fall, cuts to the heart of privacy concerns in today's high-technology age, when data can be transferred at the touch of a button. More broadly, the case could become important in the Rehnquist court's effort to curtail what it believes are unwarranted federal intrusions into states' prerogatives. A narrow but determined majority has struck down several acts of Congress in recent terms as encroaching on state authority.

The 1994 Driver's Privacy Protection Act arose from congressional concern about stalkers and other criminals who used motor vehicle records to track down their victims—particularly the case of actress Rebecca Schaeffer, who was murdered in 1989 by a man who found her California address through motor vehicle records. The law generally forbids personal information from being disclosed but provides numerous exceptions for public safety, anti-fraud and other authorized purposes.

Several states say the act, which began taking effect in most places in 1997, is an unconstitutional burden on them. They object not only to the prohibition on disclosing data that they routinely sell to businesses, but also contend that because the statute is riddled with exceptions, it is complicated to carry out.

The 4th U.S. Circuit Court of Appeals struck down the law last year, ruling that Congress was impermissibly forcing states to run a federal program. But appeals courts nationwide have been divided over the constitutionality of the act, and in the South Carolina case taken yesterday, both the Justice Department and the state said the Supreme Court should decide the issue once and for all.

Motorists typically provide an array of information to obtain a driver's license, including name, address, telephone number and, in some cases, Social Security number, medical information and photographs. States often pass along this information to individuals and businesses, sometimes making considerable money from it. The Justice Department said New York's motor vehicle department earned $17 million in one year by selling driver records.

In its appeal, the Justice Department asserts that the law was a legitimate use of Congress's power to regulate interstate commerce after lawmakers found the "nefarious" use of personal records "posed a sufficient threat to individuals' personal safety and autonomy."

But in challenging the law as a burden on the states, South Carolina officials said in *Reno v. Condon*, "The practical reality of the matter is that [it] commands the states to maintain a broad and ongoing administrative effort."

PRIVACY ISSUE CASES FLOODING HIGH COURT

The Augusta (Ga.) Chronicle

Sunday, May 30, 1999

James J. Kilpatrick

AT SOME POINT in its next term, the Supreme Court is likely to be awash in a tide of privacy issues. A major case will take up the privacy of motor vehicle records. Another closely watched appeal will look at the privacy of police records. There is an unlikely possibility that the Supremes will ponder the disclosure of our Social Security numbers.

This is all to the good. The government has undoubted power to require a vast deal of personal information from the people it governs. Willy-nilly, we disgorge information about our incomes, our illnesses, our births and marriages and deaths. The question is, what records must the government maintain in confidence? What information may the government disclose?

APART FROM the propriety of disclosing a lady's age, as recorded on her driver's license, the cases present an overriding constitutional question. How viable is the 10th Amendment? To some of us curbstone constitutionalists, the 10th is the key that unlocks the house of our fathers. To others, quoting Justice Harlan Stone, the 10th states a mere "truism." We'll see about that.

In *Reno v. Condon*, the High Court faces the 10th Amendment squarely. The amendment says that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Every word of the 10th Amendment carries a weight of fundamental principle. Here is the foundation of federalism. The federal government has only those powers delegated to it by the Con stitution. If the Constitution does not vest a particular power in Congress, the courts or the executive branch, the power does not exist—or rather, the power remains with the states "respectively."

In 1994, as part of the Omnibus Crime Control Act, Congress passed the Driver's Privacy Protection Act. In general, the act prohibits the states from disclosing certain personal information in their motor vehicle records.

IN ADOPTING the Driver's Privacy Protection Act, Congress acted on the best of motives. In the wrong hands, data lifted from motor vehicle records can lead to serious crime. In 1989, actress Rebecca Schaeffer was murdered by a man who obtained her address from her driver's license. Testimony before congressional committees in 1993 and 1994 turned up similar incidents.

There's another side. The states routinely sell motor vehicle records to attorneys, automobile dealers and automobile manufacturers. New York earned $17 million in one year from sales of license data.

In 1997, South Carolina took the lead in challenging the act as a violation of the 10th Amendment. In the view of Attorney General Charlie Condon, the Constitution does not delegate power to Congress to say what a sovereign state

may do with its own records. The U.S. Court of Appeals for the 4th Circuit agreed. The act is beyond congressional reach under the commerce clause, said Judge Karen J. Williams. The 7th and 10th Circuits have taken the opposite view.

THE HIGH COURT has agreed to hear a separate but similar case from California. The state adopted a law prohibiting local sheriffs and police departments from selling information gleaned from records of arrest. United Reporting Publishing Corp. buys such records and resells the data to attorneys, insurance companies, alcohol counselors and driving schools. The law is so riddled with exceptions for journalistic and investigative purposes that the 9th Circuit found it violates the corporation's right of access to public documents.

A third privacy case has been filed by a Louisiana woman, Mary Vice Evans, whose son died as a result of an automobile accident. She sued an insurance company and other defendants. They responded by demanding her Social Security number (and her son's) for purposes of preparing interrogatories. She balked, citing a constitutional right of privacy. The Louisiana Supreme Court ordered her to provide the numbers for restricted use.

A CONSTITUTIONAL right of privacy may exist somewhere out in the penumbra of the law, but I doubt that Mrs. Evans will win a full-dress review in the High Court. Come October, the Supremes will have about all the privacy issues they can handle.

FOURTH CIRCUIT HOLDS THAT DRIVER'S PRIVACY PROTECTION ACT VIOLATES TENTH AMENDMENT

Condon v. Reno, 155 F.3D 453 (4th Cir. 1998).

Harvard Law Review

March, 1999

Recent Case

Recent Supreme Court decisions have suggested that the Tenth Amendment limits Commerce Clause power to a greater extent than previously predicted. Last September, in Condon v. Reno, the Fourth Circuit followed this trend, finding the Driver's Privacy Protection Act of 1994 (DPPA) unconstitutional. Because the Fourth Circuit failed to consider states' ability to avoid the DPPA's mandates, its analysis diverged from the Court's focus on state choice[1] as a way to ensure political accountability and protect federalism.[2] In so doing, the decision further split Tenth Amendment jurisprudence under the Commerce Clause from related Tenth Amendment decisions dealing with field preemption and the Spending Clause.

Congress enacted the DPPA to discourage the "active commerce" in and "easy availability" of personal information obtained via motor vehicle records. The DPPA prohibits state departments of motor vehicles (DMVs) and their employees from "knowingly disclos[ing] or otherwise mak[ing] available" such information. The Act contains a number of exceptions and allows individuals to waive its protection. In addition, the Act imposes criminal fines and civil penalties for noncompliance.

In September 1997, South Carolina challenged the DPPA as a violation of the Tenth and Eleventh Amendments. The United States moved to dismiss, claiming that the Act was lawfully enacted pursuant to the Commerce Clause and section 5 of the Fourteenth Amendment. The district court granted summary judgment to South Carolina and enjoined enforcement of the DPPA.

The Fourth Circuit affirmed. Writing for the majority, Judge Williams divided the Supreme Court's Tenth Amendment jurisprudence into two distinct lines of cases. The first, following Garcia v. San Antonio Metropolitan Transit Authority, "concerns the authority of Congress to regulate the States as States" and permits Congress to "enact laws of

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[1] "State choice" indicates a state's ability to opt out of a statute by not legislating in a given field, by leaving that field, or by never entering the field in the first place.

[2] Although only one means of protecting federalism, political accountability concerns have been of primary importance in recent decisions, see, e.g., Printz, 117 S. Ct. at 2377, and at least one commentator views political accountability as fundamental to federalism, see D. Bruce La Pierre, Political Accountability in the National Political Process--The Alternative to Judicial Review of Federalism Issues, 80 Nw. U. L. Rev. 577, 582-83 (1985). The question of accountability is one not only of the locus of decisionmaking, but also of state and national perception of that locus.

general applicability that incidentally apply to state governments." The second, following New York v. United States and Printz v. United States, "concerns the authority of Congress to direct the States to implement or administer . . . federal regulat[ions]" and prohibits Congress from either "commandeer[ing] the legislative processes of the States" or "conscripting the State's officers directly" to effect such regulations.

Judge Williams distinguished the DPPA, which regulates only state agencies, from the statutes upheld in the first line of cases by holding that, in the context of laws regulating states as states, only "generally applicable" regulations are constitutional. Judge Williams therefore placed the DPPA within the second line of cases. Although the DPPA neither commandeers state legislatures nor conscripts state officers, the court found that "state officials must . . . administer [the Act]."[3]

Judge Phillips, in dissent, criticized the majority for "[p]igeonholing the Act into one of two narrow legal constructs." Judge Phillips emphasized that the DPPA did not "commandeer" the South Carolina legislature because the state could have stopped selling information compiled using motor vehicle records. Furthermore, Judge Phillips contended, because the DPPA directly regulates a state agency, it differs fundamentally from statutes that indirectly regulate private conduct, such as the ones invalidated in New York and Printz. Citing South Carolina v. Baker[4] as precedent for a broader reading of Garcia, Judge Phillips considered the DPPA a similarly permissible federal regulation of state governments.

Although invoking the "anti-commandeering" principle as a bright-line response to Tenth Amendment concerns, the Fourth Circuit failed to recognize that the anti-commandeering standard is inextricably linked to a state's ability to decline the imposed regulation. By reading Garcia to indicate that only "generally applicable" statutes can be constitutional exercises of Commerce Clause power over states, the majority opinion neglected broad swaths of contrary precedent affirming the role of state choice in the constitutional inquiry: the jurisprudence of "general applicability," field preemption, and Spending Clause "encouragement." The majority ignored states' ability to stop selling motor vehicle information. Unlike the DPPA, the challenged statutes in New York and Printz prevented states from declining regulatory mandates; thus, their coercive nature accordingly piqued the Court's accountability concerns. A more searching analysis of the Supreme Court's approach to Tenth Amendment challenges would uphold the DPPA as a constitutional regulation of states as voluntary market participants able to stop disseminating motor vehicle information. Such an analysis best incorporates the Court's accountability concerns while harmonizing its Tenth Amendment jurisprudence across doctrinal lines.

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[3] *Id.* The majority opinion also analyzed the DPPA under section 5 of the Fourteenth Amendment, see Condon, 155 F.3d at 463, but found "no constitutional right to privacy in the information contained in motor vehicle records," id. at 465.

[4] 485 U.S. 505 (1988). Judge Phillips noted that South Carolina v. Baker demonstrated "that not every kind of federally forced state administration to comply with federal law violates the Tenth Amendment." Condon, 155 F.3d at 467 (Phillips, J., dissenting).

At least one Supreme Court decision demonstrates that a limited "general applicability" inquiry can be both overly restrictive and overly manipulable, whereas a broader determination of the existence of state choice proves more sustainable. In South Carolina v. Baker, South Carolina challenged an amendment to the Internal Revenue Code that denied federal tax exemption for interest on unregistered state and local bonds. Although the statute in Baker, taken as a whole, could be read as "generally applicable" in its across-the-board discouragement of bearer bonds, the challenged subsection could apply only to a state.[5] Nonetheless, the Baker Court characterized the statute as generally applicable and upheld it. The similarities between the Baker statute and the DPPA are readily apparent: only states (and municipalities) can issue tax-exempt bonds; likewise, only states can market DMV information. Furthermore, under the statutes at issue in Condon, Garcia, and Baker, states retained the option, however impractical, to avoid implementing the required regulation—all of these situations demonstrate states' active choices to participate in economic markets. Because states have a theoretical right to revoke such a choice, they cannot raise Tenth Amendment challenges to the federal regulation of that market. Finally, accountability concerns are not at stake because state political actors have made the decision to enter a market—Congress has merely chosen to regulate that entry.

Two legislative techniques that have withstood Tenth Amendment scrutiny—field preemption and Spending Clause encouragement—suggest that laws of "general applicability" are but one subset of statutes that constitutionally restrict, but do not entirely remove, state choice. Congress routinely allows state legislatures to choose between following congressional guidelines in a given field and leaving that field altogether. Such preemption is constitutional, in part because "the residents of the State retain the ultimate decision as to whether or not the State will comply. . . . [S]tate governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." Legislation passed pursuant to the Spending Clause presents state decision makers with a similar "choice." Furthermore, the Court has suggested that neither the existence of an alternative federal preemptive regime nor the practicality of a state's decision to decline federal grants is relevant. Thus, "encouragement," however difficult to ignore, has a different constitutional status from commandeering or conscription because states can choose to decline the federal invitation to regulate. Similarly, because states can decline to follow the DPPA by no longer selling driver information, the practicality of such a course is irrelevant to the constitutionality of the Act.

Furthermore, the court should have found the DPPA constitutional because the availability of state choice limits accountability concerns by requiring affirmative decisions by state legislatures. In contrast, the statutes challenged in New York and Printz raised serious accountability concerns because state legislatures lacked the

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[5] *See id.* The challenged statute aimed "to address the tax evasion concerns posed generally by unregistered bonds." *Id.* The challenged subsection, however, applied only to tax-exempt bonds issued by states and municipalities. *See id.* The Condon majority refused to read South Carolina v. Baker as an assessment of the entire statute. *See* Condon, 155 F.3d at 461.

ability to decline any responsibility for the regulation—the state could not leave a field, decline a grant, or exit a market. For example, the Low-Level Radioactive Waste Policy Amendments Act at issue in New York presented the state with a "choice" between unconstitutional alternatives. Neither choice allowed New York to avoid enacting unwanted legislation entirely; the Act "commandeered" the state legislature in order to implement congressional will. Similarly, the Brady Act, which was invalidated in Printz, did not even offer states a non-regulatory alternative, but simply "compel[led] the States to enact or administer a federal regulatory program." Because states could not refuse enactment or administration, this coercion was unconstitutional. Unlike the statutes at issue in New York and Printz, however, the DPPA does not raise similar accountability concerns because it leaves states the option not to disseminate or sell motor vehicle information, even if many state governments would be unwilling to make that difficult choice.

The Supreme Court has slowly receded from the process-oriented federalism hinted at in Garcia; the Court's emphasis on substantive accountability concerns ultimately proved fatal to the statutes challenged in New York and Printz. These cases, when viewed in conjunction with the Court's federal preemption and Spending Clause jurisprudence, demonstrate the centrality of state choice to the constitutional inquiry. The DPPA should have been found constitutional because it presented a complicated regulatory scheme with which states must comply—but only after states choose to disseminate driver information. Had the Fourth Circuit focused on the constant role of state choice in Tenth Amendment jurisprudence, it could have helped unify several doctrinal strands without needlessly narrowing congressional power under the Commerce Clause.

VERMONT AGENCY OF NATURAL RESOURCES v. UNITED STATES

Blowing the Whistle on State Immunity

Matthew Frey *

A case before the Supreme Court this term will address whether individuals may sue States on behalf of the federal government under the False Claims Act (FCA), a measure designed to encourage workers to report mismanagement of federal funds on the job. Joining a long line of opinions issued this decade concerning the proper balance of state and federal power, the Court's decision in this case will settle whether state workers may sue federally funded state agencies under the FCA's so-called "whistle-blower" provision.

Conflicting results in two cases decided recently at the federal level suggest that this issue is ripe for Supreme Court review. In one involving the University of Minnesota, the Eighth Circuit in September 1998 held that States were "persons" and therefore liable to suit under the FCA's provisions. Following that ruling, the University agreed to settle charges it had failed to report income from an experimental drug to the federal institute that had funded the drug's development. Later that year, on the other hand, a district court judge in a New York case found that States were immune from suits under the FCA, a ruling which nonetheless prompted the defendants in that lawsuit, both the City and the State of New York, to pay $49 million to settle allegations they had collected federal funds to support foster programs that neither in fact provided.

The present case arises from a qui tam, or whistle-blower, suit brought by an employee of the Vermont Agency for Natural Resources. The employee alleges that the agency overstated the number of hours agency employees spent working on federally funded projects in an attempt to mislead federal officials.

Writing for the 2-1 majority that ruled that the employee's lawsuit may go forward, Second Circuit Judge Amalya L. Kearse probed both the language and the legislative history of the FCA, a measure that dates to an 1863 law that was meant to combat widespread profiteering among suppliers of the Union army.

Judge Kearse wrote that the FCA's mention of "the term 'any person' . . . is sufficiently broad to encompass the States; [and] that Congress meant to include the States within the term 'person.'" In addition, she rejected Vermont's claim that it was immune to qui tam suit under the Eleventh Amendment. "The real party in interest in a qui tam suit is the United States," she concluded, likening the individual who commences the suit to "an attorney working for a contingent fee." (Qui tam plaintiffs stand to receive up to 30% of any damages award.)

In a detailed dissent, Judge Jack B. Weinstein disagreed with the court's finding that individuals were permitted to pursue claims on the federal government's behalf. "The federal government's power to sue a state is a narrow and nontransferable exception to the

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broad and fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment," he wrote.

Even if that were not true, Judge Weinstein continued, echoing the reasoning contained in most recent pro-states' rights opinions (see *Kimel v. Florida Board of Regents* on page 138), a private party suing a state for money damages "can only be permitted to press his suit if he can establish Congress' intent under the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity." "This a qui tam plaintiff cannot do," Judge Weinstein concluded.

If Judge Weinstein's views find company among a majority of the Supreme Court, the federal government will no longer be able to entice would-be whistle-blowers working for state governments with visions of the nearly $250 million in damages that qui tam plaintiffs have won for themselves since 1966.

98-1828 Vermont Agency of Natural Resources v. United States

Ruling below (2d Cir., 162 F.3d 195, 67 U.S.L.W. 1381):

States are "persons" that can be sued under qui tam provisions of False Claims Act and, because United States is real party in interest in qui tam litigation, do not enjoy 11th Amendment immunity from qui tam suits brought by individuals.

Questions presented: (1) Is state "person" subject to liability under FCA? (2) Does 11th Amendment preclude private relator from commencing and prosecuting FCA suit against unconsenting state?

UNITED STATES of America, *ex rel.* Jonathan STEVENS, *qui tam* and as relator, Plaintiff-Appellee,
United States of America, Intervenor,
v.
The STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Defendant-Appellant.

United States Court of Appeals
for the Second Circuit

Decided December 7, 1998

KEARSE, Circuit Judge.

Defendant State of Vermont Agency of Natural Resources (the "Agency" or the "State") appeals from an order of the United States District Court for the District of Vermont, J. Garvan Murtha, Chief Judge, denying the State's motion to dismiss the present qui tam suit brought by Jonathan Stevens on behalf of the United States under the False Claims Act * * * ("FCA" or the "Act"), for lack of subject matter jurisdiction. The district court ruled that the State is a "person" within the meaning of § 3729(a) and is thus subject to suit under the Act, and that such suits are not barred by the Eleventh Amendment. The State challenges these rulings on appeal. For the reasons set forth below, we affirm.

I. BACKGROUND

At all relevant times, the Agency was a recipient of federal funds, and Stevens was an employee of the Agency. Stevens commenced this action as a qui tam suit under the FCA for himself and the United States, alleging that the Agency had made fraudulent claims against the United States. The allegations of the complaint, taken as true for purposes of the State's motion to dismiss, include the following.

A. The Complaint

The Agency, through its Department of Environmental Conservation ("DEC") and a DEC subdivision called the Water Supply Division ("WSD"), was the recipient of a series of federal grants administered by the United States Environmental Protection Agency ("EPA") * * *. These grants, which substantially funded WSD's budget, provided federal funds to pay for, inter alia, salary expenses for work performed by WSD employees in connection with the grants.

As a recipient of these funds, the Agency was subject to certain reporting requirements, including the requirement that it submit time and attendance records reflecting the hours actually worked and the work actually performed by the pertinent individual employees. The complaint alleges that DEC instead made advance estimates of the federal-grant-attributable time to be worked by individual WSD employees in a given federal fiscal year and instructed those employees to fill out their biweekly reports, purporting to show actual work done, to match DEC's estimates, regardless of the time actually worked * * *.

The complaint alleges that the Agency thus "knowingly and continuously submitted false claims to EPA for salary and wage expenses of its employees purporting to show that employees were working on federally-funded projects when, in fact, they were not working the hours as reported." * * * This allowed the Agency to retain funds to which it was not entitled for a given year. In addition, because DEC reported each year that all of the federal grant moneys received had been properly used, and proceeded to submit new grant requests using estimates based on the previous year's reported spending level, the false reports for a given year enabled the Agency to maintain or increase its funding in each succeeding fiscal year.

Stevens and other DEC employees complained to their supervisors that the biweekly reports that DEC instructed the employees to fill out were not accurate and that the reported hours were not being worked. Management instructed them to continue in accordance with DEC's prior instructions. The complaint also alleges, on information and belief, that a similar course of action was followed in several DEC subdivisions other than WSD.

* * *

B. The Denial of the State's Motion To Dismiss

In March 1997, the State moved to dismiss the complaint for lack of jurisdiction, contending (1) that states and their instrumentalities (collectively "States") are not "person[s]" under § 3729(a) who are subjected to suit or liability by the terms of the Act, and (2) that, in any event, the imposition of such liability on the States would violate the Eleventh Amendment. Stevens opposed the motion and was supported by the United States as amicus curiae.

In an Order dated May 9, 1997 ("Order"), the district court denied the motion to dismiss. The court rejected the State's contention that the Act does not make States "person[s]" who are subject to liability under the Act, noting that States have considered themselves "persons" within the meaning of the Act in order to bring suits as qui tam plaintiffs, and pointing out that, as a matter of statutory construction, identical words used in different parts of the same statute should normally be accorded the same meaning. The court stated that

> it would be anomalous to acknowledge that a state is a "person" within the meaning of the statute if it chooses to bring a False Claims Act suit, but that the same state is not a "person" if named as a defendant.

* * * The court rejected the State's claim of Eleventh Amendment immunity on the ground that that Amendment does not bar suits against the States by the United States itself, and that the United States "is the real party in interest and ultimately the primary beneficiary of a successful qui tam action." * * *

II. DISCUSSION

On appeal, the State contends (1) that Congress did not intend to subject States to suit or liability under the FCA, and (2) that to the extent that the Act is construed to permit qui tam suits against the States, the Act violates the immunity conferred on the States by the Eleventh

Amendment. The United States, which declined to intervene in the suit in the district court, has intervened in this appeal pursuant to 28 U.S.C. §§ 517 and 2403(a) (1994) to support the decision of the district court.

A. The Scope and Qui Tam Provisions of the Act

The FCA imposes civil liability on "[a]ny person" who makes a false monetary claim to the United States government. * * * Such a person is liable to the government for treble damages plus a $5,000-$10,000 civil penalty:

* * *

If a qui tam action has been brought, the United States must be given an opportunity to intervene and take control of the action. * * * Failure to comply with [certain] mandatory threshold requirements warrants dismissal of the qui tam complaint with prejudice, which bars the qui tam plaintiff from refiling such a suit, but leaves the government free to bring suit on its own. * * *

* * *

B. The Eleventh Amendment Defense

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." Although the terms of the Amendment, which embody the principle of sovereign immunity, refer only to suits against a state by persons who are not citizens of that state, it is clear that, unless the state has given its consent, the Amendment also bars a suit against the state by its own citizens, * * * as well as suits by a foreign nation, * * * or by an Indian tribe * * *.

As against the United States, however, States have no sovereign immunity. * * * When the States, in framing and adopting the Constitution, agreed to create a federal government "established for the common and equal benefit of the people of all the States," * * *, they necessarily recognized that the privilege of immunity would be inconsistent with that government's paramount sovereignty. A permanent waiver of the States' immunity from suit by the United States is "inherent in the constitutional plan." Monaco v. Mississippi, 292 U.S. at 329; see Blatchford v. Native Village of Noatak, 501 U.S. at 781-82; United States v. Minnesota, 270 U.S. 181 (1926) ("[o]f course the immunity of the State is subject to the constitutional qualification that she may be sued . . . by the United States"); United States v. Texas, 143 U.S. at 64. In sum, "nothing in [the Eleventh Amendment] or in any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." United States v. Mississippi, 380 U.S. 128, 140 (1965); see also Seminole Tribe v. Florida, 517 U.S. 44, 71 n. 14 (1996) ("the Federal Government can bring suit in federal court against a State").

The question for the present case is whether a qui tam suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred. The interests to be vindicated, in

combination with the government's ability to control the conduct and duration of the qui tam suit, persuade us that the Eleventh Amendment does not bar such a suit.

The real party in interest in a qui tam suit is the United States. All of the acts that make a person liable under § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share—at least 70%--of any recovery. To be sure, the qui tam plaintiff has an interest in the action's outcome, but his interest is less like that of a party than that of an attorney working for a contingent fee. * * * Qui tam claims simply do not seek the vindication of a right belonging to the private plaintiff, and if there has been no injury to the United States, the qui tam plaintiff cannot recover.

In sum, "although qui tam actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action." * * *

Further, as described in Part II.A., the government has the right to control the action. If it wishes to intervene in the action at the outset, the qui tam plaintiff cannot prevent it from doing so. Whether or not the government intervenes, it has the right to be kept abreast of discovery in the qui tam suit and the right to prevent that discovery from interfering with its investigation or pursuit of a criminal or civil suit arising out of the same facts. If the government intervenes, it takes control of the lawsuit; it may have the participation of the qui tam plaintiff limited; and it is not bound by any act of the qui tam plaintiff. The government has both the right to prevent a dismissal sought by the qui tam plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the qui tam plaintiff's desire that it continue.

In light of the fact that qui tam claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment. * * *

* * *

We thus turn to the remaining question, over which we exercise pendent appellate jurisdiction, of whether qui tam suits against the States are authorized by the Act.

C. Applicability of the False Claims Act to the States

The question is whether "person" in § 3729(a), the section imposing liability, includes States. At the outset, we note the State's contention that we should apply the "plain statement" rule and decline to construe § 3729(a) as exposing the States to liability absent the clearest of legislative statements that that was Congress's intent. We reject this contention.

* * *

In the FCA, we see no alteration of "the usual constitutional balance of federal and state powers" such as to require application of the plain statement rule. The Act does not intrude into any area of traditional state power. The goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud. The States have no right or authority, traditional or otherwise, to engage in such conduct. Accordingly, we reject the State's contention that the plain statement rule applies, and we turn to the question of the proper interpretation of the FCA using the usual standards of statutory construction.

Under the usual standards, although "in common usage[ ] the term 'person' does not include the sovereign, . . . there is no hard and fast rule of exclusion." * * * "Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." * * * "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring [a] state . . . within the scope of the law." * * *

In the FCA, the principal uses of the term "person" are found in 31 U.S.C. §§ 3729 and 3730, which provide that "[a]ny person" is liable for making false claim, id. § 3729(a); that the Attorney General may bring a civil action "against the person," id. § 3730(a); and that "[a] person" may bring a qui tam action, id. § 3730(b)(1). Thus, the same term is used to categorize both those who may sue and those who may be sued, whether by the government itself or by a qui tam plaintiff.

In a number of instances, States have brought suits under the FCA as qui tam plaintiffs, clearly indicating that they viewed themselves as "person[s]" within the meaning of § 3730(b)(1). * * * That view clearly was also shared by Congress. * * *

* * *

We thus think it plain that the States are "persons" within the meaning of § 3730(b)(1). Absent some indication to the contrary, we normally infer that in using the same word in more than one section of a statute—or indeed twice within the same section, as in subsections (a) and (b) of § 3730—Congress meant the word to have the same meaning. * * * We see nothing in the language of the FCA to indicate that Congress intended that States would be "person[s]" within the meaning of § 3730(b)(1) but not "person[s]" within the meaning of § 3729(a) or § 3730(a).

Nor do we see any such indication in the legislative history. The FCA has its origin in a 1863 statute entitled "An Act to prevent and punish Frauds upon the Government of the United States" * * *. The 1863 Act similarly used the term "person" to designate both those who could be found liable under the law and those who could bring suit on behalf of the government. * * * With respect to false monetary claims made to the United States, the 1863 Act imposed both criminal and civil liability on "any person in the land or naval forces of the United States," * * * and on "any person not in the military or naval forces," * * *. The 1863 Act provided that a qui tam suit could be brought "by any person," against

"the person doing or committing" the forbidden fraudulent act. * * *

* * *

In sum, we conclude that the term "[a]ny person" in § 3729(a) is sufficiently broad to encompass the States; that Congress meant to include the States within the term "person" in § 3730(b)(1), allowing them to bring suits under that section as qui tam plaintiffs; that there is no indication in the language or in the legislative history that Congress ascribed different meanings to the term "person" as used in §§ 3729(a), 3730(a), and 3730(b)(1); and that Congress intended the false-claims statutes to permit suits under §§ 3730(a) and 3730(b)(1) against any entity that presented false monetary claims to the government. We thus conclude that the present suit is authorized by the FCA.

CONCLUSION

We have considered all of the State's arguments on this appeal and have found them to be without merit. The district court's order denying the State's motion to dismiss is affirmed.

WEINSTEIN, District Judge, dissenting.

I. INTRODUCTION

I respectfully dissent from this decision approving a private qui tam federal court lawsuit against a state. In violation of the Eleventh Amendment, the result distorts the dynamics of our federal system, denigrates the traditional role of congresspersons as bridges between their state communities and the national executive branch, and undermines cooperative relationships between federal and state agencies.

* * *

III. LAW

A. Eleventh Amendment

1. Suits by Individuals

* * *

Although the [Eleventh] Amendment makes no explicit reference to sovereign immunity, it has consistently been interpreted to mean that a state, as a sovereign entity within our constitutional system, may not be sued by an individual–whether a citizen of that state, another state or a foreign country–in federal court without its consent. * * *

* * *

a. Original Understanding

There is no record of any discussion of state immunity at the Constitutional Convention. Nevertheless, federal courts' jurisdiction over suits by private citizens against states which had not consented to such litigation was disavowed by the framers of the Constitution during the pre-ratification debate over the meaning and scope of Article III.

* * *

b. Broad Conception

The current broad conception of the

Eleventh Amendment as the constitutional guarantor of state sovereign immunity is usually traced to the Supreme Court's decision in Hans v. Louisiana, 134 U.S. 1 * * *.

* * *

Any attempted abrogation by Congress of the states' Eleventh Amendment immunity is subject to two strict requirements. * * * First, Congress must unequivocally express its intent to abrogate the immunity, a requirement which arises from "the Eleventh Amendment's role as an essential component of our constitutional structure." * * * Second, Congress' abrogation of sovereign immunity must be "pursuant to a valid exercise of power" under section five of the Fourteenth Amendment. * * * The Fourteenth Amendment warrants this distinction, the *Seminole Tribe* Court explained, because it was adopted "well after the adoption of the Eleventh Amendment and the ratification of the Constitution [and it] operated to alter the pre-existing balance between the state and federal power achieved by Article III and the Eleventh Amendment." * * *

2. Suits by the United States

a. Original Understanding

It is well settled that the states' Eleventh Amendment immunity does not extend to suits brought against them by the federal government. * * *

Suits by the United States against a state do not denigrate the dignity and respect owed the states in the way that suits by individuals do. "The submission to judicial solution of controversies arising between [the United States and a state], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' . . . but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty." * * *

The possibility of suits by the United States against the states is essential to our federal system. Early on, the framers recognized that the power to enforce federal law against the states would be vital to the Union's stability. * * * Justice Story regarded federal jurisdiction over suits to which the United States is a party as an absolute necessity: "Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the states."

* * *

b. No Delegation

The federal government's power to sue a state is a narrow and nontransferable exception to the broad and fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment. The Supreme Court has rejected the argument that the federal government may delegate its authority to sue the states in federal court. * * *

B. Fundamental to Federalism

The Supreme Court's generous, protective interpretation of the Eleventh Amendment reflects its recognition that the Amendment, as the constitutional

repository of state sovereign immunity, is essential to the preservation of our federal system. *** Accordingly, any discussion of the Eleventh Amendment must take place within the larger context of our federalism and the constitutional balance it was designed to maintain.

1. Original Understanding

Our federalism is dynamic, ensuring decentralization of power by maintaining an appropriate balance between the federal and state governments even as demands on these sovereignties change. * * * The founders were well aware that the creation of a system of government capable of fostering and safeguarding a process which would continuously balance centrifugal and centripetal forces was a necessary precondition of the Constitution's ratification and of its successful operation.

* * *

The subsequent expansion of central power resulted in part from ratification of the post-Civil War Amendments and the increasingly broad interpretation of the Commerce Clause and spending power in response to the growth of our national technological, economic and social systems. Nevertheless, even the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments, and enormous recent changes in our culture, did not alter our essential federal constitutional structure. * * *

2. Current Views

The continuing potency of the states has recently been emphasized by the Supreme Court in a series of cases demonstrating an increased sensitivity to state independence. * * *

These decisions iterate with renewed vigor the system of "dual sovereignty" envisioned by the framers and established by the Constitution with the fundamental goal of preventing the expansion of state or federal governmental power at the expense of the liberty of individuals. * * *

b. Qui Tam Suits Measured Against Eleventh Amendment

As a private party in interest suing a state for money damages, the relator can only be permitted to press his suit if he can establish Congress' clear intent under the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. * * * This a qui tam plaintiff cannot do.

First, the language of the False Claims Act mentions neither the states' sovereign immunity nor the Eleventh or Fourteenth Amendments. The Act provides only that "[a]ny person" is subject to liability. * * * The Supreme Court has repeatedly held that such general authorizations for suit in federal court are insufficient to abrogate the protections of the Eleventh Amendment. * * *

Even if Congress had made its intent to abrogate the states' immunity from private suit unmistakable in the language of the Act, this clear expression would fall short of overriding the Eleventh Amendment. The only authority recognized by the Supreme Court as a basis for abrogating state sovereign immunity is Section 5 of the Fourteenth Amendment. * * * The Fourteenth Amendment deals with such matters as

civil rights and equal protection. It has never been put forward as support for the kind of qui tam action authorized by the FCA. Rather, the FCA was enacted under Article I of the Constitution. As the Court made clear in *Seminole Tribe*, "Article I cannot be used to circumvent the constitutional limits placed on federal jurisdiction." * * *

Nor may the relator seek to bypass the requirements of the Eleventh Amendment by cloaking himself in the federal government's power to sue a state. * * * [This exception] does not carry over to the relator's suit simply by virtue of the fact that he is deemed a substitute for the United States for standing purposes. The theory that the qui tam relator has somehow been "deputized" as an agent of the United States through the language of the FCA ignores the fact that the relator does not sue under the auspices and control of the United States, but exercises his own statutory right to bring suit * * *, a right which is afforded procedural protections by specific provisions of the FCA.

* * *

V. CONCLUSION

Because the False Claims Act fails plainly to state Congress' design under the Fourteenth Amendment to abrogate the states' sovereign immunity, because destruction of the states' sovereign immunity by the qui tam provisions of the False Claims Act unnecessarily upsets a cooperative process essential to American federalism, and because Appellee's suit against the State of Vermont is barred by the Eleventh Amendment, this qui tam action against the State of Vermont should be dismissed. However rational and desirable this form of qui tam action may be to protect the federal fisc, it is barred by the Constitution.

ANOTHER APPEALS CT UPHOLDS FALSE CLAIMS ACT SUITS VS STATES

Dow Jones News Service

Tuesday, December 8, 1998

Michael Rapoport

NEW YORK (Dow Jones) – State agencies can be held liable for misusing fe deral funds under a key law employed by whistle-blowers, another federal appeals court ruled Tuesday.

The 2-1 ruling by a three-judge panel of the Second U.S. Circuit Court of Appeals in New York said an employee of the Vermont Agency of Natural

Resources can proceed with a lawsuit against the agency under the federal False Claims Act.

The ruling is the second major victory in three months for whistle-blowers as they attempt to fend off states' attempts to carve out exemptions from the law, which is used to fight alleged fraud by government contractors as well as states and cities. In September, the Eighth U.S. Circuit Court of Appeals made a similar ruling that allowed a whistle-blower to sue the University of Minnesota.

"We're ecstatic," said Mark G. Hall, an attorney for Jonathan Stevens, the employee who originally filed the Vermont suit. "We think it's the right decision."

Vermont Assistant Attorney General Ronald Shems had no immediate on the ruling. Representatives of the U.S. Attorney's office in Vermont couldn't immediately be reached.

The False Claims Act is a Civil War-era law that allows individuals to file lawsuits on the federal government's behalf accusing government contractors or others of fraud in obtaining or using federal funds. If the suit is successful, the individual gets part of any verdict or settlement.

The Vermont case concerns Environmental Protection Agency grants for employee salaries in the Vermont agency's Water Supply Division. The suit alleges that the Vermont agency filed misleading reports with the federal government about the time those employees were spending on federally funded projects, allowing the agency to retain funds it wasn't entitled to.

The Vermont agency has tried to get the suit dismissed, claiming the agency isn't a "person" subject to False Claims Act suits under the terms of the law. Twenty-six other states sided with Vermont, filing a friend-of-the-court brief on its behalf.

But a lower court ruled, and the appeals court agreed, that states are considered "persons" who Congress intended to hold liable for damages. The appeals court noted that states themselves have brought False Claims Act lawsuits as plaintiffs in a number of cases, and so it is "plain" they can also be sued as defendants.

"It's absolutely the correct decision," said John Phillips of Phillips & Cohen in Washington, a prominent whistle-blowers' attorney. Now, he said, the chances are "much greater that kind of fraud (by states) is going to be exposed and

pursued."

In a dissenting opinion, Judge Jack B. Weinstein said allowing False Claims Act suits against states would violate the 11th Amendment, which exempts states from federal lawsuits brought by individuals. Allowing such suits would "distort the dynamics of the federal system" by driving a wedge between state agencies and their federal counterparts, he said.

The Eighth Circuit's September ruling concerned a suit in which the University of Minnesota was charged with reaping profits from illegal sales of an experimental drug for which the federal government had funded the research. The appeals court's ruling allowed the suit to proceed, and the university later settled the lawsuit for $32 million.

WHISTLEBLOWER SUITS MAY TARGET STATES
Question Seen Headed for Supreme Court

New York Law Journal

Wednesday, December 9, 1998

Deborah Pines

RULING ON an issue likely to be resolved by the U.S. Supreme Court, a sharply divided Manhattan federal appeals panel on Monday declared that states can be targets of the big-damages federal whistleblower suits typically brought against contractors to recover fraudulently obtained federal funds.

The 2-1 decision by the U.S. Court of Appeals for the Second Circuit panel, which gave the go-ahead to a lawyer's suit against a Vermont State environmental agency, found no constitutional or statutory reason why states cannot be "persons" subject to qui tam suits under the False Claims Act (FCA), which permits treble damages and penalties of as much as $10,000 per false claim.

The Eleventh Amendment, which precludes citizen suits against states, does not preclude these whistleblower actions because the federal government "remains the real party of interest," Second Circuit Judge Amalya L. Kearse wrote for the majority in United States of America, ex rel. Jonathan Stevens, qui tam and as relator v. The State of Vermont, 97-6141.

Judge Kearse also found the act's language and Civil War roots indicate Congress intended states to be among the many "persons" that can be sued in qui tam lawsuits. Whistleblowers who file such suits can recover bounties of as much as 30 percent of the often multi-million dollar claims.

Judge Kearse's ruling, joined in by Second Circuit Judge John M. Walker, followed an Eighth Circuit ruling in September reaching the same result on the issue that has split several district courts and is pending before appellate panels in the Fifth and D.C. Circuits.

Dissenting, in a strongly worded 46-page opinion, was a visiting judge, Eastern District Judge Jack B. Weinstein who claimed that permitting qui tam suits against states "distorts the dynamic of our federal system."

Treble Damages

Ronald A. Shems, a Vermont Assistant Attorney General who had pressed the Second Circuit to reverse a lower court and find Vermont immune from suit, said no decision has been made about an appeal.

Frederick Robinson of Fulbright & Jaworski, Washington, D.C., who had filed an amicus brief on behalf of state medical colleges, one of many groups that supported Vermont's position, said the ruling leads to a result Congress never intended. "A citizen should not be able to sue a state and get punitive damages which only punishes the citizens of the state by opening up the treasury and taking money that should be spent on education, fire, police, roads, all the public services you need," Mr. Robinson said.

Sonya Sanchez, a spokeswoman for State Attorney General Dennis Vacco, who joined other attorneys general in supporting Vermont, said "the court's

decision exposes states and taxpayers to treble damages liability and raises significant issues concerning the relationship between the federal government and the states."

The winning lawyer, Mark G. Hall, of Paul, Frank & Collins, in Burlington, Vt., who represented whistleblower Jonathan Stevens, said the Second Circuit ruling is significant because it represents an influential court endorsing an expansive interpretation of this anti-fraud statute. "To shield states, state universities and medical colleges would let a lot of people off the hook for fraud," Mr. Hall said.

Time Allocation Issue

The Second Circuit ruling affirmed a 1997 decision from Vermont Chief District Court Judge J. Garvan Murtha permitting the False Claims Act suit by Mr. Stevens, of Burlington, Vt., a former lawyer with the Water Supply Division of the State of Vermont Agency of Natural Resources. Mr. Stevens's suit claimed that division's method of reporting the time employees spent in 1993 and 1994 on federally funded projects amounted to fraud on the federal government.

His division, he claimed, routinely submitted time sheets indicating employees worked pre-approved hours, rather than actual hours. His suit, seeking the return of millions of dollars in funding to the federal government, seeks 25 percent of the proceeds for himself as well as reimbursement for attorney's fees, costs and expenses.

Judge Kearse found that qui tam suits, like Mr. Stevens's, may be filed against states without violating the Eleventh Amendment. "To be sure, the qui tam plaintiff has an interest in the action's outcome, but his interest is less like that of a party than that of an attorney working for a contingent fee," Judge Kearse wrote. She noted "qui tam claims are designed to remedy only wrongs done to the United States" and "substantial control" over these suits is granted the federal government.

In addition, Judge Kearse also found proof in the Act's language and legislative history that Congress intended States to be "persons" in these suits. She rejected Vermont's claims that states should be immune from suit because Congress did not explicitly refer to them as targets.

"The goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud," Judge Kearse wrote. "The States have no right or authority, traditional or otherwise, to engage in such conduct," so they have no basis for asserting a shield.

In his dissent, Judge Weinstein called "dubious" the suggestion that whistleblowers stand "in the shoes of the government," noting that since 1996, whistleblowers have earned a total of approximately $244 million dollars in qui tam suits. Summing up, he wrote, "Entrusting the United States' decision to sue a state to a qui tam realtor, with an incentive to sue even when the merits of the suit are questionable, and even though its prosecution harms the interests of the federal government, the state and the ongoing relationship between the two sovereigns, effectively short circuits the moderating processes afforded congresspersons and state and federal administrators."

Similar Cases

The Eighth Circuit ruling, issued in September, which reached the same result as the Second Circuit, came in a since-settled case against the University of Minnesota. In November, the university agreed to pay $32 million to the U.S. government to settle charges it illegally

sold an experimental drug and failed to report the income to the federal institute that funded the research.

A Southern District ruling, from Judge Denny Chin, in June reached the opposite result (NYLJ, June 15). After Judge Chin ruled that states could not be sued under the False Claims Act, New York City and New York State agreed in November to pay $49 million to settle claims it fraudulently collected hundreds of millions in federal funds between 1990 and 1994 for required foster care services that were not provided.

In addition to Mr. Hall, Stephen G. Norten of Paul, Frank & Collins, Burlington, Vt., represented Mr. Stevens.

In addition to Mr. Shems, David M. Rocchio, Mark J. Di Stefano, and Rebecca M. Ellis, Assistant Vermont Attorneys General, Montpelier, Vt., represented Vermont.

Counsel for the United States, which intervened in support of Mr. Stevens, were Douglas N. Letter and Frank W. Hunger, of the U.S. Justice Department, Washington D.C. and Charles R. Tetzlaff, the Vermont U.S. Attorney, Burlington, Vt.

First Amendment