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The Supreme Court and the Devolution of Federal Power in American Politics

Following the *Federal Maritime Commission v. South Carolina* Decision

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by Timothy J. Conlan*

Since the administration of Ronald Reagan, American politics have been embroiled in debates concerning devolution in the American federal system. Some of the most fundamental questions of federalism have been the focus of political debate: which level of government should be responsible for which tasks, where authority should rest in a system of divided sovereignty, who is helped or hurt when power and responsibilities are decentralized.

Within the elected branches of American government, there has been a seesaw battle between the political parties and governing institutions. Reagan tried, with some success, to advance an ambitious agenda of decentralization. His successor, George Bush, showed little interest in such matters and instead promoted more federal involvement in education and the environment. Bill Clinton came to power seeking a historic expansion of federal responsibility for healthcare, which failed, and law enforcement, which succeeded. In 1995, President Clinton's agenda was overshadowed by that Newt Gingrich's "Republican revolution," which sought to shrink the welfare state and radically restructure domestic governance. The revolution failed, but the Republican Congress did advance devolution with historic reforms of welfare and restrictions on federal mandates. Yet, by the time Clinton left office, Gingrich had resigned in disgrace and federal spending had reached new heights. Before Clinton could claim credit for withstanding the conservative onslaught, however, his chosen successor for the presidency was defeated by the more conservative son of George H.W.Bush.

Throughout the past decade of political turmoil, however, there has been one consistent proponent of decentralization in Washington: the U.S. Supreme Court. Since 1991, the Court has engaged in the most concerted judicial effort to limit the power and legal authority of the national government since its efforts to overturn Franklin Roosevelt's New Deal the early 1930s. In a series of prominent rulings, the Court has moved to limit Congress's authority to:

- regulate interstate commerce;

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- infringe on states' "sovereign immunity";
- commandeer the policy making and administrative apparatus of state and local governments; and
- regulate state action under the 14th Amendment to the Constitution.

Virtually all of these cases have been decided by a very narrow 5-4 majority, and all have been extremely controversial.[1]

On May 28, the Supreme Court issued another important ruling which adds to this growing line of decisions. In the case of *Federal Maritime Commission v. South Carolina State Ports Authority, et. al.*, the Supreme Court expanded its definition of state sovereign immunity to limit a federal agency's ability to adjudicate private citizens' complaints against non consenting states. The case originated with a cruise ship company which was refused rights to dock in Charleston South Carolina by the state port authority. When the company complained before the Federal Maritime Commission, requesting berthing rights and reparations for damages, South Carolina argued that it was immune to such complaints because of sovereign immunity. The FMC rejected this argument, declaring that "[t]he doctrine of state sovereign immunity . . . is meant to cover proceedings before judicial tribunals . . . not executive branch administrative agencies like the Commission."[2] The state of South Carolina appealed this decision, and ultimately the U.S. Supreme Court sided with the state, holding that state sovereign immunity *does* bar the FMC from adjudicating a private complaint against a state.

The legal basis for this ruling derives from the 11th Amendment to the U.S. Constitution, which states that: "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 of any foreign state." Historically, this has been a little used and largely overlooked provision of the Constitution. But, beginning in 1996, the Rehnquist Court began to rely upon this obscure clause as a means of restricting the power of Congress to regulate certain actions of state governments.

Although *Federal Maritime Commission v. South Carolina* may ultimately have limited effects, it has attracted significant attention for three reasons. First, it continues the trend of steady, incremental expansions in the scope of the sovereign immunity

[1] For a detailed discussion of these decisions and their political significance in American politics, see Timothy J. Conlan, *The Challenge of Dual Sovereignty: The Rehnquist Court and Contemporary American Federalism* (Paris: Le Centre Francais sur les Etats-Unis (CFE), ifri, 2001).

[2] *Federal Maritime Commission v. South Carolina State Ports Authority, et. al., 535 U..S.___(2002) p. 4.*

doctrine. In 1996, states were granted protection against private lawsuits authorized by Congress under the Interstate Commerce Clause by their own citizens.[3] Then, state governments were immunized by the Court against congressionally authorized suits brought by their own citizens in state courts.[4] Now the Supreme Court has expanded the protection to include citizens' complaints brought against non-consenting states in federal agency administrative proceedings. The limits to this expanding doctrine have not yet been reached.

Moreover, these cases are significant, in part, because the Court's legal reasoning has been so expansive. For example, *Federal Maritime Commission v. South Carolina* concerns administrative proceedings in an executive branch agency. Yet, the 11th Amendment explicitly refers only to "the judicial power of the United States," not executive behavior. The Court reasoned, in this case, that the quasi-judicial procedures of the FMC were comparable to use of the judicial power. This leap was motivated by the majority's expressed desire to "accord the States the dignity that is consistent with their status as sovereign entities." Such sovereignty is argued to be an underlying principle of the U.S. Constitution, yet the document itself never mentions state sovereignty, per se, or uses such language. The majority's vigorous effort to protect the sovereign dignity of state governments is not unlike past efforts by liberal justices to enunciate a constitutional right of privacy, which they located in the "penumbra" or shadow of the Constitution. Consequently, conservatives judges on the Supreme Court, who once excoriated others for taking textual liberties with the founding law, are now being accused of doing the very same thing. What are the limits, dissenting liberals are asking, to such unbounded, non-textual doctrines? What ever the limits are, they have not yet been reached.

Finally, this case may have lasting, widespread impacts if it marks the beginning of a concerted effort by the Court to restrict federal agency authority over states. This would get to the heart of the modern administrative state. Although the current case is limited in scope to a narrow category of administrative actions—citizen complaints against states brought before quasi-judicial administrative proceedings—we do not know if this is only the beginning or the end of the Court's involvement in this area.

One factor that will affect whether this case marks a major new beginning is the future composition of the Court. Currently, the conservative majority on the Rehnquist Court enjoys a very slim but consistent advantage. Several of the justices, including conservatives William Rehnquist and Sandra Day O'Connor, as well as the more liberal

[3] *Seminole Tribe of Florida v. Florida, et. al.*. 1996 Lexis 2165. The text of the 11th Amendment refers only to "citizens of another state, or citizens of any foreign state."

[4] *Alden et. al. v. Maine*, 1999 Lexis 3039.

John Paul Stevens, are candidates to step down in the next few years, because of age or health. President George W. Bush has signaled his intentions to nominate staunch conservatives to any new positions on the Supreme Court. Thus, he is in a strong position to solidify and expand the Court's conservative majority in the years to come, especially if he wins reelection in 2004. Combined with good chances for Republicans to reclaim the Senate and retain the House of Representatives in this fall's elections, the prospects for a renewed round of devolutionary policies in the United States—both on and off the Supreme Court—look promising.

Yet, history has shown that ambitious proposals for decentralization in American federalism face numerous obstacles. Important countervailing pressures in favor of centralization persist and cannot be taken lightly. Since President Bush took office in 2001, the United States has witnessed expanded national authority in the areas of homeland defense and education, dramatic new growth in the federal military budget, and new public respect for government and the public sector. The economic, social, and environmental pressures of globalization continue to enhance federal authority vis-à-vis the states in many fields of policy making and regulation, and the general public remains committed to continuing and even expanding the national welfare state in the areas of health care and pensions. Rather than acting as the vanguard of a devolution revolution, the U.S. Supreme Court may simply be serving as a counter balance to the forces of centralization that dominated the last century of American politics and continue to show significant strength.

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