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Federalism Jurisprudence: The Opinions of Justice O'Connor

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Summary

Justice O'Connor has joined the majority of the Court on many important decisions which resulted in limits on federal power. In majority opinions regarding the Tenth Amendment, sovereign immunity, and the power of Congress under the 14th Amendment, she has emphasized the dictates of the Founding Fathers and noted the policies underlying federalism such as the promotion of state accountability.

During the 1990s, the Supreme Court issued a series of 5-4 opinions regarding federalism and the limits of federal power. These cases dealt with issues such as the Tenth Amendment, the Commerce Clause, sovereign immunity, and § 5 of the 14th Amendment. Justice O'Connor was in the majority in most of these cases, and wrote significant opinions in several of them.[1] When Justice O'Connor was in dissent, such as when the Court considered Congress' Spending Clause power, it was generally to advocate for a more limited federal role. Prior to her service on the Court, Justice O'Connor served as a state assistant attorney general, a state legislator, a state trial court judge and a state appellate judge. These experiences appear to have given her a high degree of trust in state governments and courts.[2]

The Tenth Amendment

The Tenth Amendment provides that "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." Prior to Justice O'Connor's service on the Court, the Court had decided in *National League of Cities v. Usery*,[3] that the Tenth Amendment and aspects of state

[1] Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 McGeorge L. Rev. 890 (2001).

[2] Stephen J. Wemeil, *O'Connor: A Dual Role: Introduction*, 13 Women's Rts. L. Rep. 129, 131 (1991).

[3] 426 U.S. 833 (1976). In *Usery,* the Court struck down generally applicable federal wage and (continued...)

sovereignty limited the application of generally applicable federal laws to certain "core" state activities. Ten years later, however, in a 5-4 decision, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority.*[4] Justice O'Connor authored a dissent in that case in which she emphasized the Founding Father's preference for two levels of governance with independent sovereignty.[5]

Over time, the Court turned to the different question of whether the Tenth Amendment limits the federal government from using the machinery of the state government to regulate state citizens. In a dissent in *FERC v. Mississippi,*[6] which predated *Garcia,* Justice O'Connor first raised the suggestion that Congress could not compel states to undertake certain legislative or administrative actions.[7] She argued that this power was not contemplated by the Founding Fathers[8] nor was it consistent with the policy principles underlying federalism.[9] These same themes were evident when Justice O'Connor authored her majority opinion in *New York v. United States.*[10]

In *New York,* the Congress provided that states must develop legislation on disposal of privately held low-level radioactive waste generated within the state, or the state would be forced to take title to such waste, which would mean that it would become the state's responsibility to dispose of it. The Court found that, although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, in effect, Congress had sought to "commandeer" the legislative process of the states.

Justice O'Connor's opinion, which commanded a 6-3 majority, found that this power was not found in the text or structure of the Constitution, and thus the statute was a violation of the Tenth Amendment. She emphasized that the Founding Fathers had specifically contemplated that Congress would exercise legislative authority directly upon

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[3] (...continued)
price controls as applied to state employees.

[4] 469 U.S. 528 (1985). Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical, and that the Court in 1976 had "tried to repair what did not need repair."

[5] Justice O'Connor noted that the powers delegated to the United States were "few and defined,"and that the true "essence" of federalism is that the "States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme." *Id.* at 582 (J. Connor, dissenting).

[6] 456 U.S. 742 (1982).

[7] In *FERC*, state energy regulatory authorities were required under the Public Utilities Regulatory Policies Act of 1978 to consider Federal Energy Regulatory Commission proposals, although it did not require the states to adopt them. 456 U.S. at 746-49.

[8] 456 U.S. at 791-797.

[9] 456 U.S. at 778.

[10] 505 U.S. 144 (1992).

individuals without employing the states as intermediaries.[11] She further emphasized the inherent wisdom of this, which is that to do otherwise would frustrate democratic accountability, as voters would hold a state accountable for regulation mandated by the federal government.[12]

The doctrine established in *New York* was extended in the case of *Printz v. United States.*[13] *Printz* considered the constitutionality of the Brady Handgun Act, which required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers. Justice O'Connor did not author the 5-4 opinion, but she joined the majority opinion, which built on the themes found in *New York.* This time, the Court struck down these provisions on the basis that Congress was attempting to "commandeer" state executive branch officials to implement a federal program. While *Printz* reiterated arguments regarding the intent of the Founding Fathers and the nature of a federalist system, it also relied heavily on the absence of historical examples of Congress imposing such requirements on states.[14]

Sovereign Immunity and the Fourteenth Amendment

The Eleventh Amendment reads as follows: "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." In *Hans v. Louisiana*,[15] however, the Court provided for an interpretation of the Amendment which barred all suits by citizens against a state, unless Congress had abrogated state sovereign immunity. In *Seminole Tribe of Florida v. Florida,*[16] a 5-4 decision, Justice O'Connor joined the majority opinion which held that the Article I powers such as the commerce clause could not be used to waive a state's sovereign immunity. The Court did indicate, however, that Congress can abrogate state sovereignty under the Fourteenth Amendment,[17] thus leading litigants to try to establish a Fourteenth Amendment basis for federal legislation.

The scope of Congress' power under § 5 of the Fourteenth Amendment, however, has been in flux over the years.[18] In the case of *City of Boerne v. Flores,* the Court struck down the Religious Freedom Restoration Act (RFRA) as beyond the authority of

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[11] 505 U.S. at 164.

[12] Id. at 168.

[13] 521 U.S. 898 (1997).

[14] Id. at 905-10.

[15] 134 U.S. 1 (1890).

[16] 517 U.S. 44 (1996).

[17] Section 1 of the Fourteenth Amendment provides that states shall not deprive citizens of "life, liberty or property" without due process of law nor deprive them of equal protection of the laws, while § 5 provides that the Congress has the power to legislate to enforce the Amendment.

[18] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966)(Court would approve legislation if Congress had established rational basis that legislation was necessary to protect a Fourteenth Amendment right); Oregon v. Mitchell, 400 U.S. 112 (1970)(rejected ability of Congress to extend the substantive content of 14th Amendment rights).

Congress under § 5 of the Fourteenth Amendment.[19] RFRA was passed in response to *Oregon v. Smith*,[20] where the Court had lowered the standard used to evaluate whether a law of general applicability could be applied to the free exercise of religion. RFRA was an attempt by the Congress to overturn the *Smith* case, and to require a showing of compelling governmental interest in these cases. In *Flores,* the Court struck down RFRA, finding that legislation enacted under § 5 of the Fourteenth Amendment must be a "congruent and proportional" remedy to a pattern and history of constitutional violations.[21] An important part of this analysis requires discerning whether there was a history and pattern of unconstitutional discrimination, and whether legislation would alleviate the problem.

This decision soon led to a series of cases regarding what historical factors should be considered in evaluating Congress's § 5 authority.[22] In *Kimel v. Florida Board of Regents,*[23] Justice O'Connor authored an opinion striking down the application of age discrimination laws to the states. In *Kimel,* the Court held that age is not a suspect class, and that the provisions of the ADEA far surpassed the kind of protections that would be afforded such a class under the Fourteenth Amendment. Further, as most age discrimination does not rise to the level of constitutional violation, the Court found no evidence of a pattern of state governments discriminating against employees on the basis of age. Consequently, the Court held that a state could not be liable for damages under the ADEA.

Commerce Power

From 1937 to 1995, the Supreme Court did not hold a congressional statute to be beyond the scope of the authority vested in Congress by the Commerce Clause.[24] Since 1995, however, the Court has decided three major cases impacting Congress's power under the Commerce Clause.[25] In both *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Court invalidated acts of Congress for exceeding the scope of the Commerce Clause. Nevertheless, in *Gonzales v. Raich* (2005), the Court upheld the federal Controlled Substances Act as a legitimate exercise of Congress's power under the Commerce Clause. An examination of Justice O'Connor's participation in these cases

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[19] 521 U.S. 507 (1997).

[20] 494 U.S. 872 (1990).

[21] 521 U.S. at 520 (1997).

[22] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Board of Trustees v. Garrett*, 531 U.S. 356 (2000); *Nevada Department of Human Resources v Hibbs,* 528 U.S. 721 (2003).

[23] 528 U.S. 62 (2000).

[24] For a more detailed discussion of Congress's Commerce Power, *see* CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by (name redacted) & (nam e redacted).

[25] *See United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, ___ U.S. ___, 125 S.Ct 2195 (2005).

places her squarely on the side of limiting Congress's authority with respect to commerce and, thus, protecting the prerogatives of the several states.

In *Lopez*, the Court struck down the Gun-Free School Zones Act, which made it a federal crime to knowingly possess a firearm in a school zone.[26] The Court held that because the act neither regulated a commercial activity nor contained a requirement that the possession of the firearm was connected to interstate commerce, the act exceeded Congress's authority under the Commerce Clause.[27] While Justice O'Connor did not author an opinion in this case, she did join a concurring opinion written by Justice Anthony Kennedy. Justice Kennedy's concurrence, relying in part on Justice O'Connor's majority opinion in *New York v. United States*,[28] stressed the notion that under a federalist system of government, there are required to be discrete lines of political accountability, "one between citizens and the Federal Government; the second between the citizens and the States."[29] In addition, the opinion notes that when Congress legislates in areas that have traditionally been reserved for the States "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[30] Finally, the opinion emphasizes that existing state authority was already sufficient to have enacted similar measures, and noted that the effect of a federal statute "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise . . . ."[31]

In *United States v. Morrison*, the Court, with Justice O'Connor joining the majority's opinion, again struck down a federal statute, the Violence Against Women Act, on the grounds that the legislation's creation of a private right of action against perpetrators of such crimes exceeded Congress's authority under the Commerce Clause. In *Gonzales v. Raich*, however, which dealt with a conflict between California's Compassionate Use Act and the federal Controlled Substances Act (CSA), the Court upheld the federal statute, reasoning that Congress had a "rational basis" for its conclusion that leaving home-consumed marijuana outside federal control would substantially affect conditions in the interstate market.[32] In *Raich*, Justice O'Connor authored a dissenting opinion focusing primarily on the lack of evidence indicating that users of medicinal marijuana have a discernable or significant effect on the interstate market that Congress sought to regulate.[33] Moreover, Justice O'Connor, consistent with her majority opinion in *New York*

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[26] *See* 18 U.S.C. § 922(q)(1)(A) (1994).

[27] *See Lopez*, 514 U.S. at 551.

[28] *New York v. United States*, 505 U.S. 144 (1992). For further discussion on this opinion, *see* Tenth Amendment section *supra/infra*.

[29] *Id.* at 576 (Kennedy, J., concurring).

[30] *Id.* at 577 (Kennedy, J., concurring) (*citing New York v. United States*, 505 U.S. at 155-169).

[31] *Id.* at 583 (Kennedy, J., concurring).

[32] *See Raich*, 125 S.Ct. at 2205; *see also* CRS Report RS22167, *Gonzales v. Raich: Congress's Power Under the Commerce Clause to Regulate Medical Marijuana*, by (name redacted).

[33] *Id.* at 2224 (O'Connor, J., dissenting) (stating that "[e]ven if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects

(continued...)

and Justice Kennedy's concurring opinion in *Lopez*, emphasized the importance of federalism's notion of "joint sovereignty." Justice O'Connor argued that by affirming this type of overreaching by Congress, the Court was depriving the States of their ability to make their own independent political judgments with respect to the validity of medicinal marijuana laws.[34]

Spending Power

The Court has repeatedly held that Congress, via its Spending Power, has the ability to condition the receipt of federal funds upon compliance by the states with federal statutory and administrative directives.[35] The Court, most extensively in *South Dakota v. Dole*, has set forth standards regarding Congress's discretion over the attachment of grant conditions.[36] To date it appears that federalism restraints found with respect to other federal powers have not been applied to spending conditions. While Justice O'Connor has played a major role with respect to the development of federalism constraints on Congress's power, her writings with respect to the Spending Clause have been limited to her dissenting opinion in *Dole*.

In *Dole*, the issue before the Court was the constitutionality of Congress's conditioning of federal highway funds on the states' adoption of a minimum drinking age of 21. The Court, in an opinion by Chief Justice Rehnquist, upheld the condition as a valid use of Congress's spending power.[37] Justice O'Connor distinguished between permissible and impermissible conditions on federal funds arguing that "Congress has no power to impose requirements on a grant that goes beyond specifying how the money should be spent."[38] Thus, Justice O'Connor concluded that the 21-year minimum drinking age was not a condition on how the States could spend the money, but rather who is eligible to purchase and consume liquor.[39]

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[33] (...continued)
interstate commerce.").

[34] *Id.* at 2229 (O'Connor, J., dissenting) (stating that "[t]his overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently.").

[35] *See South Dakota v. Dole*, 483 U.S. 203, 207-12 (1987).

[36] *See id.* The Court held that the condition must advance the general welfare; be unambiguous; be related to the federal interest for which the funds are expended; must not induce the States to engage in unconstitutional activities; must not be so coercive as to pass the point at which "pressure turns into compulsion;" and the States must remain free to reject the funds. *See id.* at 207-12.

[37] *Id.* at 212-13 (O'Connor, J., dissenting).

[38] *Id.* at 216 (O'Connor, J., dissenting).

[39] *See id.* at 218 (O'Connor, J., dissenting) ("[r]ather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.").

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