The Jurisprudence of Justice John Paul Stevens: Selected Federalism Issues

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Summary

Structurally, the Constitution establishes a federal government with discrete, limited powers, reserving authority not given to the federal government under the Constitution to the states and the people. The uncertain contours of this dual system have often resulted in Supreme Court decisions on the reach of the federal government's limited powers and the core autonomy of the states. Congress, for example, has invoked the Commerce Clause to regulate local, and sometimes non-economic, activities that historically have been subject to regulation under state police powers. Also, Congress has invoked its power to enforce the Fourteenth Amendment to regulate state activity that might otherwise be beyond its reach. States, on the other hand, have cited the Tenth Amendment to resist what they perceive as congressional overreaching into essential state functions.

During Justice John Paul Stevens's tenure on the Supreme Court, the Court has continued to develop its jurisprudence on these constitutional provisions in resolving tension between federal versus state authority. Justice Stevens himself has written notable opinions on a range of federalism issues. These opinions generally indicate a viewpoint that it is difficult to clearly distinguish between federal and state spheres of power, and a tendency to recognize a limited federal role in issues that affect state prerogatives and local activities.

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Structurally, the Constitution establishes a federal government with discrete, limited powers, reserving authority not given to the federal government under the Constitution to the states and the people. However, political and legal notions of the limits of federal power and the core of state autonomy change. As congressional assertions of authority have grown, the Supreme Court has had cause to delimit the reach of federal power in several legal contexts. Frequently contested provisions implicating federal versus state power include the Commerce Clause, the Tenth Amendment, and the Fourteenth Amendment. Justice John Paul Stevens has written notable opinions addressing each of these areas. These opinions generally indicate a viewpoint that it is difficult to clearly distinguish between federal and state spheres of power, and a tendency to recognize a limited federal role in issues that affect state prerogatives and local activities.

The Commerce Clause

The U.S. Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states.[1] Starting in 1937 with the decision in *NLRB v. Jones & Laughlin Steel Corporation*,[2] the Supreme Court took a significant doctrinal step in holding that Congress has the ability to protect interstate commerce from burdens and obstructions that "affect" commerce. In the *NLRB* case, the Court upheld the National Labor Relations Act, finding that control of industrial labor strife was a permissible means of preventing burdens on interstate commerce.[3] Thus, the Court rejected previous distinctions between the economic activities (such as manufacturing) that led up to interstate economic transactions, and the interstate transactions themselves. By allowing Congress to regulate activities that were in the "stream" of commerce, the Court also set the stage for the regulation of a variety of other activities that "affect" commerce. Under this reasoning, the Court upheld many diverse laws, including laws regulating production of wheat on farms,[4] racial discrimination by businesses,[5] and loan-sharking.[6]

In *United States v. Lopez*,[7] however, the Supreme Court brought into question how far Congress can rely on the Commerce Clause as a basis for federal jurisdiction. Under the Gun-Free School Zones Act of 1990, Congress made it a federal offense for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[8] In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession was connected to interstate commerce, the act exceeded the authority of Congress under the Commerce Clause. Although the Court did not explicitly overrule any previous rulings upholding federal statutes passed under the authority of the Commerce Clause, the decision did appear to suggest new limits on Congress's legislative authority.

[1] U.S. Const., Art. I, § 8, cl. 3.

[2] 301 U.S. 1 (1937).

[3] 301 U.S. at 41.

[4] *Id.*

[5] *See* Heart of Atlanta Motel v. United States, 370 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 241 (1964).

[6] Perez v. United States, 402 U.S. 146 (1971).

[7] 514 U.S. 549 (1995).

[8] 18 U.S.C. § 922(q)(1)A).

Justice Stevens, writing for the Court in *Gonzales v. Raich*, made clear the extent to which Congress still retained authority after *Lopez* to govern individual, localized activities so long as they had potential cumulative economic effects on regulated national markets.[9] *Raich* evaluated an "as applied" challenge to the Controlled Substances Act as regards obtaining, manufacturing, or possessing marijuana for medical purposes. The case was brought by two seriously ill residents of California who used marijuana in compliance with the California Compassionate Use Act of 1996.[10] The challenge was based on the argument that the narrow class of activity being engaged in—the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to California state law—did not have a substantial impact on commerce, and thus could not be regulated under the Commerce Clause.[11]

In upholding the application of the Controlled Substances Act in the *Raich* case, Justice Stevens relied on the Court's decision in *Wickard v. Filburn*,[12] which held that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[13] The *Wickard* case upheld the application of the Agricultural Adjustment Act of 1938,[14] which was designed to control prices by regulating the volume of wheat moving in interstate commerce. The Court in *Wickard* held that Congress could regulate not only the wheat sold into commerce, but also wheat retained for consumption on a farm.[15] The Court did so on the theory that the while the impact of wheat consumed on the farm on interstate commerce might be trivial, it was significant when combined with wheat from other farmers similarly situated.[16]

Based on *Wickard*, the Court in *Raich* held that Congress could consider the aggregate effect that allowing the production and consumption of marijuana for medical purposes would have on the illegal market for marijuana.[17] Of even greater concern was that diversion of marijuana grown for medicinal purposes for other uses would frustrate the federal interest in eliminating commercial transactions in the interstate market.[18] In both cases, the Court found that the regulation was within Congress's commerce power because Congress had a rational basis to determine that production of a commodity meant for home consumption, be it wheat or marijuana, could have a substantial effect on supply and demand. In addition, because exempting the use of medical marijuana could undercut enforcement of the Controlled Substances Act, the Court found that the application in this case was within Congress's authority to "make all Laws which shall be necessary and proper"[19] to effectuate its powers. As *Wickard* has traditionally been seen as one of the most expansive interpretations of the Commerce Clause, the Court's reliance on that case seemed to limit the possibility that the Commerce Clause would be likely to be subjected to a major retrenchment.

[9] 125 S. Ct. 2195 (2005).

[10] Cal. Health & Safety Code Ann § 11362.5 (West Supp. 2005) (providing for the legal possession of medical marijuana by a patient or primary care-giver, upon the written or oral recommendation of a physician).

[11] 125 S. Ct. at 2211.

[12] 317 U.S. 111 (1942).

[13] *Id.* at 125.

[14] 52 Stat. 31.

[15] *Id.* at 128-29.

[16] *Id.* at 127.

[17] 125 U.S. at 2207.

[18] *Id.*

[19] U.S. Const., Art. I, § 8.

Tenth Amendment

The powers of the federal government, while limited to those enumerated in the Constitution,[20] have been interpreted expansively at times, so as to create a large potential overlap with state authority. For instance, Article I, § 8, cl. 18 provides that "[t]he Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Early in the history of the Constitution, the Supreme Court characterized how this clause supplemented the powers of Congress.[21]

Recognizing that the Constitution nevertheless does place limits on the powers of the federal government, the Court has found it difficult to articulate clear principles to define these limits. For instance, for a time, the Court discerned it significant that 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." While this language would appear to represent a clear example of a federalist principle in the Constitution, it has ultimately had only limited impact in defining the reach of federal authority.

Thus, in *National League of Cities v. Usery*,[22] the Court struck down federal wage and price controls on state and local employees as involving the regulation of core state functions.[23] The author of the opinion, then-Justice Rehnquist, wrote that the statute at issue was unconstitutional because it "displaced the states' freedom to structure integral operations in areas of traditional governmental functions."[24] The opinion first suggested there had to be a limiting principle to guide federalism-based restrictions on national power, and that such a limit must be judicially enforceable.[25] Second, Justice Rehnquist opined that an essential part of state sovereignty was flexibility to determine the compensation state employees would be paid and the hours they would work.[26] Third, he argued that federal wage and price controls substantially interfered with state sovereignty by imposing significant new costs that could "force[] relinquishment of important governmental activities" or "displace[] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[27]

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[20] Article I, § 1, of the Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States." Unlike a typical grant of power to states, Article I, § 1, does not grant to Congress "all legislative power," but rather grants to Congress only those specific powers enumerated in § 8 and elsewhere in the Constitution.

[21] As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

[22] 426 U.S. 833 (1976).

[23] In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was undoubtedly within the scope of the Commerce Clause, but it cautioned that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[24] 426 U.S. at 852.

[25] 426 U.S. at 842.

[26] 426 U.S. at 845.

[27] 426 U.S. at 847.

Justice Stevens, who had only recently joined the Court, dissented from the holding in *National League of Cities*, arguing that it was difficult to perceive a defining principle within the majority opinion to distinguish between which state regulations were valid and which were not. The Court, by limiting the application of wage and price controls, was holding that the federal government could not interfere with a state's right to "pay a substandard wage to the janitor at the state capitol." Yet, Justice Stevens argued, there were many ways that the janitor could still be regulated:

> The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State qua State, I have no doubt that they are subject to federal regulation.[28]

Justice Stevens's concerns proved to be well-founded. After *National League of Cities*, the lower courts struggled for a number of years to define which "core state functions" were not amenable to federal regulation.[29] For instance, lower federal courts found that providing ambulance services, licensing automobile drivers, and operating a municipal airport were immune from government regulation.[30] On the other hand, the courts had found that issuance of industrial development bonds, regulation of traffic on public roads, and regulation of air transportation were subject to federal regulation.[31] This was the state of the law nine years after *National League of Cities* when the Court decided *Garcia v. San Antonio Metropolitan Transit Authority*.[32]

In *Garcia*, Justice Harry Blackmun reversed course and, in an opinion that Justice Stevens joined, overruled *National League of Cities*. The Court picked up the theme that had been introduced by Justice Stevens:

> We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.[33]

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[28] *Id.* at 880-81.

[29] In *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 276-277 (1981), the Court summarized the four conditions to establish a core state function. First, the federal statute must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably '[attributes] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest ... justifies state submission." 452 U.S. at 287-288, and n. 29, quoting *National League of Cities*, 426 U.S. at 845, 852, 854.

[30] Gold Cross Ambulance v. City of Kansas City, 538 F.Supp. 956, 967-969 (WD Mo. 1982), *aff'd on other grounds*, 705 F.2d 1005 (CA8 1983)(ambulance services); United States v. Best, 573 F.2d 1095, 1102-1103 (CA9 1978)(auto licenses); Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-1038 (CA6 1979)(municipal airport).

[31] Woods v. Homes and Structures of Pittsburg, Kansas, Inc., 489 F.Supp. 1270, 1296-1297 (Kan. 1980)(industrial bonds); Friends of the Earth v. Carey, 552 F.2d 25, 38 (CA2), cert. denied, 434 U.S. 902 (1977)(public roads); Hughes Air Corp. v. Public Utilities Comm'n of Cal., 644 F.2d 1334, 1340-1341 (CA9 1981)(air transportation).

[32] 469 U.S. 528 (1985).

[33] 469 U.S. at 538.

In sum, the Court in *Garcia* seems to have said that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions, and that the states should look for relief from federal regulation through the political process.[34] This appeared to have ended the Court's attempt to substantively limit federal government regulation of the states.

The Court soon turned, however, to the question of how the Constitution limits the means by which the federal government regulates the states. In *New York v. United States*,[35] Congress had attempted to regulate in the area of low-level radioactive waste. In a 1985 statute, Congress provided that states must either develop legislation on how to dispose of all 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 became the state's responsibility. 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, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states. In the *New York* case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. This case, *Printz v. United States*,[36] involved the Brady Handgun Act. The Brady Handgun Act required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.

Justice Stevens, in dissent, pointed to a practical concern with the Court's Tenth Amendment decisions. By limiting the authority of the federal government to allow states to share in the establishment of federal policy, the Court seemed to invite even more pervasive federal regulation. Hence, the rule actually may encourage the federal government to assume even greater authority. As Justice Stevens argued in *Printz*,

> Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of states' rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the States.[37]

[34] *See also South Carolina v. Baker*, 485 U.S. 505 (1988).

[35] 505 U.S. 144 (1992).

[36] 521 U.S. 898 (1997).

[37] 521 U.S. at 959.

Fourteenth Amendment

Section 5 of the Fourteenth Amendment is a significant, yet circumscribed, source of congressional power. The Fourteenth Amendment provides that states shall not deprive persons of "life, liberty, or property" without due process of law nor deprive them of equal protection of the laws. Section 5 empowers Congress to legislate to enforce the amendment. When Congress has properly acted under § 5, the courts are more deferential toward federal regulation of state action than they might be when Congress exercises other powers. That is, the courts have upheld limits on state autonomy under § 5 that might not otherwise be sustainable under the Constitution.

Interpretations of when Congress may use its § 5 powers, however, have been in flux over the years. At issue has been how expansively Congress may act to "enforce" rights, as opposed to creating or more generally protecting them. For example, in the case of *Flores v. City of Boerne*,[38] the Court struck down the Religious Freedom Restoration Act (RFRA) as beyond the authority of Congress under § 5 of the Fourteenth Amendment. In enacting RFRA, Congress had cited its § 5 powers to require a state to show a compelling state interest before applying an otherwise neutral state law to religion. Congress took this step after the Court had held in *Oregon v. Smith*[39] that the Freedom of Exercise Clause of the First Amendment did not require a state to demonstrate a compelling interest before it could apply a generally applicable drug regulation to peyote use during a religious ceremony.

The *City of Boerne* case arose when the City of Boerne, TX, denied a church a building permit to expand, because the church was in a designated historical district. The church challenged the zoning decision under RFRA. The Supreme Court reiterated that § 5 of the Fourteenth Amendment gave Congress the power to enforce existing constitutional protections, but found that this did not automatically include the power to pass any legislation to protect these rights. Instead, the Court held that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end. Rather than an attempt to remedy a problem, RFRA was seen by the Court as an attempt by Congress to overturn an unpopular Supreme Court decision. The law focused on no one area of alleged harm to religion, but rather just broadly inhibited state and local regulations of all types. Consequently, the Court found RFRA to be an overbroad response to a relatively nonexistent problem.

The "congruence and proportionality" test in *Boerne* for sustaining an exercise of § 5 powers became a formidable hurdle in other contexts as particular regulation of the states was held to be unsustainable under other means. For example, though Congress has broad power to regulate a wide range of activities under the Commerce Clause, the Court has held that Congress cannot authorize suits against states for violations of federal laws enacted under its commerce authority: in such circumstances, state sovereign immunity under the Eleventh Amendment prevails. On the other hand, Congress could abrogate state sovereign immunity when it acted under § 5, but a line of cases applying *Boerne* reiterated that § 5 power was generally circumscribed.

[38] 521 U.S. 507 (1997).

[39] 494 U.S. 872 (1990).

Then, in a 2004 decision written by Justice Stevens, the Court took a different analytical tack in upholding certain suits against states for violating the Americans with Disabilities Act (ADA). In *Tennessee v. Lane*,[40] two paraplegic plaintiffs alleged that the State of Tennessee and several of its counties violated Title II of the ADA, which requires that the disabled be provided access to public services, programs, and activities, by failing to provide physical access to state courts.[41] Analyzing the case as an attempt to ensure a fundamental right to access courts as part of Due Process instead of as an antidiscrimination measure to ensure Equal Protection, the Court held that Title II, as applied to this right of access to the courts, was a proper exercise of Congress's authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity.[42]

In applying the *Boerne* congruence and proportionality test, the Court in *Lane* noted that the right protected in Title II of the act was access to public services, programs, and activities. While the unequal treatment of the disabled would only generally be a constitutional violation enforceable under § 5 if it were irrational, the Court emphasized that Title II was also intended to reach the more rigorously protected rights of the Due Process Clause of the Fourteenth Amendment, such as the right of access to the courts.[43] The Court stated that these due process rights required a higher standard of protection than would generally apply. The limited nature of Title II as a remedy for the denial of the right of access to courts also informed the Court's holding that the measure is a valid prophylactic remedy.[44]

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[40] 541 U.S. 509 (2004).

[41] One plaintiff in *Lane* claimed he was unable to appear to answer criminal charges on the second floor of a courthouse that had no elevator. The second plaintiff, a certified court reporter, claimed she was denied the opportunity both to work and to participate in the judicial process because she was unable to access numerous county courthouses.

[42] The Court cited congressional evidence that legislative attempts preceding Title II inadequately addressed the problem of patterned unconstitutional treatment in access to the courts. 541 U.S. at 526.

[43] The Court held that it need not examine Title II as a whole when evaluating the remedy's congruence and proportionality to the injury of disability discrimination in access to the courts. The relevant inquiry solely concerned Title II's scope as applied to the rights associated with access to judicial services. The Court cited as precedent for this limited application approach the *Garrett* case, in which it considered only Title I of the ADA for purposes of Fourteenth Amendment analysis. Based on this narrow scope of inquiry, the Court determined that both the pattern of past discrimination in access to the courts and the failure of previous legislative attempts to remedy the injury were sufficient to hold that Title II is a valid exercise of Congress's power under § 5 of the Fourteenth Amendment.

[44] Title II does not require states to compromise the integrity of public programs or make unduly burdensome changes to public facilities. 541 U.S. at 532. Rather, states need only take reasonable measures to comply with Title II regulations. *Id.*