US Supreme Court rulings attack democratic rights

John Andrews
25 June 1999

In three reactionary decisions announced at the completion of its 1998-1999 term, a bitterly divided Supreme Court on Wednesday ruled five to four that state governments are immune from individual lawsuits for violations of federal laws. In doing so, the Court elevated archaic concepts of sovereign immunity dating back to feudal privileges into absolute rules of Constitutional law that can only be changed by amending the Constitution or by future Supreme Court decisions.

Previous rulings by the (Chief Justice) Rehnquist Court had barred individuals from suing states for violations of federal law in *federal courts*. With these rulings, the public is barred from seeking redress for such violations in *state* courts as well.

Technically the rulings do not exempt states from complying with federal laws. However, they deprive people of the ability to sue in court when states violate such laws. This severely limits the ability of the public to enforce rights guaranteed it by federal statute and negates a basic democratic precept, that a right must be backed by a remedy in the event that the right is denied.

The June 23 decisions were the latest and most dramatic in a series of rulings extending back at least seven years restricting federal authority over the states. The rulings will encourage individual states to compete with one another in curtailing workers' rights, eroding health and safety standards and weakening environmental regulations, so as to attract investment from corporations seeking to lower their costs.

The decisions have far-reaching and extreme consequences. In the entire history of the United States, the Supreme Court has held only some 150 federal laws to be unconstitutional. On Wednesday the Court invalidated three in one day. The abrupt and radical change in the law has called into question the enforcement of countless federal laws and regulations. In two of the cases, the Supreme Court ruled that even laws protecting intellectual property such as patents and copyrights cannot be enforced against state institutions, such as universities, that are engaged in "businesses" such as technological research or book publishing.

Only federal civil rights laws are exempt, at least for the time being, because the Fourteenth Amendment, enacted after the Civil War to protect the rights of the freed slaves in the former slave states, has an express provision granting Congress authority to make laws affecting states' rights. However, the Court has at least one case concerning civil rights on its docket for next year—whether state workers can sue for age discrimination—and has already in previous rulings curtailed individual rights to sue states for other civil rights violations.

In the most dramatic of the three cases, *Alden v. Maine*, the Court ruled that state employees cannot file lawsuits like their counterparts in private businesses to enforce the right to overtime pay under the federal Fair Labor Standards Act of 1938. Instantaneously, 4.7 million state workers lost the right to sue their employer over the most basic workplace violations.

This week's action marks a new period of relations between the federal government, the state governments and the masses of people. As pointed out by the dissenting justices themselves, the last comparable Supreme Court action took place in 1905, when a reactionary group of judges invalidated state reform measures limiting the work day to ten hours and the work week to six days. This decision was justified on the grounds that "the freedom of master and employee to contract with each other . . . cannot be interfered with . . . without violating the Federal Constitution."

A thorough analysis of the implications of the Court's

action is beyond the scope of this preliminary article. It should be noted, however, that there is nothing in the text of the Constitution which grants states any form of "sovereign immunity".

Justice Anthony Kennedy, writing for the majority, dispensed with this fact with the cynical claim that the Constitution's "silence is instructive" because "the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution". His decision exposed the hypocrisy of the right wing, fond of championing "strict construction" and decrying "judicial activism" whenever a court ruling threatens to protect or expand the rights of individuals against big business or the state.

Kennedy's majority decision was supported by Justice Sandra Day O'Connor and the Court's hard-core right-wing triumvirate of Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. Rehnquist wrote a perfunctory opinion in one of the companion cases and Scalia a venomous opinion in the other, in which he compared the views of the four dissenting justices to Robespierre. Scalia expressed openly the profoundly anti-democratic substance of the rulings, writing that the United States was established by people "whose north star was that governmental power, even indeed, especially governmental power wielded by the people, *had to be dispersed and countered"*. (Scalia's emphasis).

The dissent of Justice David Souter, joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer, exposed in considerable detail the majority's intellectual bankruptcy.

In an unusually lengthy and scholarly opinion, Souter explained how the founders' views on "sovereign immunity" were far more varied and complex than the majority's claim that "Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal."

There were, Souter explained, at least three camps on this crucial question, not one. The most right-wing faction espoused the theory of "natural law," according to which the sovereign, as the maker of the law, could not in turn be bound by it. The most democratic thinkers contended that the state was not "sovereign" at all because the sovereign power resided in "the people". Finally, there was a middle ground that espoused the "common law" view that sovereign immunity could be recognized, modified or discarded depending on more fundamental policy concerns.

Souter traced the doctrine of sovereign immunity to "the feudal system that had been brought to England and the common law by the Norman Conquest," and ridiculed Kennedy's concern for "the dignity and respect afforded a State, which the immunity is designed to protect". He chastised the majority for "abandon[ing] a principle... much closer to the hearts of the Framers: that where there is a right, there must be a remedy".

His dissent concluded with an express reference to the now discredited Supreme Court decisions striking down worker-protection laws:

"The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution."

With Wednesday's rulings the process of stripping away the democratic rights of the people has been significantly accelerated.

Justice Souter's dissenting opinion can be accessed at http://supct.law.cornell.edu/supct/html/98-436.ZD.html