US Supreme Court strips state workers of protection against age discrimination

John Andrews
14 January 2000

On January 11 the United States Supreme Court held unconstitutional the 25-year-old federal civil rights law that protects 4.7 million workers employed by state governments from discrimination on account of age. The case, *Kimel v. Florida Board of Regents*, marks yet another milestone in the Rehnquist court's campaign to weaken the power of the US Congress over state governments.

The Court's action, although not a surprise (see our coverage of the oral arguments at US Supreme Court escalates attack on rights of death row prisoners), is nevertheless notable for several reasons. Most importantly, it underscores the determination of right-wing elements to dismantle what is left of social legislation dating from the 1960s and 1970s.

The Court last year issued three profound rulings curtailing the power of Congress to pass laws subjecting states to liability for failing to adhere to federal labor standards or for violating intellectual property rights arising under federal patent or copyright laws. It did so by declaring that the founders would not have ratified the Constitution had it not preserved the "sovereign immunity" of states. (See US Supreme Court rulings attack democratic rights).

This week's decision goes significantly further by limiting Congressional power to enact laws under the Fourteenth Amendment to the Constitution, which was ratified after the Civil War specifically to expand Congressional authority over the former slave states. The amendment eliminates any possibility of "sovereign immunity" by expressly granting Congress the power to enforce its terms by passing laws subjecting states to liability.

Despite the Fourteenth Amendment's recognition of federal "privileges and immunities," and its guarantee of "due process" and "equal protection," the Supreme Court majority held the Age Discrimination in Employment Act (ADEA) cannot be enforced against states because the Supreme Court itself never said discrimination against older workers violates the Constitution.

The majority opinion, penned by Justice Sandra Day O'Connor, a Reagan appointee, swept aside the interests of older workers, declaring that old age does not define "a discrete and insular minority because all persons, if they live out their normal life spans, will experience it."

Congress "has been given the power to 'to enforce,' not the power to determine what constitutes a constitutional violation," according to O'Connor. In other words, Congress cannot define or expand the rights of individuals; its role is reduced to that of an "enforcer" of rights already approved by the Supreme Court. There is absolutely nothing in the text of the Constitution or any of its amendments restricting Congressional power so severely. In essence, the Court's ruling arrogates to itself—an unelected body—enormous latitude to override legislation passed by Congress against various forms of discrimination.

In a short, but cogent dissenting opinion, Justice John Paul Stevens, joined by Justices Breyer, Souter and Ginsburg, exposed the anti-democratic essence of the ruling. "The Framers did not ... select the Judicial Branch" to defend state interests, he wrote. They designed the legislative process itself to do so. Not only do new laws require a majority vote of the elected representatives, he explained, they must also be approved by the Senate, where each state has an equal voice, and by the president.

Many commentators acknowledge that the Court's attack on Congressional power under the Fourteenth Amendment sounds the knell for a wide variety of federal civil rights laws, especially those giving injured

people the right to sue government officials in federal court for police misconduct, such as excessive force and frame-ups.

The decision highlights a division between justices on the Supreme Court perhaps deeper than any other in history. O'Connor dismisses the dissenters by declaring that their resistance to the majority's view "makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution."

The dissent, on the other hand, takes the extraordinary position that the majority's past sovereign immunity decisions are not "controlling precedent" because "the reasoning . . . is so profoundly mistaken and so fundamentally inconsistent with the Framer's conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court." It concludes by labeling the majority opinion "judicial activism" and "a radical departure" from the Court's proper role.

Also on January 11, the Supreme Court heard arguments on the constitutionality of the federal Violence Against Women Act in a case involving a 23-year-old woman who sued two former football players at Virginia Tech University for allegedly raping her when she was a freshman at the school. The same five-justice majority seems poised to strike down that law as well, on the ground that it invades states' rights.

This controversy is reminiscent of the dispute during the first half of the twentieth century over enactment of federal anti-lynching laws to stop the widespread vigilante murders of black men in the Deep South. Those efforts too were met with claims that they invaded "states' rights."

In another decision issued this week, the Supreme Court, by the same 5-4 majority, ruled that police can stop and search anyone who flees from them, regardless of whether there is any other reason to suspect criminal activity. The decision undermines one of the most important decisions of the Warren Court era, *Terry v. Ohio*, which requires police to have "reasonable suspicion" before detaining or searching a person.

Finally, on Monday, the Supreme Court denied *certiorari* in the case of two HIV-positive men who claimed that their health insurance company's rules providing less health coverage for AIDS-related illnesses than for other conditions violated a federal ban on discrimination against the disabled. Because the Court ruled only that it would not hear the case at this time, no grounds for the decision were given, and the issue could be taken up at a later time. There is little reason to doubt, however, that the current majority will eliminate federal protection for disabled persons when the opportunity presents itself.