Most radical "states' rights" ruling to date

US Supreme Court steps up attack on federal regulatory powers

Don Knowland
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On May 28 the five-member right-wing majority on the US Supreme Court issued a radical new states' rights decision barring federal agencies from adjudicating complaints by private parties against states that violate federal law.

The ruling was the latest in a series of decisions dramatically curtailing the power of the federal government to compel the states to observe laws passed by Congress or agency regulations implementing them, including elementary protections for workers, the disabled, the elderly and other sections of the population. The ruling marks a new stage in the Court's attack, mounted under the banner of states' rights, on those aspects of federal authority historically associated with the social reforms and restrictions on big business first enacted under the Depression-era New Deal of Franklin Roosevelt.

In a decision authored by Justice Clarence Thomas, which Thomas admitted lacked any support in the text of the US Constitution, the Court virtually ignored the powers accorded to the national government by the Constitution. Instead it affirmed a virtually boundless and ahistorical proposition—that the states are sovereign powers, absolutely coequal with the national government.

The case, *Federal Maritime Commission v. South Carolina State Ports Authority*, dealt with the adjudication by the Federal Maritime Commission of a complaint filed by a cruise line operator charging that South Carolina's Ports Authority was violating the 1984 Federal Shipping Act in refusing to permit the line's ships to berth. The majority decision concluded, on the basis of tortured analogies between agency proceedings and court proceedings, that the nation's founders could neither have imagined nor condoned the affront to state sovereignty and immunity from suit entailed in a federal agency's adjudication of a private complaint against a state government.

The decision does not purport to remove the power of federal agencies to issue regulations applicable to states that protect workers in areas such as child labor, worker safety, the minimum wage, hours of work and overtime pay, or impose standards on industrial pollution, education and health care. Federal agencies can still, at least for now, file complaints on their own in federal court against states for violations in these areas. But federal agencies typically rely on the efforts of private complainants to marshal the facts and bear much of the workload of proving such violations. Thus, as a practical matter, the decision threatens to greatly undermine the ability of federal agencies to rein in the states and state agencies.

The majority decision of the Court is so bereft of textual support in the Constitution or support in the historical record that it cannot be seen as anything other than a politically motivated ruling by a highly partisan majority bent on imposing a pre-set, radical-right agenda. This faction on the Court is a cabal that makes it up as it goes along, starting not from legal arguments, precedent and constitutional jurisprudence, for which it has thinly veiled contempt, but rather from a desired political result, using sophistry and rhetorical tricks to rationalize its decisions.

No better proof of this is the role this same five-member majority played in the anti-democratic installation of George W. Bush—who lost the popular vote nationally—as president in December of 2000. Then, in order to halt the counting of disputed votes in Florida—as ordered by the Florida Supreme Court—and secure a majority of electoral votes nationally for the candidate of the Republican right, these legal charlatans tossed aside their supposed reverence for the sovereignty of the states, overrode Florida's highest court, ignored the state's election laws and constitution, and the notion of popular sovereignty embedded in them, and inserted themselves as the arbiters of the contested election in Florida.

It may be true, as Thomas claims, that the apparatus of federal agencies that developed in the twentieth century was not imagined by the Constitution's framers. Neither was the emergence of political parties, the modern corporation, the urbanization and industrialization of the country, and a host of other transformations that occurred over the past two centuries. There is no doubt, however, that in enacting the Constitution in 1787 the framers shifted the balance of power away from the states in favor of a stronger and more centralized national government.

Although the Tenth Amendment reserved to the states or the people any powers not delegated to the United States by the Constitution, substantial economic and regulatory powers were, in fact, delegated to the federal government. These powers encompassed the passage of laws binding the states and giving the federal government the ability to enforce such laws. The legal form of this material fundament of the emerging bourgeois order was plainly reflected in constitutional provisions dealing with money, debts, tariffs, treaties, contracts, police powers and the like.

Most central was the provision set forth in Article I, section 8, clause 3, commonly known as the "Commerce Clause," giving the federal government the power "to regulate Commerce with Foreign Nations and among the several States." As Justice Stephen Breyer points out in his dissent in the *Federal Maritime Case*, the framers thereby attempted to create sufficient structural flexibility to adapt laws and institutions to future social, economic and technological changes.

Battles over the limits to these and other national powers were fought and won by the Federalists during the two terms of Washington's presidency and that of John Adams, in opposition to the Republican faction. With Jefferson's presidency, the Federalists were routed as a political faction, but the preceding battles over the powers of the federal government were for the most part not revisited, at least until the great struggles over the slavery issue emerged some decades later. Jefferson himself played a huge part in expanding the embryonic American empire with the Louisiana Purchase.

The Civil War of 1861-65 settled not only the slavery question, abolishing the institution, but also the issue of federal-state authority, decisively establishing the United States as a national whole, rather than a loose confederation of states that exercised unlimited sovereignty.

The Depression of the 1930s brought American, and world, capitalism to the brink of collapse. The more farsighted bourgeois representatives saw the need for governmental programs and regulation of capitalist excesses in areas such as working conditions and social welfare in order to avert further economic catastrophe and forestall working class revolt. Effective implementation of these efforts required the expansion of existing federal agencies and the creation of new ones. Postwar economic growth, allowing expansion of social welfare measures, brought a concomitant growth of federal agencies.

The US Supreme Court, after initial showdowns with Roosevelt, routinely approved federal agency rulemaking and regulatory and adjudicatory powers, subject to certain checks, such as court review and Senate confirmation of agency heads. The Court also determined in a string of cases that US federal agencies, while authorized by congressional legislation, would function as part of the executive branch and answer to the president—that they were not courts or part of the judicial branch of government.

As a concomitant to the powers granted to the federal government, the framers plainly enunciated the power of the United States to sue a state in federal court. In 1793 the US Supreme Court decided that a citizen of a state could sue another state in federal court to collect a debt owed under state law. The result greatly surprised many, leading to the enactment of the Eleventh Amendment, which provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted versus one of the United States by Citizens of another State...."

The history of the amendment makes clear that it was not meant to immunize a state from federal judicial power. As early as 1821 the Supreme Court ruled in a decision authored by Chief Justice John Marshall that that Eleventh Amendment was not intended to protect a state's "dignity." The feudal notion that a sovereign had a right not to be "offended" by suit by one of the lower orders plainly had no application to the states of the United States.

By the 1980s, profound changes in world economy and a deterioration in the economic position of the United States caused a sharp shift to the right by the American bourgeoisie. A new consensus emerged within the ruling class that federal regulation of business had to be reduced, social welfare had to be sharply cut back and workers' rights and protections substantially dismantled.

These developments had their inexorable reflection in neo-liberal economic and political doctrines, and in legal jurisprudence. Conservative judges cut back federal economic and social regulation, while removing restraints against government infringement of basic democratic and civil rights.

Right-wing Supreme Court justices under Chief Justice William Rehnquist developed new modes of constitutional interpretation. In contrast to the view that the framers drafted a document that would evolve over time to meet changes, and that the content of broadly described democratic rights would likewise evolve to combat the expansion of government intrusion and technology, the conservative mantra of judicial "restraint" was proclaimed. The text of the Constitution had to be "strictly construed," and judges were obliged to limit themselves to the framers' "original intent." (These injunctions were ever more frequently violated in practice by the right-wing faction on the Court, which showed little restraint and scant regard for the text of the Constitution when it came to attacking the legal foundation for social welfare legislation, civil liberties protections or federal restrictions on the pursuit of corporate profit.)

These justices unearthed new theories of states' rights that had been interred after the Civil War. Their most radical decisions created a broad new principle that sovereign immunity protected states against private lawsuits. Beginning in 1991, the Court proclaimed that the states enjoyed sovereignty equal in principle to that of the federal government, rather than being "mere appendages." They therefore had immunity from suit except where otherwise consented to in the Constitution.

The Rehnquist faction claimed that the Eleventh Amendment did not define the extent of state sovereign immunity from suit, but rather was only one particular example of a much more expansive principle. In 1996, the Court (in *Seminole Tribe of Florida v. Florida*) resurrected the theory put to rest in 1823 that the states, like feudal lords, had some sort of "dignity" interest that barred suit by those from the "lower orders."

The years 1999 and 2000 were banner years for these dubious theories. Despite the supremacy of federal over state law, state workers, already barred from proceeding in federal court, were told by the Court (in *Alden v. Maine*) that they could not bring suit in state court to oppose violations of federal labor laws. Although Congress has the power under the post-Civil War Fourteenth Amendment to override state immunity in order to enforce the equal protection and due process clauses of that amendment, Congress, the Court ruled (in *College Savings Bank v. Florida*), could not abrogate state immunity to enforce federal trademark laws. Similarly, the Court ruled (in *Kimel v. Board of Regents*) that individuals or groups could not sue a state for violation of the federal Age Discrimination in Employment Act, because, as the Court arbitrarily decided, protection of such workers does not relate to equal protection of the law.

On its face, the case decided last month should have presented a fairly routine instance of a federal agency adjudicating a complaint by a private party that a state agency had violated federal law. The need for uniformity in the regulation of maritime commerce is a paradigmatic example of the exercise of federal power within the meaning of the Commerce Clause.

Thomas's majority decision concedes that the federal agency's adjudication was not the exercise of the federal judicial power, since the case did not involve suit by a private party in court. Thus, it could not be classified as a suit by a private party within the meaning of the plain words of the Eleventh Amendment.

Nevertheless, the majority purports to find virtually limitless state immunity from suit to be lurking somewhere (apparently in the justices' minds) behind the text of the Eleventh Amendment. This is a radical departure from previous state immunity rulings, which at least involved suit in a court by a private party, and thus could arguably be grounded, however weakly, in constitutional text. The extreme nature of last month's decision is further shown by its attempt to dismantle federal regulatory power under the pretense that the case involves a complaint by a private party, not the federal agency.

How do Thomas and the majority attempt to justify the unprecedented leap in their ruling? They concede, as they must, that no text in the Constitution prohibits a federal executive officer, such as an agency head, from enforcing federal law or agency regulations against a state under the Commerce Clause. They are thus obliged to concede that nothing in the actual language of the Constitution supports their ruling, and, in passing, that the Commerce Clause argues against it.

Thomas further concedes that the federal agency itself could sue the state agency in federal court for violation of federal law, since the states consented at the time of the Constitution to federal government suit against them. In other words, Thomas concedes that the federal agency could act on "information," as opposed to a "complaint," concerning a violation of federal law provided by a private party, evaluate the charge in some fashion and then itself seek relief in federal court for enforcement of its findings, without violating the state's sovereign immunity.

Despite all of the above, the Thomas majority nevertheless comes down against the Federal Maritime Commission's adjudication of a private complaint based on a superficial analogy to court proceedings. According

to Thomas, the Federal Maritime Agency has afforded parties to its adjudications procedural and discovery rights much like those given to parties in civil court proceedings. The agency adjudicatory proceeding "walks, talks and squawks much like" a civil lawsuit, he declares.

The flimsy nature of these arguments can be quickly seen. The court-like rules of the agency in its adjudicatory proceedings are formulated to provide the benefit of fairness to the parties to the proceedings, including the state entity. If the federal agency eliminated those procedural rules, Thomas's analogy to a court proceeding would immediately collapse, as would his invocation of immunity from suit. Moreover, unlike a court decision by an independent judge, an agency head, as an executive branch officer, can reverse the adjudicatory findings of the agency administrative judge.

Thomas's attempt to ground the decision in constitutional history is equally bereft of any force. Thomas concedes, as he must, that "the relevant history does not provide direct guidance" for the Court's inquiry. Thomas is forced to speculate as to the intent of the framers, since he concedes they likely never imagined the vast modern apparatus of federal agencies and their powers.

Nevertheless, according to Thomas, given the virtually boundless and a priori nature of state sovereign immunity as he expounds it, the framers could not have looked favorably on adjudication of a complaint by a private party brought before a federal agency, as opposed to a court, if the proceedings are so similar in nature.

Thomas's only attempt to actually discern the framers' intent is equally feeble. It consists solely in a reference to Alexander Hamilton's general observation in the Federalist Papers that the states as sovereigns retained their right not to be sued without their consent by individuals. His utterly abstract manner of posing the issue begs the question whether the states consented to the executive branch of the federal government enforcing the federal law of commerce, regardless of the mode it utilizes to determine whether a violation of that law has occurred. In fact, the states plainly did so consent, a fact that Thomas and the Court's majority effectively ignore.

Thomas resorts to other vague allusions to the "constitutional design" and the "system of federalism," without historical or textual explication, to support the majority decision. These are precisely the type of vague phrases that judicial reactionaries have derided for years, but are only too happy to adopt when it suits them. According to Justice Breyer in his dissent, the Court's result undermines a basic structural aim of the Constitution: the "creation of a representative form of government capable of translating the will of the people into effective government action."

As pointed out by legal scholar Cass Sunstein in a May 29 opinion piece in the *New York Times*, this new decision is an extreme departure even from the prior state immunity from suit jurisprudence of the Rehnquist court. The Court reaches back to archaic feudal doctrines that were transcended by the revolutionary and progressive impulses operative at the time of the American union. Even the Bush administration, and its extreme right-wing solicitor general, Theodore Olson, argued against the Court's result.

The prior sovereign immunity decisions, however reactionary, could at least arguably be clothed in a semblance of legal doctrine, in that they all involved suits in court by private individuals. The current decision clearly reveals a group of justices in control of the Court who are overtly political and intellectually dishonest. They are simply making it up as they reach for desired results—in this case, to dismantle Congressional power to adopt social legislation that protects the health, safety and welfare of state employees and other persons abused by the states, and the power of federal agencies to implement such legislation in an effective fashion.

This latest states' rights case is yet another example of the increasing arrogance displayed by this unelected branch of government, arrogating to itself the right to overturn measures enacted by Congress and signed by the president, i.e., laws enacted by elected bodies. It is doing so under the shoddiest constitutional and legal pretext. This is truly a Supreme Court in pronounced decay, unanswerable to and contemptuous of the democratic will of the people, as it overtly pursues a reactionary political agenda.