

## **The Supreme Court's Federalism Cases This Term:**

A String of Decisions Upholding Federal Power Show the Portrayal of the Court as Extreme Is A Caricature

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In the 1990s, when the current Supreme Court first launched its federalism jurisprudence, there was great consternation that it would roll back thirty years of civil rights jurisprudence. A corollary concern was that state and local government, presumed to be hostile to civil rights, would gain power to crush such rights.

The Supreme Court, however, is not an institution that is naturally inclined to extreme results. This Term, more than any other, reveals that the Court is actually quite moderate on federalism issues. Indeed, in three of four of this Term's federalism cases, the Court ruled against the states' rights argument.

It's high time for those who claimed that "the sky is falling" with respect to the Supreme Court and federalism to recant. In this area, as in many others, the Court has taken a moderate perspective that balances state and federal rights and interests. In this column, I will review the four federalism cases decided so far this Term, and explain why each result is a moderate solution.

### **The *Sabri* Case: Can Local Government Bribery Be a Federal Crime?**

In [\*Sabri v. United States\*](#), the Court addressed whether Congress had overstepped its boundaries, and invaded the states' proper boundaries, when it criminalized acts of bribery involving officials of local governments who were administering funds that had some portion of federal funds mixed in.

Congress justified the law as an exercise of its power under the Spending Clause. But the money directly involved (the bribe) could not itself be linked to a particular federal program or purpose.

Nevertheless, the Court unanimously upheld Congress's power to criminalize the bribes - reasoning that the Spending Power encompasses the power to police the integrity of the local officials' administering the funds spent.

Some had though *Sabri* would be a vehicle for revisiting Spending Clause jurisprudence and in particular the Court's holding in [\*South Dakota v. Dole\*](#), which upheld the federal government's imposition of a 21-year-old drinking age on the states on the ground that the federal government gave federal money for highways. *Dole* left open the possibility that the Court would further explain what nexus there needs to be between the federal money and the program, but it has yet to revisit the issue. This was not the case, because the bribery law is an odd bird - and did not provide a good context for such an analysis.

Some future case may provide the right vehicle for the Court to ask whether there are some meaningful limits on the power of Congress to regulate local government through its spending power. But this case, the Court rightly perceived, was not the place for the Court to spell out those limits.

Those who complain that the Court aggressively reaches out to support states' rights, and rebuff federal power, need to rethink their position in the face of reasoned, cautious rulings like this one.

**The *Frew* Case: Must State Officials Abide by a Federal Consent Decree?**

[\*Frew v. Hawkins\*](#) is another case where the Court declined to stretch for a federalism holding, and opted instead for a more moderate solution.

The question was whether the Eleventh Amendment protected state officials from having to abide by a consent decree -- involving Medicaid programs. The consent decree required the state to institute certain programs that were not required by federal law, and was agreed to by earlier officials no longer in office. The U.S. Court of Appeals for the Fifth Circuit took the federalism view and held that the Eleventh Amendment provided immunity from the continuing obligations of the decree.

The Court reversed the Fifth Circuit and held that the state officials were bound by the decree--even if they were not in power at the time it was created, and thus had not agreed to it.

That was the right decision. Had the case gone the other way, it would have opened Pandora's box and upset hundreds of consent decrees in the United States.

Moreover, the Court wisely did not leave the state officials with no avenue of recourse. Instead, it instructed them to ask for revision of the decree if they found its requirements overly burdensome. That is reasonable, for both sides.

Again, those who believed that a majority of the Supreme Court would find a federalism violation anywhere it could were disproven. Justice Kenney wrote the opinion for a unanimous Court.

**The *Nixon* Case: An Anti-Federal Power Decision, But Hardly a Radical One**

In [\*Nixon v. Missouri Municipal League\*](#), the federalism argument did prevail. But nevertheless, the Court's decision created little new law.

*Nixon* addressed the question whether the Telecommunications Act's Section 253 included the state's own subdivisions, and therefore diminished the power of the states to restrict their own delivery of telecommunication services. It was a statutory interpretation case, but it plainly implicated federalism principles.

The Court reaffirmed the approach it has taken in a number of previous cases, saying that if Congress intended to deprive the states of power through a federal law, that it had

better be clear about it. Here, it held, the language of the Act was not sufficiently clear to conclude Congress intended to displace the state power. As a result, the states won the case.

The underlying theory of the case was that federalism is an important element of the Constitution, but it is no insuperable barrier to federal lawmaking. Where Congress decides to displace the states, however, it needs to make that intention abundantly clear.

By clarifying its intention, Congress gives the states notice, so that they can prepare themselves, or become involved in the legislative process.

The idea that states - indeed, that parties generally - deserve fair notice of legal changes that affect them is far from a revolutionary concept. And it would seem more than appropriate in a Constitution explicitly premised on the existence of dual sovereigns. Certainly, one need not be a "states' rights" extremist to believe that Congress does not hold plenary power to do whatever it sees fit, but rather ought to exercise its enumerated powers to do what is delineated in the Constitution.

#### ***Tennessee v. Lane: A Congressional Abrogation of State Sovereign Immunity***

The fourth federalism case of the term so far is [\*Tennessee v. Lane\*](#). *Lane* asked whether Congress could abrogate state sovereign immunity through Title II of the ADA. Its asserted power to do so came from Section 5 of the Fourteenth Amendment.

Many disability rights advocates were concerned that the Court would rule against their rights. On the contrary, it ruled, 5-4, in their favor - and in favor of this particular exercise of Congressional power.

In the end, though, a majority of the Court did not find that federalism was a boundary to Title II. In an opinion by Justice Souter, the majority stressed that what was really at issue in the case - brought by a paraplegic who could not make a court date due to lack of elevator access - was the important constitutional right of access to the courts. The majority upheld Congress's Section 5 power to protect this right, with respect to the disabled, because it found in the record more than adequate evidence of widespread and persisting constitutional violations by the states to justify the invocation of Section 5.

*Lane* established, then, that where the right at issue is weighty, Congress has more latitude under Section 5 to force states to obey rules that would otherwise go beyond congressional power. It is in every sense of the term a "civil rights" opinion and further proof that this Court is not extremist.

#### **Four Carefully Analyzed Cases Display a Moderate, Logical Supreme Court**

Even if one does not like the results in these cases, it is hard to argue with their logic. As my analysis above reveals, the Court had excellent reasons for each of these rulings; never opted for an extreme result when a moderate solution was available; and was not in any way ideological in its rulings.

This Term, then, shows just how moderate the Court's federalism jurisprudence has turned out to be - despite baleful predictions that it would be radical. These cases show the Court never wanted to start a federalism revolution in the first place. It only wanted, quite properly, to be careful to honor the entirety of the constitutional scheme - which does allow a place for state power.

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