



REGIONAL RESOURCE

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Federalism Cases in the Most Recent and Upcoming Terms of the United States Supreme Court

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Introduction

In the last decade, the U.S. Supreme Court decided a series of important cases involving the relationship between the states and the federal government. That relationship is, of course, the core component of our federalist system. This Southern Legislative Conference (SLC) *Regional Resource* describes the federalism cases that were decided by the Court during its last Term and the cases that will be decided by the Court in the upcoming Term.

The following cases illustrate the multifaceted nature of federalism. All three of the cases from last Term involved one aspect of federalism – namely, the states’ sovereign immunity from private lawsuits. Two cases in the Court’s upcoming Term will concern other aspects of federalism: Congress’ “spending power” and the liability of counties to lawsuits under the federal False Claims Act.

State Sovereign Immunity

Background

The general rule is that a private individual cannot sue a state. The federal government likewise is immune from private lawsuits. As applied to the states, however, the doctrine of sovereign immunity is a component of federalism. It protects states even from lawsuits based on federal law.

Unfortunately, the doctrine of sovereign immunity is a little like Swiss cheese; it is full of holes. The rule that prevents private plaintiffs from suing a state is subject to all kinds of exceptions that enable states to be sued in many situations. Three of those exceptions are particularly important for understanding the Court’s most recent decisions in this area.

First, the states’ sovereign immunity protects them from suits by private parties, but not from suits by the federal government. Thus, when the United States is willing to stand before the court as a plaintiff, it can sue the states for violations of federal law. Such suits are thought necessary to preserve the supremacy of federal law.

Second, a state can consent to be sued. When a state does so, it has “waived” its immunity. Because pure sovereign immunity can have harsh consequences, most states *have* waived their immunity from some types of lawsuits. For example, most states have tort-claim statutes that allow people to sue a state for the torts of its state employees.

Third, sometimes the federal government, acting through Congress, can override (or “abrogate”) state sovereign immunity. The principal situation when Congress can abrogate state sovereign immunity is to enforce the civil rights guaranteed by the Fourteenth Amendment, such as the right to due process of law and the equal protection of the law. Probably the most famous example of Congress overriding state sovereign immunity is the federal statute called Title VII. Under Title VII, people can sue states for various forms of employment discrimination, such as race and gender discrimination.

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These and other exceptions to state sovereign immunity lead some to claim that the doctrine of sovereign immunity is dying. Others would say, instead, that the doctrine has evolved since it was adopted from Britain to reflect the structure of government in this country and our modern notions of fairness.

State Sovereign Immunity in the U.S. Supreme Court

The doctrine of state sovereign immunity often has divided the U.S. Supreme Court, generating a series of 5-4 decisions over the last decade. The Court has been divided on several issues surrounding sovereign immunity, including three that arose in the cases from last Term.

One issue is the *scope* of state sovereign immunity. At issue, in general terms, is in what settings a state can claim sovereign immunity? That was the issue in the first case that is discussed in more detail below: *Federal Maritime Commission v. South Carolina State Ports Authority* (the “Ports Authority” case).

A second issue concerns *waivers* of state sovereign immunity. In other words, by what means can a state give up or waive its immunity? Most of the time, it is easy to tell whether a state has waived its sovereign immunity or not. One needs only to determine whether the state has enacted a statute waiving immunity, such as a tort claims statute. There is a gray area, however, as illustrated in the second case discussed below: *Lapides v. Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002).

A third issue concerns the scope of Congress’s power to *override* state sovereign immunity. This issue was addressed – but the Court eventually avoided it – in the third case explored below: *Raygor v. Regents of the University of Minnesota*, 122 S. Ct. 999 (2002).

Sovereign Immunity Decisions from the October 2001 Term

Federal Maritime Commission v. South Carolina State Ports Authority

Ports Authority posed this question: Can a state claim sovereign immunity when someone brings a judicial-type proceeding against the state in a federal agency? The Court held, by a 5-4 vote, that a state does have immunity when “sued” in a federal agency. Thus, the *Ports Authority* case was a narrow win for the states. Although the case does

not have great importance from a practical standpoint, it does have importance for the constitutional doctrine of state sovereign immunity.

The factual background of the *Ports Authority* case involves a subject that often is controversial at the state level: gambling. The case arose when a cruise ship sought permission to dock at the Port of Charleston, South Carolina. The Port of Charleston is run by the South Carolina State Ports Authority (SCSPA), an agency of the state. The SCSPA refused to let the cruise ship dock in Charleston because people were allowed to gamble on board the ship once they left state waters.

After being denied permission to dock, the cruise operator filed a complaint against the SCSPA with a federal agency, the Federal Maritime Commission. The complaint was based on a federal maritime law that prevents undue discrimination among the users of a port. The proceedings before the Federal Maritime Commission are quite judicial in structure and can result in cease-and-desist orders and orders awarding reparations.

The SCSPA claimed sovereign immunity from this proceeding before the Federal Maritime Commission, even though this proceeding was not brought in a court. That claim raised the novel issue of whether a state can claim sovereign immunity from a proceeding in a federal agency. Sovereign immunity is usually thought of as a protection that is claimed in a *court* proceeding.

Even so, the U.S. Supreme Court held that the SCSPA could claim sovereign immunity from this proceeding before the Federal Maritime Commission. The 5-member majority began with the premise that the main purpose of state sovereign immunity is to protect the dignity of the states. The majority concluded that this dignity would be offended regardless of whether the state was sued in a court or a federal agency.

The primary precedent for this conclusion was the Court’s 1999 decision in the case of *Alden v. Maine*. In *Alden*, the Court held that states have sovereign immunity not only when they are sued in federal court but also when they are sued in their own state courts. *Alden* was a watershed case because the *Alden* Court decisively broke all connections between the doctrine of sovereign immunity, on the one hand, and the only provision in the U.S.

Constitution that appears specifically related to state sovereign immunity, the Eleventh Amendment. The text of the Eleventh Amendment limits only the power of the federal courts to hear suits against states. The *Alden* Court, nonetheless, held that states can also claim sovereign immunity from lawsuits in their own courts. That is because, the Court determined, sovereign immunity is a protection that is built into the federalist structure of the Constitution as a whole. The Eleventh Amendment reflects just one facet of that structural protection.

If you accept *Alden*'s "structural" rationale for state sovereign immunity, the decision in *Ports Authority* makes sense. And the *Ports Authority* case's importance lies in this reaffirmation of the structural rationale for sovereign immunity articulated in *Alden*. *Alden* was decided by a bitterly divided 5-4 vote. The four Justices who dissented in *Alden* have continued to state their disagreement with the decision in later cases. Indeed, they have made it quite clear that they are prepared to overrule *Alden* as soon as they have the right opportunity (such as the appointment of a new, like-minded Justice). Last Term's *Ports Authority* case, however, stands as another precedent that would have to be overruled before the dissenters in *Alden* could have their way. For that reason, the case is important for the doctrine of sovereign immunity.

As a practical matter, though, *Ports Authority* is not a major victory for the states. That is primarily because of one of the exceptions to state sovereign immunity that already has been mentioned. The United States, acting through the Federal Maritime Commission, can sue state-run port authorities in federal court to enforce federal shipping laws. Likewise, other federal regulatory agencies have the power to go to court to sue state agencies or officials who violate other federal laws.

Lapides v. Board of Regents of the University System of Georgia

Lapides posed this question: When a state is sued in its own court under a state law that waives the state's immunity, and the state consents to have the lawsuit removed to federal court, can the state then claim sovereign immunity in federal court? The Court held unanimously that: No; the state waives its immunity by invoking removal jurisdiction. So, *Lapides* was a decisive loss for the states.

In fact, the *Lapides* case has the potential to devastate the current doctrine of state sovereign immunity, but this will depend, among other things, on whether the current 5-4 division on the Court about this subject stays the same or not.

The plaintiff *Lapides* was a professor at Kennesaw State University, part of Georgia's state university system. *Lapides* sued the University and several of its officials for allegedly putting, in his personnel files, documents that falsely accused him of sexual harassment.

Lapides brought his suit against the University and its officials in Georgia state court. He asserted claims under both a federal civil rights statute – 42 U.S. Code Section 1983 (Section 1983) – and state tort law. As to the state tort claims, *Lapides* contended that Georgia had waived its immunity from those state tort claims under the Georgia Tort Claims Act.

The state defendants – meaning the University System as an entity and the individual officials – removed the case to federal district court based on the presence of the federal claims under Section 1983. Then, once these state defendants got to federal court, they moved to dismiss the whole lawsuit. They argued that the claims against the University System were barred by state sovereign immunity and that the claims against the individual officials were barred by another type of immunity – official immunity.

By the time the case got to the U.S. Supreme Court, there was only one claim left, and that was Professor *Lapides*'s state tort claims against the University System. Those claims were potentially within the federal court's supplemental jurisdiction, unless they were barred by the state's sovereign immunity. The issue was whether the state had waived its federal court immunity by consenting to have the case removed to federal court.

The U.S. Supreme Court unanimously held that the state of Georgia had indeed waived its sovereign immunity by removing the case from state to federal court. The Court relied on an old line of cases holding that, when a state invokes the jurisdiction of the federal courts, it gives up its immunity.

Although the Court used the term "waiver" to describe how the state lost its immunity, the Court's holding does not really

reflect a principle of “waiver.” After all, Georgia did not intend to consent to be sued when it removed the case from a Georgia state court to the federal court. In reality, the Court concluded that the state had *forfeited* the protection of sovereign immunity by its conduct in the litigation. The Court said as much, stating: “An interpretation of [the doctrine of state sovereign immunity] that finds waiver in the litigation context rests upon the [doctrine’s] presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a state’s actual preference or desire, which might, after all, favor selective use of ‘immunity’ to achieve litigation advantages.”

In other words, the state was found to forfeit its immunity to prevent it from using the federal courts to achieve unfair results. No less than seven times in its short opinion, the Court said it would be unfair to allow states to remove cases to federal court and then claim immunity from the federal courts’ processes. The Court probably was concerned, in particular, with the prospect of states using the removal statute to yank plaintiffs back and forth between state court and federal court and to force plaintiffs to split their claims between the federal and state court system.

Although this concern is understandable, it also is virtually unprecedented in the Court’s modern cases. Not since the early 1900s has the Court relied on its own conception of fairness to decide the scope of state sovereign immunity. Since then, fairness has usually been irrelevant to the scope of sovereign immunity. There is a good reason for this. The whole idea behind any doctrine conferring immunity from lawsuits (whether it is sovereign immunity or immunity for charitable organizations or doctors who have acted as “good Samaritans”) is to block lawsuits regardless of the merits of any particular case.

The Court’s concern with fairness in *Lapides* is the aspect of the opinion that makes it potentially devastating to the current doctrine of sovereign immunity. Although the *Lapides* Court did not mention the due process clause, it would be a natural source for fairness-based restrictions on sovereign immunity. If the current pro-immunity majority on the Court becomes a minority, *Lapides* could be a tool for overhauling the doctrine.

Lapides need not be read expansively, however. It can be read, instead, as reflecting

the Court’s particular concern with litigation gamesmanship. A majority of the current Supreme Court is willing to trust states in many situations. Even members of the majority faction recognize, however, the potential for real abuse in the litigation context, in which state attorneys, like other litigators, will do anything they can to gain tactical advantage.

Furthermore, even conservative Justices like Chief Justice Rehnquist and Justices Scalia and Thomas do not like the idea of extended jurisdictional battles over where a case is going to be litigated. They want clear rules, which is what the *Lapides* opinion provides for the removal situation.

Raygor v. Regents of the University of Minnesota

The issue in *Raygor* was this: Does a federal statute, 28 U.S.C. § 1367(d), extend the time period prescribed by state law for suing a state in its own court on a state law claim? The Court held, by a vote of 6-3, that: No; this federal statute does not extend the state law statute of limitations. *Raygor* was a decision based on statutory interpretation, but the Court chose an interpretation that avoided constitutional concerns about the limits of Congress’s power. Therefore, it is an important case.

In the underlying case, two employees of the University of Minnesota sued the University in a federal court for trying to force them to retire at the age of 52. In their federal court lawsuit, they claimed that the University had violated both federal and Minnesota statutes barring age discrimination. Their case was dismissed from federal court, but their claim against the University based on the Minnesota age-discrimination statute was dismissed without prejudice. This meant that they could bring that state law claim in a new lawsuit in Minnesota state court.

That is what the plaintiffs did. They filed a new lawsuit against the University of Minnesota, this time in Minnesota state court, asserting only their claim under the Minnesota age-discrimination statute. Unfortunately for these plaintiffs, under Minnesota state law, their claim was by now barred by the Minnesota statute of limitations.

Now comes the twist that led the case to the U.S. Supreme Court. Although the plaintiffs’ state court lawsuit was filed too late according to Minnesota law, there is a

federal statute that appears to extend – or to use the legal term, to “toll” – a state statute of limitations in this situation. The statute is 28 ASCOT, § 1367(d). That statute states, in simplified terms: (i) If you bring a lawsuit in federal court; (ii) and the lawsuit includes a claim based on state law; and (iii) if the lawsuit is later dismissed from federal court, you automatically have at least 30 days to bring a new lawsuit in state court asserting the state law claim in state court.

The U.S. Supreme Court in *Raygor* held that this federal statute should be interpreted as not applying to lawsuits against states. Thus, the Court in effect carved out an exception so that the federal statute is still presumably valid; it simply doesn’t apply to lawsuits brought against states based on state law. As a result, the federal statute did not give the plaintiffs in *Raygor* an extra 30 days to bring a new lawsuit in Minnesota state court asserting their state law age discrimination claims against the University. Instead, their lawsuit – like others that assert state law claims against the states in their own courts – will be governed exclusively by the state law prescribing the statute of limitations.

The Court interpreted the federal statute as carving out this exception to avoid constitutional concerns. The Court said that it is a serious question whether Congress constitutionally can enact a federal statute that extends the state statute of limitations for bringing a lawsuit based on state law against a state in its own courts. The key idea here is that a state’s sovereign immunity from lawsuits is a protection that comes from the U.S. Constitution. This constitutional protection applies whether those lawsuits are brought in federal court or the state’s own courts. That was the conclusion of the Court in a case mentioned earlier, *Alden v. Maine*. Like other constitutional protections, state sovereign immunity is something that Congress has only limited power to modify. The Court was reluctant to interpret a federal statute as an attempt by Congress to modify the states’ constitutionally protected immunity from lawsuit in their own courts.

Raygor was a victory for the states, but the practical consequences of the Court’s decision are likely small. They are likely to be small because it will probably be easy for people who prefer to sue a state in federal court to protect their state court option in the event that

their federal court lawsuit is dismissed. All the plaintiff has to do is to file lawsuits in both the state court and the federal court at the same time, and have the state court judge put the state court case on hold, pending resolution of the federal court suit. By filing in state court at the very beginning, the plaintiff avoids statute of limitations problems. And the plaintiff can always reactivate the state court lawsuit if his or her federal court lawsuit is dismissed without prejudice.

This assumes that a state court judge is willing to let a lawsuit against the state sit on his or her docket while the plaintiff litigates a duplicate lawsuit in federal court. If a state court judge did not do so voluntarily, the question could arise whether a state court judge has some obligation under federal law to stay the state court lawsuit. The argument in support of such an obligation would stress the importance of giving plaintiffs with federal claims a chance to assert them in a federal court. The argument against such an obligation would emphasize the long tradition of state courts hearing claims based on federal law, as well as the power of state courts to control their dockets without federal interference.

An even broader issue is whether the federal statute at issue in *Raygor* is constitutional as it applies to lawsuits against private defendants. Federal statute sometimes extends the time period prescribed by state law for bringing a lawsuit based on state law in that state’s court. Does Congress have the power to control the statute of limitations for someone to file a lawsuit based on state law in a state court? One argument would be that Congress can do this, if it is an appropriate way of facilitating people’s ability to litigate federal claims in federal court without losing the fallback option of going to state court. The counter-argument would focus on the state’s right to control the operation of their court system. These arguments can arise whether or not a lawsuit is a suit against a state.

The issue of Congress’s power to control state court procedures is an important one, because there are several federal statutes that purport to do so, besides the federal statute that was at issue in *Raygor*. For example, a provision in the federal Bankruptcy Code automatically stays state court litigation pending a federal bankruptcy proceeding, 11 U.S.C. § 362(a). Other federal laws, such as the Soldiers’ and Sailors’ Civil Relief Act of

1940, extend the statute of limitations – in all courts – for soldiers during their military service, 50 U.S.C. App. § 525.

Federalism Cases from the October 2002 Term

Congress's Spending Power

Guillen v. Pierce County, Washington

In the upcoming Term, the Court will address Congress' spending power. That is an important power, of course, because there is no purse bigger than Congress'. The case posing the issue is *Guillen v. Pierce County, Washington*, 144 Wash. 2d 696 (2001), a case from the Washington State Supreme Court.

The case arose when people were injured at an allegedly dangerous intersection in Pierce County, Washington. The injured parties sued the county in a state court, claiming that the county was negligent for maintaining such a dangerous intersection. In this lawsuit, they sought through the civil discovery process to obtain data on prior accidents at that same intersection.

A federal statute, however, prohibits this sort of data from being obtained through civil discovery and from being admitted into evidence at trial if, as was true here, the state previously had submitted that data to the federal government to receive federal highway funds. The statute imposes this restriction whether the data is sought in a state court suit or a federal court suit. The statute was supported by many states, so that the information that they collected to get federal money to improve highway safety was not used to hold them liable for unsafe road conditions.

The Washington State Supreme Court held that, as applied to state court proceedings, this statute exceeds Congress' power. The Court concluded that Congress went too far in trying to control the way state courts operate. That conclusion is now being defended by the private plaintiffs who sued the County and sought the data. The County, however, is in the unusual position of defending Congress' power to control state court procedures.

The Liability of Counties for False Claims

Chandler v. Cook County, Illinois

The other important federalism case pending before the Court this Term is another case involving counties: *United States ex. rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002).

The case arises from a federal grant made to a county hospital to study drug-dependent, pregnant women. The director of the study, Dr. Janet Chandler, determined that other county officials administering the program were submitting false reports to the federal government. The reports, for example, included data on study participants who did not actually exist. After Dr. Chandler was fired, she sued the County under the federal False Claims Act. That statute prohibits any "person" from filing false claims with the federal government. The statute also imposes treble damages for violations.


The question before the U.S. Supreme Court is whether a county is a "person" subject to the False Claims Act. The Court has previously concluded that states are not "persons" within the meaning of the Act. The lower federal courts have disagreed on whether counties similarly are excluded from the statutory term "person."

This question is one of statutory interpretation. It is clear that, unlike states, counties do not enjoy any constitutional immunity from lawsuits. The issue is whether or not Congress intended to subject counties to liability – including treble damages – under the Act. The question is an important one, because every year the federal government channels billions of dollars to counties and other units of local government.

Summary

Overall, states have done very well in the U.S. Supreme Court in the last decade, continuing to do so during the 2002 Term. This situation can change very rapidly, however, as most of these cases have been decided by a 5-4 majority. Furthermore, two of the five Justices, Justices O'Connor and Kennedy, are not always reliable votes in the area of states' rights.

Contrary to popular opinion, the states' success in the U.S. Supreme Court does not depend exclusively on the ideology of the current Justices. It has much to do with a broader appreciation among the public, as well as the Justices, that states play a vital role in the federal system. Accordingly, many also see a need to guard against the federal government overreaching its authority.

As the Court enters its 2003 Term, it continues to show a keen interest in the subject of states' rights. Those sharing that interest should continue to follow its decisions closely. 

This Regional Resource was prepared for the Intergovernmental Affairs Committee of the Southern Legislative Conference (SLC) by Richard Seamon, J.D., Associate Professor, University of South Carolina School of Law, and is based upon his presentation to the SLC Intergovernmental Affairs Committee which took place on Monday, August 5, 2002, in New Orleans, Louisiana.

The SLC is a non-partisan, non-profit organization serving Southern state legislators and their staffs. First organized in 1947, the SLC is a regional component of The Council of State Governments, a national organization which has represented state governments since 1933. The SLC is headquartered in Atlanta, Georgia.