FIRST IMPRESSIONS: A TRIBUTE TO JUSTICE SANDRA DAY O'CONNOR

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Justice O'Connor cares about federalism, and here is how I know. I first met her after two nights without sleep. In typical law student fashion, I had prepared for the clerkship interview by reading everything possible about the Justice — law review articles, major opinions, transcripts of confirmation hearings, even a biography written for sixth graders. I prepared a list of questions and answers, talked to professors, and practiced with friends.

All for naught. After pleasantries about writing and the Court, my discussion with the Justice took a curious turn. Referring to my first summer in college, Justice O'Connor said, "I see you were an intern for the City of Yorba Linda." I muttered a flustered response, and we spent a good deal of time talking about my experience working for city governments and my college thesis on local politics.

During our conversation (and in her various public comments), Justice O'Connor drew upon her own career in state government. Before her appointment to the Court, Justice O'Connor was a veteran of Arizona government, both in the judiciary and the legislature, where she served as majority leader. This experience gave life to her respect for the federal system, a system which Simon Bolivar once criticized as "over perfect" and which "demands political virtues and talents far superior to our own."[1] Recent decisions from the Court concerning federalism[2] and proposals to convey federal power to states call forth Justice O'Connor's challenge to Bolivar's notion that federalism is beyond human capacity:

> While our federal system can never be perfect as long as the United States remains a sovereign union of equally sovereign

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1 Bolivar, *Reply of a South American to a Gentleman of this Island*, 6 September 1815, *reprinted in* 1 SELECTED WRITINGS OF BOLIVAR 118-19 (1951).

2 *See* Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S. Ct. 1114 (1996); United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995).

> states, federalism's vitality is evident from the intensity of debates about the limits of federal and state power. The same tensions and conflicts that render questions relating to government action difficult, make our liberties strong.[3]

Questions of the proper division of authority between the state and national governments are as old as the Republic. And with the Supreme Court rests the responsibility for preserving the admittedly imperfect[4] balance of power between the periphery and the center — a task that, given the Court's national character, must be undertaken with utmost care and independence. "The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."[5] It is this responsibility and promise of impartiality that Justice O'Connor has taken to heart:

> [T]he reach of the state and federal governments has extended into new areas not foreseen by the Founders, making it necessary to define both the outer limits of all government authority and also the boundaries of federal and state government with respect to each other. This job rests primarily with American judges.[6]

When Justice O'Connor joined the Court in 1981, *National League of Cities v. Usery*[7] governed the uneasy relationship between the federal regulatory regime and the autonomy of states. That case invalidated the extension of labor standards to state and local employees because they impair " 'the States' integrity or their ability to function effectively in a federal system."[8] Permitting such regulation would pave the way for federal intervention into areas traditionally governed, and better governed, by the states.[9]

Federal regulators marched down the path nevertheless and the Court fell into step, time and again, upholding federal laws against

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[3] Justice Sandra Day O'Connor, Federalism: Problems and Prospects of a Constitutional Value, Speech to the Woodrow Wilson Center (June 11, 1992) (transcript available at the Seton Hall Legislative Bureau).

[4] *See* THE FEDERALIST No. 38, at 187 (James Madison) (Bantam Classics ed., 1987). As between the Constitution and the Articles of Confederation, "[i]t is not necessary that the former is perfect; it is sufficient that the latter is more imperfect." *Id.*

[5] *See* THE FEDERALIST No. 39, at 194 (James Madison) (Bantam Classic ed., 1982).

[6] Justice Sandra Day O'Connor, The American Federal System, Remarks to the Salzburg Institute (July 1992).

[7] 426 U.S. 833 (1976).

[8] *Id.* at 843 (quoting Fry v.United States, 421 U.S. 542, 547 n.7 (1975)).

[9] *See id.* at 851-52.

state autonomy challenges.[10] The junior Justice did not hesitate to decry this trend of national encroachment. In an early dissent, Justice O'Connor recognized that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare."[11] Protection of this sovereign domain is critical to preserving the balance between state and federal governments, a division of authority that checks against government abuse. "Unless we zealously protect against these distinctions, we risk upsetting the balance of power that buttresses our basic liberties."[12] Justice O'Connor continued to carry this theme of federalism and respect for state institutions beyond the context of limits on federal power — into opinions ranging from Supreme Court jurisdiction[13] to habeas corpus review[14] — drawing on such varied sources as the case and controversy requirement[15] and the Judges Clause.[16]

In 1989, the Court ended even the illusion that it would recognize a sovereign sphere of autonomy for the states. *Garcia v. San Antonio Metropolitan Transit Authority*[17] explicitly overruled *National League of Cities* and upheld federal minimum wage and overtime requirements on state and local government employers.[18] Thenceforth, according to the Court, the judiciary will not limit federal regulatory powers, and states must protect their spheres of sovereignty through

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10 *See, e.g.*, Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983) (holding that the federal Age Discrimination in Employment Act applied to state governments because the state's regulation of employment was not directly impaired by the Act); Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) (upholding federal regulations dictating procedures and standards for state utility commissions in setting rates); Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264 (1981) (upholding federal law which displaced state regulation of mining operations).

11 Federal Energy Regulatory Commission v. Mississippi, 456 U.S. at 777 (O'Connor, J., concurring in part, dissenting in part).

12 *Id.* at 790.

13 *See* Michigan v. Long, 463 U.S. 1032, 1040-42 (1983).

14 *See* Teague v. Lane, 489 U.S. 288, 298-99 (1989); Coleman v. Thompson, 501 U.S. 722, 730 (1991).

15 *See* Michigan v. Long, 463 U.S. at 1041.

16 *See* U.S. CONST., art. VI, cl. 2. The Supremacy Clause provides that federal law "shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* A negative implication of this language is that the Constitution does not permit Congress to command state legislatures to legislate in furtherance of a federal interest. *See* New York v. United States, 505 U.S. 144, 178-79 (1992).

17 469 U.S. 528 (1985).

18 *Id.* at 546-47.

"the procedural safeguards inherent in the structure of the federal system."[19] Justice O'Connor strongly dissented and accused the Court of shirking its responsibility of protecting the fragile balance between state and federal powers. "A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power."[20] Ever optimistic, Justice O'Connor expressed confidence that "this Court will in time again assume its constitutional responsibility."[21]

Justice O'Connor, true to form, gently guided the Court's journey back toward a proper balance of power between state and national governments. In *Gregory v. Ashcroft*,[22] several state judges argued that a Missouri constitutional provision mandating retirement at 70 years of age violated the federal Age Discrimination in Employment Act (ADEA), which Congress enacted pursuant to its power to regulate interstate commerce.[23] Writing for the Court, Justice O'Connor acknowledged that *Garcia* precluded judicial review of the constitutional boundaries between state autonomy and federal powers.[24] Nevertheless, the Court could, as a matter of statutory interpretation, determine whether the ADEA covers state judges. Drawing upon the same principles that animated *National League of Cities* — the respect for local governance and an appreciation of our federal system that underlies much of her jurisprudence —Justice O'Connor opined that Congress must clearly state its intent to invade areas of traditional state regulation and sovereignty.[25] "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[26] Because Congress did not unambiguously express its intention to interfere with the states' sovereign sphere, the Court held that the ADEA did not cover Missouri's mandatory retirement rule.[27]

In practical effect, *Gregory v. Ashcroft* chipped away at *Garcia*, but a more fundamental reassessment was needed before the Court would

19 *Id.* at 552.
20 *Id.* at 581 (O'Connor, J., dissenting).
21 *Id.* at 581.
22 501 U.S. 452 (1991).
23 *Id.* at 455-56.
24 *Id.* at 464.
25 *Id.* at 460-61 (citations omitted).
26 *Id.* at 461.
27 *Id.* at 467.

again assume its constitutional responsibility to preserve our federal system. In *New York v. United States,* [28] another opinion by Justice O'Connor, the Court invalidated a federal law regulating hazardous waste disposal because the national government may not "'commandeer' state governments into the service of federal regulatory purposes."[29] In reaching this conclusion of law, Justice O'Connor provided the reassessment of jurisprudence that the Court needed. Building on the classic notion that the Tenth Amendment is a truism,[30] Justice O'Connor observed that federalism can be ensured either by protecting a zone of state sovereignty, as *National League of Cities* did, or by limiting the federal government to those powers enumerated by the Constitution or to those necessary and proper to effectuate those powers.[31]

> In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.[32]

Three years later, the Court took up this invitation to enforce the limits of the power delegated to the Federal government. In *United States v. Lopez,*[33] the Court, for the first time in nearly 60 years,[34] invalidated a federal law because it exceeded Congress' power to regulate interstate commerce.[35] The Court found dispositive the fact that the Gun-Free School Zones Act of 1990, which prohibited firearms possession in the vicinity of a school, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one may define these terms."[36] Were the Act upheld, "there never will be a distinction between what is truly national and what is truly local,"[37] and the Court "would be hard-

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28 505 U.S. 144 (1992).

29 *Id.* at 175.

30 *See* United States v. Darby, 312 U.S. 100, 124 (1941) (concluding that the Tenth Amendment "states but a truism that all is retained which has not been surrendered").

31 New York v. U.S., 505 U.S. at 157-59.

32 *Id.* at 159.

33 ___ U.S. ___, 115 S.Ct. 1624 (1995).

34 *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

35 *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630-31.

36 Id.

37 *Id.* at ___, 115 S.Ct. at 1634.

pressed to posit any activity by an individual that Congress is without power to regulate."[38] One could almost hear the echo of Justice O'Connor's voice: "our federal system requires something more than a unitary, centralized government."[39]

Consider the overall picture: The Supreme Court's recent federalism jurisprudence is Justice O'Connor's jurisprudence. The Court now enforces the limits of enumerated powers; prevents federal commandeering of state governments; construes statutes generally, and the habeas corpus statute, in particular, in light of federalist values; and defines its appellate jurisdiction with a proper respect for state institutions. All these developments bear Justice O'Connor's indelible stamp.

Principled and persistent in the effort to restore the Court's constitutional duty to protect the rights of States, Justice O'Connor nevertheless is not an absolutist. Rather, laced through her jurisprudence is a healthy respect for "a proper 'sensitivity to the legitimate interests of both State and National Governments.'"[40] Even in her strongest defenses of state sovereignty, Justice O'Connor recognized that the uneasy constitutional balance of power draws no bright lines, but posits difficult questions which require the considered judgment of the Court. "Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of this difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance."[41]

At the heart of Justice O'Connor's jurisprudence is a concern for people. Her belief in the Court's duty to protect state sovereignty stems from the recognition that "federalism enhances the opportunity of all citizens to participate in representative government."[42] Justice O'Connor cares deeply for the democratic processes and, unlike Simon Bolivar, believes that federalism fosters human capacity for self-governance. "If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their

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38 *Id.* at ___, 115 S.Ct. at 1632.

39 *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting).

40 *Federal Energy Regulatory Comm'n*, 456 U.S. at 797 (O'Connor, J., dissenting).

41 *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting).

42 *Federal Energy Regulatory Comm'n*, 456 U.S. at 789 (O'Connor, J., dissenting).

local problems."[43] More important, "our federal system provides a salutary check on governmental power."[44] The Framers, suspicious of authority, divided power among the branches and between state and national governments, and it is this difffusion that protects individual liberties against governmental encroachment.[45]

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Looking back now, the substance of my clerkship interview with Justice O'Connor should have been predictable. Justice O'Connor's faith in the federal system and confidence in state and local government — beliefs borne from her experience prior to joining the Court — are obvious. What took me aback was how she drew the link between these beliefs and my own history; I had expected a discussion of abstract principles and impersonal doctrines. But knowing her as I do now, it is not at all surprising that Justice O'Connor made the connection which the young law student failed to recognize. At bottom, Justice O'Connor is a person who cares about other people — who they are, what they think, and perhaps most important, how her actions would affect their lives.

With the Medal of Honor, Seton Hall University School of Law honored Justice O'Connor for her pathbreaking achievements as a woman. That focus, however, misses the scope of her contributions to our country and the spirit with which she practices her craft. For Justice O'Connor, independent of being a woman judge, is a pioneering jurist and a decent human being — one who fully appreciates the Court's place in government and the government's place in citizens' lives, and who cares deeply about the life of each person whom she touches. I thank God that she has touched me and am confident that she will touch many others.

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[43] *Id.* at 790.
[44] Id.
[45] Id.