

THE FEDERALISM REVOLUTION

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Thank you so much for the incredibly kind introduction. It's truly an honor and a pleasure to be with you again. Although I live in Los Angeles, I've come to feel that I am very much a part of the Tenth Circuit.

I. INTRODUCTION

I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism. *Miranda v. Arizona*¹ wasn't overruled.² Abortion rights aren't going to be eliminated.³ School prayer isn't going to be allowed.⁴ But there has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.

On January 20, 1981, President Ronald Reagan, in his first inaugural address,⁵ proclaimed a need for a new federalism, greatly limiting the powers of the federal government and turning much governance back to the states.⁶ Today, five Justices, placed on the Supreme Court by Presidents Reagan and Bush,⁷ are dramatically changing the nature of American government. No matter what kind of law you practice, no matter what court you sit in, these federalism decisions are likely to have a direct effect on you.

Debates over federalism are nothing new in American history. The very existence of a national government came, grudgingly, only after the failure of the Articles of Confederation.⁸ Some of the most heated political battles in American history have been over states' rights; the fight over the abolition of slavery, the Civil War itself, the battle over the New Deal, and the fight over civil rights in the 1950s and 1960s were all conducted with regard to federalism and states' rights.

Over the course of American history, the Supreme Court has shifted between two different views of constitutional federalism. One view is what I would call a nationalist vision. This approach says that the powers of the national government should be broadly defined so as to give it the power to deal with social problems. Under this approach, the Tenth Amendment⁹ should not be interpreted as a constraint on congressional powers. It's not for the judiciary to protect the states under the nationalist vision. Rather, the interests of states as states can be adequately safeguarded through the national political process.

1. 384 U.S. 436 (1966).

2. See *Dickerson v. United States*, 530 U.S. 428 (2000).

3. See *Stenberg v. Carhart*, 530 U.S. 914 (2000).

4. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

5. President's Inaugural Address, 1981 PUB. PAPERS 1 (Jan. 20, 1981).

6. *Id.* at 2 (noting his "intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people").

7. Justice O'Connor, Justice Scalia, Justice Kennedy, Justice Thomas and Chief Justice Rehnquist, who was made Chief Justice by President Reagan.

8. Michael Les Benedict, *Articles of Confederation*, in *SOURCES IN AMERICAN CONSTITUTIONAL HISTORY* 20-25 (Michael Les Benedict ed., D.C. Heath & Co. 1996).

9. U.S. CONST. amend. X (reserving powers not delegated to the United States by the Constitution, nor prohibited by it, to the States or to the people).

The competing vision is one that I would call a federalist approach. This model says that the powers of the national government should be limited, and that the Tenth Amendment should be seen as a judicially-enforced limit on the powers of Congress so as to safeguard the autonomy of state governments. Under a federalist approach, it is the role of the federal judiciary to safeguard the states, especially with regard to protecting state sovereign immunity.

In the first century of American history, the Court took the nationalist approach. Though the federal government's activities were more limited than they are today, there were many Supreme Court cases that broadly defined the scope of Congress's powers. In *Gibbons v. Ogden*,¹⁰ for example, Chief Justice John Marshall expansively defined the scope of Congress's Commerce Clause authority, and rejected the idea that the Tenth Amendment serves as any limit on Congress when it is exercising its constitutionally enumerated authority.

From the 1890s to 1937, the Court shifted to a federalist vision. During this time, the Court narrowly defined the scope of Congress's powers. For example, the Court said that Congress, under the Commerce Clause,¹¹ could only regulate the last phase of business but could not regulate mining,¹² manufacturing, or production.¹³ During this era, the Court made substantial use of the Tenth Amendment as a limit on congressional power. When Congress passed a law prohibiting the shipment in interstate commerce of goods made by child labor, the Supreme Court said it violated the Tenth Amendment.¹⁴

From 1937 to the 1990s, the pendulum swung back, and the Court emphatically chose the nationalist model. From 1937 until April 26, 1995, not one federal law was found to exceed the scope of Congress's Commerce Clause authority. From 1937 until 1992, only one federal law was found to violate the Tenth Amendment,¹⁵ and that case was overruled less than a decade later.¹⁶ But now, as we enter the twenty-first century, the Supreme Court has again shifted to the federalist model.

There have been three themes to what the Rehnquist Court has done with regard to federalism. One theme is the narrowing of the scope of congressional power; the second is the revival of the Tenth Amendment as a limit on Congress's authority; and the third is the great expansion of the scope of state sovereign immunity. I would like to discuss each of these three themes, looking at what the Supreme Court has done, particularly in the decisions of the last Term. I would also like to identify for you the recent Tenth Circuit decisions related to these three themes.

10. 22 U.S. (9 Wheat.) 1, 198 (1824).

11. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with foreign nations, and among the several States, and with Indian Tribes).

12. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936).

13. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1895); see also *Kidd v. Pearson*, 128 U.S. 1, 20-22 (1888).

14. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100, 116 (1941).

15. See *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that Congress had impermissibly interfered with the integral functions of the states by enacting amendments to the Fair Labor Standards Act that would have displaced state policies).

16. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

II. NARROWING THE SCOPE OF CONGRESSIONAL POWER

A. *The Commerce Clause*

The first theme, which is the limiting of the scope of Congress's power, is manifested with regard to the Supreme Court's interpretation of two important congressional powers; the first of these powers is Congress's authority under the Commerce Clause.

From 1937 to 1995, the Supreme Court's broad definition of the commerce power meant that Congress regularly used this authority to adopt numerous regulatory and even criminal statutes.¹⁷ But in 1995 the Court decided *United States v. Lopez*,¹⁸ holding that the Federal Gun-Free School Zone Act was unconstitutional. This federal law made it a crime to have a firearm within 1000 feet of a school.¹⁹ Alfonz Lopez, a twelfth grader in San Antonio, Texas, was convicted for violating this law.²⁰ The United States Supreme Court, in a five-to-four decision, declared the law unconstitutional.²¹ Chief Justice Rehnquist, writing for the majority,²² said that it is axiomatic under the Constitution that the powers of Congress are limited and that there must be restrictions on the scope of Congress's Commerce Clause authority.²³ Chief Justice Rehnquist indicated that Congress, under the Commerce Clause, can regulate in three circumstances.²⁴ First, Congress can regulate the channels of interstate commerce, the places where commerce occurs, such as highways and waterways.²⁵ Obviously, *Lopez* didn't involve the channels of interstate commerce.²⁶ Second, Chief Justice Rehnquist said that Congress can regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce.²⁷ The Chief Justice pointed out that there was no requirement under the

17. See, e.g., *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that the National Labor Relations Act of 1935, which provided for union-employee collective bargaining in all industries affecting interstate commerce, was an appropriate exercise of congressional Commerce Clause authority); *Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (holding that the Agricultural Adjustment Act of 1937, which allowed Congress to regulate home production and use of wheat, was within Congress's Commerce Clause power, based on the substantial effect on interstate commerce of the aggregate of such local activity); *Perez v. United States*, 402 U.S. 146, 151-52 (1971) (holding that the Consumer Credit Protection Act, which contained a provision that extended federal criminal jurisdiction to extortionate credit transactions, was an appropriate exercise of Congress's Commerce Clause authority because even purely intrastate activities may affect interstate commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (holding that Title II of the Civil Rights Act of 1964, which prohibited racial discrimination by private motels which accepted out-of-state business, was within Congress's Commerce Clause authority because the activity regulated had a real and substantial relation to the national interest and placed a burden on interstate commerce).

18. 514 U.S. 549 (1995).

19. See Federal Gun-Free School Zone Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844 (current version at 18 U.S.C. § 922 (q)(1)-(4) (1994 & Supp. IV 1998)).

20. *Lopez*, 514 U.S. at 551.

21. *Id.* at 580.

22. Joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

23. *Lopez*, 514 U.S. at 566 (asserting that, because Congress's Commerce Clause authority is limited, legislation passed under Congress's commerce power will always engender legal uncertainty).

24. *Id.* at 558.

25. *Id.* (citing *United States v. Darby*, 312 U.S. 100, 114 (1941); *Heart of Atlanta Motel*, 379 U.S. 241, 256-57 (1964)).

26. See *id.* at 559.

27. *Id.* at 558 (citing *Houston E. & W. Texas Railway Co. v. United States (The Shreveport Rate Case)*, 234 U.S. 342 (1914)).

Gun-Free School Zone Act that the gun must have traveled in interstate commerce.²⁸ Third, Chief Justice Rehnquist said Congress can regulate activities that have a substantial effect on interstate commerce.²⁹ Prior to *Lopez*, there were some Supreme Court cases that said that Congress had the power to regulate wherever there was an effect on interstate commerce.³⁰ But Chief Justice Rehnquist, writing for the *Lopez* majority, said that the test should be whether there is a "substantial effect."³¹ The Court rejected the argument that guns near schools have a significant effect on interstate commerce, so as to allow Congress to regulate.³²

On May 15, 2000, the Supreme Court applied and extended *Lopez* in *United States v. Morrison*.³³ In *Morrison*, the Supreme Court declared unconstitutional the civil damages provision of the Violence Against Women Act.³⁴ The Violence Against Women Act³⁵ is a comprehensive federal statute. One provision authorizes victims of gender-motivated violence to sue.³⁶ The *Morrison* case involved a woman who was allegedly raped by some football players while a freshman at Virginia Tech University.³⁷ The football players avoided criminal liability and, ultimately, even escaped university discipline.³⁸ The student who had been raped sued the football players and the university under the Violence Against Women Act.³⁹ The Supreme Court ruled that the civil damages provision of the Violence Against Women Act exceeds the scope of Congress's Commerce Clause authority.⁴⁰

Again, as in *Lopez*, Chief Justice Rehnquist wrote the opinion for the Court, with the same five-to-four split. The Chief Justice returned to the three-part *Lopez* test and said that Congress can regulate under the Commerce Clause in any one of three circumstances.⁴¹ First, Congress can regulate the channels of interstate commerce.⁴² Obviously, this case didn't involve channels of interstate commerce. Second, Congress can regulate instrumentalities of interstate commerce, or persons or things involved in interstate commerce.⁴³ Because the Violence Against Women Act does not require proof that the woman or her assailant traveled in interstate commerce,

28. See *Lopez*, 514 U.S. at 561.

29. *Id.* at 558-59 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)).

30. See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971) (holding that Congress may define a class of activities that have an effect on interstate commerce; even purely intrastate activities may affect interstate commerce. The Consumer Credit Protection Act's Title II provision, which extended federal criminal jurisdiction to extortionate credit transactions, was within Congress's Commerce Clause authority).

31. *Lopez*, 514 U.S. at 558.

32. *Id.* at 567.

33. 529 U.S. 598, 608-19 (2000).

34. *Id.* at 627.

35. Violence Against Women Act of 1994, Pub. L. 103-322, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 13701 (1994)).

36. See *id.* at § 13981(c).

37. See *Morrison*, 529 U.S. at 602-03.

38. See *id.*

39. *Id.*

40. *Id.* at 617-19.

41. *Id.* at 608-09.

42. *Morrison*, 529 U.S. at 608-09.

43. *Id.* (indicating that petitioners never actually contended that the case fell within either of these first two categories, but sought to sustain the action through the third prong of the *Lopez* test by arguing that the Act regulated activity that has a substantial effect on interstate commerce).

this doesn't apply. And third, Congress can regulate where there is a substantial effect on interstate commerce.⁴⁴ Here, the *Morrison* case differs from *Lopez* because there were extensive congressional findings related to the economic effects of violence against women.⁴⁵ There is a voluminous legislative record documenting that violence against women costs the American economy billions of dollars a year.⁴⁶ The Supreme Court said that this is not enough to prove a substantial effect on interstate commerce.⁴⁷ Chief Justice Rehnquist, writing for the Court, said that the Violence Against Women Act does not regulate economic behavior such as commercial transactions, but regulates conduct that has traditionally been left to state law.⁴⁸ The Chief Justice argued that if this kind of "but-for" argument were sufficient to allow Congress to regulate under the commerce power, there would be no limit to what Congress could regulate.⁴⁹ *Morrison* seems to not only reaffirm *Lopez*, it appears to go even further if it says that even legislative findings of a substantial economic effect are not enough.⁵⁰ Where Congress is not regulating commercial economic transactions, it's a matter traditionally left to the states.⁵¹

I predict, especially after *Morrison*, that we're going to see dozens of federal laws challenged as exceeding the scope of Congress's Commerce Clause authority. Think of the many firearm laws; there is a federal law that says that if a person is covered by a restraining order in a domestic relations case, they are not allowed to have a firearm.⁵² Is this valid under the commerce power in light of *Lopez* and *Morrison*? There is a federal law that prevents having cloned cell phones.⁵³ Is this constitutional with regard to *Lopez* and *Morrison*?

The next case that the Supreme Court will decide with regard to the commerce power is on the docket for next Term: *The Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.⁵⁴ This case involves the constitutionality of a federal rule that protected migratory birds in interstate flight.⁵⁵ Is this within the scope of Congress's Commerce Clause authority? My guess is that those migratory birds have even less effect on interstate commerce than violence against women. And what the Court says in this case could affect many other

44. *Id.*

45. *Id.* 614-15.

46. *Id.*

47. *Morrison*, 529 U.S. at 614-15.

48. *Id.* at 617-18.

49. *Id.* at 615.

50. *See id.*

51. *See id.* at 617-18.

52. *See* Gun Control Act of 1968, 18 U.S.C. § 922(d)(8) (1994) (prohibiting the sale or transfer of a firearm to any person subject to a court order restraining them from stalking, harassing, or threatening an intimate partner or their child, or engaging in conduct that places them in reasonable fear of bodily harm).

53. *See* 18 USC § 1029 (2000).

54. 191 F.3d 845 (7th Cir. 1999), *rev'd by* Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 529 U.S. 159 (2001) (holding that the Migratory Bird Rule, which had extended protection to all waters that provided a habitat to migratory birds, exceeded congressional Commerce Clause authority).

55. *See id.* at 848 ("This rule, or interpretive convention, reflects the fact that the definition of 'waters of the United States' found in 33 C.F.R. § 328.3(a)(3) has long been understood by the EPA and the Corps to include all waters, including those otherwise unrelated to interstate commerce, 'which are or would be used as habitat by birds protected by Migratory Bird Treaties' or 'which are or would be used as habitat for other migratory birds which cross state lines.'") (citing 51 Fed. Reg. 41, 216, 41, 217 (Nov. 13, 1986) ("1986 preamble")).

environmental laws. Think of the Federal Endangered Species Act of 1973,⁵⁶ which was adopted by Congress under the Commerce Clause authority. Do endangered species meet the Court's recent requirement that there be a substantial effect on interstate commerce?⁵⁷

Recently, in *United States v. Kovach*,⁵⁸ the Tenth Circuit addressed the prosecution of counterfeit securities under a federal securities law.⁵⁹ The defendant argued, based on *Lopez*, that it exceeded the scope of Congress's power to regulate securities in this way.⁶⁰ The Tenth Circuit, in an opinion by Judge Briscoe, upheld the law as constitutional.⁶¹ The court focused on the third part of the *Lopez* test, saying that securities do have a substantial effect on interstate commerce.⁶² In this case, more than \$6,000 in counterfeit securities were involved.⁶³ But, even if it was *de minimis* in this case, cumulatively, the effects of such securities across the country are enough to constitute a substantial effect on commerce.⁶⁴ I would think this fits, even after the subsequent decision in *Morrison*, for here what's being regulated are commercial economic activities.

B. Section Five of the Fourteenth Amendment

The second way in which the Court has narrowed the scope of congressional power is by limiting Congress's power under Section Five of the Fourteenth Amendment. Section Five authorizes Congress to adopt laws "to enforce the Fourteenth Amendment."⁶⁵ There have been two very important ways in which the Court has limited Congress's Section Five power; one is a limit on what Congress can regulate, the other is a limit on who Congress can regulate.

The decision with regard to what Congress can regulate was *City of Boerne v. Flores*⁶⁶ in 1997. In 1990, in *Employment Division v. Smith*,⁶⁷ the Supreme Court narrowly interpreted the Free Exercise Clause⁶⁸ of the Constitution.⁶⁹ Congress then passed, and President Clinton signed, the Religious Freedom Restoration Act of

56. 16 U.S.C. § 1531 (1994).

57. See *Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (applying *Morrison*, the court found that, unlike the Violence Against Women Act or the Gun Control Act, the regulation of endangered red wolves under the Endangered Species Act was an economic activity).

58. 208 F.3d 1215 (10th Cir. 2000).

59. See 18 U.S.C. § 513(a) (1994) (making it a crime, punishable by fine and/or ten years imprisonment, for an organization to utter or possess a forged security with intent to deceive another person, organization, or government).

60. 208 F.3d at 1217.

61. *Id.* at 1218.

62. *Id.* at 1217.

63. See *id.* at 1217-18.

64. See *id.*

65. U.S. CONST. amend. XIV, § 5.

66. 521 U.S. 507 (1997) (finding that Section Five of the Fourteenth Amendment gives Congress the power to enact legislation that deters or remedies constitutional violations, but not the power to determine what constitutes a constitutional violation).

67. 494 U.S. 872 (1990).

68. U.S. CONST. amend. I (prohibiting Congress from enacting any law respecting an establishment of religion or prohibiting the free exercise thereof).

69. See 494 U.S. at 882 (holding that the Free Exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote because the right of free exercise does not relieve the obligation of a person to comply with valid, neutral laws of general applicability).

1993.⁷⁰ This statute restored strict scrutiny as the test to be used in determining whether a governmental regulation violated the First Amendment Free Exercise Clause.⁷¹ In 1997, the Supreme Court, in a six-to-three decision, declared the Religious Freedom Restoration Act unconstitutional.⁷² Justice Kennedy, who wrote the majority opinion, said that when Congress acts under Section Five of the Fourteenth Amendment, it cannot expand the scope of rights or create new rights.⁷³ Congress is authorized to remedy rights recognized by the courts, or adopt laws to prevent the violation of rights recognized by the courts.⁷⁴ The Court said that any such remedial statute has to be proportionate to the problem that exists, as found by Congress.⁷⁵ The Court held that the Religious Freedom Restoration Act was an expansion of rights.⁷⁶ Because the Court viewed it as creating new rights, it declared this statute unconstitutional.⁷⁷ Justice Kennedy said that there was not evidence before Congress of a pattern of violation of free exercise of religion by state and local governments that would make this act proportionate in preventing violations of rights as a needed remedy.⁷⁸

The other way in which the Supreme Court has narrowed Congress's Section Five power concerns who Congress can regulate under Section Five of the Fourteenth Amendment. On May 15, 2000, in *United States v. Morrison*,⁷⁹ the other argument⁸⁰ that the United States Government made to the Supreme Court was that the civil damages provision of the Violence Against Women Act was constitutional because Congress could adopt it pursuant to Section Five of the Fourteenth Amendment.⁸¹ The Supreme Court, in a five-to-four decision, held that the Act was not a constitutional exercise of Congress's Section Five power.⁸² Chief Justice Rehnquist, writing for the Court, said that Congress, under Section Five of the Fourteenth Amendment, may only regulate state and local government behavior.⁸³ Congress cannot regulate private conduct, even on a finding that state and local regulation was inadequate.⁸⁴

In 1883, in *The Civil Rights Cases*,⁸⁵ the Supreme Court said that Congress, under Section Five of the Fourteenth Amendment, could only regulate state and local government behavior, not private conduct.⁸⁶ The Civil Rights Act of 1964,⁸⁷ which

70. 42 U.S.C. § 2000 bb *et seq.* (1993).

71. *See id.*

72. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

73. *Id.* at 527-29.

74. *Id.* at 518-25.

75. *Id.* at 520, 530.

76. *Id.* at 532.

77. *City of Boerne*, 521 U.S. at 536.

78. *Id.* at 532.

79. 529 U.S. 598 (2000).

80. *See supra* text accompanying notes 33-51 (discussing whether the Violence Against Women Act was a valid exercise of congressional Commerce Clause authority).

81. 529 U.S. 619.

82. *Id.* at 627.

83. *Id.* at 621.

84. *Id.*

85. 109 U.S. 3 (1883).

86. *Id.* at 11.

87. 42 U.S.C. § 2000a (1994).

prohibits racial discrimination by hotels and restaurants and employment discrimination by private employers, was adopted by Congress under its Commerce Clause authority⁸⁸ because of fears that *The Civil Rights Cases*⁸⁹ might still be good law. Since 1964, however, the Supreme Court has, in many cases, indicated that Congress, under Section Five of the Fourteenth Amendment, could regulate private conduct. In *United States v. Guest*,⁹⁰ five Justices agreed that Congress, under Section Five of the Fourteenth Amendment, could regulate private conduct.⁹¹ In *Bray v. Alexandria Women's Health Clinic*⁹² in 1992, a majority of the Court cited approvingly to *United States v. Guest*,⁹³ seemingly treating it as if it were the law.⁹⁴ But in *United States v. Morrison*,⁹⁵ Chief Justice Rehnquist, writing for the Court, indicated that these cases are not the law; *The Civil Rights Cases* are still controlling.⁹⁶ Congress can't regulate private behavior under Section Five of the Fourteenth Amendment.⁹⁷

This seems to me to open the door for challenges to many federal laws. For example, 42 U.S.C. § 1985 authorizes a civil cause of action against private actors involved in a conspiracy to violate civil rights.⁹⁸ It's always been thought that section 1985 was adopted under Section Five of the Fourteenth Amendment. Does that make it unconstitutional? Consider also the freedom of access to clinic entrances, a federal law adopted under Section Five of the Fourteenth Amendment, which protects access to abortion clinics.⁹⁹ Since it regulates private behavior, is it then unconstitutional?

In the last three years, the Court has narrowed Congress's Section Five power dramatically by limiting what Congress can regulate, and also by limiting who Congress can regulate.

III. THE TENTH AMENDMENT AS A LIMIT ON CONGRESSIONAL POWER

As I mentioned earlier, there are three themes to what the Rehnquist Court has done with regard to federalism. One of these themes is the narrowing of the scope of Congress's power under the Commerce Clause, and under Section Five of the Fourteenth Amendment. The second theme is the revival of the Tenth Amendment as a limit on Congress's authority.

88. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245 (1964).

89. 109 U.S. 3 (1883).

90. 383 U.S. 745 (1966).

91. See *id.* at 759.

92. 506 U.S. 263 (1993).

93. 383 U.S. 745 (1966).

94. See *Bray*, 506 U.S. at 297, n.7.

95. 529 U.S. 598 (2000).

96. See *id.* at 621.

97. See *id.*

98. See 42 U.S.C. § 1985(1) (1994).

99. See 42 U.S.C. § 1985(3) (1994) (providing for civil remedy for damages where two or more persons conspire on the premises of another for the purposes of depriving any person or class of persons equal protection of the laws or of equal privilege and immunities under the law).

The Tenth Amendment says that all powers not delegated to the United States, nor prohibited by it, are reserved to the states or to the people respectively.¹⁰⁰ In *Gibbons v. Ogden*,¹⁰¹ Chief Justice John Marshall viewed the Tenth Amendment as a reminder for Congress to point to its authority in the Constitution.¹⁰² Under this view, there is no Tenth Amendment limit on Congress's power.¹⁰³ In the first third of the twentieth century, until 1937, the Court indicated that the Tenth Amendment was the provision that reserved a zone of activities for the states. From 1937 until 1992, there was only one case that found a federal law to violate the Tenth Amendment: *National League of Cities v. Usery* in 1976.¹⁰⁴ That case was overruled in 1985 by *Garcia v. San Antonio Metropolitan Transportation District*.¹⁰⁵

In the 1990s, the Supreme Court has revived the Tenth Amendment. There have been three Supreme Court decisions related to the Tenth Amendment. The first of these was *New York v. United States*¹⁰⁶ in 1992. This case involved the Low-Level Radioactive Waste Disposal Policy Act of 1985,¹⁰⁷ a federal law that required the states to clean up their nuclear waste by 1986. Any state that failed to do so would then be deemed to be responsible for the nuclear waste and would be liable for any harms it had caused.¹⁰⁸ The Supreme Court, in a six-to-three decision, declared this unconstitutional.¹⁰⁹ Justice O'Connor, writing for the Court, said that Congress, in this Act, is conscripting state and local governments by forcing the states to enact laws or to adopt regulations to clean up nuclear waste.¹¹⁰ The Court said it violates the Tenth Amendment for Congress to compel such state legislative or regulatory behavior.¹¹¹

The Supreme Court followed and extended *New York v. United States*¹¹² in *Printz v. United States*¹¹³ in 1997. *Printz* involved the Brady Handgun Violence Prevention Act,¹¹⁴ a federal law that required state and local law enforcement personnel to do background checks before issuing permits for firearms. The Supreme Court, in a five-to-four decision, declared the Brady Handgun Violence Prevention Act unconstitutional.¹¹⁵ Justice Scalia, writing for the majority in *Printz*, said here, too,

100. U.S. CONST. amend. X.

101. 22 U.S. (9 Wheat.) 1 (1824).

102. *See id.* at 198.

103. *See generally id.*

104. 426 U.S. 833, 842 (1976).

105. 469 U.S. 528, 557 (1985).

106. 505 U.S. 144 (1992).

107. 42 U.S.C. § 5(d)(2)(C), amended by, 42 U.S.C. § 2021 (d)(1) (1994).

108. *See id.*

109. *New York*, 505 U.S. at 177, 186 (having decided that the "take title provision" of the Act was unconstitutional, the Court went on to hold that this provision could be severed without doing violence to the rest of the Act).

110. *Id.* at 175-76 (noting that the "take title" provision of the Act and the provision that would require the state to become liable for generator's damages would commandeer state governments for the service of a federal regulatory scheme, while the other alternative, regulating pursuant to Congress's direction, would simply represent a command to states to implement legislation enacted by Congress).

111. *Id.* at 174-77.

112. 505 U.S. 144.

113. *See* 521 U.S. 898, 933 (1997).

114. *See* 18 U.S.C. § 922 (1994 & Supp. IV.1998).

115. 521 U.S. at 933-35 (finding the provisions of the Act that required state officials to conduct background checks unconstitutional. The Court did not resolve questions regarding provisions of the Act affecting firearm

Congress is conscripting state and local governments by forcing the state and local governments to administer a federal program to carry out a congressional mandate.¹¹⁶ Furthermore, this Act did not provide federal funding for the administration of such a program.¹¹⁷ The Court said it violates the Tenth Amendment for Congress to conscript state and local governments in this manner.¹¹⁸

I just want to pause for a moment and reflect on the cases that I've talked about in the last few years. Think about what Congress was regulating in these cases: guns within 1000 feet of schools,¹¹⁹ violence against women,¹²⁰ cleaning up low level nuclear waste,¹²¹ requiring background checks for handguns.¹²² All of these are unquestionably desirable federal laws in terms of their merits. These are all, unquestionably, popular federal laws. Notice, however, that the Supreme Court's federalism jurisprudence found them unconstitutional,¹²³ either exceeding Congress's power or as violating the Tenth Amendment.

There was one Tenth Amendment decision from this Term that indicates that there is some limit to how far the Court is going to go in extending the reach of the Tenth Amendment as a constraint on Congress; the case, *Reno v. Condon*,¹²⁴ involved the federal Driver's Privacy Protection Act.¹²⁵ This is a federal law that says that states' Departments of Motor Vehicles cannot release personal information about people, like their home addresses or their Social Security numbers.¹²⁶ This bill was introduced into Congress by California Senator Barbara Boxer after an actress in Los Angeles, Rebecca Schaefer, was stalked and murdered by a man who got her home address from the California Department of Motor Vehicles.¹²⁷ The United States Court of Appeals for the Fourth Circuit declared the law unconstitutional as violating the Tenth Amendment.¹²⁸ The Fourth Circuit said that through this Act

dealers and purchasers.).

116. *Id.* at 935.

117. *See* 18 U.S.C. § 922.

118. *Printz*, 521 U.S. at 935 (holding the Act "fundamentally incompatible with our constitutional system of dual sovereignty").

119. *See* Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844 (current version at 18 U.S.C. § 922 (q)(1)-(4) (1994 & Supp. IV 1998)).

120. *See* Violence Against Women Act of 1994, Pub. L. 103-322, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 13701 (1994)).

121. *See* The Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 5(d)(2)(C), *as amended*, 42 U.S.C. § 2021 (e)(2)(A) (1994).

122. *See* The Brady Handgun Violence Prevention Act, 18 U.S.C. § 922.

123. *See* *United States v. Lopez*, 514 U.S. 549, 580 (1995) (holding that the Gun-Free School Zones Act is unconstitutional as exceeding the scope of congressional commerce power); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the civil cause of action provision of the Violence Against Women Act exceeded congressional authority under the Commerce Clause and, under Section Five of the Fourteenth Amendment, Congress may not regulate private activity); *New York v. United States*, 505 U.S. 144, 177, 186 (1992) (holding that The Low-Level Radioactive Waste Policy Act is unconstitutional as in impermissible conscription of state governments in violation of the Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that the Brady Handgun Violence Prevention Act, which requires state and local law enforcement personnel to conduct background checks before issuing permits for firearms, violates the Tenth Amendment).

124. 528 U.S. 141 (2000).

125. 18 U.S.C. §§ 2721-25 (1994 & Supp. III).

126. *See generally id.*

127. *See* 179 CONG. REC. S15794 (Nov. 16, 1993).

128. 155 F.3d 453, 463 (4th Cir. 1998).

Congress is regulating state governments, which violates state sovereignty.¹²⁹ The Supreme Court unanimously reversed the Fourth Circuit.¹³⁰ It's nice to see a circuit other than the Ninth Circuit getting unanimously reversed. Chief Justice Rehnquist, writing the opinion for the Court, explained that the states were engaging in commercial behavior by selling the DMV lists.¹³¹ Chief Justice Rehnquist said that Congress, under the Commerce Clause, may regulate such commercial behavior.¹³² The Chief Justice distinguished *New York v. United States*¹³³ and *Printz v. United States*¹³⁴ because in those cases Congress was compelling state and local behavior.¹³⁵ In the Driver's Privacy Protection Act, Congress is prohibiting state and local governments from acting a certain way.¹³⁶ Chief Justice Rehnquist pointed out that this isn't a law that targets only the state and local governments.¹³⁷ There are aspects of the law that also regulate private entities that have DMV information; thus, it is a more comprehensive law that escapes the limits of the Tenth Amendment.¹³⁸

Here is a key question with regard to the Tenth Amendment that's going to be litigated throughout the country. To what extent does Congress induce or, depending upon your perspective, coerce state and local behavior by putting strings on grants? The last Supreme Court case to address this was *South Dakota v. Dole*¹³⁹ in 1987. Congress passed legislation requiring the states to set a twenty-one-year-old drinking age in order to receive federal highway funds.¹⁴⁰ Chief Justice Rehnquist, writing for the majority in *Dole*, upheld the constitutionality of this legislation.¹⁴¹ The Supreme Court said that Congress may put conditions on grants, so long as the conditions are expressly stated and so long as the conditions relate to the purpose of the spending program.¹⁴² *South Dakota v. Dole*¹⁴³ was, however, decided in 1987, before the recent federalism and the recent Tenth Amendment cases.¹⁴⁴ Might the Supreme Court reconsider whether Congress may conscript the states by placing strings on grants?

There is a very recent Tenth Circuit case on point now, one of the leading cases in the country on the issue. The case is *Kansas v. United States*,¹⁴⁵ decided on June

129. *Id.*

130. *Reno v. Condon*, 528 U.S. 141, 148 (2000).

131. *Id.* at 148.

132. *Id.*

133. 505 U.S. 144 (1992).

134. 521 U.S. 898 (1997).

135. *Reno*, 528 U.S. at 149.

136. *See id.*

137. *Id.*

138. *See id.* at 149-51.

139. 483 U.S. 203 (1987).

140. 23 U.S.C. § 158 (1982 & Supp. IV. 1998).

141. *Dole*, 483 U.S. at 206 (holding that Congress, acting under its spending power by encouraging uniformity in state drinking ages, was within the scope of its constitutional authority).

142. *Id.* at 208-09 (finding that the conditions set forth by Congress were clearly stated and directly related to one of the main purposes of highway funding: safe interstate travel).

143. 483 U.S. 203.

144. *See Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that the Brady Handgun Control Act violates the Tenth Amendment; *New York v. United States*, 505 U.S. 144, 177, 186 (1992) (holding that The Low-Level Radioactive Waste Disposal Act impermissibly conscripts state governments in violation of the Tenth Amendment).

145. 214 F.3d 1196 (10th Cir. 2000).

1, 2000. This case involved the federal welfare program, specifically the Temporary Assistance to Needy Families Program, that came into existence as part of the Welfare Reform Law of 1996.¹⁴⁶ As a condition for states receiving money under this program, they have to take into account certain conduct, especially with regard to child support enforcement.¹⁴⁷ The State of Kansas argued that it was a violation of the Tenth Amendment for the federal government to force it to take actions, even as a condition for receiving federal money.¹⁴⁸ The Tenth Circuit, in an opinion by Chief Judge Seymour, upheld the constitutionality of this federal law.¹⁴⁹ The Tenth Circuit, citing *South Dakota v. Dole*,¹⁵⁰ said that Congress can put strings on grants so long as the terms are clearly stated and the conditions relate to the purpose of the program.¹⁵¹ The Tenth Circuit found that the conditions for receiving this funding were clearly stated.¹⁵² The Tenth Circuit also found that these conditions related to the purpose of the program.¹⁵³

Assuming that other circuits follow this pattern, and that the Supreme Court agrees, we may be seeing Congress trying to achieve through the spending program what it's not going to be able to achieve through the commerce power or through Section Five of the Fourteenth Amendment.

IV. THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

A. *State Sovereign Immunity in State Court*

The third theme with regard to federalism has been the dramatic expansion of the scope of state sovereign immunity. The Supreme Court has done this with regard to suits against states in state court, and with regard to suits against states in federal court. First, I will address suits against states in state court. *Alden v. Maine*,¹⁵⁴ one of the most important of all of these federalism cases, was decided on June 23, 1999. The facts of the case were simple; probation officers in the State of Maine claimed that they were owed overtime pay by the State.¹⁵⁵ They sued the State in federal court, and the federal court said that the case was barred by the Eleventh Amendment.¹⁵⁶ So the probation officers sued the State of Maine in Maine state court,¹⁵⁷ since state courts have concurrent jurisdiction in these suits under the

146. Formerly known as the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

147. See *Kansas*, 214 F.3d at 1197.

148. See *id.* at 1198.

149. *Id.* at 1204.

150. 483 U.S. 203 (1987).

151. *Kansas*, 214 F.3d at 1199.

152. *Id.* (concluding that, although Kansas asserted that some of the conditions were vague, it failed to assert any alleged ambiguity that would interfere with its ability to accept the funds "knowingly" and "cognizant of the consequences...of participation," as required by *Dole*).

153. *Id.* at 1200, 1204.

154. 527 U.S. 706 (1999).

155. *Id.* at 711.

156. *Id.* at 712 (citing *Seminole Indian Tribe of Florida v. Florida*, 517 U.S. 44, 64 (1996) (holding that, under the Eleventh Amendment, state sovereign immunity limits the jurisdiction of federal courts)).

157. *Id.*

Federal Fair Labor Standards Act.¹⁵⁸ The Maine Supreme Judicial Court ruled that the State of Maine had sovereign immunity and held that the State couldn't be sued in its own state courts without its consent.¹⁵⁹ The United States Supreme Court, in another five-to-four decision, affirmed the Maine Supreme Judicial Court.¹⁶⁰ Justice Kennedy, who wrote the opinion for the Court, acknowledged at the outset that there is no provision in the text of the Constitution that deals with suing states in state court.¹⁶¹ The Eleventh Amendment deals only with whether suit may be brought in federal court.¹⁶² Justice Kennedy also acknowledged that the framers were silent, in Philadelphia and in the state ratifying conventions, about whether states could be sued in state court.¹⁶³ The silence of the framers, according to Justice Kennedy, indicates that they thought it impossible to sue a state without the state's consent.¹⁶⁴ Justice Kennedy said it's unthinkable that states are restricted by the Constitution, or that they ought to allow themselves to be sued in their own courts without consent.¹⁶⁵

I think this case is enormously important. In part, it's significant because of the Court's approval of broad preclusion of all judicial jurisdiction.¹⁶⁶ The probation officers in Maine unquestionably have a federal right to overtime pay.¹⁶⁷ But they can't sue in federal court and they can't sue in state court,¹⁶⁸ although they might be able to sue the state officers for injunctive relief in the future. The United States Government, if it wanted to, could sue the State of Maine. But the probation officers, themselves, have nowhere that they can sue. I think the case is also very important for what it says in terms of holding state governments accountable.

In oral argument before the Supreme Court,¹⁶⁹ the Solicitor General of the United States, Seth Waxman, quoted to the Court from the Supremacy Clause of Article XI.¹⁷⁰ "The Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land."¹⁷¹ Waxman asked, "How can we assure the supremacy of law unless there is a judicial forum available?"¹⁷² Justice Kennedy devoted an entire section in *Alden* to addressing this argument.¹⁷³ I want to quote Justice Kennedy; it's such remarkable language. Justice Kennedy wrote,

158. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1994).

159. *Alden v. State*, 715 A.2d 172, 174 (Me. 1998).

160. *Alden v. Maine*, 527 U.S. at 760.

161. *Id.* at 750.

162. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.").

163. *See Alden v. Maine*, 527 U.S. at 743.

164. *Id.* at 741-43.

165. *See id.* at 743.

166. *See id.* at 712.

167. *See The Fair Labor Standards Act of 1938*, 29 U.S.C. § 207(k) (1994 & Supp. III).

168. *See Alden v. Maine*, 527 U.S. at 712; *Mills v. Maine*, 118 F.3d 37, 55 (1st Cir. 1997).

169. 1999 U.S. Trans. Lexis 1.

170. *See id.* at 11.

171. U.S. CONST. art. VI, § 2.

172. 199 U.S. Briefs 436, 14.

173. *See Alden*, 527 U.S. at 754-55.

[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer on the State a concomitant right to disregard the Constitution or valid federal law.... We are unwilling to assume that the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[the] Constitution, and Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land."¹⁷⁴

So what's the assurance that the states will comply with federal law, trust in the good faith of state governments? Can you imagine what would have happened, twenty or thirty years ago at the height of the civil rights movement, if the Supreme Court had said, "no need to review what the state courts are doing with desegregation; we'll trust them"? James Madison said that if people were angels, there would be no need for a constitution.¹⁷⁵ But there would be no need for a government either. Whether you're a judge or a practitioner, you know that state and local governments, whether intentionally or unintentionally, do sometimes violate federal law. And yet, the Supreme Court says we can put our trust in the good faith of state governments.¹⁷⁶

B. The Eleventh Amendment

The other aspect of the expansion of sovereign immunity has been related to whether States may be sued in federal court. The Eleventh Amendment says that the judicial power of the United States shall not extend to a suit against the state brought by citizens of another state or citizens of a foreign country.¹⁷⁷ In 1890, in *Hans v. Louisiana*,¹⁷⁸ the Supreme Court said that states can't be sued by their own citizens in federal court.¹⁷⁹ The Supreme Court said it would have been anomalous to allow a state to be sued by its own citizens when it can't be sued by out of state parties.¹⁸⁰

Over the course of the twentieth century, three ways of getting around the Eleventh Amendment, and holding state governments accountable, have been developed. There have been important Supreme Court cases in the last few years addressing each of these methods.

1. Congressional Power to Authorize Suits against States

In 1976, in *Fitzpatrick v. Bitzer*,¹⁸¹ the Supreme Court said that when Congress acts under Section Five of the Fourteenth Amendment, it can override the Eleventh Amendment and authorize suits against state governments.¹⁸² *Fitzpatrick* involved a suit against the State of Connecticut for violating Title VII with regard to

174. *Id.*

175. THE FEDERALIST No. 51 (James Madison).

176. *See Alden*, 527 U.S. at 754-55.

177. U.S. CONST. amend. XI.

178. 134 U.S. 1 (1890).

179. *Id.* at 21.

180. *Id.* at 15-16.

181. 427 U.S. 445 (1976).

182. *Id.* at 456.

employment discrimination.¹⁸³ The Supreme Court said Congress applied Title VII to the States, pursuant to Section Five of the Fourteenth Amendment.¹⁸⁴ Justice Rehnquist, who wrote the opinion in *Fitzpatrick*, said that the Fourteenth Amendment can modify the Eleventh Amendment because it was ratified after the Eleventh Amendment.¹⁸⁵ Moreover, the Court said that the Fourteenth Amendment was meant to place limits on state power.¹⁸⁶ Accordingly, Congress, under Section Five of the Fourteenth Amendment, can override a state's Eleventh Amendment immunity.¹⁸⁷

In 1989, in *Pennsylvania v. Union Gas*,¹⁸⁸ the Supreme Court said Congress can override the Eleventh Amendment by using any of its constitutional powers, so long as the text of the law is clear in doing so.¹⁸⁹ *Union Gas* involved a federal environmental statute.¹⁹⁰ But in 1996, in *Seminole Tribe v. Florida*,¹⁹¹ the Supreme Court overruled *Union Gas*.¹⁹² You might wonder what happened in those seven years. Is it that somebody found a musty copy of the Eleventh Amendment that showed the Supreme Court had gone wrong in *Union Gas*?¹⁹³ Was it that *Union Gas* had proved impractical as it was administered? The simple, and I think uncontroverted, explanation is the change in the composition of the Supreme Court. *Union Gas* was a five-to-four decision.¹⁹⁴ Justice Brennan wrote the opinion for the Court, joined by Justices Marshall, Blackmun, White, and Stevens. Justices Rehnquist, O'Connor, Scalia, and Kennedy dissented. Between 1989 and 1996, Justices Brennan, Marshall, Blackmun, and White all left the Court. The four dissenters remained on the Court and were joined by Justice Thomas, who gave them the fifth vote to overrule *Union Gas*.¹⁹⁵

*Seminole Tribe v. Florida*¹⁹⁶ dealt with the Federal Indian Gaming Act.¹⁹⁷ The federal law required that Indian tribes be able to negotiate in good faith with state governments to allow gambling on Native American reservations.¹⁹⁸ The law created an unquestionable duty for state governments to negotiate in good faith with Indian tribes, and it was alleged that the State of Florida did not do so.¹⁹⁹ The law specifically authorized the suit against the State in federal court.²⁰⁰ Chief Justice

183. *See id.* at 445.

184. *Id.* at 447.

185. *See id.* at 456-57.

186. *Fitzpatrick*, 427 U.S. at 456.

187. *Id.*

188. 491 U.S. 1 (1989).

189. *See id.* at 7.

190. *See id.* (holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), expresses an intent to permit states to be held liable for damages in federal courts and that Congress has the constitutional authority to override state Eleventh Amendment immunity in this regard).

191. 517 U.S. 44 (1996).

192. *Id.* at 66.

193. 491 U.S. 1 (1989).

194. *See generally id.*

195. *Seminole*, 517 U.S. at 66.

196. *Id.*

197. Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710 (d)(3)(A).

198. *Id.*

199. *Seminole*, 517 U.S. at 52.

200. 25 U.S.C. 2710 § (d)(7).

Rehnquist, writing for the Court in a five-to-four decision, held that *Pennsylvania v. Union Gas* was to be overruled.²⁰¹ The Supreme Court said that *Union Gas* was not in accord with long-standing precedents of the Supreme Court and gave Congress too much authority to authorize suits against state governments.²⁰² In *Seminole Tribe*, the Supreme Court said Congress can authorize suits against states only when Congress is acting under Section Five of the Fourteenth Amendment, not when Congress is using any other power, like the Commerce Clause.²⁰³ This is where the cases that I was talking about earlier, with regard to Congress's power under Section Five of the Fourteenth Amendment, become particularly important. The Supreme Court, in cases like *City of Boerne v. Flores*,²⁰⁴ has narrowed the scope of Congress's authority under Section Five of the Fourteenth Amendment. The issue now becomes whether a law is a valid exercise of Congress's power under Section Five of the Fourteenth Amendment, in which case a state can be sued for violating the law.

There have been two Supreme Court cases in just the last year dealing with this issue. One that came down a year ago, on June 23, 1999, was *Florida Prepaid v. College Savings Bank*.²⁰⁵ College Savings Bank is a New Jersey company that devised a system allowing people to set aside money to pay later for college and university education.²⁰⁶ Florida Prepaid is an agency of the State of Florida that copied that system and allowed students to use the system to set aside money to pay for their education at Florida colleges and universities.²⁰⁷ It turned out that Florida Prepaid was violating a patent by copying the prepayment system devised by College Savings Bank.²⁰⁸ After *Pennsylvania v. Union Gas*,²⁰⁹ Congress had amended the patent laws to specifically say that states could be sued for patent or other intellectual property violations.²¹⁰ The Supreme Court, in a five-to-four decision, held that state governments cannot be sued for patent violations in federal court.²¹¹ The issue, of course, was whether the law authorizing suits against the states for patent violation was a valid exercise of Congress's Section Five power.²¹² The Supreme Court went back to *City of Boerne v. Flores*²¹³ and said, in light of that decision, that Congress cannot create new rights or expand the scope of rights.²¹⁴ Congress can only provide remedies to prevent the violation of existing rights, and these remedies must be in proportion to the nature of the violation.²¹⁵ The Supreme

201. *Seminole*, 517 U.S. at 66.

202. *Id.*

203. *Id.* at 65.

204. 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993, which sought to enforce the First Amendment's Free Exercise Clause, exceeded Congress's Section Five power, contradicting vital principles necessary to maintain the separation of powers).

205. 527 U.S. 627 (1999).

206. *See id.* at 630.

207. *See id.* at 631.

208. *See id.*

209. 491 U.S. 1 (1989).

210. *See* 106 Stat. 3567 § 43 (a).

211. *Florida Prepaid*, 527 U.S. at 630.

212. *See id.* at 653-54.

213. 521 U.S. 507 (1997).

214. *See Florida Prepaid*, 527 U.S. at 638.

215. *See id.*

Court said that because there was no proof before Congress of a widespread practice of state governments violating patents or intellectual property, this law was not remedial, but exceeded the scope of Congress's Section Five power.²¹⁶ Therefore, states can't be sued for patent violations.²¹⁷

Imagine a state laboratory that violates somebody's patents. Imagine that a state government, being short of money, decides to make as many copies of Windows 2000 as they can and sell them before a suit for injunctive relief can be brought. There is no place in which the victim can sue the state for money damages. They can sue the state officer for injunctive relief, and if they can overcome the officer's individual immunity, they may get money from the officer's pocket. But they can't sue the state in state court according to *Alden v. Maine*.²¹⁸ Besides, federal courts have exclusive jurisdiction over intellectual property.²¹⁹ And a state can't be sued in federal court because that's the holding of *Florida Prepaid*.²²⁰ This is a tremendous expansion of state immunity in an area that can cost private investors in private companies millions of dollars or more.

On January 11, 2000, the Supreme Court followed and extended this expansion of state immunity in *Kimel v. Florida Board of Regents*.²²¹ *Kimel* involved the question of whether state governments can be sued for violating the Federal Age Discrimination in Employment Act.²²² Again, the Court addressed the same issue. If the Age Discrimination in Employment Act is a valid exercise of Congress's power under Section Five of the Fourteenth Amendment then a state government can be sued for violating it.²²³ If it's not valid under Section Five, then a state government can't be sued in federal court for violating the Act.²²⁴ The Supreme Court, in a five-to-four decision, held that state governments cannot be sued for violating the Federal Age Discrimination in Employment Act.²²⁵ Justice O'Connor wrote the majority opinion for the Court, with the same split among the Justices.²²⁶ Justice O'Connor, at the beginning of her opinion, acknowledged that the Supreme Court in *E.E.O.C. v. Wyoming*²²⁷ had said that the Age Discrimination in Employment Act was a valid exercise of Congress's power under the Commerce Clause. Congress, however, cannot authorize suits against states when it acts under the Commerce Clause.²²⁸ When asking whether a state can be sued, the question is

216. See *id.* at 630.

217. See *id.*

218. See *Alden*, 527 U.S. 754 (1999).

219. See 28 U.S.C. 1338 (a).

220. *Florida Prepaid*, 527 U.S. at 630.

221. 528 U.S. 62 (2000).

222. See *id.* at 66-67; 29 U.S.C. § 626(b) (1990).

223. *Kimel*, 528 U.S. at 80.

224. *Id.*

225. *Id.* at 91.

226. Justice O'Connor was joined by Justices Rehnquist, Scalia, Kennedy, and Thomas on Parts I, II, and IV of the majority opinion. Justice O'Connor was joined, on Part III, by Justices Rehnquist, Stevens, Scalia, Souter, Ginsburg, and Breyer. Justice Stevens filed an opinion, dissenting in part and concurring in part, in which he was joined by Justices Souter, Ginsburg, and Breyer. Justice Thomas, joined by Justice Kennedy, filed an opinion concurring in part and dissenting in part.

227. 460 U.S. 226 (1983).

228. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may override state sovereign immunity only when acting pursuant to Section Five of the Fourteenth Amendment).

whether it is valid under Section Five of the Fourteenth Amendment.²²⁹ The Court went back to *City of Boerne*²³⁰ and *Florida Prepaid*²³¹ and said that Congress can only act to remedy violations of rights or prevent violations of rights.²³² Furthermore, these remedial actions have to be in proportion to the violation.²³³ Congress can't expand the scope of rights.²³⁴ Justice O'Connor said age discrimination receives only rational basis review under equal protection.²³⁵ The Federal Age Discrimination in Employment Act prohibits much that would not violate the Constitution.²³⁶ Moreover, in terms of whether this act was necessary to prevent state violations, Justice O'Connor said that there was little evidence before Congress, when they adopted the Age Discrimination in Employment Act, of a pattern of state age discrimination, so this can't be said to be proportionate to the nature of the violations.²³⁷ Of course, the Age Discrimination in Employment Act²³⁸ was adopted before *City of Boerne*²³⁹ and *Seminole Tribe*.²⁴⁰ Congress didn't know then that it needed to document a pattern of violation of rights. But the Supreme Court said that without that kind of documentation, it can't be said that the remedy is proportionate to the pattern of violation of rights.²⁴¹ So the Age Discrimination in Employment Act exceeds the scope of Congress's power under Section Five of the Fourteenth Amendment.²⁴²

In light of these cases, you can immediately see that many federal laws will be challenged with the argument that they weren't valid under Section Five of the Fourteenth Amendment, and that states can't be sued for violating these laws. What about the Family and Medical Leave Act,²⁴³ can a state be sued for violating that? What about the Rehabilitation Act?²⁴⁴ Or what about the act that's now before the Supreme Court, the Americans With Disabilities Act?²⁴⁵

Twice this past Term, the Supreme Court granted certiorari in cases involving whether or not states could be sued for violating the Americans With Disabilities Act, but both of those cases settled while on the Supreme Court's docket.²⁴⁶ Not to

229. *See id.*

230. 521 U.S. 507 (1997).

231. 527 U.S. 627 (1999).

232. *Kimel*, 528 U.S. at 81.

233. *See id.* (citing *Boerne*, 521 U.S. at 518).

234. *See id.*

235. *See id.* at 83-84 (explaining that, because age is not a suspect class and such classification is presumptively rational, the individual challenging the constitutionality of such a classification bears the burden of proving that the government had no rational basis for its actions).

236. *See id.* at 86.

237. *Kimel*, 528 U.S. at 88-89.

238. 29 U.S.C. §§ 621-634 (1990).

239. 521 U.S. 507 (1997).

240. 517 U.S. 44 (1996).

241. *See Kimel*, 528 U.S. at 82-83.

242. *Id.* at 91.

243. 29 U.S.C. § 2601-2654 (1993).

244. 29 U.S.C. §§ 701-97 (1973).

245. 42 U.S.C. §§ 12101-12113 (1990).

246. *See Alsbrook v. City of Maumelle*, 184 F.3d 999, 1007-10 (8th Cir. 1999), *cert. granted in part*, *Alsbrook v. Arkansas*, 529 U.S. 1001 (2000), *dismissed*, 529 U.S. 1001 (2000) (holding that extension of ADA Title II to the States is not a proper exercise of Congress's power under Section Five of the Fourteenth Amendment, disagreeing with decisions in the Eleventh, Fifth, Ninth, and Seventh Circuits). *Alsbrook*, which has been settled,

be frustrated, the Supreme Court granted cert in a case for next year that involves the same issue: *University of Alabama v. Garrett*.²⁴⁷ And again, the same question, Can the Americans With Disabilities Act be seen as a valid exercise of Congress's power under Section Five, so that state governments could be sued for violations?²⁴⁸ The Americans with Disabilities Act²⁴⁹ has a far more elaborate legislative record, including the documentation of state and local violations. So we'll see what kind of record is enough.

There is a Tenth Circuit case, *Martin v. Kansas*,²⁵⁰ where the Tenth Circuit, in an opinion by Judge Ebel, found that the Americans With Disabilities Act is a valid exercise of Congress's power under Section Five and does override the Eleventh Amendment.

2. Waiver

It's a bit strange; the Supreme Court has frequently spoken of the Eleventh Amendment as if there were a restriction on federal court subject matter jurisdiction.²⁵¹ And we all know that the basic rule is that subject matter jurisdiction can't be gained by consent.²⁵² But the Eleventh Amendment is different. Even in *Hans v. Louisiana*,²⁵³ in 1890, the Supreme Court said that states can waive their Eleventh Amendment immunity. The question then becomes, What's enough to constitute a waiver by state government? There have been many Supreme Court cases about this.²⁵⁴

The most recent, a decision from last Term, was *College Savings Bank v. Florida Prepaid*.²⁵⁵ This case involves, instead of a patent claim,²⁵⁶ a Lanham Act claim for deceptive business practices.²⁵⁷ When Congress amended the intellectual property laws, it also changed the trademark laws to say that states could be sued in federal court for Lanham Act violations.²⁵⁸ The attorneys for College Bank said that the State of Florida, having made the voluntary choice to engage in this behavior,

was to be consolidated with *Florida Dept. of Corrections v. Dickson*, 528 U.S. 1132, *dismissed*, 528 U.S. 1184 (2000) (presenting the question of whether the ADA is a proper exercise of Congress's power under Section Five of the Fourteenth Amendment).

247. See *Board of Trustees of the Univ. of Alabama v. Garrett*, ___ U.S. ___, 121 S. Ct. 955 (2001) (holding that state governments may not be properly sued under Title I of the ADA because such suits are barred by the Eleventh Amendment).

248. See *id.*

249. 42 U.S.C. §§ 12101-12113 (1990).

250. 190 F.3d 1120, 1126 (10th 1999).

251. See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

252. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 398 (1975).

253. 134 U.S. 1, 13 (1890); See also, ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 399 (Aspen Law & Business, 3d. ed. 1999).

254. See, e.g., *Port Author. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531 (1936).

255. 527 U.S. 666 (1999).

256. See *Florida Prepaid v. College Sav. Bank*, 527 U.S. 627 (1999) (although involving the same parties as *College Sav. Bank*, this case involved a claim against a State for violating The Patent and Plant Protection Remedy Clarification Act, rather than a Lanham Act claim, as in *College Sav. Bank*).

257. See *College Sav. Bank*, 527 U.S. at 669.

258. See *id.*: 15 U.S.C. § 1125(a), (2) (1992).

waived its Eleventh Amendment immunity and, therefore, could be sued.²⁵⁹ Is this sufficient to constitute a waiver? The Supreme Court, in an opinion by Justice Scalia, said there is no doctrine of implied or constructive waiver of the Eleventh Amendment.²⁶⁰ Any waiver by the State must be explicit and expressed.²⁶¹

The question that some of you will have to decide as judges, and some of you must litigate as lawyers, is who in the state has the authority to waive a state's sovereign immunity, and what kind of conduct by the state government is enough to constitute such a waiver? The Tenth Circuit is the leader, I think, across the country in being willing to find waivers of Eleventh Amendment immunity; three recent Tenth Circuit cases are widely cited with regard to waiver.²⁶²

The first of these cases is *Innes v. Kansas State University*,²⁶³ often referred to as *In Re. Innes* because it comes out of the bankruptcy context. In essence, it involves the ability to bring a proceeding against a state to discharge a student loan obligation as part of bankruptcy proceedings.²⁶⁴ Generally, student loans are not dischargeable in bankruptcy, but on specific findings they can be discharged.²⁶⁵ The question here was whether the bankruptcy court had jurisdiction over the State to order such a discharge of the debt.²⁶⁶ The Tenth Circuit, in an opinion by Judge McKay, found that the State had waived its Eleventh Amendment immunity by voluntarily choosing to participate in the federal student loan program; thus the discharge was permissible.²⁶⁷ The State of Kansas had entered into contracts with the federal Department of Education.²⁶⁸ The Tenth Circuit said that, by voluntarily choosing to enter that program and agreeing to that contract, the State had also agreed to the other terms of the contract, including the circumstances under which student loans can be discharged in bankruptcy.²⁶⁹ There is now a conflict among the circuits; most of the circuits have ruled in agreement with the Tenth Circuit, but some circuits disagree.²⁷⁰ So it's likely to go on to the Supreme Court.

Utah School for the Deaf and Blind v. Sutton,²⁷¹ another Tenth Circuit case, involved the question of whether the state government had waived its Eleventh Amendment immunity by choosing to remove a case from state to federal court.²⁷² In 1998, the Supreme Court decided a case called *Wisconsin Department of Corrections v. Schacht*.²⁷³ Justice Kennedy wrote a concurring opinion in which he

259. See *College Sav. Bank*, 527 U.S. at 680.

260. *Id.* at 682.

261. See *id.*

262. See, e.g., *Kansas State Univ. v. Innes*, 184 F.3d 1275 (10th Cir. 1999); *Utah Sch. for the Deaf and Blind v. Sutton*, 173 F.3d 1226 (10th Cir. 1999); *MCI Telecoms. Corp. v. PSC of Utah*, 216 F.3d 929 (2000).

263. 184 F.3d 1275 (10th Cir. 1999).

264. See *id.* at 1277.

265. See *id.*; see also, 11 U.S.C. § 523 (a)(8).

266. See *Innes*, 184 F.3d at 1283.

267. See *id.* at 1284.

268. *Id.* at 1282.

269. *Id.*

270. See, e.g., *Jane v. Coordinating Bd. For Higher Ed.*, 251 B.R. 525, 538 (W.D. Mo. 2000) (asserting that the *Innes* Court overlooks the essential fact that the contract has not been enacted into legislation).

271. 173 F.3d 1226 (10th Cir. 1999).

272. See *id.* at 1234, 1236 (holding that the State had waived its Eleventh Amendment immunity by removing a case from state court to federal court).

273. 524 U.S. 381 (1998).

suggested that a choice by the State to remove a case from state to federal court would be enough for a waiver.²⁷⁴ The Tenth Circuit, citing expressly to language from Justice Kennedy, found that the State's decision to remove from state to federal court was a waiver.²⁷⁵ But here's the underlying heart of the issue, Can a state attorney general's office, by removing, waive the state sovereign immunity, or can only the state legislature waive the state sovereign immunity? When it comes to federal sovereign immunity, only Congress can waive that.²⁷⁶ Is this true with regard to the states, or can others in the state waive the state's immunity? And if so, by doing what?

The most recent case from the Tenth Circuit was *MCI Telecommunications Corporation v. PSC of Utah*, which was decided on June 20, 2000.²⁷⁷ This case involved a claim against the State of Utah, specifically against the Utah Public Service Commission.²⁷⁸ The argument was made that under the Federal Telecommunications Act²⁷⁹ the Utah Public Service Commission, in choosing to arbitrate a dispute among private parties, had waived its Eleventh Amendment immunity and consented to suit in federal court.²⁸⁰ The Tenth Circuit, in an opinion by Judge Tacha, found that there was effective waiver because the Commission had made the voluntary choice, under the act, to serve as an arbitrator of this private dispute, and that under the terms of the law, that's enough for a waiver.²⁸¹ There has been very little guidance from the Supreme Court as to what behavior by a state is enough to constitute a waiver; the leader in clarifying under what circumstances there can be a waiver is really the Tenth Circuit.

As I said, there are three ways around the Eleventh Amendment. One way is when a federal law is adopted under Section Five of the Fourteenth Amendment. Another way is waiver. And third, practically speaking probably the most important, is the ability to sue state officers.

3. Suits against Individual Officers

In *Ex Parte Young*,²⁸² in 1908, the Supreme Court held that state officers can be sued in federal court, even though state governments cannot be sued in federal court.²⁸³ And so, ever since *Ex Parte Young*, if a plaintiff wants to enjoin a state government from doing something, the plaintiff simply names state officers as defendants and gets an injunction against the state officers. The Supreme Court frequently has said that *Ex Parte Young* creates a fiction.²⁸⁴ *Ex Parte Young* said that state officers alleged to violate federal law are stripped of state authority, and of

274. See *id.* at 393-98.

275. See *Utah School*, 173 F.3d at 1234.

276. See, e.g., *United States v. Shaw*, 309 U.S. 495 (1940); *Munro v. United States*, 303 U.S. 36 (1938); *Finn v. United States*, 123 U.S. 227 (1887).

277. 216 F.3d 929 (2000).

278. See *id.* at 929.

279. 47 U.S.C.A. § 252 (e)(4)-(6).

280. See *MCI*, 216 F.3d at 935.

281. See *id.* at 939.

282. 209 U.S. 123 (1908).

283. *Id.* at 148.

284. See, e.g., *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997).

Eleventh Amendment immunity, but are still considered to be state actors for other constitutional purposes.²⁸⁵

The Supreme Court, in the last few years, has also narrowed the ability to sue state officers, although less dramatically, I think, than it has narrowed the other ways around the Eleventh Amendment. In *Seminole Tribe v. Florida*,²⁸⁶ in addition to the suit against the State of Florida to enforce the Federal Indian Gaming Act, there was also a suit against Florida officials under the Federal Indian Gaming Act, which would seem to fit under *Ex Parte Young*.²⁸⁷ Chief Justice Rehnquist, however, created a new exception to *Ex Parte Young*; a suit can't be brought under *Ex Parte Young*, against the state officers, to enforce federal laws that create and contain comprehensive enforcement mechanisms.²⁸⁸ So you can't bring a suit against the state officer to enforce a federal law if that federal law has a comprehensive enforcement mechanism.²⁸⁹ The obvious question is what's enough to make a federal law have a comprehensive enforcement mechanism? There is nothing in Chief Justice Rehnquist's opinion that gives any guidance.²⁹⁰ What's puzzling is what the mechanism was in the federal Indian Gaming Act²⁹¹ that was enough to preclude a suit against state officers. The primary enforcement mechanism was the ability to sue state governments, which the Supreme Court found unconstitutional in the first half of its opinion.²⁹² Surely that can't be enough to be a comprehensive enforcement mechanism. There is very little guidance, even from the other courts, regarding under what circumstances *Ex Parte Young* suits are precluded because the federal statute creates or contains a comprehensive enforcement mechanism.

The other limit on *Ex Parte Young* suits, which I think is more narrow, comes from a case called *Idaho v. Coeur d'Alene Tribe of Idaho*.²⁹³ This was a suit brought by a Native American Tribe in Idaho to quiet title to submerged land.²⁹⁴ The suit named the State as a defendant; this was, of course, barred by the Eleventh Amendment.²⁹⁵ But the Tribe also sued state officers as defendants.²⁹⁶ The Supreme Court, in a five-to-four decision, held that the suit against the state officers was barred.²⁹⁷ The Supreme Court said that states have a unique sovereign interest with regard to their submerged land.²⁹⁸ Therefore, because of this unique sovereign interest, the action to quiet title couldn't be brought against the officers.²⁹⁹ In other words, there is a new exception to *Ex Parte Young* in situations where a state has a

285. See *Ex Parte Young*, 209 U.S. at 160.

286. 517 U.S. 44 (1997).

287. See *id.* at 74.

288. *Id.*

289. See *id.*

290. See generally *id.*

291. 25 CFR 525.

292. *Seminole*, 517 U.S. at 76.

293. 521 U.S. 261 (1997).

294. *Id.* at 261.

295. *Id.*

296. *Id.*

297. *Id.* at 287-88.

298. *Coeur d'Alene*, 521 U.S. at 283.

299. *Id.*

special sovereign interest.³⁰⁰ Two things about the case are notable. One is the Court doesn't give any guidance as to what's enough to make a unique sovereign interest. The Court says there is a unique sovereign interest on an action for quiet title to submerged land,³⁰¹ but what else would be we don't know.

The other thing that I think is very notable about the case is that Justice Kennedy wrote an opinion, joined only by Chief Justice Rehnquist, that essentially called for the overruling of *Ex Parte Young*.³⁰² Justice Kennedy said that *Ex Parte Young* is a fiction and that we should only indulge this fiction in two circumstances: when there is a special federal interest or when it's proven that state remedies are inadequate.³⁰³ My guess is that, had the majority of the Court adopted this view, there would be relatively few instances in which either of those circumstances would be found to be present, and all full litigation against state government, via *Ex Parte Young*, would have been shifted to the states. I have often been curious as to why Justices Scalia and Thomas did not go along with Justice Kennedy's opinion; they are the foremost advocates of states' rights on the Court, yet they didn't go along with Justice Kennedy's opinion. My own guess, and it's just a surmise, is that it was because Justice Scalia, who has said he likes bright line rules of constitutional law, doesn't like ad hoc balancing.³⁰⁴ Justice Kennedy was calling for case-by-case balancing, suits against state officers being allowed only if one of these factors is proved to be present in the particular case.³⁰⁵ I wonder whether Justices Scalia and Thomas might be willing to go for a much more radical overruling of *Ex Parte Young*, rather than a case-by-case approach. However, Justice O'Connor, who would be the necessary fifth vote, wrote in defense of *Ex Parte Young*.³⁰⁶ Refusing to go as far as some of the other conservative members of the Court, she defended *Ex Parte Young* as a mainstay of state compliance with federal law in the Constitution.³⁰⁷

There is one Tenth Circuit case, *J.B. v. Valdez*,³⁰⁸ that deals with the issue of what's a unique sovereign interest by applying *Idaho v. Coeur d'Alene Tribe*.³⁰⁹ *J.B. v. Valdez* was a suit by developmentally disabled children against the State, arguing that services should be provided to them.³¹⁰ The State, having clever lawyers who read the United States Reports, essentially said, "We'll invoke *Idaho v. Coeur d'Alene*; there are special state interests here, like allocating educational funds."³¹¹ The Tenth Circuit, in an opinion by Judge Tacha, rejected that argument.³¹² The

300. *Id.*

301. *Id.*

302. *Id.* at 277-279.

303. *Coeur d'Alene*, 521 U.S. at 281.

304. *See, e.g.,* *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J. concurring) ("I would...abandon the 'balancing approach' to these negative Commerce Clause cases and leave essentially legislative judgments to Congress.").

305. *See Idaho v. Coeur d'Alene*, 521 U.S. at 281.

306. *Id.* at 288.

307. *Id.*

308. 186 F.3d 1280 (10th Cir. 1999).

309. 521 U.S. 261 (1997).

310. *See J.B.*, 186 F.3d at 1282-84.

311. *Id.*

312. *Id.* at 1282.

Tenth Circuit said that this is a state program; there are not the unique kind of state interests that were present in *Idaho v. Coeur d'Alene*.³¹³

V. CONCLUSION

So that's an overview of what the Rehnquist Court has done with regard to federalism in the last decade. Striking, to me, is the fact that every Supreme Court case that I've focused on is from 1992 or later. In fact, except for *New York v. United States*,³¹⁴ which was decided in 1992, and *United States v. Lopez*,³¹⁵ in 1995, all of the other cases were decided in the last three years. When you look at these cases together, it truly is a federalism revolution. How far the Supreme Court will go in this regard, how many laws will be invalidated, and how broadly state sovereign immunity will be interpreted, will likely depend, as in all areas in constitutional law, on where the next vacancy will be in the Supreme Court, and who will make the replacements.

313. *Id.* at 1287.

314. 505 U.S. 144 (1992).

315. 514 U.S. 549 (1995).