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Supreme Court Federalism Decisions

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SUPREME COURT FEDERALISM DECISIONS

*Leon Friedman**

Hon. Leon D. Lazer:

Now, our next speaker is one that we are always proud to have here.

He is widely regarded as a profound constitutional law authority and he is a professor at the Hofstra Law School. He was director of the Committee for Public Justice, Staff Attorney for the Civil Liberties Communication Communion, and has written extensively on numerous Supreme Court issues of critical importance.

The federalism cases are probably among the most startling and interesting ones that came down in the last term and we have asked Professor Friedman to talk to us about them. Professor Friedman.

Professor Friedman:

I. INTRODUCTION

Thank you very much. In this era of baseball statistics I thought I would give you a few numbers relating to the United States Supreme Court. Since *Marbury v. Madison*,¹ when the Supreme Court established the principal of judicial review, the Supreme Court has found one hundred fifty federal laws unconstitutional. Which is, the last time I looked, a little less than one per term. It

* LL. B. 1960 Harvard, Admitted New York Bar, 1961. Graduate Student, History, Harvard GSAS, 1954-55; Assoc. Kaye, Scholer, Fierman, Hays & Handler, NY 1960-67; Gen. Counsel, Chelsea House Publishers, 1968-70; Associate Director NYC Bar Association Special Committee on Courtroom Conduct, 1970-73; Staff Counsel ACLU 1973-74; Associate Professor Hofstra 1974-80; Professor since 1980.

¹ 5 U.S. 137 (1803).

was not until *Dred Scott v. Sanford*,² in 1857, that the Supreme Court declared the next federal law unconstitutional.³

The Warren Court was a very activist court. Justice Warren was chief justice for sixteen years, and in that sixteen-year period they declared nineteen laws unconstitutional, which is approximately 1.19 laws per year. While, in the last five years the Rehnquist court, a very conservative court, has declared twenty-one federal laws unconstitutional, an average of 4.1 federal laws declared unconstitutional per year.

Just so we have all the numbers correct, over the entire thirteen years of the Rehnquist court they declared twenty-nine laws unconstitutional, an average of 2.23 federal laws per year. Now, who is the activist court? If we think that Congress represents the people and that the Supreme Court should be very reticent about exercising its power of judicial review, how can you explain twenty-one federal laws being struck down in a five-year period?

Now, of those twenty-one laws struck down in this five-year period, seven of them were on federalism grounds. These did not concern constitutional rights (i.e. "you violated my constitutional right"), but rather involved federalism grounds (i.e. "you have violated the structure of the Constitution" and "you have taken power away from state governments, not necessarily local governments"). That is an astounding switch in the way in which the Supreme Court applied its power of judicial review.

II. FEDERALISM AND THE COURT

There are four areas in which the Supreme Court has in effect raised the power of federalism. The first of the four is the *United States v. Lopez* line of cases.⁴ *Lopez* involved a law passed by Congress, the Gun Free School Zone Act,⁵ which said that if you

² 60 U.S. 393, (1857). The Court held that Dred Scott had not become a free man during his residence at Fort Snelling, Wisconsin despite his claim of freedom under the Missouri Compromise, because the Missouri Compromise was unconstitutional from the beginning, as it was in violation of the Fifth Amendment guarantee against deprivation of property without due process of law. *Id.*

³ *Id.*

⁴ *United States v. Lopez*, 115 S. Ct. 1624 (1995).

⁵ 18 U.S.C. § 921(a), 922(q) (1990).

possess a gun within a thousand feet of a school zone you have violated a federal law, and it is a five-year felony.⁶ However, in 1995, the Supreme Court held that the Act exceeded Congress' power under the Commerce Clause.⁷ The Supreme Court had not told Congress that they had gone too far in exercising their power under the Commerce Clause since 1936.⁸ If you look before *Lopez*, maybe go back through the late New Deal period, it was sixty years before the Supreme Court told Congress that they did not have these powers.

As an aside, the Commerce Clause is back before the Supreme Court this year in a case involving the Violence Against Women Act.⁹ In a badly split opinion, the Fourth Circuit reviewed the Violence Against Women Act, another law passed by a virtually unanimous Congress, which made it a federal crime to engage in an act of violence on the basis of gender.¹⁰ The original panel decision upheld the Act on the basis of the Commerce Clause, saying that if you kill and murder and rape enough women, they would not go to work in the morning and won't produce enough goods and services that move across state lines.¹¹ However, on rehearing *en banc*, the Fourth Circuit said, it does not substantially affect commerce and we do not think Congress made sufficient findings that rape, murder and assault on women really affects commerce.¹² The Supreme Court will look at that case this year.¹³

⁶ 18 U.S.C. § 922(q).

⁷ U.S. CONST. art. I § 8, cl. 3. The Commerce Clause provides in pertinent part: "The Congress shall have the power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." *Id.*

⁸ *United States v. Butler*, 297 U.S. 1 (1936). This was the last of a series of cases in which the Supreme Court struck down various "New Deal" legislation. Following his election in 1936, Roosevelt revealed his Court Packing Plan, which would have increased the number of Supreme Court Justices to fifteen, six of whom would be Roosevelt appointees. After the "court-packing" plan was presented to Congress the Court curtailed their review of economic reform. *Id.*

⁹ 42 U.S.C. § 13981 *et. seq.* (1999).

¹⁰ *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999) (*en banc*).

¹¹ 132 F.3d 949 (4th Cir. 1997), *vacated* 169 F.3d 840 (4th Cir. 1999).

¹² *Id.*

¹³ *United States v. Morrison*, 120 S. Ct. 11 (1999).

The second area in which the Supreme Court has raised the issue of federalism involves the line of Tenth Amendment cases, beginning with *Printz v. United States*,¹⁴ which dealt with the Brady Handgun Violence Act.¹⁵ In the decision by Justice Scalia, he said that the federal government cannot make state officials carry out federal policy; they are not your servants, they (i.e. county attorneys, city attorneys and state attorneys) are not the instruments of federal policy.¹⁶ If you want to do something, have your own federal officials do it. Do not make state officials carry out a federal policy,¹⁷ even a policy as small making a handgun check to find out whether a person who is trying to buy a handgun fell within one of the prohibited categories (i.e. had a criminal conviction, mental health problem, etc.).¹⁸ Therefore, since the Brady Act placed an obligation on local chief law enforcement officers to make background checks, the Supreme Court held, in a five to four decision, that the Tenth Amendment prohibits the federal government from forcing state officials to carry out federal policy.¹⁹

This year, the Supreme Court has another case involving the Drivers Privacy Protection Act.²⁰ This is yet another law passed by a unanimous Congress that says we do not want state officials to sell motor vehicle information for commercial purposes.²¹ In the past, the states' motor vehicle division would sell motor vehicle information to a commercial outfit who would then make some money reselling the information.²² Unfortunately, a stalker found out where some actress lived by buying motor vehicle information

¹⁴ *Printz v. United States*, 521 U.S. 898 (1997); see also U.S. CONST. amend. X. The Tenth Amendment provides in pertinent part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

¹⁵ 18 U.S.C. § 922 *et. seq.* (1999).

¹⁶ *Printz*, 521 U.S. at 898.

¹⁷ *Id.*

¹⁸ 18 U.S.C. § 922.

¹⁹ *Printz*, 521 U.S. at 936.

²⁰ 18 U.S.C. § 2721 (1999).

²¹ *Id.*

²² *Reno v. Condon*, 120 S. Ct. 666 (2000). "The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers . . . to contact drivers with customized solicitations." *Id.* at 667.

available through a commercial outfit, found and killed her.²³ Congress thought this was not a good idea, so they passed the Drivers Privacy Protection Act, which prohibited States from selling this information for commercial purposes.²⁴

The Fourth Circuit held that the Act was unconstitutional, a Tenth Amendment violation because Congress is forcing the states to carry out a federal policy.²⁵ However, I am not sure if preventing the sale of motor vehicle information is carrying out a federal policy, because they are prohibiting the states from doing something. So that is the Tenth Amendment line of cases.

The third line of cases are the combination of Eleventh and Fourteenth Amendment cases.²⁶ Again of the seven federal laws that were declared unconstitutional on federalism grounds, four of them are on Eleventh Amendment grounds.

In 1996, the Supreme Court, in *Seminole Tribe of Florida v. Florida*,²⁷ held that Congress cannot overturn a state's Eleventh Amendment immunity unless two things are done.²⁸ Number one, it must make its intention clear, absolutely clear.²⁹ Number two, there must be some other constitutional basis for overturning the state's immunity.³⁰ That is to say, Congress can overturn a state's Eleventh Amendment immunity if they are exercising their powers

²³ Pryor v. Reno, 171 F.3d 1281, n.4 (1999) (During floor debate on the Senate version of the Act, Senators invoked the example of Rebecca Shaeffler, an actress from California, who was murdered by an obsessed fan who obtained her address from the department of motor vehicles through a private investigator. See 139 Cong.Rec. § 15, 766, Comments of Senator Harkin. See also (Feb. 4, 1994) (statement of Rep. Moran): 139 Cong.Rec. § 15, 762 (Nov. 16, 1993) (statement of Sen. Boxer); 139 Cong. Rec. § 15, 765 (Nov. 16, 1993) (statement of Sen. Robb); 139 Cong.Rec. § 15, 765 (statement of Sen. Biden)).

²⁴ 18 U.S.C. § 2721 (1999).

²⁵ Pryor v. Reno, 171 F.3d 1281 (1999).

²⁶ See U.S. CONST. amend XI. Providing in pertinent part: "The judicial power of the United States shall not be construed to extend to any situation . . . against one of the United States by citizens of another State." *Id.*; see also, U.S. CONST. amend XIV § 5. (authorizing Congress to enforce the other provisions of the Fourteenth Amendment, which insure protection against the deprivation of life, liberty or property without due process of law).

²⁷ 517 U.S. 44 (1996).

²⁸ *Id.*

²⁹ *Id.* at 56.

³⁰ *Id.* at 40.

under the Fourteenth Amendment.³¹ The *Seminole Indian* decision overturned *Pennsylvania Union Gas*,³² which held that Congress could overturn Eleventh Amendment immunity pursuant to the Commerce Clause, the Court created a much stricter constitutional rule for overturning Eleventh Amendment immunity.³³

The final line of cases follows *City of Boerne v. Flores*,³⁴ in which the Supreme Court said when Congress exercises its Fourteenth Amendment power, it must do so to remedy an already existing constitutional violation.³⁵ In other words, Congress cannot declare what the Constitution means and afford a remedy for violations.³⁶

In *Boerne*, the Supreme Court reviewed the Religious Freedom Restoration Act,³⁷ which broadened religious freedom beyond that which the Supreme Court had defined, and the Act established a remedy for violations.³⁸ The Supreme Court held that this was beyond the power of Congress.³⁹ The Supreme Court defines what the constitutional right is, and Congress is then empowered to provide a proportional remedy.⁴⁰ Accordingly, Congressional power under Section 5 is limited to preparing, creating, or establishing a proportionate remedy to a Constitutional violation already found by the Supreme Court.⁴¹

The whole point of the Fourteenth Amendment, by the way, is to put restrictions on the states. Section 1 says, "No state shall deprive a person of life, liberty or property without due process of law, or deprive any person of . . . equal protection of the law."⁴² Therefore, since the Fourteenth Amendment speaks to the states,

³¹ *Id.*

³² *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989).

³³ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

³⁴ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁵ *Id.* at 518. (prohibiting Congress from creating new Constitutional rights, but allowing Congress to remedy or prevent a Constitutional wrong).

³⁶ *Id.* at 508.

³⁷ *Id.* at 507.

³⁸ 42 U.S.C.A. § 2000bb.

³⁹ *Flores*, 521 U.S. at 520.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² U.S. CONST. amend XIV.

and Section 5 of the Fourteenth Amendment, the Enabling Act,⁴³ is the vehicle by which Congress passes these laws, what *Boerne* really says to Congress is you have to be very careful when you exercise that power.

All of these three things came together in the very last day of the term when the Supreme Court, on June 23, 1999, declared three separate federal laws unconstitutional.⁴⁴ The three cases are *Alden v. Maine*,⁴⁵ *Florida Prepaid v. College Savings Bank*,⁴⁶ and *College Savings Bank v. Florida Prepaid*.⁴⁷ Remember, from the beginning of time until today, one hundred fifty federal laws have been declared unconstitutional. Now in one day they declared three federal laws unconstitutional. Big day!

III. ALDEN V. MAINE

Alden dealt with the Fair Labor Standards Act.⁴⁸ If ever the Supreme Court has had a flip-flop, their view on this Act is the biggest flip-flop of all time. The Fair Labor Standards Act, which applies to all employers across the country (i.e. private employers, county employers and local government employers), created a forty hour work week, and says that if employees work overtime, they must be paid time and a half for overtime, and double time for weekends.⁴⁹ However, the longstanding question facing the Court was whether this law could be applied to the state governments?

The first case dealing with the Fair Labor Standards Act, *Maryland v. Wirtz*,⁵⁰ was heard in the 1970's. Federal law said that the Fair Labor Standards Act applied to state schools as well as to

⁴³ U.S. CONST. amend XIV § 5. this section provides that "Congress shall have power to enforce, by appropriate legislation the provisions of this article."
Id.

⁴⁴ The Fair Labor Standards Act, The Patent Remedy Act, and The Trademark Remedy Act.

⁴⁵ 119 S. Ct. 2240 (1999).

⁴⁶ 119 S. Ct. 2219 (1999).

⁴⁷ 119 S. Ct. 2199 (1999).

⁴⁸ Fair Labor Standards Act, 29 U.S.C.A. § 201 (1938).

⁴⁹ *Id.*

⁵⁰ *Maryland v. Wirtz*, 392 U.S. 183 (1968).

hospitals.⁵¹ The Supreme Court, in *Wirtz*, saw no problem with this.⁵²

However, when Congress later expanded the Act to all state employees,⁵³ the Fair Labor Standards Act once again came before the Supreme Court, this time in *National League of Cities v. Usery*.⁵⁴ In *Usery* the Supreme Court found the new provision, which made all state government employees subject to the Fair Labor Standards Act, unconstitutional under the Tenth Amendment.⁵⁵ It was a Tenth Amendment case because the financial obligation placed on the states and local governments may be so onerous that the states and local governments may not be able to perform their functions.⁵⁶ In other words, if you have to pay time and a half to a fire person or police person, the financial drain could be so severe that the states could not do what they are supposed to do. Well, the Court's opinion *National League of Cities* only lasted nine years, because the Supreme Court once again went the other way in *Garcia v. San Antonio Metro. Transit Authority*.⁵⁷

So, first in *Wirtz*, the Court said that Fair Labor Standards Act can be applied to states.⁵⁸ Then in *National League*, it said no, it cannot be applied to the states.⁵⁹ However once again, in *Garcia*, the Court said it can be applied to the states.⁶⁰ So now what happens in *Alden v. Maine*? The Supreme Court says it cannot be applied to the states.⁶¹ So they have flip-flopped on this issue three times.

⁵¹ 29 U.S.C.A. § 216.

⁵² *Wirtz*, 329 U.S. 183.

⁵³ Fair Labor Standards Act of 1938, 29 U.S.C. § 201 as amended by 29 U.S.C. § 203(s)(5).

⁵⁴ 426 U.S. 833 (1976).

⁵⁵ *Id.* at 842.

⁵⁶ *Id.*

⁵⁷ 469 U.S. 528 (1985). In *Garcia*, the Supreme Court held that the Transit Authority was not entitled to Tenth Amendment Immunity from the minimum wage and overtime pay provisions of the Fair Labor Standards Act.

⁵⁸ *Wirtz*, 329 U.S. at 197.

⁵⁹ *Usery*, 426 U.S. at 842.

⁶⁰ *Garcia*, 469 U.S. at 557.

⁶¹ *Alder v. Maine*, 119 S.Ct. 2240 (1999) holding that the Fair Labor Standards Act cannot be applied to the states because the federal system established by our Constitution preserves the sovereign status of the states. *Id.*

Alden v. Maine is not a Tenth Amendment decision, it is an Eleventh Amendment decision.⁶² In *Alden*, state probation officers in Maine wanted overtime pay.⁶³ They worked a lot, so they brought an action in federal court for their overtime relying on the Fair Labor Standards Act.⁶⁴ While the case was pending, the *Seminole Indian* case was decided, holding that Congress cannot overturn Eleventh Amendment immunity unless it is relying on the Fourteenth Amendment, and can not do it pursuant to the Commerce Clause.⁶⁵ As a result, the First Circuit threw out the case saying that the Fair Labor Standards Act was not passed pursuant to the Fourteenth Amendment.⁶⁶ In response, the probation officers bring their action in state court.⁶⁷

The Eleventh Amendment says two things, both of which the Supreme Court has totally disregarded since the beginning. It says the judicial power of the United States shall not extend to a suit between a state and a citizen of another state.⁶⁸ If you want to be textualists, that is the text. "The judicial power of the United States shall not extend to a case between a state and a citizen of another state."⁶⁹ *Alden* brings a suit against Maine, his own state, in the state court.⁷⁰ Therefore, on two grounds the Eleventh Amendment should not be a problem. In numerous cases the Supreme Court said again and again that the Eleventh Amendment only prohibits suits against states in federal court, and does not in any way affect a suit against a state in a state court.⁷¹ This is a Supreme Court that looks at the text, after all, we should not read our own view into the Eleventh Amendment. We have to read the

⁶² *Id.* at 2247.

⁶³ *Id.* at 2246.

⁶⁴ *Id.* Fair Labor Standard Act, 29 U.S.C. § 201 (1938), which provides for the standards of labor in the United States.

⁶⁵ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996).

⁶⁶ *Id.* at 75.

⁶⁷ *Alden v. Maine*, 715 A.2d 172 (1998).

⁶⁸ U.S. CONST. amend XI, which states in pertinent part: "[t]he judicial power of the United States shall not be extended to a case between a state and a citizen of another state." *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See generally *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991).

text and here the text of the Eleventh Amendment tells us that on two grounds it should not be a problem.

The Amendment is read that way because back in 1789 one could not sue a state in federal court on general federal question grounds, the only basis for suing a state was diversity jurisdiction. Diversity jurisdiction was the only way you could get the case into federal court, because the general federal question jurisdiction statute was not passed until 1875.⁷² All cases, except cases where there was diversity, had to be brought in state court. Then, of course, if a state was sued in state court, it could apply whatever sovereign immunity doctrine it might have. So a hundred years ago in *Hans v. Louisiana*,⁷³ the Supreme Court says, "Oh, well, it doesn't say between a state and its own citizen, but that is what they meant, I know we have to violate the text of the Constitution, but that is really what they meant."⁷⁴

In the 1970's and 1980's there was an effort to overturn this ruling by, I have to call them the liberals, Blackman, Stevens, Marshall and Brennan, who asserted that the restrictive *Hans* decision was against the Constitution. It only deals with diversity cases, it does not deal with federal question cases, so one should be able to sue a state in federal court if you are relying on general federal question jurisdiction. Thus, you should be able to sue your own state in federal court on the basis of some federal statute. There are a series of cases in which all the Justices were getting closer and closer to overruling *Hans*, and going back to the text of the Eleventh Amendment. However, that never happened. Forget throwing the Eleventh Amendment out the window, the Eleventh Amendment had become enormously strong. That whole effort to read the Eleventh Amendment in accordance with its text did not happen.

Indeed, *Alden* itself is an expansion of the Eleventh Amendment way beyond its actual text. The Supreme Court in *Alden* said that

⁷² See, 28 U.S.C. § 1331, which provides in pertinent part: "[T]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, treaties of the United States. *Id.*

⁷³ *Hans v. Louisiana*, 134 U.S. 1 (1890). The *Hans* case held that a State cannot be sued by a citizen of another state or a foreign state. *Id.*

⁷⁴ *Id.* at 11, "[The Eleventh Amendment] did not in its terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits." *Id.*

whatever immunity a state would have in federal court, it must also have in its own state courts.⁷⁵ Therefore, if a state establishes a sovereign immunity doctrine, it can apply that doctrine in any federal claim brought in the state courts.⁷⁶ That is an extraordinary expansion of the Eleventh Amendment, and to do so the Supreme Court had to overrule or explain away a whole series of earlier cases.⁷⁷

Justice Kennedy accomplished this feat by noting that if you want to read the textbooks, read the text.⁷⁸ How did he get there? He used history, practice, precedent and structure.⁷⁹ When we started, states historically had sovereign immunity.⁸⁰ The practice at the time was that states could not be sued in their own courts.⁸¹ Whatever precedents we have, I know we have to explain away about half a dozen cases, but those all can be explained away. However, most importantly, the structure of the Constitution prohibits this.⁸² There is a wonderful phrase in which he talks about the states, and asserts that the states are not provinces as in France or a subsidiary of a corporation.⁸³ Accordingly, the Court held that they can not make states subject to suit in their own courts.⁸⁴

I will now review the manner in which he did this. I mean the history, practice, precedent and structure. The history was a little more complicated, and Justice Souter has a much longer dissent.⁸⁵

⁷⁵ *Alden v. Maine*, 119 S.Ct. 2240, 2245 (1999). The Court found that "Congress cannot abrogate States' sovereign immunity in federal court; were the rule different the National Government would wield greater power in state courts than in federal courts. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 2258. *see also* *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

⁷⁸ *Id.*

⁷⁹ *Id.* at 2246.

⁸⁰ *See generally* *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)(noting that "[t]he states entered the federal system with their sovereignty intact."

⁸¹ *Id.*

⁸² *Alden*, 119 S.Ct. at 2246.

⁸³ *Id.* at 2250.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2269 (J. Souter, dissenting).

The discussion goes back to the Federalist Papers, back to the ratification debates.⁸⁶ As a matter of fact the colonies were not immune, and Justice Souter goes into this in great detail.⁸⁷ So when did this long established doctrine of state sovereign immunity arrive? States were independent states for a very short period of time and it was not all that clear.

Besides, the whole point of the Constitution and the social contract theory is that we the people are sovereign, not the states. We give to government very limited powers, and only those powers that are necessary to function. We give to the states certain limited powers, and we give to the federal government certain limited power. So where does the state get its sovereignty? The people. If we give Congress certain powers, why is not the congressional exercise of those powers superior to whatever it was we gave the states? Thus, there is a little theoretical problem about where the sovereignty comes from.

The big fight in the historical debate was all about *Chisholm v. Georgia*.⁸⁸ In *Chisholm*, as part of the post revolutionary war, there was a big fight over land grants.⁸⁹ The states had seized the land of the royalists who left the country, and then proceeded to sell the land. The fight was outlined in the case *Hunter v. Martin*.⁹⁰ Pursuant to the Jay Treaty and the Paris Treaty, the federal government agreed to give the land back to the original landowners.⁹¹ Naturally, many fights ensued over the title to this land. *Chisholm*, a resident of South Carolina, sued the State of Georgia in a federal court in Georgia.⁹² The case went to the Supreme Court, and they held it was okay to sue the state in federal court.⁹³ Of the four justices who voted in the majority, two of them were at the Philadelphia Convention, and they should know whether the Constitution permitted a suit against the state or not.

⁸⁶ *Id.* at 2292.

⁸⁷ *Id.* at 2271-73.

⁸⁸ 2 Dall. 419 (1793).

⁸⁹ *Id.*

⁹⁰ 1 Wheat. 304 (1816).

⁹¹ The Jay Treaty, 1794, U.S.-Gr.Brit., 8 Stat. 116; The Treaty of Paris, 1783, U.S.-Gr.Brit., 8 Stat. 80.

⁹² 2 Dall. at 426.

⁹³ *Id.*

Thus, the historical evidence concerning sovereign immunity was not all that clear.

The very fact that states could be sued in federal court was a radical departure from the prevailing ethos at the time. The Eleventh Amendment was passed in response to *Chisholm*, and was a very quick answer to that decision. Consequently, the history and practice is not all that clear.

There is a lot of confusion about how well established sovereign immunity was even in the state's own courts. As for precedents, that is not so easy. The Supreme Court had a case that was directly on point, *Hilton v. South Carolina Public Railway Commission*.⁹⁴ In *Hilton*, a suit was brought in federal court in South Carolina under the Federal Employees Liability Act.⁹⁵ The issue was whether an employee of the state railroad could be subject to this federal statute?⁹⁶ The Supreme Court said yes, the employee could.⁹⁷

Justice Kennedy said they did not raise the argument.⁹⁸ They did not know they had this wonderful argument about the Eleventh Amendment and that is why the case ended up the other way.⁹⁹ There were a couple of other problem cases. In *Hall v. State of Nevada*,¹⁰⁰ the State of Nevada was sued in California State Court.¹⁰¹ The question was whether Eleventh Amendment immunity applied where the state of Nevada was sued in a California State Court.¹⁰² The answer was no, the state of Nevada did not have immunity.¹⁰³ Well, that is another precedent you have to forget about. The whole idea, and a major part of the *Alden*

⁹⁴ 502 U.S. 197 (1991).

⁹⁵ 45 U.S.C. § 51, this section provides in pertinent part that "[E]very common carrier by railroad while engaging in commerce between any of the several States or Territories ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee to his or her personal representatives." *Id.*

⁹⁶ *Hilton*, 502 U.S. at 199.

⁹⁷ *Id.* at 204-05.

⁹⁸ *Id.* at 200.

⁹⁹ *Id.* at 205.

¹⁰⁰ 440 U.S. 410 (1979).

¹⁰¹ *Id.*

¹⁰² *Id.* at 411.

¹⁰³ *Id.* at 414.

decision, is trying to explain away a whole bunch of precedents that would seem to say that states do not have all that sovereignty.

Another problem for the Court, lurking in the *Alden* case, is an argument that was made below, that you can not make a state court hear a federal claim. This is a Tenth Amendment argument because it comes out of the *Printz* case.¹⁰⁴ If you cannot make a state sheriff do a background check to enforce the Brady Bill, how can you make a state judge hear a federal claim? That is a Tenth Amendment problem. If Congress wants to carry out a federal policy, then have federal courts do it. Why should a state court hear a Section 1983 case or a Title VII case, a RICO case, or any other federal case? We have been doing this for a couple hundred of years. Indeed at the very beginning the state courts were the only courts that could hear federal claims since there was no federal question jurisdiction.

One of the arguments that was made here was to forget suing in state court.¹⁰⁵ State courts should not be the vehicle for hearing federal claims. If you have a federal claim go to federal court, do not burden the state courts. Do not clog our courts with your federal claims.¹⁰⁶ Moreover, there was an earlier precedent, *Howlett v. Rose*,¹⁰⁷ which relied upon the Supremacy Clause, and held that Congress can require state courts to hear federal claims.¹⁰⁸ Again, this is not a claim against just the state, but any federal claim.

In *Alden*, the majority said that they were not going to overrule that precedent.¹⁰⁹ As far as we are concerned, state courts are obligated to hear federal claims against everyone else (i.e. counties, cities, local governments, private people), but not against the state, if the state has a sovereign immunity doctrine that would apply.¹¹⁰ Thus, whatever sovereign immunity doctrine it has with respect to its own causes of action it can apply to any federal cause

¹⁰⁴ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁰⁵ *Id.* at 924.

¹⁰⁶ *Id.*

¹⁰⁷ 496 U.S. 356 (1990).

¹⁰⁸ *Id.* at 367-68.

¹⁰⁹ *Alden*, 119 U.S. at 2245.

¹¹⁰ *Id.*

of action. Why? Because of the structure of the Constitution, not the text of the Constitution.¹¹¹

There is nothing in the Tenth Amendment, Eleventh Amendment or any other part of the Constitution that requires the result. It is the structure of the Constitution. The whole point of our system is that power is divided. We have state governments and local governments. We have the separation of powers, and the more power that is divided and diffused, the better. Accordingly, if the states have to be sued in their own state courts on a federal claim, that will somehow upset the structure of the Constitution.¹¹²

I am on the Federal Legislation Committee of the City Bar Association, and we just issued a report,¹¹³ that is soon to be published in the City Bar Association record, in which we say the reason why the states had the separate power back in 1789 was because they had just established the federal government and gave the federal government the power to have a standing army.¹¹⁴ The big fear back in 1789 was that the federal government, with its standing army, would somehow march on the states and take away their power. However, that problem does not seem to be a big one today. It does not seem to have been a big problem for one hundred eighty years. Therefore, there has to be a better reason for saying we want the states to have this separate identity.

The second part of our report asserts that the states have plenty of political power (i.e. the electoral college, two senators for each state, the fact that the qualifications for voters are set by the states), and they do not need any assistance from the Supreme Court. It is not as if we allow states to be sued in federal court on a federal claim, that this will somehow take away from the political power the states have. It struck us as a little bit unrealistic. There has to be a reason for this. If you are not looking to the text of the Constitution, and there is nothing in the text that supports this

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See appendix I, *The New Federalism: A Report of the Committee on Federal Legislation of the Bar of the City of New York*, 54 *The Record* 712 (1999).

¹¹⁴ U.S. CONST. amend. II, allowing the state to establish a well regulated Militia and the right to bear arms. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed. *Id.*

result, you really have to have a better reason for coming to this result, so our committee said.

Nevertheless, it was a five to four decision and that is just the first one.¹¹⁵ The bottom line is that the Fair Labor Standards Act cannot be applied to a state employee, but may be applied to private and local employees.¹¹⁶ However, there are four and a half million people working for the states, it is about two to three percent of the entire work force, and they are not subject to the protection of the Fair Labor Standards Act.

Two days ago, the Supreme Court heard arguments as to whether state employees are subject to the Age Discrimination Law.¹¹⁷ Therefore, it is likely we may get the same five to four decision with respect to the Age Discrimination Law.¹¹⁸ We still have the Family Leave Act,¹¹⁹ the American with Disabilities Act,¹²⁰ and half a dozen other federal laws designed to protect employees in the United States. The only employer within the United States that will not be subject to these protective measures is state government. That is a peculiar result, but that apparently is the way in which the court is moving.

IV. COLLEGE SAVINGS BANK & FLORIDA PREPAID

The two other cases are not quite as visible as the implications of the *Alden* case.¹²¹ In 1992, Congress passed three laws; the Patent Remedy Act,¹²² the Trademark Remedy Act¹²³ and the Copyright Remedy Act.¹²⁴ All three of these laws made the states amenable to suits for trademark infringement, copyright infringement and patent infringement in federal court. These laws were passed pursuant to *Pennsylvania v. Union Gas*.¹²⁵ Congress established

¹¹⁵ *Alden* 119 U.S. at 2445.

¹¹⁶ *Id.* at 2246.

¹¹⁷ 29 U.S.C. § 621 *et. seq.* (1999).

¹¹⁸ 29 U.S.C. § 633 *et. seq.* (1999).

¹¹⁹ 29 U.S.C. § 2611 *et. seq.* (1999).

¹²⁰ 42 U.S.C. § 12111 *et. seq.* (1999).

¹²¹ *Alden v. Maine*, 527 U.S. 706 (1999).

¹²² 35 U.S.C. § 281 *et. seq.* (1999).

¹²³ 15 U.S.C. § 1051 *et. seq.* (1999).

¹²⁴ 17 U.S.C. § 501 *et. seq.* (1999).

¹²⁵ 491 U.S. 1 (1989).

that there really is a problem about state universities, subject to Eleventh Amendment copying people's writings, stealing their inventions, or engaging in commercial activity generally.¹²⁶ Furthermore, there is no reason why the states, when engaging in proprietary commercial activities, should not be subject to the same laws as anyone else.

In *College Savings Bank v Florida*, suit was brought in a district court in New Jersey because the State of Florida had established some sort of student loan system that copied a student loan program established by a bank in New Jersey.¹²⁷ The College Saving Bank, which had a patent on a particular procedure for arranging student loans, sued the Florida Prepaid Secondary Education Expense Board, which was an agency of the State of Florida, for trademark infringement and patent infringement.¹²⁸

Patent cases get appealed through the Court of Appeals for the Federal Circuit. The appeal on the patent claim went to the Federal Circuit. Since all other cases are appealed to the circuit court in which the district court sits, the appeal on the trademark claim went to the Third Circuit. The Third Circuit found that the Trademark Remedy Act was unconstitutional, because it violated the Eleventh Amendment.¹²⁹ However, the Federal Circuit found that the Patent Remedy Act was a proper exercise of Congress' power under the Fourteenth Amendment.¹³⁰ Subsequently, both cases went to the Supreme Court.¹³¹

In deciding these cases, the Supreme Court utilized the two-part test for Eleventh Amendment immunity.¹³² First, did Congress make its intention clear? Give me a break. The law clearly mandates that the states shall be amenable to suits in federal court for trademark infringement and patent infringement.¹³³ There was nothing else in the law. The whole purpose of the law was to make

¹²⁶ See *supra* notes 128-130.

¹²⁷ *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 948 F. Supp. 400 (D. N.J. 1996).

¹²⁸ *Id.* at 402.

¹²⁹ *College Savings Bank*, 131 F.3d at 366.

¹³⁰ *College Savings Bank*, 148 F.3d at 1355.

¹³¹ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

¹³² See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

¹³³ *Id.*

the states amenable. That one was easy, and no one had any doubt that Congress made its intention clear.

However, one of the reports I saw about *Kimel v. Florida Bd. of Regents*¹³⁴ the other day indicates that Justice O'Connor said: "Did Congress mention the Eleventh Amendment when it made the states amenable?"¹³⁵ You've got to mention the Eleventh Amendment? The Age Discrimination Act has a very tortured history because Congress simply adopted the provisions of the Fair Labor Standards Act and did not come right out and scream and yell and say we mean to make the states amenable to suit, and we mean to overrule their Eleventh Amendment immunity.¹³⁶ That indeed may be how the age discrimination case comes out. Nevertheless, there was no doubt about it in the patent and trademark case.

Now you have a *Boerne* problem, which is that you cannot expand on the definition of any right and there must be a proportional remedy.¹³⁷ Remember the structure of the Fourteenth Amendment. Section 1 provides that every citizen is a citizen of the state in which he or she resides, as well as a citizen of the United States.¹³⁸ In addition, no state shall deprive any person of life, liberty or property without due process, nor violate the privileges and immunities of any citizen, nor deny any person equal protection of the law.¹³⁹ Section 5, specifies that Congress shall enforce this provision by appropriate legislation.¹⁴⁰

Section 5 had been given the broadest interpretation by the Supreme Court in a whole series of cases during the 1960's and

¹³⁴ *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000)

¹³⁵ *Id.* at 640.

¹³⁶ *Id.*

¹³⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court cut back on Congress' Section 5 powers by making those powers remedial and preventive. That is, Congress cannot create a new Constitutionally protected right, but may remedy an existing Constitutional wrong or prevent one from occurring. The Court also opined that when Congress does enact a law which is either remedial or preventive it must follow a rule of proportionality or congruence; meaning that the law must be somehow proportionately or congruently related to the Constitutional violation Congress is attempting to remedy or prevent from occurring. *Id.*

¹³⁸ U.S. CONST. amend. XIV.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

1970's. Section 5 is equivalent to the necessary and proper clause.¹⁴¹ The Supreme Court, in *Katzenbach v. Morgan*,¹⁴² gave section 5 a very broad reading.¹⁴³ We all know about the Necessary and Proper Clause and *M'Culloch v. Maryland*,¹⁴⁴ in which the Supreme Court permitted Congress to do whatever is appropriate for them to do in exercising their powers.¹⁴⁵ Thus, the Supreme Court give Congress the broadest possibly powers in Section 5.

The Fourteenth Amendment is anomalous because the only power that is talked about is the power of the federal government vis-a-vis the states. Therefore, the real question is, are you going to read Section 5 that broadly when the effect of the law is to restrict the power of the states? It's one thing to say that the Necessary and Proper Clause should be read broadly, however, if the states have this residuary sovereignty, then how broad are you going to read Section 5 power? This was the issue that the Supreme Court had to decide in the *Florida Prepaid* case.¹⁴⁶

The trademark case was easy.¹⁴⁷ The decision, written by Justice Scalia, addressed the question "how was Congress enforcing the Fourteenth Amendment when it passed the Trademark Remedy Act?"¹⁴⁸ The Fourteenth Amendment provides that "No state shall deprive any person of life, liberty or property without due process of the law."¹⁴⁹ Is trademark property? Are you depriving anybody of property if you engage in unfair competition? Well, the Supreme Court said that there is no property right.¹⁵⁰ We do not think you can justify it on the grounds of the Fourteenth Amendment.¹⁵¹

¹⁴¹ U.S. CONST. art. 1, § 8, cl. 18. This clause expands Congress' powers under Art. 1 § 8. While Congress has been granted expressed powers in the Constitution this clause allows for Congress to enact laws which are "necessary and proper" to the carrying out of the expressed powers. *Id.*

¹⁴² 384 U.S. 641 (1966).

¹⁴³ *Id.* at 648-49.

¹⁴⁴ 17 U.S. 316 (1819).

¹⁴⁵ *Id.* at 330.

¹⁴⁶ *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct at 2204.

¹⁴⁷ *College Savings Bank*, 119 S. Ct. 2219.

¹⁴⁸ *Id.* at 2222.

¹⁴⁹ U.S. CONST. amend. XIV.

¹⁵⁰ *College Savings Bank*, 119 S. Ct. at 2225.

¹⁵¹ *Id.*

There had been an earlier doctrine in the 1960's, called the *Parden* Doctrine, under which the Supreme Court unanimously said that Congress may pass a law saying that if you engage in this activity you can be sued in federal court.¹⁵² The *Parden* case was a railroad case, and the law provided that if you start a railroad and take any of the proscribed actions, then you can be sued in federal court.¹⁵³ In *Parden*, a state had started a railroad, and they were sued in federal court.¹⁵⁴ The Supreme Court, nine to nothing, said that taking such actions as proscribed by the law is implied waiver of the state's Eleventh Amendment immunity.¹⁵⁵ Therefore, if Congress tells you that to engage in this activity shall waive your immunity, and you engage in this activity, well then you waive your immunity.

However, the Supreme Court in *Florida Prepaid* said "so what," and they overruled *Parden*,¹⁵⁶ finding no implied waiver.¹⁵⁷ The whole *Parden* Doctrine mandating that if you engage in proscribed activity you can be sued in federal court and you waive your Eleventh Amendment immunity, goes right out the window. Accordingly, *College Savings Bank* gets dismissed since that was the only basis for holding the state in the trademark case.¹⁵⁸

¹⁵² *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964), *reh'g denied* (June 22, 1964) *overruled by* *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987).

¹⁵³ Petitioners in *Parden* sued under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (FELA). FELA made it clear that any state operating a common carrier railway while engaging in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier" *Id.* at § 51. Congress set the appropriate jurisdiction for such a cause of action in the district courts. *Id.* at § 56.

¹⁵⁴ *Parden*, 377 U.S. at 1208-09.

¹⁵⁵ The *Parden* decision was a 5-4 decision with Justices White, Douglas, Harlan and Stewart dissenting, however, all nine Justices agreed it is consistent with Congress' power to base a State's participation in the interstate transportation business "on a waiver of the State's sovereign immunity from suits arising out of such business." *Id.* at 198 (J. White, dissenting).

¹⁵⁶ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199, 2204-05 (1999).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 2211.

Incidentally, the vote was five to four.¹⁵⁹ You know who the five are, and you know who the four are. So the key is can our side get Kennedy or O'Connor? That is the question in every case, because you know you are not going to get Scalia, Thomas or Rehnquist. Therefore, you have to get Kennedy or O'Connor if you want to win one of these cases. Every time a federalism argument is made you must look at Kennedy and O'Connor. Ask yourself what did they say in previous cases; what questions did they ask; are they leaning in our direction; is there something in their earlier decisions that we can rely on to get them on our side?

The more interesting case is the patent case, because a patent is property. That is the *Florida Prepaid* case while *College Savings Bank* is the trademark case.¹⁶⁰ In the patent case, they all agreed that it was property, and a patent is property.¹⁶¹ The state's argument was that we have not deprived any person of property without due process of law.¹⁶² The Fourteenth Amendment does not say, "Nor shall any state deprive any person of life, liberty or property", it says, "Nor shall any state deprive any person of life, liberty or property without due process."¹⁶³

The state said we have a condemnation action, therefore you can come into state court.¹⁶⁴ If your patent is infringed, go to the Court of Claims in New York and bring an eminent domain action. Unfortunately, there are a few problems with that. You can't get an injunction, which is very important in a patent case. More importantly, there is no longer uniformity because you are going to have fifty states deciding what a patent is. The whole point of establishing the Court of Appeals for the Federal Circuit is to have some sort of uniformity in patent cases.¹⁶⁵ Uniformity goes out the window.

¹⁵⁹ Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas voted in the majority while Justices Stevens, Souter, Ginsburg and Breyer dissented.

¹⁶⁰ *Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. at 2204.

¹⁶¹ *Id.*

¹⁶² *Id.* at 2203.

¹⁶³ U.S. CONST. amend. XIV.

¹⁶⁴ *Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. at 2213.

¹⁶⁵ *Id.*

The most important part of the whole decision was the restriction on Congress' power under Section 5. Justice Rehnquist said, and here is the magic phrase, in enacting the Patent Remedy Act Congress identified "no pattern" of patent infringement.¹⁶⁶ Unlike the established record of pervasive racial discrimination confronting Congress in the voting rights issue, Congress came up with little evidence of infringing conduct on the part of the state.¹⁶⁷ Therefore, when enforcing Section 5 it is not enough to say there is a problem. There must be a pattern, a big problem, before Congress can exercise its power under Section 5.

You can never say that about the Necessary and Proper Clause. The Supreme Court cannot tell Congress that it cannot pass a law pursuant to the Necessary and Proper Clause unless there is a big problem. It cannot be a little problem, it has to be a big problem; it has to be a pattern. Nevertheless, in passing laws that take away the state's Eleventh Amendment immunity, you must have a pattern. That one is a rather serious block to the way in which Congress exercises power under Section 5.

CONCLUSION

So this year, there are four more federal laws under challenge this year on federalism grounds. However, I am not going to predict their outcome, as I do not want to eat my words next year. So, thank you very much.

¹⁶⁶ *Id.* at 2207.

¹⁶⁷ *Id.* at 2205.

APPENDIX I

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THE NEW FEDERALISM

A Report of the Committee on Federal Legislation
Association of the Bar of the City of New York

I. INTRODUCTION

Since the 1994-95 Supreme Court Term, the Court has held twenty separate federal laws unconstitutional. This rate is unprecedented in our history. The Supreme Court has nullified a total of 150 acts of Congress on constitutional grounds since *Marbury v. Madison*, 1 Cranch 137 (1803), an average of slightly less than one act per year. The recent trend of striking down an average of four statutes each year is exceptional and deserves the attention of the legal profession and other branches of government.

In annulling these federal laws, the Court has applied new standards for examining legislation passed by Congress. While it is not unusual for the Court to hold that a particular law violates the First Amendment or the equal protection or separation of powers doctrines, it was previously quite rare for the Court to hold that Congress exceeded its powers under the Commerce Clause, as the Court did in *United States v. Lopez*, 514 U.S. 549 (1995). Indeed, before *Lopez*, the Court had not struck down a federal law on that basis since 1936. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

In the Term after *Lopez*, 1995-96, the Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) that the Commerce Clause did not give Congress the power to override the State's Eleventh Amendment immunity. Congress, the Court said, could only overcome the Eleventh Amendment immunity of the States by exercising its power under the Fourteenth Amendment and only by expressing an unequivocal intent to do so.

More recently, the Court greatly expanded the Tenth Amendment in *Printz v. United States*, 117 S.Ct. 2365 (1997). In *Printz*, the

Court struck down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement officials to perform background checks on handgun purchasers for an interim period before a federal computer system could be established. The Court held that the federal government may not enlist state officials to carry out federal policies. *Printz* calls into question many federal laws that impose minimum burdens on state officials to supply information to, or cooperate with, the federal government.

After *Printz*, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that Congress could not, by exercising its powers under Section 5 of the 14th Amendment, expand individual rights beyond the limits established by the Supreme Court in interpreting that Amendment. That decision goes against a long line of decisions by the Court that had interpreted Section 5 as the equivalent of the "necessary and proper clause" in Article 1, Section 8. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966):

By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.

In its most recent Term, 1998-99, the Court expanded the federalist rulings noted above still further. In *Alden v. Maine*, 119 S.Ct. 2240 (1999), the Court held that those provisions of the Fair Labor Standards Act that expanded the protection of that law to state employees, 29 U.S.C. §216(b), and that required the States to pay overtime to their employees, could not be enforced in either state or federal court. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999), the Court struck down the Trademark Remedy Clarification Act, 15 U.S.C. §1122, which extended the protections of the federal Lanham Act to the States, holding that the Eleventh Amendment prohibited any such suit in federal court. And in the companion case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999) the Court came to a similar conclusion which respect to the Patent Remedy Act, 35 U.S.C. §271(h) and 296(a), which made the States amenable to suits for patent infringement in federal court.

These decisions have created considerable concern that the Court has imposed impractical and inappropriate limitations on the power

of Congress to legislate in the national interest. The theme of all of the decisions is a new view of federalism in which the power of the federal government vis-a-vis the States is constitutionally limited to a degree unprecedented in modern times. The Court explained the principle in *Printz*:

It is incontestible that the Constitution established a system of "dual sovereignty." . . . Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

117 S.Ct. at 2376-77.

The lower federal courts have recognized this trend, and some have stretched and expanded the concept of states' rights to an unprecedented degree. The discussion in some recent cases is reminiscent of the early debates between the Federalists and Anti-Federalists over ratification of the Constitution. The Fourth Circuit began its recent opinion invalidating the Violence against Women Act — a law protecting women from violence, sponsored in part by Senators Hatch and Dole and passed by large majorities in both Houses of Congress in 1994 — with the following exhortation:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). These simple truths of power bestowed and power withheld under

the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

Brzonkala v. Virginia, 169 F.3d 820, 825-26 (4th Cir. 1999)(en banc).

Similarly, lower federal courts have applied the new federalism to strike down numerous federal statutes, whose validity had never been questioned before. Besides the Violence Against Women Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Drivers Privacy Protection Act were held invalid as applied to the States. Justice Stevens, in his dissent in *Florida Prepaid*, identified a number of other laws that were vulnerable, based on the reasoning in that case -- including the Family and Medical Leave Act and the Individuals with Disabilities Education Act. See 119 S.Ct.at 2219 fn 18. (Stevens, J. dissenting).

The Committee on Federal Legislation is greatly concerned that the New Federalism developed by the Supreme Court and expanded by the lower federal courts is both inappropriate and dangerous.

First, the formalistic rules established by the Supreme Court are anti-majoritarian in the extreme. The decisions discussed in detail below make it more difficult for the national Congress -- surely expressing the desires and wishes of "We the People" -- to address problems of national dimension on a national basis. The New Federalism decisions focus primarily on those provisions of the Constitution intended to preserve the theoretical separation of the States in the constitutional scheme and protect them from encroachment by the central federal government. These concerns had some force at the founding of the republic, when a strong central government was viewed as a danger to liberty. We believe that the Court's resurrection of these doctrines at the threshold of the 21st Century is anachronistic at best.

Second, the States do not need the assistance of the United States Supreme Court to protect their independence. The Court's fear that the States' separateness will be overwhelmed or undermined by federal legislation and that they will become mere provinces in the European model subject to direct central control is unrealistic in the extreme. The Constitution affords the states ample power to protect their separateness in a number of ways: the Senate consists of two

senators from each state regardless of population. The Electoral College guarantees that any candidate for President must deal with the political power of each State separately. The States establish both the qualifications of voters and the electoral lines of legislative districts for the House of Representatives. We disagree with the view that the States need further protection from the United States Supreme Court, applying the vague phrases of the Tenth Amendment or some general idea of proper "structure" between the states and the federal government.

We believe that it is very undesirable to impose dramatic new restrictions on Congress' power to legislate in the national interest. The New Federalism adds to the already difficult process of marshalling political and legislative support for initiatives that must occur on a national level. We reject the notion that Congress, which represents the concerns of the entire nation, cannot ask for State cooperation on national policies, such as protecting the environment, and cannot make the States amenable to protective or anti-discriminatory legislation in dealing with its own employees. We are not dealing with theoretical problems of an Eighteenth Century rural society where the greatest danger to freedom seemed to be a national government with a standing army. We should not interpret the Constitution as if that were the chief threat facing our government today.

This report will examine each of the relevant recent Supreme Court decisions and suggest ways in which Congress, in passing future legislation, may satisfy the Supreme Court's concerns about federalism. We believe that Congress should make its purpose clear in passing protective federal legislation affecting state employees or requesting state aid in carrying out federal policies. In addition, in exercising its power of the purse, it may condition the grant of federal funds to the States upon their compliance with federal policies designed to resolve national problems on a national basis.

II. COMMERCE CLAUSE POWERS AFTER *LOPEZ*

Lopez appeared, initially, to impose the most severe restrictions on Congress. In practice, however, the lower federal courts have generally not expanded the ruling, which appears to present serious challenges to few federal laws, with one notable exception from the Fourth Circuit. Congress itself easily corrected the defect the Court identified in *Lopez*. The Court gave Congress considerable leeway in relying on the Commerce Clause, and the case no longer seems a serious barrier to legislation.

A. The holding in *Lopez*.

The Supreme Court in *Lopez* invalidated the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows ... is a school zone," 18 U.S.C. § 922(q)(2)(A). The Court held in a five-to-four decision that the law was explicitly based upon Congress' power under the Commerce Clause. The Court returned to what it called "first principles" of our Constitutional scheme, under which the police power of the States was virtually unlimited (unless specifically prohibited by some Constitutional limitation) while the powers of the federal government "are few and defined."

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."

Although the Court acknowledged that its modern precedents had significantly expanded Congress' power under the Commerce Clause to permit it to deal with national problems, there remained limitations on that power:

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin*

Steel, the Court warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.” 301 U.S., at 37, 57 S.Ct., at 624.

514 U.S. at 556-57.

To support a Congressional enactment under the clause, one of three conditions had to be met. The Court explained:

First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.

514 U.S. at 558-59.

Congress has broad power to regulate the “channels of interstate commerce,” (*e.g.*, railroads, wire communications, the mail) and to “protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” *e.g.*, guns or drugs that have moved in interstate commerce. But with respect to the last category, where an interstate facility is not involved and no “person or thing” has moved in interstate commerce, three requirements must be met: (1) the activity that is regulated must involve or affect commerce in the strictest sense, that is, “economic enterprise” or activity; (2) the activity regulated by the federal law must “substantially affect” interstate commerce; (3) the Court will not simply accept Congress’ say-so that the required effect exists.

We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no

such substantial effect was visible to the naked eye, they are lacking here.

514 U.S. at 562-63.

The Court rejected the government's argument that crime has an affect on interstate commerce and that guns in school zones will ultimately impact on the nation's economic activities, noting:

Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564.

The Court thereby redefined federalism, finding the general power to legislate for the public good should remain in the hands of the States, and that the Commerce Clause does not empower Congress to legislate in every area of national life.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.

514 U.S. at 567-68.

B. Lower Court interpretation of *Lopez*.

The decision in *Lopez* precipitated challenges against dozens of federal laws. The constitutionality of the Violence against Women Act (VAWA) (42 U.S.C. § 13981 et seq.) under *Lopez* has been debated in many cases, see, e.g., *United States v. Page*, 136 F.3d

481 (6th Cir. 1998) and *United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998). The Fourth Circuit, however, is the only circuit to apply the reasoning of *Lopez* to invalidate the VAWA. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999)(en banc)(holding that criminal violence based on gender did not involve commercial activity and that ultimate impact of violence against women on the movement of goods and services across state lines did not create sufficient interstate nexus under *Lopez*). The validity of the Child Support Recovery Act (18 U.S.C. §228) was upheld in *United States v. Williams*, 121 F.3d 615 (11th Cir. 1997) and *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

Federal courts have also had to deal with *Lopez* challenges to the Hobbs Act (18 U.S.C. §1951), see *United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999); the Freedom of Access to Clinics Act (FACE), see *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997) and *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); the federal drug trafficking statute (21 U.S.C. §841(a)(1)), see *United States v. Patterson*, 140 F.3d 767 (8th Cir. 1998); the federal child pornography statute (18 U.S.C. §2252), see *United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998) and *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998); the federal arson statute (18 U.S.C. §844(i)), see *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998); the firearm possession law, (18 U.S.C. §922(g)(1)), see *United States v. Crawford*, 130 F.3d 1321 (8th Cir. 1997); the domestic violence gun possession law, (18 U.S.C. §922(g)(8)), see *United States v. Cunningham*, 161 F.3d 1343 (11th Cir. 1998); contraband cigarette trafficking law, (18 U.S.C. §2341-46), see *United States v. Abdullah*, 162 F.3d 897 (6th Cir. 1998); the federal car-jacking law (18 U.S.C. § 2119) and sentencing factors under the law, see *United States v. Rivera-Figueroa*, 149 F.3d 1 (1st Cir. 1998); *United States v. Cobb*, 144 F.3d 319 (4th Cir. 1998) and *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), *appeal after remand*, 116 F.3d 1487 (9th Cir. 1997).

The lower courts have had no difficulty in concluding that even without a specifically articulated interstate nexus, laws against arson, the possession of a machine gun, devices of mass destruction or possession of explosives has a "substantial effect" on interstate commerce. See generally *United States v. Latouf*, 132 F.3d 320 (6th Cir. 1997)(arson statute), *United States v. Franklyn*, 157 F.3d 90

(2d Cir. 1998)(machine gun possession), *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998)(possession of weapons of mass destruction), and *United States v. Dascenzo*, 152 F.3d 1300 (11th Cir. 1998)(possession of explosives).

Rarely has a lower federal court upheld a challenge under *Lopez* to a federal law. However, the Fourth Circuit held that regulations issued under the Clean Water Act, which extended federal legal protection to certain wetlands, exceeded Congressional power under the Commerce Clause, see *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). It has also recently held that the VAWA was unconstitutional since there was no showing that violence against women had a substantial effect on commercial activity between the states. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999)(en banc). Prompt review of that decision in the Supreme Court is being sought by the government.

In addition, one district court has held that the Child Support Recovery Act (18 U.S.C. §228), criminalizing a parent's failure to make child support payments when the parent and child live in different states, was unconstitutional, see *United States v. Schroeder*, 894 F.Supp 360 (D. Ariz. 1995), but that decision was reversed on appeal, *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

The overwhelming number of cases treat the limitations established by *Lopez* as a minor problem, easily correctable through the devices mentioned below. So long as Congress relies upon regulating the "channels" of interstate commerce or "persons or things" moving in interstate commerce as the basis for legislation, *Lopez* should not pose an impediment.

C. Congressional Response After *Lopez*.

Shortly after the decision in *Lopez*, Congress amended the Gun Free School Zones Act to correct the defect noted by the Supreme Court. In P.L. 104-294, Congress added the underlined twelve words to the law to create the missing interstate nexus: "It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. §922(q)(2)(A). Since the new law

specifically relies for federal jurisdiction upon a “thing” (the gun) that moved in interstate commerce, the deficiency noted in *Lopez* was corrected.

Thus, so long as Congress relies on the first two bases for its commerce clause legislation — regulating a “channel” of interstate commerce or regulating or protecting a “person or thing” that moved in interstate commerce, *Lopez* is not a problem.

Even if there is no explicit interstate nexus, Congress can make specific legislative fact-findings to demonstrate the “substantial effect” on economic activity required for the third prong of *Lopez*. In the future, the case should not create a serious bar to the exercise of Congressional power under the Commerce Clause.

III. STATE IMMUNITY FROM FEDERAL SUIT UNDER THE ELEVENTH AMENDMENT.

The most serious obstacle to the exercise of Congressional power is *Seminole Tribe*. The Supreme Court expanded the rationale of that decision in three cases decided in the 1998-99 Term, mentioned above, *Alden*, *Florida Prepaid*, and *College Savings Bank*. Lower federal courts found that Congress lacked the power after *Seminole Tribe* to expand federal court jurisdiction over the States in many separate instances, involving such important federal laws as the Age Discrimination in Employment Act and the Americans with Disabilities Act. As noted above, in his dissent in *Florida Prepaid*, Justice Stevens identified six separate federal laws that were also susceptible based on *Seminole Tribe*.

A. *Seminole Tribe*, *Alden* and *Florida Prepaid*.

The Supreme Court held in *Seminole Tribe* that Congress could not rely upon its commerce clause power to overcome a State’s Eleventh Amendment immunity, even if Congress made its intent and purpose unequivocally clear. In a five-to-four decision (involving the same majority as in *Lopez*), the Court struck down a provision of the Indian Gaming Regulatory Act (IGRA) that permitted a federal court action against a state to compel state officials to negotiate with an Indian tribe with respect to a gambling compact. The IGRA allows an Indian tribe to conduct certain gaming activities only in

conformance with a valid compact between the tribe and the State in which the gaming activities are located. 25 U.S.C. § 2710(d)(1)(C). Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710(d)(3)(A), and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710(d)(7). Florida refused to negotiate with the Seminole Tribe, and suit was then brought by the Seminoles in federal court to compel the State to engage in the required negotiations.

Striking down that provision of the IGRA that permitted a federal court action to compel the state to negotiate, the Court noted that there were two requirements for Congress to abrogate a State's Eleventh Amendment immunity: First, Congress must unequivocally express its intent to do so and second, it must act "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

In this instance, through the numerous references to the "State" in § 2710(d)(7)(B)'s text, Congress provided an "unmistakably clear" statement of its intent to abrogate.

With respect to the second condition, the Court had to decide whether the law was passed pursuant to a constitutional provision granting Congress such power. The Court had previously held that Congress could rely upon its power under Section 5 of the Fourteenth Amendment to overrule a State's Eleventh Amendment immunity, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In a later split decision, the Court held that Congress could also rely upon the Commerce Clause to overrule a State's Eleventh Amendment immunity, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The *Union Gas* plurality found that Congress' power to abrogate came from the States' cession of their sovereignty when they gave Congress plenary power to regulate commerce, and thus the States had "consented" to the waiver of their 11th Amendment immunity.

Seminole Tribe overruled *Union Gas* and held that Congress could not rely upon the Commerce Clause to make States amenable to federal court jurisdiction.

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of

Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

517 U.S. at 72-73.

The Supreme Court read even more federalism dictates into the Eleventh Amendment in *Alden v. Maine*. That case was originally brought by certain probation officers from the State of Maine, who sued for overtime pay under the Fair Labor Standards Act. After the *Seminole Tribe* decision, the First Circuit dismissed the case, holding that since the FLSA was passed pursuant to Congress' Commerce Clause power, the State could now raise an Eleventh Amendment defense. See *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997).

The plaintiff in *Mills* then moved his case for overtime pay to state court, relying on a long line of Supreme Court cases holding that the Eleventh Amendment was not a defense to a suit against a State brought in state court: "... the Eleventh Amendment does not apply in state courts," *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 63?64 (1989). Nevertheless, the Maine Supreme Court held that Congress could not require the states to entertain federal causes of action that could not be brought in federal court because of the Eleventh Amendment, see *Alden v. Maine*, 715 A.2d 172 (Me. 1998), *affirmed*, 119 S.Ct. 2240 (1999).

The Supreme Court, in yet another five-to-four decision written by Justice Kennedy, held that even though the Eleventh Amendment by its own terms prohibited suits against the States in *federal court*, the Amendment embodies a broader sovereign immunity doctrine which protects the States from federal suits in their own courts.

We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is

limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

119 S.Ct. at 2246.

Examining the history of the Court's Eleventh Amendment immunity cases, Justice Kennedy noted:

These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.

Id. at 2254.

The Court examined in great detail the historical background to State sovereign immunity, Congressional practice and court decisions interpreting the concept. Based on this broader interpretation of the meaning of the Eleventh Amendment, the Court held that Congress lacked the power to abrogate State sovereign immunity in its own courts.

In some ways, of course, a congressional power to authorize private suits against non consenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. . . . A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. . . Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

The Court concluded:

In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from

private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

In the two other five-to-four Eleventh Amendment decisions decided in the 1998-99 Term, *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board*, 119 S.Ct. 2219 (1999) and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999), the Court struck down the Trademark Remedy Clarification Act, 15 U.S.C. §1122, and the Patent Remedy Act, 35 U.S.C. §271(h) and 296(a), which made the States amenable to suit for trademark and patent infringement in federal court.

In the trademark case, the Court held that the State of Florida had not impliedly or constructively waived its Eleventh Amendment immunity by engaging in commercial activity that fell within the Trademark Remedy Act. The Court overruled the *Parden* doctrine (*Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)), under which a State may constructively waive its Eleventh Amendment immunity by engaging in activity that Congress warned could lead to a federal suit. *Parden* had held:

By enacting the [FELA] ... Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U. S., at 192.

In *Florida Prepaid*, the Court rejected the principle of “constructive waiver”:

We think that the constructive-waiver experiment of *Parden* was ill-conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, *Parden* broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, *Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law. Today, we

drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.

In the companion patent case, the Court examined the question whether Congress had properly exercised its power under section 5 of the Fourteenth Amendment in passing the Patent Remedy Act. That is, was Congress enforcing the due process clause by making the States amenable to suit in federal court for patent infringement? The Court concluded that a patent right was a property right. But it held that Congress exceeded its powers under the Fourteenth Amendment by passing the law in question, since it was not clearly established that patent infringement by the States was a pervasive problem that had to be solved by Congressional exercise of its Section 5 power. Relying on the narrowing interpretation of Congressional power under section 5 as described in *City of Boerne*, the Court held that Congress had to demonstrate that the law it passed could be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for victims of State actions.

The Court explained:

In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases, *see City of Boerne, supra*, at 525-27, Congress came up with little evidence of infringing conduct on the part of the States. The House Report acknowledged that "many states comply with patent law" and could provide only two examples of patent infringement suits against the States. See H. R. Rep., at 38. The Federal Circuit in its opinion identified only eight patent infringement suits prosecuted against the States in the 110 years between 1880 and 1990.

Even if a deprivation of property rights had occurred, the States did provide a remedy through their own courts.

Thus, under the plain terms of the Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to

injured patent owners for its infringement of their patent could a deprivation of property without due process result. Since a remedy (such as an eminent domain suit in state court) was possible, no deprivation could be shown.

B. Lower Court Expansion of Eleventh Amendment.

After 1989, Congress reacted to the *Union Gas* decision by passing a series of laws making the States amenable to federal court jurisdiction. As noted above, Congress amended the Copyright, Patent and Trademark Laws, specifically granting jurisdiction to federal courts to hear cases against the States involving infringement of rights in those areas. See e.g., 17 U.S.C. §511, 35 U.S.C. §271(h) and §296(a), and 15 U.S.C. §1125(a)(1) and (2). In addition, Congress had expanded federal anti-discrimination laws, particularly in the employment area, and made the States proper defendants in such suits, in view of the States' significant role as a major employer.¹

Soon after *Seminole Tribe*, the lower federal courts began to examine the question of whether the States may be sued in federal court for violating various anti-discrimination laws passed by Congress. As noted above, the Court had held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) that Congress had properly exercised its powers under Section 5 of the Fourteenth Amendment in making the states amenable to suit under Title VII for discrimination based on race, gender or national origin.

Lower federal courts applied the same reasoning to uphold the Equal Pay Act (29 U.S.C. §206) see *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998). For the most part, federal courts have upheld the validity of almost all of the important anti-discrimination laws such as Title VI, the ADEA and the ADA as applied to the States. See *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998)(ADEA); *Magneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998)(ADEA); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998)(ADEA);

¹ According to Justice Souter's dissent in *Alden*, the States collectively employed 4,732,608 workers in 1997, see fn. 40, approximately 3.5% of the total civilian work force in the United States.

Debs v. Northeastern Illinois University, 153 F.3d 390 (7th Cir. 1998)(ADEA); and *Goshtasby v. Board of Trustees of the University of Illinois*, 123 F.3d 427 (7th Cir. 1997)(upholding validity of ADEA as applied to the States); *Autio v. AFSCME*, 140 F.3d 802 (8th Cir. 1998)(ADA as applied to states was valid exercise of Congressional power under Section of 14th Amendment); *Alsbrook v. City of Maumelle*, 156 F.3d 825 (8th Cir. 1998)(ADA); *Lesage v. State of Texas*, 158 F.3d 213 (5th Cir. 1998)(Congress had authority to abrogate States' Eleventh Amendment immunity under Title VI); *Anderson v. State University of New York*, 169 F.3d 117 (2d Cir. 1999)(Congress had authority to overrule state's 11th Amendment immunity in Equal Pay Act); *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998)(Equal Pay Act).

But some lower federal courts have come to opposite conclusions. Thus the Eighth Circuit and the Eleventh Circuit have held that the ADEA was not properly passed pursuant to Section 5 of the Fourteenth Amendment, and States may assert their Eleventh Amendment immunity to private suits brought against the states to enforce that law. See *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822 (8th Cir. 1998) and *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1997) *cert. granted*, 119 S.Ct. (January 25, 1999). The Americans with Disabilities Act was recently declared invalid insofar as it authorized suits against the states, see *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999)(holding that ADA regulations prohibiting states from charging handicapped people for special parking places were unconstitutional) and *Kilcullen v. New York State Department of Transportation*, 33 F.Supp.2d 133 (N.D. N.Y. 1999)(ADA requirement of "reasonable accommodation" placed upon States and permitting suits against States, invalid under Eleventh Amendment).

The 1998-99 cases read even more force into the Eleventh Amendment, thus encouraging the States to raise even more objections to federal law.

C. Legislative Abrogation of Eleventh Amendment Immunity

As noted, Congress may abrogate the States' Eleventh Amendment immunity if it makes its intention to do so clear, and if

it acts pursuant to a valid exercise of Constitutional power, such as section 5 of the Fourteenth Amendment. Thus, for example, to the extent that Congress' intention to overrule a State's Eleventh Amendment immunity was held to be unclear under the ADEA or the ADA, Congress could rectify the problem by doing what it tried to do in the Patent Remedy Act — specifically naming the States as proper defendants under these Acts.

The Eighth Circuit held in *Humenansky* that Congress did not make its intent to overrule a state's Eleventh Amendment immunity "unmistakably clear," as required by *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989). Although the 1974 amendments to the ADEA specifically broadened the definition of an "employer" to include a "State or a political subdivision of a State," see 29 U.S.C. §630(b), the Eighth Circuit found that Congress' failure to specifically mention its intent to overrule a State's Eleventh Amendment immunity or to amend the jurisdictional section of the law (specifically allowing suits in federal court) did not satisfy the strict requirements of *Seminole Tribe*, 517 U.S. at 54, n. 6. See 152 F.3d at 825.

In the Eleventh Circuit decision in *Kimel*, also invalidating the ADEA's application to the States, one judge (Edmondson) came to the same conclusion. (A concurring Judge found that age was not a protected status under the equal protection clause of the Fourteenth Amendment and thus the law was invalid on that ground since Congress could enforce the equal protection provisions of Section 1 only with respect to classes found subject to heightened scrutiny. This was also an alternative holding of the Eighth Circuit in *Humenansky*.)

The solution is for Congress to specifically express its intention not only to make States amenable to suit, but also to express its desire to overrule the States' Eleventh Amendment immunity. For example, 42 U.S.C. §2000d-7 (a)(1) reads as follows: "A State shall not be immune under the Eleventh Amendment of the Constitution . . . from suit in Federal court for a violation of Section 504 of the Rehabilitation Act, . . . title IX of the Education Amendments . . . Title VI of the Civil Rights Act of 1964 or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." This type of provision

would certainly seem to satisfy the "unmistakably clear" requirement mentioned above.

In addition, if Congress is relying upon Section 5 of the Fourteenth Amendment as the basis for overruling a States' Eleventh Amendment immunity, it should say so. The Fifth Circuit panel decision in *Chavez* holding that the Copyright Remedy Act was unconstitutional relied in part on the fact that Congress did not explicitly cite Section 5 of the 14th Amendment when it passed that law: "The Copyright Remedy Clarification Act does not expressly rely on section 5 of the Fourteenth Amendment . . . It may be too much of a leap to infer Congress' reliance on the Fourteenth Amendment in the copyright amendments when it did not expressly state its intent to legislate on that basis." 157 F.3d at 288, n. 8.

Once again, the solution is to cite specifically Section 5 if Congress wishes to make the States amenable to suit in federal court. As noted below, *City of Boerne* also places an additional burden on Congress to show that its reliance on Section 5 was remedial and proportionate. In addition, Congress is now required to make findings that the State action it is remedying involved a "pattern" of unconstitutional action. See *Florida Prepaid*: "In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. . . . Congress came up with little evidence of infringing conduct on the part of the States."

Another possible solution, as previously suggested by the Civil Rights Committee of this Association, was for Congress to condition federal financial assistance upon a State's waiver of its Eleventh Amendment immunity. Under the Supreme Court decision in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)(a seven-to-two decision written by Chief Justice Rehnquist, in which Justice Scalia joined), Congress may impose conditions on the States pursuant to its exercise of its Spending Power. Thus Congress could require the States to surrender their immunity under the Eleventh Amendment in order to obtain highway funds, crime control expenditures, medicaid or medicare funds, education funds or even funds under the Social Security Act. If the States wish to obtain federal funds under various social welfare provisions, they must accede to the anti-discrimination laws mentioned above, such as the ADEA and

ADA, and waive their immunity for suit in federal court. See discussion below at pp. 25-26.

IV. THE *PRINTZ* DECISION AND TENTH AMENDMENT IMMUNITY

In yet another five-to-four decision involving the same voting majority as in *Lopez* and *Seminole Tribe*, the Court in *Printz* held that the federal government may not enlist state officials to carry out federal policies. Thus as minor a burden as requiring local sheriffs to conduct background checks on potential purchasers of handguns (until a national computer system could be established) violated States' rights under the Tenth Amendment.²

A. The *Printz* Decision

The 1993 amendments to the federal Gun Control Act (the Brady Bill) required the "chief law enforcement officer" in local jurisdictions to make background checks on potential purchaser of handguns, to insure that they did not fall within certain prohibited categories, such as convicted felons, aliens, dishonorably discharged veterans or persons adjudicated as mentally defective or committed to mental institutions. The Act required the Attorney General to establish a national instant background check system by November 30, 1998, at which time the state officers' obligation to perform background checks would end.

The interim background check requirement was challenged by various sheriffs, who claimed that the Tenth Amendment forbade Congress from enlisting them to carry out the federal policy. The Supreme Court agreed.

In the majority opinion, Justice Scalia examined various early federal laws which generally placed certain reporting requirements on state officials to supply information to the federal government and distinguished them from the requirements of the Brady Bill.

² The Association had filed a brief as *Amicus curiae* in *Printz* urging that the background check provision be upheld. See "The Brady Bill and the Tenth Amendment," 52 *The Record* (March, 1997).

He then examined the “structure” of the Constitution, which unequivocally showed that:

using the States as the instruments of federal governance was both ineffectual and provocative of federal/state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and “[t]he practicality of making laws, with coercive sanctions, for the States as political bodies” having been, in Madison’s words, “exploded on all hands,” 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people ?? who were, in Hamilton’s words, “the only proper objects of government,” The Federalist No. 15, at 109.

117 S.Ct. at 2376.

According to Justice Scalia’s analysis, “The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.” *Id.* This structure, the Court reasoned, was crucial to protect the people’s freedom:

This separation of the two spheres is one of the Constitution’s structural protections of liberty. “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

Id. citing *Gregory*, 111 S.Ct.; at 2400.

Finally, the Court found that the requirements of the Brady Bill violated the “political accountability” requirements of *New York v. United States*, 505 U.S. 144 (1992):

The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of New York because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take

credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. 117 S.Ct. at 2382.

B. Application of the *Printz* Decision

Other courts have applied *Printz* to cast doubt on the constitutionality of the Fair Labor Standards Act as it applies to state and local government employees. See *West v. Anne Arundel County Maryland*, 137 F.3d 752 (4th Cir. 1998).

The Fourth Circuit held that the Driver’s Privacy Protection Act (18 U.S.C. §2721-2725), which broadly prohibited States from selling motor vehicle records for commercial purposes, was unconstitutional under *Printz*, see *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, 119 S.Ct. since Congress was requiring state officials to carry out a federal policy.

The First Circuit had to deal with the question of whether, after *Printz*, an injunction would be issued under the Endangered Species Act against state officials issuing permits for lobster pot fishing. See *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). Although the Court ultimately upheld the injunction against state officials issuing gillnet permits and lobster pot fishing permits, the Court acknowledged that *Printz* had raised serious barriers to federal environmental requirements against state officials. The Ninth Circuit found the Forest Resources Conservation and Shortage Relief Act (16 U.S.C. § 620-620j) invalid, *Board of National Resources v. Brown*, 993 F.2d 937, 947 (9th Cir 1993), because of the burden placed on state officials to carry out a federal environmental policy.

Many other requirements of the federal environmental laws, which require state coordination and reporting, may be questionable after *Printz*. Among the questionable laws are the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2645, 2647, requiring governors to develop management plans for dealing with asbestos in school buildings, and the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §11001, requiring states to create emergency response commissions. See generally Jonathan Adler, “The Green Aspects of *Printz*: The Revival of Federalism and Its Implications for Environmental Law,” 6 Geo. MASON L. REV. 573 (1998). See also Vicki C. Jackson,

"Federalism and the Uses and Limits of Law," 111 HARV. L. REV. 2181, 2205 (1998).

C. Legislative Solution to *Printz*

The *Printz* restriction on Congressional power under the Tenth Amendment cannot be evaded simply by Congressional expression of its intent to overturn a State's immunity. *Printz* and *New York* both provide that a State cannot involuntarily be required to carry out any federal policy.

However, in the same way that Section 5 of the Fourteenth Amendment can be utilized to overrule States' immunity under the Eleventh Amendment, we think it can also be relied upon to serve as a basis for federal action to prevail against a Tenth Amendment challenge. See Evan H. Caminker, "*Printz*, State Sovereignty, and the Limits of Federalism," 1997 Sup. Ct. Rev. 199, 238 (1997). Thus so long a Congress has made the proper legislative findings and has expressed its clear intent to rely on Section 5, the analysis is the same as with the Eleventh Amendment above.

For example, the States can be obliged to follow the requirements of the Voting Rights Act and carry out federal policy to insure the elimination of barriers to voting. Since the Voting Rights Law was clearly based on the Fourteenth Amendment, *Printz* does not bar its enforcement.

Another solution to the problems caused by the Court's reliance on the Tenth Amendment doctrine may lie in the Spending Power. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that Congress may condition receipt of federal funds upon state compliance with federal requirements if three conditions are met: (1) the condition must relate "to the federal interest in particular national projects or programs," 483 U.S. at 210; (2) there is no other constitutional prohibition that independently bars the conditional grant of funds (such as the "unconstitutional condition" doctrine), 483 U.S. at 207; (3) the financial inducement must not be "coercive," 483 U.S. at 211.

States receive a wide variety of federal funds for highway construction, crime control, medicaid, medicare, education, social security and other programs. Congress could condition the States' receipt of such funds upon the States' agreement to carry out certain

federal policies in the areas for which funds are made available to the States, such as the Brady gun control act (crime control funds) or the Driver's Privacy Protection Act (highway funds), the subject of cases described above. Surely if Congress could require the states to raise the drinking age to 21 or lose millions of dollars in highway funds, Congress could also require the States to protect the privacy of motor vehicle records or lose such funds.

Congressional conditional grant of funds in these areas would appear to meet the three conditions noted above.³

V. CONGRESSIONAL POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Another important federalism decision was *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down a very popular Congressional enactment, the Religious Freedom Restoration Act. In *Morgan v. Katzenbach*, 384 U.S. 641, 650 (1966) the Court had held that Congress could, through specific legislation, enlarge the scope of Fourteenth Amendment rights as previously defined by the Supreme Court. Now the Supreme Court in *City of Boerne* has cast doubt on that principle.

A. The Decision in *City of Boerne*.

In *City of Boerne*, the Court analyzed the extent of Congressional power under Section 5 of the Fourteenth Amendment. The Court examined Congress' power to alter the extent of protection of religious rights through the Religious Freedom Restoration Act. In a previous decision, the Court had held in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) that any law of general applicability that impacted on free exercise rights would be measured under a more lenient standard than a "compelling state interest" test.

Congress was dissatisfied with such a moderate and easily met test. It quickly passed the RFRA, which required that whenever

³ This is the conclusion reached by most commentators on the issue. See Jesse H. Choper, "On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term," 19 CARDOZO L. REV. 2259, 2271 (1998).

government action substantially burdens religious free exercise rights, the government action can be upheld only by the demonstration of a compelling state interest. And this test would have to be applied to laws or actions that directly focused on religious rights or to laws of general applicability that impacted substantially on such rights. It was that law, explicitly passed pursuant to Congressional power under Section 5, which *City of Boerne* examined.

In previous cases, the Court had held that Section 5 must be interpreted as broadly as the Necessary and Proper clause.

By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.

Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

The Court had noted that Congress may deem it necessary to add specific statutory guarantees to the broad language of the rights contained in Section 1 of the Amendment:

[i]t is the power of Congress which has been enlarged [by §5]. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. *Id.* at 648.

To eliminate any lingering doubt over the true intent of Section 5, Justice Brennan, writing for the Court and citing the legislative history of the Amendment, reasoned in *Morgan*:

[e]arlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment . . . The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. *Id.*, fn. 9.

But as broad as this power may be, Congress cannot create new constitutional rights in the guise of enforcing the Fourteenth Amendment. The Court explained in *Boerne*:

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach*, *supra*, at 326, 86 S.Ct., at 817-18. The design of the Amendment and the text of § 5 are

inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

117 S.Ct. 2164.

The Court concluded that any remedy that Congress establishes to enforce the substantive provisions of the Fourteenth Amendment must be "proportionate" to the evil sought to be corrected:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment. *Id.*

In *Florida Prepaid*, the Court added another prerequisite to exercise of Congress' power under Section 5. Chief Justice Rehnquist noted that:

Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any §5 legislation 'must be judged with reference to the historical experience ... it reflects.'" With respect to the problem of state infringement of patents, the Court noted that: "In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.

B. Effect of *City of Boerne* and *Florida Prepaid*

The key issue under *City of Boerne* is whether Congress is simply providing a proportionate remedy to the violation of a Constitutional right already recognized by the Supreme Court or whether Congress is attempting to "decree the substance of the Fourteenth Amendment's restrictions on the States." In addition, there must be a showing that Congress was attempting to deal with a "pattern" of unconstitutional action by the States, as required by *Florida Prepaid*.

The issue has arisen in a scattering of cases in the lower federal courts. The Fourth Circuit has rejected the purported exercise of Congressional power under Section 5 in two recent cases, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (holding that federal regulations under the ADA prohibiting states from charging for handicapped parking privileges were unconstitutional and not a proper exercise of Congressional power under Section 5) and *Brozankala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999) (holding that the Violence against Women Act was not validly enacted pursuant to Congress' Section 5 power).

In *Brown*, the Court found that the regulations under the ADA which barred the requirement of payment for handicapped parking was too much of an intrusion into the States' traditional power. The Court noted:

Nor do the safeguards of federalism wither in the face of an overzealous bureaucracy intent upon imposing its will on the states. Regulations that unjustifiably intrude "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *Boerne*, 117 S.Ct. at 2171, are invalid exercises of power. Just as the Eleventh Amendment does not leave states without a shield when they confront congressional acts, states are not rendered defenseless in their duels with government by bureaucracy. 166 F.3d at 704.

The Court noted:

Here, we hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a

constitutionally valid exercise of power, and the effort to abrogate must fail. *Id.* at 705.

Similarly, in the *Brzonkala* decision, the Court relied upon generalized notions of federalism, noting “‘the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.’” 169 F.3d at 851.

In both cases, the Fourth Circuit found that Congress’ power to legislate under Section 5 is disproportionate and a violation of the *Boerne* restriction if it violates the States’ traditional prerogatives and general authority “to regulate for the health and welfare of their citizens.”

Most other Circuits have rejected the Fourth Circuit’s approach. Thus the Second Circuit recently upheld the validity of the Equal Pay Act as a proper exercise of Congress’ Section 5 power.

Finally, the EPA’s provisions are not out of proportion to the harms that Congress intended to remedy and deter. . . . Since the EPA provides an employer with four affirmative defenses, including the ability to prove that the wage differential [is] based on any other factor other than sex, 29 U.S.C. § 206(d)(1)(iv), the EPA reaches only those wage disparities for which the employee’s sex provides the sole explanation. . . . Thus, the statute is remedial legislation reasonably tailored to remedy intentional gender-based wage discrimination and is sufficiently limited in scope to satisfy the City of Boerne test.

Anderson v. State University of New York, 169 F.3d 117, 121 (2d Cir. 1999).

C. Congressional Response to City of Boerne.

Congress has limited options to meet the requirements of *City of Boerne*. Once again, it can attempt to justify any remedial legislation by making a careful legislative record of the problem which the legislation is attempting to meet and why its legislation is “proportionate” to the problem. While Congressional findings are not conclusive on the federal courts, *see Lopez*, the normal deference that federal courts afford to Congressional conclusions on the need for legislation should go a long way to satisfying the rule.

VI. CONCLUSION

The States' concern about restrictions being placed on them by Congressional legislation can better be determined in the political arena, where the States have ample power to express and defend their positions, rather than by federal court decision. The New Federalism presents an unnecessary barrier to the already difficult process of enacting legislation on a national scale.

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[1] According to Justice Souter's dissent in *Alden*, the States collectively employed 4,732,608 workers in 1997, see fn. 40, approximately 3.5% of the total civilian work force in the United States.

[2] [Get citation of Civil Right Committee report]

[3] The Association had filed a brief as *Amicus curiae* in *Printz* urging that the background check provision be upheld. See "The Brady Bill and the Tenth Amendment," 52 *The Record* (March, 1997).

[4] This is the conclusion reached by most commentators on the issue. See Jesse H. Choper, "On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term," 19 *Cardozo L. Rev.* 2259, 2271 (1998).

