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Federalism, the Commerce Clause, and Equal Protection

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FEDERALISM, THE COMMERCE CLAUSE, AND EQUAL PROTECTION

Hon. Leon D. Lazer:

It is now my pleasure to introduce another constitutional authority whose opinions are held in high regard and who is certainly a first-class scholar, Professor Leon Friedman of Hofstra University. He is a lecturer at the Federal Judicial Center on Civil Rights, co-editor of the volume "Justices of the United States Supreme Court,"[1] and he is going to speak to us about a whole series of cases that do not fit easy categorization.

Professor Leon Friedman:

I did not think I would be hearing so many praises of Justice O'Connor, but I am going to be doing the same thing in another moment. This afternoon, I am going to talk about an important federalism case[2] and some Commerce Clause[3] cases,[4] all of which bear directly on the way in which state and local governments operate.

I would like to start out with a few batting averages, in terms of what the Supreme Court did last year. The Court found, particularly in the area of federalism, one federal law unconstitutional.[5] As I add up my running total, from *Marbury v. Madison*[6]

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1. LEON FRIEDMAN & FRED L. ISREAL, THE JUSTICES OF THE SUPREME COURT (1969).

2. New York v. United States, 112 S. Ct. 2408 (1992).

3. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides: "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." *Id.*

4. Kraft Gen. Foods v. Iowa Dep't of Revenue, 112 S. Ct. 2365 (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); Chemical Waste Management v. Hunt, 112 S. Ct. 2009 (1992); Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992); Wyoming v. Oklahoma, 112 S. Ct. 789 (1992).

5. New York v. United States, 112 S. Ct. at 2428-29.

6. 5 U.S. (1 Cranch) 137 (1803).

to today, the Court has found 129 federal laws unconstitutional.[7] Prior to the 1991-92 Term, the Court would often invoke the First Amendment[8] or the Fifth Amendment[9] in order to find laws unconstitutional.[10] It has been some time since the Court has found a federal law unconstitutional on Tenth Amendment[11] grounds.[12] However, that is indeed what the Court did during this Term.[13]

In addition, the Supreme Court found fifteen state laws unconstitutional.[14] Five state laws were found unconstitutional on

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7. CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION, S. Doc. No. 101-36, 101st Cong., 2d Sess. 239-42 (Supp. 1990).

8. U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

9. U.S. CONST. amend. V. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

10. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (federal restriction on political committee expenditures implicated Free Speech and Freedom of Association Clauses); Califano v. Westcott, 443 U.S. 76 (1979) (gender classification enumerated in Social Security Act violated Due Process Clause of Fifth Amendment).

11. U.S. CONST. amend. X. The Tenth Amendment provides: "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.*

12. National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

13. *See* New York v. United States, 112 S. Ct. 2408 (1992).

14. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992); Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992);

First Amendment grounds[15] and three state laws were struck down on preemption grounds.[16] The Court also found one state law unconstitutional on Fourteenth Amendment[17] grounds[18] and one state law unconstitutional on Fifth Amendment grounds.[19] Finally, in the cases I will discuss this afternoon, the Supreme Court held that five state laws violated the Commerce Clause.[20]

According to my scoreboard, from 1789 to 1992, the United States Supreme Court struck down as unconstitutional 2,112 local laws.[21] In other words, there is a sixteen-to-one ratio between the Supreme Court striking down federal laws as compared to state laws. This reminds me of Oliver Wendell Holmes' statement regarding *Marbury v. Madison* and *Martin v. Hunter's Lessee*.[22] He said: "I do not think the United States would come to an end

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Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992); Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992); Kraft Gen. Foods v. Iowa Dep't of Revenue, 112 S. Ct. 2365 (1992); Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); ; Chemical Waste Management v. Hunt, 112 S. Ct. 2009 (1992); Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992); Wyoming v. Oklahoma, 112 S. Ct. 789 (1992); Norman v. Reed, 112 S. Ct. 698 (1992); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501 (1991).

15. *Lee*, 112 S. Ct. at 2709; *R.A.V.*, 112 S. Ct. at 2538; *Forsyth*, 112 S. Ct. at 2395; *Norman*, 112 S. Ct. at 698; *Simon & Schuster*, 112 S. Ct. at 501.

16. *Cipollone*, 112 S. Ct. at 2608; *Gade*, 112 S. Ct. at 2374; *Morales*, 112 S. Ct. at 2031.

17. U.S. CONST. amend. XIV, § 1, cl. 2. The Due Process Clause states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

18. *Casey*, 112 S. Ct. at 2791.

19. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

20. Kraft Gen. Foods v. Iowa Dep't of Revenue, 112 S. Ct. 2365 (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); Chemical Waste Management v. Hunt, 112 S. Ct. 2009 (1992); Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992); Wyoming v. Oklahoma, 112 S. Ct. 789 (1992).

21. S. DOC. NO. 101-36, *supra* note 7, at 243-59.

22. 14 U.S. (1 Wheat) 304 (1816).

if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[23] This relates precisely to questions of uniformity of federal and state laws throughout the country.

I. FEDERALISM

Now let me turn to some specific cases because there were a couple of eyebrow-raisers during this Term. I think the most interesting case in the area of federalism, notably, state governmental control, is *New York v. United States*.[24] This case dealt with the Low-Level Radioactive Waste Policy Amendments of 1985.[25] At issue was the disposal of low-level radioactive material such as "luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants."[26] The federal government gave the states many opportunities to deal with the disposal of this material, but the states were not interested in dealing with it.[27] This was a classic case of "not in my backyard."[28] For instance, only three states operated low-level radioactive waste disposal sites: Nevada, Washington, and South Carolina.[29] Thereafter, Nevada and Washington closed

23. OLIVER WENDELL HOLMES, Speech at a Dinner of the Harvard Law School Ass'n of N.Y. (Feb. 15, 1913), *in* COLLECTED LEGAL PAPERS 295-96 (1920).

24. 112 S. Ct. 2408 (1992).

25. 42 U.S.C. § 2021 (1988 & Supp. II 1990).

26. New York v. United States, 112 S. Ct. at 2414.

27. *Id.* at 2414-15. Although there were available sites between 1969 and 1970 for the disposal of low-level waste, in the mid-1970s, many facilities suffered from "unstable waste forms and packaging, and faulty facility siting, design, and operations." Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437, 441 (1987).

28. Michael E. Burns, *Living the Past, Facing the Future, in* LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR 279, 293 (Michael E. Burns ed., 1988). "No one wants to live next door to a LLRW [low-level radioactive waste] disposal facility." *Id.*

29. New York v. United States, 112 S. Ct. at 2414.

down their sites.[30] In response to an anticipated influx of radioactive waste, South Carolina decreased the amount of radioactive waste it would accept by one-half.[31]

In December, 1979, The National Governors' Association (NGA) formed a task force to create a state solution to this problem.[32] In short, the NGA recommended that regional state compacts should be formed whereby one state among the compact would house the repository.[33] Relying on the NGA's recommendations, Congress, in 1980, passed the Low-Level Radioactive Waste Policy Act,[34] which authorized states to form regional compacts.[35] However, when only three of these compacts had been formed, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985.[36] This Act states in pertinent part: "If a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste . . . each State in which such waste is generated, . . . shall take title to the waste . . . ."[37] In my view, this amendment seems perfectly sensible; states may dispose of radioactive waste by enacting their own laws or by forming regional compacts, or states will be forced to take title to the waste.[38]

Seven years after this Act's enactment, forty-two states formed regional compacts.[39] Even New York was perfectly willing to comply with this Act until it met with local political pressure.[40] New York originally designated two counties upstate as appro-

30. *Id.* at 2415.
31. *Id.*
32. Berkovitz, *supra* note 27, at 443.
33. *Id.* at 444.
34. 42 U.S.C. § 2021 (1982) (amended 1985).
35. New York v. United States, 112 S. Ct. at 2415.
36. *Id.* The three compacts were formed with the South Carolina, Nevada, and Washington sites. *Id. See also* 42 U.S.C. § 2021 (1988).
37. 42 U.S.C. § 2021e(d)(C) (1988).
38. 42 U.S.C. § 2021 (1988).
39. New York v. United States, 112 S. Ct. at 2416.
40. *Id.* at 2416-17.

priate sites for low-level radioactive waste,[41] but residents of these counties opposed the state's selections.[42] Another case of "not in my backyard." At this point, confronted with the problem of having no radioactive disposal site, New York brought this lawsuit.[43]

The United States Supreme Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 infringed on the sovereign rights of the states, making it unconstitutional.[44] Justice O'Connor wrote, in my view, an extremely sophisticated opinion in which she discussed the complicated problems regarding federal and state relations.[45] Historically, the states had an enormous scope of operation and the federal government was simply supposed to pick up the pieces when the states could not do it themselves.[46] However, we no longer practice that system.[47] In the case at hand, petitioners agreed that Congress could have directly regulated waste disposal.[48] Rather, "Congress . . . impermissibly directed the States to regulate in this field."[49] As such, the states' choices, namely, the "take title" provision or another federal instruction, amounted to "two unconstitutionally coercive regulatory techniques . . . ."[50]

Justice O'Connor discussed two ways in which Congress could influence a state's policy choice.[51] Primarily, the federal government can persuade states to adopt federal policy by imposing

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41. *Id.* The five proposed sites were to be located in Allegany and Cortland Counties. *Id.*

42. *Id.* at 2417.

43. *Id.*

44. *Id.* at 2428.

45. *Id.* at 2417-24.

46. *See id.* at 2421. "Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly." *Id.*

47. *Id.* at 2423. "In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.*

48. *Id.* at 2419-20.

49. *Id.* at 2420.

50. *Id.* at 2428.

51. *Id.* at 2423-24.

conditions on the federal funding received by states.[52] This has been done in welfare,[53] Medicare[54] and Medicaid,[55] wherein the state machinery acts, using federal funds, to further the federal government's interests. In my view, states are perfectly happy to adhere to the conditions because the funding is provided by the federal government. Indeed, if the states failed to comply with this scheme, the federal government would tax them directly and then impose its own system by preempting state law.[56]

The second way in which the federal government can regulate matters within the state is to bypass the state machinery altogether.[57] Either states must adhere to federal policy or the state law will be preempted by federal regulation.[58] For instance, various state statutes disallowed double trucks more than fifty-five feet in length.[59] Thereafter, Congress imposed a law pro-

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52. *Id.* at 2423. *See also* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding Congress' requirement that South Dakota raise drinking age to twenty-one in order to receive federal highway funds).

53. *See* King v. Smith, 392 U.S. 309, 316 (1968) (The Aid to Families With Dependent Children Program [AFDC] is a voluntary program, subject to federal conditions, and "is financed largely by the Federal Government, . . . and is administered by the States.").

54. *See* United States v. Erika, Inc., 456 U.S. 201, 202 (Medicare is a "federally subsidized, voluntary health insurance system for persons 65 or older or who are disabled . . . .").

55. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502 (1990) ("[P]articipating States must comply with certain requirements imposed by the [Medicaid Act] . . . and regulations promulgated by the Secretary of Health and Human Services . . . .").

56. *See* United States v. Butler, 297 U.S. 1, 65 (1936) ("The Congress is expressly empowered to lay taxes to provide for the general welfare.").

57. *See* New York v. United States, 112 S. Ct. at 2424. *See also infra* notes 58-60 and accompanying text.

58. New York v. United States, 112 S. Ct. at 2424. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-27, at 497 (2d ed. 1988). "For if Congress has validly decided to 'occupy the field' for the federal government, state regulations will be invalidated no matter how well they comport with substantive federal policies." *Id.*

59. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (holding state truck length restrictions violative of Commerce Clause); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (statute

hibiting truck length limitations.[60] Of course, under the expansive view of the Commerce and Spending[61] Clauses, practically everything that Congress does in this area is going to be upheld.[62]

Justice O'Connor stated that if the federal government preempts state law, federal officials will suffer the consequences if their decision results in an unpopular sentiment.[63] However, where state officials act upon federal direction, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[64] This type of direction adversely affects legislative accountability.[65] "[D]ue to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulations."[66] Indeed, this is an interesting way of looking at federal/state relations.

II. COMMERCE CLAUSE

Let me now turn to the Commerce Clause cases. Two of these cases respectively concerned statutes which dealt with the state taxation of foreign activities[67] and interstate activities.[68] In *Kraft*

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restricting use of 65 foot double trucks held to be violation of Commerce Clause).

60. 49 U.S.C. app. § 2311(b) (1988). This section provides in pertinent part: "No State shall establish, maintain, or enforce any regulation of commerce which imposes an overall length limitation on commercial motor vehicles . . . ." *Id.*

61. U.S. CONST. art. 1, § 8, cl. 1 . The Spending Clause states: "The Congress shall have Power To lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." *Id.*

62. *See* United States v. Butler, 297 U.S. 1, 67 (1936) (congressional action in regard to Spending Clause is presumptively constitutional).

63. New York v. United States, 112 S. Ct. at 2424.

64. *Id.*

65. *Id.*

66. *Id.*

67. Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 112 S. Ct. 2365 (1992).

General Foods, Inc. v. Iowa Department of Revenue,[69] the Iowa Business Tax on Corporations[70] imposed a tax on dividends from a corporation's foreign subsidiaries, but dividends received from domestic subsidiaries were not taxed.[71] In a very straightforward opinion, the Supreme Court declared this statute unconstitutional.[72] The Court held that on its face, the statute discriminated against foreign commerce[73] in violation of the Foreign Commerce Clause.[74]

The second Commerce Clause case, *Quill Corporation v. North Dakota*,[75] received a lot of attention from the legal community.[76] The Court was presented with a question regarding whether an out-of-state mail order company can be subjected to a use tax,[77] on behalf of its customers inside the state, when the company solicits orders in a state, but has no sales representative, no salesman of any kind, and no office in the state.[78] Previously, in *National Bellas Hess, Inc. v. Department of Revenue*,[79] the Supreme Court held that the Commerce Clause is violated when a state taxes an out-of-state mail-order company whose only contact

68. Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

69. *Kraft*, 112 S. Ct. at 2365.

70. IOWA CODE § 422.32 (1990).

71. *Kraft*, 112 S. Ct. at 2367.

72. *Id.* at 2372.

73. *Id.*

74. U.S. CONST. art. 1, § 8, cl. 3. The Foreign Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . ." *Id.*

75. 112 S. Ct. 1904 (1992).

76. *See The Supreme Court, 1991 Term; Leading Cases*, 106 HARV. L. REV. 163, 163-73 (1992); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 16 (1992).

77. *Quill*, 112 S. Ct. at 1908. In North Dakota, a use tax is imposed "upon property purchased for storage, use or consumption within the State." *Id.*

78. *Id.* at 1907.

79. 386 U.S. 753 (1967), *overruled by Quill*, 112 S. Ct. at 1910-11.

with the state is to solicit and fulfill mail orders.[80] The Supreme Court upheld the *Bellas Hess* rule in regard to the Commerce Clause and found the North Dakota statutory scheme unconstitutional.[81] In so doing, the Court underscored Congress' constitutional ability to legislatively overrule this decision[82] since it is well within Congress' powers to regulate interstate commerce.[83]

Of the two non-tax cases this Term,[84] *Wyoming v. Oklahoma*,[85] a case heard under the Supreme Court's original jurisdiction,[86] was one of the more interesting cases. Wyoming filed a bill of complaint in the Supreme Court against the State of Oklahoma because Oklahoma passed a law requiring utility plants within the state to use at least ten percent of its coal from mines in Oklahoma.[87] This was a "buy local law" aimed at private utility companies in Oklahoma.[88]

This case is factually dissimilar to *Reeves, Inc. v. Stake*,[89] which focused on the constitutionality of a South Dakota policy which directed cement produced at a state owned cement plant to be sold to South Dakota residents prior to other contract com-

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80. *Id.* at 758, 760. The Court also held that, consistent with the Due Process Clause, physical presence must be demonstrated in order for a state to impose a use tax on a mail order company. *Id.* at 758-59. However, in *Quill*, the Court overruled the physical presence requirement and instead held that the inquiry focuses upon whether "a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State . . . ." *Quill*, 112 S. Ct. at 1910-11.

81. *Quill*, 112 S. Ct. at 1916.

82. *Id.*

83. U.S. CONST. art. 1, § 8, cl. 3.

84. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); Wyoming v. Oklahoma, 112 S. Ct. 789 (1992).

85. 112 S. Ct. 789 (1992).

86. U.S. CONST. art. III, § 2, cl. 2 provides in pertinent part: "In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original Jurisdiction." *Id. See also* 28 U.S.C. § 1251 (a) (1988). Section 1251 provides: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." *Id.*

87. Wyoming v. Oklahoma, 112 S. Ct. at 792-93.

88. OKLA. STAT. tit. 45, § 939 (Supp. 1993).

89. 447 U.S. 429 (1980).

mitments.[90] Essentially, the Court upheld the policy since the state was a market participant, instead of a market generator,[91] the latter directly implicating the Commerce Clause.[92] Rather, in *Wyoming v. Oklahoma,* the state was acting as a regulator, requiring utility plants to buy ten percent of their coal locally before they sought coal from other states.[93]

The Supreme Court held that Wyoming had standing to bring this suit.[94] The State of Wyoming faced a loss in severance taxes since private Wyoming coal companies would not be able to sell their coal in Oklahoma as a result of the stated legislation.[95] Thus, Wyoming suffered direct injury, namely, a decrease in tax revenues.[96] Furthermore, the Court struck down the Oklahoma legislation as violative of the Commerce Clause.[97] Inasmuch as the Act discriminated against interstate commerce, Oklahoma failed to justify its protectionist actions.[98]

There are two other Commerce Clause cases that require some attention and both of them are waste cases, *Chemical Waste Management, Inc. v. Hunt*[99] and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources.*[100] These cases directly relate to *City of Philadelphia v. New Jersey,*[101] where the Supreme Court held that garbage was an item of commerce when it moved across state lines since it can be bought or

90. *Id.* at 432-33.

91. *Id.* at 440. The Commerce Clause is not implicated when a state acts as a purchaser (market participant). Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976). A market participant neither prohibits nor regulates the flow of commerce. *Id.* at 806.

92. *See Reeves,* 447 U.S. at 437.

93. Wyoming v. Oklahoma, 112 S. Ct. at 793.

94. *Id.* at 796. To have standing, a litigant must allege specific and concrete injury to himself and show that the exercise of judicial review will remedy his injury. Warth v. Seldin, 422 U.S. 490, 508 (1975).

95. Wyoming v. Oklahoma, 112 S. Ct. at 796.

96. *Id.* at 797.

97. *Id.* at 800.

98. *Id.* at 801.

99. 112 S. Ct. 2009 (1992).

100. 112 S. Ct. 2019 (1992).

101. 437 U.S. 617 (1978).

sold.[102] In both *Chemical Waste Management* and *Fort Gratiot* there were long quotes from *City of Philadelphia v. New Jersey*, whereby the Supreme Court stated that it does not believe in artificial barriers between states, and that there should not be political barriers to the free movement of commerce.[103] Clearly, this reasoning directly implicates the original intent behind the Commerce Clause.[104]

In *Chemical Waste Management*, Alabama passed legislation which imposed a fee in the amount of $25.60 per ton for the disposal of hazardous waste and an additional fee for the disposal of hazardous waste generated outside Alabama.[105] The State contended that its actions were justified by legitimate safety and health concerns.[106] However, the Court held that this statutory scheme violated the Commerce Clause because less discriminatory methods would have efficiently decreased the amount of waste.[107] "To the extent Alabama's concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste . . . ."[108]

Fort Gratiot was not a state barrier to waste case, but instead involved a county barrier to waste.[109] Specifically, the Michigan

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102. *See id.* at 622. "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.*

103. *Chemical Waste Management*, 112 S. Ct. at 2013 (quoting City of Philadelphia v. New Jersey, 437 U.S. at 626-27); *Fort Gratiot*, 112 S. Ct. at 2024 (quoting City of Philadelphia v. New Jersey, 437 U.S. at 626-27).

104. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

105. *Chemical Waste Management*, 112 S. Ct. at 2012. The Alabama statute provided: "For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of $72.00 per ton." ALA. CODE § 22-30B-2(b) (Supp. 1992).

106. *Chemical Waste Management*, 112 S. Ct. at 2014.

107. *Id.* at 2015-16.

108. *Id.*

109. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2022 (1992).

statutory scheme restricted any person from "accept[ing] for disposal solid waste . . . that is not generated in the county in which the disposal area is located" without authorization.[110] Respondents, Michigan and St. Clair County, contended that the statute was valid inasmuch as it treated out-of-state waste and waste generated in other Michigan counties in the same manner.[111] In support of the Court's disagreement with respondents' argument, the majority cited *Dean Milk Co. v. City of Madison.*[112] In *Dean Milk,* the Supreme Court struck down, as violative of the Commerce Clause, an ordinance which prevented the sale of milk unless the milk was pasteurized at a plant within five miles from the City of Madison.[113] The fact that Wisconsin plants which were geographically beyond the proscribed five mile radius were similarly situated to out-of-state plants proved to be irrelevant.[114]

The Supreme Court held that the Michigan statute violated the Commerce Clause inasmuch as respondents failed to justify its actions on any health or safety basis.[115] The Court found that respondents incorrectly relied on *Sporhase v. Nebraska.*[116] In *Sporhase,* the State of Nebraska tried to preserve precious groundwater through legislation which prevented the exportation of ground water without a permit.[117] The statute placed four conditions on the obtainment of a permit: a request which is reasonable, not harmful to the public welfare, not against conservation, and the state which is receiving water from Nebraska must "grant[] reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska."[118] The Supreme Court held that the reciprocity requirements were unconstitu-

110. *Id. See also* MICH. COMP. LAWS ANN. § 299.413a (West 1992).

111. *Fort Gratiot,* 112 S. Ct. at 2024.

112. *Id.* at 2025 (discussing Dean Milk Co. v. Madison, 340 U.S. 349 (1951)).

113. *Dean Milk,* 340 U.S. at 356.

114. *Id.* at 354 n.4.

115. *Fort Gratiot,* 112 S. Ct. at 2027.

116. *Id.* at 2026 (discussing Sporhase v. Nebraska, 458 U.S. 941 (1982)).

117. *Sporhase,* 458 U.S. at 944.

118. *Id.* (quoting NEB. REV. STAT. § 46-613.01 (1978)).

tional.[119] Writing generally about a state's ability to preserve its own ground water, the Supreme Court seemed to be very sympathetic to a state's desire to save its resources, particularly those that are vital for its own citizens.[120] It was for that very reason, furtherance of the health and safety of its citizens, that the Court upheld the first three conditions.[121] But in *Fort Gratiot,* the county could not offer any health or safety justification for its waste discrimination.[122] Therefore, the statute was struck down.[123]

III. TITLE IX

Now I am going to make a huge leap from state and federal Commerce Clause cases, to cases dealing with obligations of state or local governments to protect their citizenry from injuries. In *Franklin v. Gwinnett County Public Schools,*[124] a teacher sexually abused and harassed a female student.[125] Plaintiff, seeking money damages, invoked Title IX of the Educational Amendments of 1972.[126] Title IX states in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[127] The federal government can enforce Title IX by threatening to withhold funds.[128] Title IX was passed because Title VI,[129] while covering race and national origin, did not

119. *Id.* at 957-58.
120. *Id.* at 956.
121. *Id.* at 955.
122. *Fort Gratiot,* 112 S. Ct. at 2027.
123. *Id.* at 2028.
124. 112 S. Ct. 1028 (1992).
125. *Id.* at 1031.
126. *Id.*
127. 20 U.S.C. § 1681(a) (1988).
128. 20 U.S.C. § 1682(1) (1988).
129. 42 U.S.C. § 2000(d) (1988).

cover gender.[130] Congress, rather than amending Title VI, passed Title IX.

In *Franklin,* the Supreme Court unanimously held that Title IX, which affords litigants an implied right of action, provides a damages remedy when appropriate.[131] The majority opinion, delivered by Justice White, stated that although the text and history of a statute should be examined in determining whether Congress intended to create a right of action, the general rule is that courts have the power to award any appropriate remedy unless Congress has expressly indicated otherwise.[132]

Justice Scalia, who concurred in the judgment,[133] had been trying to cut back on *Cort v. Ash,*[134] which provided four factors that courts may look at when determining whether a private remedy is implied in a statute not expressly providing one.[135] In his concurring opinion in *Franklin,* Justice Scalia disagreed with the majority's broad remedial policy since Title IX provides an im-

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130. *Id.* Title VI provides in pertinent part: "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." *Id.*

131. *Franklin,* 112 S. Ct. at 1038.

132. *Id.* at 1032. *See also* Davis v. Passman, 442 U.S. 228, 246-49 (1979) (damages remedy available in due process claim since Congress took no explicit action to bar such judicial relief); Bell v. Hood, 327 U.S. 678, 684 (1946) (federal courts have broad remedial powers "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion . . . .").

133. *Franklin,* 112 S. Ct. at 1038-39 (Scalia, J., concurring).

134. Cort v. Ash, 422 U.S. 66 (1975).

135. *Id.* at 78.

> First, is the plaintiff "one of the class for whose *special* benefit the statute was enacted," - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (citations omitted).

plied right of action.[136] "[W]hen rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well."[137] However, Justice Scalia examined the legislative history and found that since 1979, when the Supreme Court declared that there was an implied right of action under Title IX,[138] Congress had not enacted any legislation which limited the remedies available in a suit brought under Title IX.[139] Such a failure was proof that Congress intended a broad remedial scheme under Title IX.[140] In essence, the Supreme Court held that a private damages remedy was available under Title IX in suits against school boards.[141]

IV. EQUAL PROTECTION

Finally, I will discuss two other school district cases dealing with Equal Protection[142] violations. The Supreme Court heard two desegregation cases, one dealing with Mississippi's higher education system[143] and the other dealing with a local public school system.[144]

In the first of these decisions, *United States v. Fordice*,[145] the Supreme Court addressed the Mississippi higher education system.[146] The Mississippi State University system is composed of eight separate campuses.[147] Although the State no longer fol-

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136. *Franklin*, 112 S. Ct. at 1038-39 (Scalia, J., concurring).

137. *Id.* at 1039 (Scalia, J., concurring).

138. Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

139. *Franklin*, 112 S. Ct. at 1039 (Scalia, J., concurring).

140. *Id.* (Scalia, J., concurring).

141. *Id.* at 1038.

142. U.S. CONST. amend. XIV, § 1, cl. 3. The Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

143. United States v. Fordice, 112 S. Ct. 2727 (1992).

144. Freeman v. Pitts, 112 S. Ct. 1430 (1992).

145. 112 S. Ct. 2727 (1992).

146. *Id.* at 2733.

147. *Id.* at 2732. Mississippi's eight public universities are: University of Mississippi, Mississippi State University, University of Southern Mississippi, Delta State University, Mississippi University for Women, Jackson State

lowed the concept of "separate but equal" that was found unconstitutional in *Brown v. Board of Education*,[148] the race-neutral selection system utilized by the Mississippi higher education system produced campuses composed of 80% to 91% whites at the University of Mississippi, Mississippi State, Southern Mississippi, Delta State, and Mississippi University for Women, and at Jackson State, Alcorn State, and Mississippi Valley, 92% to 99% of the student population was black.[149] Under the race-neutral selection system, admission to a particular university depended on a student's score on the American College Testing Program (ACT).[150] Mississippi required higher ACT scores for some universities, but not for others.[151]

The Supreme Court held that Mississippi, by adopting and implementing a race-neutral selection policy, did not do enough to disestablish segregation.[152] There were many failings on the part of the university administrators in their application of the race-neutral selection system that perpetuated this segregation.[153] For example, students who scored fifteen or above on the ACT were automatically eligible to attend the more select schools, which of course were predominantly white, while those who scored less than fifteen were automatically sent to the schools which were predominantly black.[154] This effect was directly related to the significant difference in the test scores between white and black

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University, Alcorn State University, and Mississippi Valley State University. *Id.*

148. 347 U.S. 483, 495 (1954).

149. *Fordice*, 112 S. Ct. at 2734.

150. *Id.* at 2738-39.

151. *Id.* at 2739. Students who received a score of 13 or 14 on the ACT were generally excluded from those universities which were regarded as white. *Id.*

152. *Id.* at 2736.

153. *Id.* at 2738.

154. *Id.* at 2739.

students.[155] Indeed, a high percentage of blacks achieved low scores on the ACT.[156]

Furthermore, black universities, as compared to their white counterparts, had a much more limited academic mission.[157] When established, black dominated schools were designed to educate black students in teaching and agriculture.[158] Then, in 1981, three white-dominated colleges were designated as "comprehensive" universities, offering a variety of programs and graduate degrees.[159] Two other historically white universities and two black universities were labeled as "regional," providing students with limited program availability.[160] Essentially, the Supreme Court held that "when combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system."[161]

The Supreme Court, however, was not as hard on the local school system. In *Freeman v. Pitts*,[162] DeKalb County, Georgia had been under a federal court decree for many years to desegregate its schools.[163] There were certain phases of the operation which were race-neutral,[164] although the school system as a whole had not totally complied with earlier decrees.[165] The question in *Freeman* was whether a federal court can withdraw its supervision over those phases of a school board's operation that were now in compliance with the law, but maintain control only over those phases of the school system's operation that have not

155. *Id.*

156. *Id.* In 1985, 72% of white high school seniors received a score of fifteen or higher, whereas less than 30% of black high school seniors achieved the same score. *Id.*

157. *Id.* at 2741.

158. *Id.*

159. *Id.* at 2742.

160. *Id.*

161. *Id.*

162. 112 S. Ct. 1430 (1992).

163. *Id.* at 1435.

164. *Id.* at 1436-37.

165. *Id.* at 1437.

complied with the law.[166] Such an action was called the "incremental withdrawal of [court supervision]."[167] In a unanimous decision, the Supreme Court held that it was permissible for federal courts to "return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree."[168] Indeed, this decision underscores the Supreme Court's effort to relinquish federal control over local activities.[169]

Professor Eileen Kaufman:

Do you think that *New York v. United States*, when considered with *Gregory v. Ashcroft*,[170] signaled some new chapter in the Supreme Court's Tenth Amendment jurisprudence?

Professor Leon Friedman:

In my view, *New York v. United States* was an easy case. Every aspect of the law was upheld except for the title compulsion element.[171] Justice O'Connor's analysis was quite important because it introduced a whole new aspect of political responsibility, namely, that one of the elements in state and federal relationships is whether it is clear who is responsible for a particular policy.[172] That element should be taken into account as you do the analysis. I think it is a new approach and certainly a new factor that we never had to consider before in looking at this problem.

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166. *Id.* at 1443.
167. *Id.*
168. *Id.* at 1446.
169. *Id.* at 1445.
170. 111 S. Ct. 2395 (1991).
171. New York v. United States, 112 S. Ct. 2408, 2429 (1992).
172. *Id.* at 2424.

Audience Participant:

I just have one question from a parochial point of view, dealing with interstate commerce and garbage. It seems that there may be some differences in this type of commerce since garbage impacts on so many purely local questions like land use and the need for resources. For instance, one part of a county having enough resources may refuse out-of-state garbage while other parts of a county needing resources may want the garbage to come in from out-of-state. How does this factor into anything you have discussed so far?

Professor Leon Friedman:

The Supreme Court has stated that a policy implicating interstate commerce will be upheld if it furthers legitimate health or safety concerns and cannot be accomplished through nondiscriminatory measures.[173] But a local government cannot simply set up a political barrier to what is essentially an economic problem.[174] Essentially, local governments may not refuse garbage because it was generated in another county or state unless there is a valid health or safety reason for doing so.[175]

Audience Participant:

What if a county's landfills are of limited size and, therefore, it refuses to accept out-of-county garbage because it would rather save its landfills for the disposal of its own waste?

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173. *See* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2027 (1992).

174. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978).

175. *See id. See also Fort Gratiot,* 112 S. Ct. at 2027.

Professor Leon Friedman:

Although a county may want to save its landfills for its own residents, it cannot do so because states, and thus counties too, are not independent economic units.[176]

176. *Fort Gratiot*, 112 S. Ct. at 2024. "[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Id.*