THE INVINCIBILITY OF CONSTITUTIONAL ERROR: THE REHNQUIST COURT'S STATES' RIGHTS ASSAULT ON FOURTEENTH AMENDMENT PROTECTIONS OF INDIVIDUAL RIGHTS

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I. INTRODUCTION

*[T]he most significant lesson to be learned from the post-[*Brown*] decision episodes and arguments is the invincibility of constitutional error. No matter how often the doctrine of state interposition, for example, has been put down in our history, no matter how thoroughly repudiated by Congress, blasted by national executive action, disposed of by the courts, and buried by the Civil War, it continues still to be disinterred and resurrected to reenact its inevitable fate.*[1]

The Rehnquist Supreme Court[2] is engaged in an aggressive judicial campaign to dismantle federal protection for individual rights, claiming to restore a "balance of power" between states and the federal government.[3] As one commenta-

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[1] JACOBUS TENBROEK, EQUAL UNDER LAW (originally published as: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT), 11-12 (1969) (emphasis added).

[2] For purposes of this Article, the "Rehnquist Court" specifically refers to the five conservative members of the Supreme Court who have either voted for or authored opinions supportive of the Chief Justice's states' rights jurisprudence – i.e., Chief Justice Rehnquist and Associate Justices O'Connor, Scalia, Thomas, and Kennedy.

[3] *See* Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 695-696 (2000): "[P]erhaps most surprising is the Court's willingness to elevate the protection of state sovereignty over assuring a uniform and efficacious national system for the protection of core federal rights – rights that are important to the vision of the national government having responsibility for the economic well being of the country as a whole. . . ." *See also*, H. Jefferson Powell and Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645, 645 (2000):

tor notes, however, "many of the justices in the majority are motivated by a misguided conception of federalism."[4] In a recent series of 5-4 decisions,[5] the conservative members of the Court have increased the pace of their efforts to resurrect the repudiated theory that state sovereignty and sovereign immunity act as affirmative limitations on federal powers.[6] Through little more than judicial fiat, the Court has overruled or ignored longstanding precedent[7] governing federal-state relations, placing almost exclusive reliance on its own 5-4 decisions[8] in re-

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Recent Supreme Court decisions have dramatically underscored the significance of the states as vital entities within the United States constitutional system. The Court has repeatedly protected the states' political and legal integrity against congressional conscription and federal court litigation. In addition, the Court has broadened the effective range of state autonomy through its revival of content-based limitations on the scope of Congress's delegated powers. This recent wave of federalism has generated opinions that often seem to turn on what it means to ascribe "sovereignty" to the states.

[4] Jackson, *supra* note 3, at 697.

[5] *See, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Alden v. Maine, 527 U.S. 706 (1999); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000). Each of these cases is discussed in detail below.

[6] *See, e.g.*, Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 1 ("[T]he Court's most persistent and aggressive efforts have focused on the arcane doctrine of state sovereign immunity."). *See also* Powell & Priester, *supra* note 3, at 647: "Despite the centrality of federalism to the American political landscape, the Court has never provided a precise definition of 'state sovereignty.' In fact, the Court has failed even to use the idea or language of 'state sovereignty' in a consistent way in its opinions."

Based on a study of 1,280 U.S. Supreme Court cases from 1792 to 1997, Powell and Priester observe that the Rehnquist Court's efforts "to rehabilitate federalism as a legally enforced limit on national power," equates to those of the pre-Civil War Taney Court (1837-60) and the turn of the century Fuller Court (1888-1910). *Id.* at 663-664. Indeed, the two periods of highest frequency for "state sovereignty" cases were 1840-55 and 1975-present. *Id.* at 666. They conclude, "The language of state sovereignty does not embody a coherent, historically accepted concept of the states' role in the federal system." *Id.* at 667.

[7] *See, e.g.*, Jackson, *supra* note 3, at 696: "[T]he Court's decisions represent a highly activist rejection of more than twenty years worth of constitutional decisions that had established Congress' power to subject states to suit under federal law."

[8] *See, e.g.*, Edelmiro A. Salas Gonzalez, Alden v. Maine: *Expanding and Buttressing Eleventh Amendment Immunity*, 23 AM. J. TRIAL ADVOC. 681, 687 (2000):

writing the Constitution. In the process, the Court has also exceeded the proper bounds of judicial review in striking down laws enacted pursuant to Congress' legislative powers under the Commerce Clause and section five of the Fourteenth Amendment.[9] As this Article demonstrates, however, the Rehnquist Court's states' rights jurisprudence represents a radical departure from the feder-

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> As for the constitutional standard of valid abrogation, the Court used the weight of stare decisis and held that under its "firmly established" one-vote-majority precedents of Seminole, College Savings, Florida Prepaid, and College Savings Bank, the ADEA [Age Discrimination in Employment Act], as an expression of Congress' Article I powers, cannot be enforced against the states. Justice O'Connor, writing for the majority [in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000)], explicitly complains of Justice Stevens' dissent because it does not adhere to stare decisis, and thus any "meaningful debate on the place of sovereign immunity" is precluded by his refusal to adhere to last years precedents. 120 S.Ct., at 644.

Justice Stevens had this to say in his *Kimel* dissent:

> [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of stare decisis in this area of law. The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank* . . . and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Kimel v. Florida Bd. of Regents, 528 U.S. 62, 98-97 (2000) (Stevens, J., dissenting)

[9] *See* Jackson, *supra* note 3, at 699: "Since 1990, the Court has held unconstitutional seven different federal laws on grounds they extended beyond federal powers into the domain of the states." Included are the Court's invalidation of: "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act, in *New York v. United States*, 505 U.S. 144 (1992); the Gun-Free School Zones Act of 1990, in *United States v. Lopez*, 514 U.S. 549 (1995); the Indian Gaming Regulatory Act provision authorizing federal suits against states, in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); the local background check of the Brady Handgun Violence Prevention Act of 1998, in *Printz v. United States*, 521 U.S. 898 (1997); provisions of the Fair Labor Standards Act authorizing private suits against states in *state* court, in *Alden v. Maine*, 527 U.S. 706 (1999); and provisions of federal patent and trademark laws authorizing private suits against states in federal courts in *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Additionally, the Court has invalidated at least three other federal provisions or statutes as exceeding the scope of Congress' remedial powers under § 5 of the Fourteenth Amendment: the Religious Freedom Restoration Act of 1994, in *City of Boerne v. Flores*, 521 U.S. 507 (1997); abrogation of state immunity under the Age Discrimination in Employment Act, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); and invalidation of the Violence Against Women Act of 1994, in *United States v. Morrison*, 529 U.S. 598 (2000).

alism envisioned by the Founders and Supreme Court precedent.[10] "All five hard-line conservatives raise state power over individual rights and federal power."[11] The Court has also abused the judicial power of the United States to the detriment of "cooperative federalism" between Congress and the states, acting through the political process.[12]

The original effort to constitutionalize a power balance between states and the federal government was the deviant objective of a post-Reconstruction Supreme Court intent on "redeeming" states' rights, reaffirming white supremacy, abandoning African-Americans to state-sanctioned racism and Klan terrorism, and dismantling the reconstructed constitutional order embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments.[13] As a consequence, many of the deci-

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[10] *See* discussion "The Balance of Power Thesis" *infra* notes 35-155 and accompanying text.

[11] James T. Wilson, *The Eleventh Amendment Cases: Going "Too Far" with Judicial Neofederalism*, 33 LOY. L.A. L. REV. 1687, 1690 (2000).

[12] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-555 (1985):

> Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . .State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system *than by judicially created limitations on federal power*. . .[Thus,] any substantive restraint on the exercise of [congressional] powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings *in the national political process*, rather than to dictate a "sacred province of state autonomy."

Id. at 550, 552, 554.

[13] *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 224-226 (1992):

> [F]ollowing the end of Reconstruction, the southern states were governed by the so-called Redeemers, who tried somehow to restore the *status quo ante bellum*. . .[T]he Redeemers promised restoration of the regime of white supremacy and stressed the need for racial solidarity among southern whites against the prospect of renewed northern aggression on behalf of blacks. . . .During this same time, the Supreme Court pursued a remarkably similar path, nostalgically invoking ideals of the antebellum past. In a series of decisions that began virtually as the northern occupying troops withdrew from the South, the Court invalidated congressional Reconstruction acts on the premise that the old constitutional tenets of state sovereignty had survived the war intact. By this reading, the War had merely refuted the secessionist claim that states were free to leave the Union, but the old ideal of "divided sovereignty" still held.

sions from that era were themselves constitutionally suspect and —until recently—had been subsequently overruled, modified, or abandoned.[14] From his earliest days on the Supreme Court, however, Chief Justice Rehnquist has

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See also, United States v. Price, 383 U.S. 787, 801 n. 9 (1966):

> It would be strange, indeed, were this Court to revert to a construction of the Fourteenth Amendment which would once again narrow its historical purpose – which remains vital and pertinent to today's problems. As is well known, for many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes were concerned. Its sole office was to impede state regulation of railroads or other corporations. Despite subsequent statements to the contrary, nothing in the records of the congressional debates or the Joint Committee on Reconstruction indicates any uncertainty that its objective was the protection of civil rights.

[14] *See* John E. Nowak, *The Gang of Five & The Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1109-1111 (2000):

> Early in the Burger Court era, it appeared that all of the Anti-Reconstruction views of the earlier Courts had been repudiated. The Court was giving great deference to congressional determinations concerning the scope of the Commerce Clause so that Congress could use that clause to protect the interest of minority race persons if it so chose. The Court overruled the earlier cases limiting the scope of Congress's Thirteenth Amendment power. In 1968 and 1976, the Court restored the original understanding of some Reconstruction era civil rights laws. The Court ruled that Congress had the power to enact legislation penalizing private persons, as well as government actors, for preventing persons from exercising basic civil rights, such as the right to travel. . .[W]e can point to one event that marks the end of an era in which the Supreme Court was interested in the protection of racial minorities and the start of an era in which the Supreme Court would consistently rule against the interests of minority race persons. That event was the appointment of Anthony Kennedy to the Supreme Court. . .Justice Kennedy would join Chief Justice Rehnquist and Justices O'Connor, Scalia, and White (and later, Justice Thomas) to form a Gang of Five that would consistently vote against the interests of racial minorities.

See also Jackson, *supra* note 3, at 700-701:

> I would have thought the Court would be embarrassed to be citing late nineteenth century decisions such as *In re Ayers* (and *Hans*) for authority. These decisions arouse out of the end of Reconstruction in the era that also is remembered for the infamous decisions of *Plessy* and *Lochner*. Instead, the Court has disingenuously treated the period from 1959-1996 as anomalous (largely ignoring the rather narrow construction of the Eleventh Amendment in the Marshall Court), preferring to rely on cases from an inglorious period of the Court's history, between 1887-1934, as a principal source on which to build its sovereign immunity doctrine for the twenty-first century.

closely aligned himself with the discredited states' rights jurisprudence of that bygone era of the Court[15] and has led the judicial campaign to sharply restrict congressional authority over states, especially where the federal rights of individuals or minorities are concerned.[16] "We mock our history and our traditions when we . . . studiously unlearn everything that our history and traditions, properly interpreted, teach us."[17]

This Article's principal thesis is that the Rehnquist Court's states' rights jurisprudence poses a direct threat to individual and equal rights secured by the Fourteenth Amendment. While the Supreme Court has long recognized the supremacy of national *economic* interests under the Commerce Clause, it has yet to

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[15] *See, e.g.*, SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 18-19 (1989):

> [Justice Rehnquist's] decision making is based on a judicial philosophy with legal positivism at its core and a particular ordering of judicial values. He places a preeminent value on federalism; indeed, the theme of state autonomy runs throughout his opinions, while he assigns a subordinate value to private property. He relegates individual rights to the bottom of his hierarchy of values. . .The thesis of this work is that Rehnquist's decision making can be understood with reference to the interaction between his judicial philosophy – made up of the democratic model, moral relativism, and his approach to constitutional interpretation – and his ordering of the values of federalism, property rights, and individual rights.

Based on his position in civil rights and affirmative action cases, it is also clear that Rehnquist places minority rights *below* individual rights in the hierarchy of constitutional values. *See* Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 Rutgers L. J. 597, 599 (1994) ("Justice Rehnquist has reinserted a jurisprudential view of race which seems to draw upon old notions of white supremacy"); *see also* Nowak, *supra* note 19, at 1096:

> The views of the Rehnquist Court majority concerning the scope of Congress's powers under the Fourteenth Amendment should be considered shocking, though not surprising. These opinions were foreshadowed by a decade of rulings adverse to the interests of racial minorities. Perhaps we should not even be shocked by a Supreme Court that wants to cut down congressional protection for civil rights because we have seen a Court like this before, in the late nineteenth century.

[16] As one constitutional scholar observes, the "[g]oals of individual rights, nondiscrimination, states rights, and popular sovereignty are in tension with each other." Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising* The Slaughter-House Cases *Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 74-75 (1996)

[17] David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1202 (1992).

fully recognize the supremacy of the national *liberty* interests of U.S. citizens under the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment.[18] Properly construed, the Privileges or Immunities Clause of the Fourteenth Amendment is to national rights, what the Commerce Clause has long stood for with respect to national economic interests.[19] The traditional interpretation of the Privileges or Immunities Clause, however, is one of the last remaining vestiges of late nineteenth century states' rights constitutionalism.

This Article focuses specifically on the Court's most recent decisions blocking enforcement of federally created rights or entitlements—including minimum wages, safe working conditions, welfare, social security, and medical benefits – against states.[20] Such federal rights or entitlements should be privately enforceable against states in federal court, under either of two alternative theories. First, longstanding views of federalism hold that states "surrendered" both sovereignty and sovereign immunity over certain subjects in the "plan of the convention."[21] Therefore, the Eleventh Amendment is inapplicable where states have no sovereignty to immunize. Second, in exercising its Article I powers, Congress may coincidentally create new rights or entitlements which also should be deemed enforceable against states as "privileges or immunities" of U.S. citizens under the Fourteenth Amendment.[22] Accordingly, Congress can exercise its section

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[18] Indeed, the Commerce Clause and the Privileges or Immunities Clause should be read as two sides of the same federalism coin – i.e., the nation is a "single economic entity" with a single body of national rights.

[19] The Commerce Clause, of course, also has been used to advance individual and equal rights. However, the Court's recent Eleventh Amendment cases also threaten that longstanding practice as well. The Court has position itself to call into question even the application of the 1964 Civil Rights Act against states, given the Acts principal reliance on the Commerce Clause.

[20] *See* Wilson, *supra* note 11, at 1689:

> Five members of the Court are determining how far their judicially fabricated doctrine of "state sovereign immunity" precludes private parties – including state employees, private citizens, aliens, and private corporations – from suing states for alleged violations of the United States Constitution and federal statutory laws and, therefore, how much it prevents Congress from protecting those rights. In other words, the doctrine elevates an implied state power above numerous individual statutory rights, constitutional rights, congressional authority, and vast amounts of constitutional text.

[21] *See* discussion of *Tennessee v. Davis infra* notes 122-24 and accompanying text.

[22] In *Saenz v. Roe*, 526 U.S. 489 (1999), three conservative members of the Court joined Justice Stevens' opinion striking down a durational residency requirement for California welfare benefits under the Citizenship and Privileges or Immunities Clauses. The 7-2 de-

five power to abrogate state immunity and authorize private enforcement of those rights in federal court.

Some have suggested that with the end of slavery and separate-but-equal, African-Americans have nothing more to fear from states' rights.[23] But the persistence of segregated public education,[24] along with racial profiling,[25] excessive use of force by police officers against minorities,[26] and gross racial disparities in

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cision signals the Court's willingness to reevaluate the meaning of Privileges or Immunities Clause of the Fourteenth Amendment. Even in dissent, Justice Thomas—joined by Chief Justice Rehnquist—indicated his willingness to reassess the Clause: "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case." *Saenz*, 526 U.S., at 527-528 (Thomas, J., dissenting).

[23] *See, e.g.*, Melvyn R. Durchslag, *Accommodation by Declaration*, 33 LOY. L.A. L. REV. 1375, 1375 (2000):

> Upon reflection, I suppose that no one should be surprised by the renewed interest in states' rights, or federalism if you will. African-Americans are no longer enslaved, nor do states subject them to the indignities of Jim Crow laws as they did thirty years ago. Consequently, the worst of states' rights history is just that – history.

But see also, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2000):

> While the scourge of officially-sanctioned segregation has been eliminated, de facto segregation and persistent racial discrimination continue to exist. The forms of discriminatory practices have changed and adapted over time, but racial and ethnic discrimination continues to restrict and limit equal opportunity in the United States. For many, the true extent of contemporary racism remains clouded by ignorance as well as differences of perception. Recent surveys indicate that, while most Whites do not believe there is much discrimination today in American society, most minorities see the opposite in their life experiences.

[24] *See, e.g.*, GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHT PROJECT, HARVARD UNIVERSITY, RESEGREGATION IN AMERICAN SCHOOLS (1999).

[25] *See, e.g., Widespread Profiling in New Jersey*, N.Y. TIMES, Nov. 29, 2000, at A34: "The release this week of 91,000 pages of internal documents provides the clearest evidence yet that racial profiling has been standard operating procedure for the New Jersey State Police for years, and that high state officials were aware of it." *See also* THE PRESIDENT'S INITIATIVE ON RACE, THE ADVISORY BOARD'S REPORT TO THE PRESIDENT, ONE AMERICA IN THE 21ST CENTURY 75-76 (1998).

[26] *See, e.g., The Diallo Legacy*, N.Y. TIMES, Feb. 28, 1999, § 4, at 18:

the administration of justice and sentencing,[27] clearly suggest otherwise. The changes embodied in the Fourteenth Amendment were not intended to serve as temporary, transitional measures in response to state-sanctioned racism and hostility to individual rights. Instead, they were adopted as permanent structural modifications to the constitutional order, insuring continual federal protection of individual rights against the abuses of state power. The Rehnquist Court is committed to dismantling those structural safeguards.

This Article explores the Rehnquist Court's embrace of repudiated states' rights doctrine developed during the post-Reconstruction/pre-New Deal period. Part I of the article analyzes three central tenets of the Rehnquist Court's states' rights jurisprudence. The first tenet is the Court's "balance of power" thesis – i.e., the theory that the Court must "restore" or "preserve" a balance of power between the states and the federal government. As this Article suggests, the Rehnquist Court's balance of power thesis is contrary to the intent and design of our federal system, which is premised on federal *supremacy* within the areas assigned to Congress under the Constitution. Under the Court's balance of power thesis, states are independent sovereigns that are "co-equal" with the federal government. The premise of federal supremacy is replaced with a "balancing" of competing federal and state by the courts, in deciding whether federal laws will be upheld. The balance of power thesis is nothing more than a restatement of the long-abandoned theory that the Tenth Amendment[28] is a limit on federal power.[29]

> The death of Amadou Diallo, the unarmed West African killed in a fusillade from four white police officers, was both a personal tragedy and civic trauma. The strains it caused between the New York Police Department and the minority and immigrant communities are serious and prolonged. Many white citizens share the concern that the city's declining crime rate has been achieved through brutal tactics that are aimed disproportionately at people of color and threaten the civil liberties of all citizens.

[27] *See, e.g.*, ONE AMERICA IN THE 21ST CENTURY, *supra* note 25, at 76-77:

> Data show that blacks composed approximately 50 percent of State and Federal prison inmates, four times their proportion in society, and Hispanics compose approximately 15 percent. These disparities are probably due in part to underlying disparities in criminal behavior. But evidence shows that these disparities also are due in part to discrimination in the administration of justice and to policies and practices that have an unjustified disparate impact on minorities and people of color.

[28] "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." U.S. CONST. amend. X.

[29] *See, e.g.*, Alden v. Maine, 527 U.S. 706,713-714 (1999): "Any doubt regarding the

A second tenet of the Rehnquist Court's states' rights jurisprudence lies in its unprecedented expansion of state immunity to federal suit under the Eleventh Amendment.[30] Even where Congress' has unquestioned authority to extend its authority over the states, the Court has seized upon the Eleventh Amendment as a means of frustrating judicial enforcement federal policies.

A third tenet is the Rehnquist Court's curtailment of Congress' legislative powers under section five of the Fourteenth Amendment. The Court no longer reads the Necessary and Proper Clause[31] in conjunction with Congress' enforcement power under section five of the Fourteenth Amendment and is far less willing to defer to Congress' choice of "appropriate" means. Instead, the Court now requires that legislation under section five satisfy its recently devised "congruence and proportionality" test.[32] Additionally, the Court has reinstated the previously abandoned requirement of state action for section five legislation.[33]

Part II of the article discusses the constitutional role of the federal government in protecting individual rights and past efforts by the Supreme Court to undermine that role. Part II also focuses on the history and demise of the Privileges or Immunities Clause of the Fourteenth Amendment, as well as the implications of the Court's recent decision in *Saenz v. Roe*.[34]

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constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." Unlike the first eight Amendments' restraint on federal interference with individual liberties, the Tenth Amendment is *not* an affirmative restraint on federal power – see *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The [tenth] amendment states but a truism that all is retained which has not been surrendered") – although clearly Justice Kennedy and the other conservative members of the Rehnquist Court would like it to be.

[30] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[31] "Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

[32] *See, e.g.*, Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627, 639 (1999). *See* discussion *infra* notes 191-217 and accompanying text.

[33] *See* United States v. Morrison, 529 U.S. 598 (2000). *See* discussion *infra* notes 246-326 and accompanying text.

[34] 526 U.S. 489 (1999).

II. THE STATES' RIGHTS JURISPRUDENCE OF THE REHNQUIST COURT: AN UNWAVERING COMMITMENT TO CONSTITUTIONAL ERROR

A. AN ERRONEOUS PREMISE: THE BALANCE OF POWER THESIS

Under our constitutional system, the allocation of powers between the states and the federal government was clearly intended to avoid concentration of power in either the states or the federal government. However, unlike the system of "checks and balances" between *coequal* branches of the federal government, the Founders did not choose to make states the "coequals" of the federal government. As between the federal government and the states, they simply chose an *allocation or division* of powers by subject matter, as opposed to an offsetting *balance* of powers. Specified powers were assigned to the federal government, with the states assuming the remainder. Under that division of powers, states were not deemed "coequal" with the federal government but were made expressly *subordinate* to the federal government.[35] The language of the Constitution speaks in terms of federal *supremacy*.[36] Nowhere does the Constitution call

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[35] *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2195-2196 (1998):

> The majority's understanding of dual sovereignty is inconsistent with *McCulloch*'s insistence that it was the "people," not the "states," that formed the Union, and with the political theory of the relationship between federal and state governments that supported it. . . . [T]he state and the federal governments are not intended as "dual" in the sense of "equal" sovereigns – the federal government is supreme in matters of federal law.

See also, McCulloch v. Maryland, 17 U.S. 316, 427 (1819):

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

[36] For example, the Supremacy Clause declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges *in every State*

for "balancing" the respective powers or interests of states and the federal government,[37] nor does it suggest that the powers of the states act as an affirmative limitation on those of the federal government.

The Rehnquist Court has steadfastly refused to reconcile itself to that clear and unequivocal constitutional arrangement. Despite the plain wording of the constitutional text and the expressed intent of its drafters, the Court insists on the clearly erroneous premise that *the design or structure* of the federal system presupposes a balance of power between "coequal" or "joint" sovereigns. Inevitably, however, the Court's erroneous "balance of power" thesis runs smack into the irreconcilable wall of the Supremacy Clause.[38]

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shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

U.S. CONST., art. VI, § cl. 2 (emphasis added).

[37] *See McCulloch*, 17 U.S. at 430:

> We have a principle [i.e., supremacy] which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve.

[38] Follow, for example, the inevitable fate of Justice O'Connor's balance of power reasoning in *Gregory v. Ashcroft*, 501 U.S. 452, 458-460 (1991):

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). 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.
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> The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. . . .

Note O'Connor's reliance on Justice Powell's dissenting opinion in *Garcia* as the *ultimate* authority for the thesis of a "constitutionally mandated balance of power" between the states and the federal government. Note too that nowhere in the Constitution is there a counterpart to the Supremacy Clause that applies to "the separation and independence of the coordinate branches of the Federal Government." In short, the federal analogy simply does not apply to the alloca-

The Rehnquist Court's balance of power thesis is, in fact, a relatively recent invention which the Court has adopted as a substitute for the long abandoned thesis that the Tenth Amendment is an affirmative limit on federal powers. Previously, the "balance of power" concept was primarily used within the context of the federal separation of powers,[39] or as a generic description of how the Fourteenth Amendment altered the relationship between states and the federal government.[40] The Court has more often and more accurately referred to an "allocation," "distribution" or "division" of power when discussing federalism.[41]

Not until Justice Powell's dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*[42] was the balance of power thesis proffered as constitutional doctrine governing the relationship between states and the federal government:

> The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. . . . [B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the *constitutionally mandated* balance of power between the States and the Federal Government, a balance de-

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tion of powers between the federal government and the states.

[39] *See, e.g.*, Clinton v. New York, 524 U.S. 417 (1998); Mistretta v. United States, 498 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988); INS v. Chadha, 462 U.S. 919 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[40] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting): "Following the Civil War, Congress propounded and the States ratified the so-called "Civil War Amendments" . . . which, together with post-Civil War legislation, sharply altered *the balance of power* between the Federal and State Governments."

[41] *See, e.g.*, Katzenbach v. Morgan,, 384 U.S. 641, 647 (1966); Knapp v. Schweitzer, 357 U.S. 371, 375 (1958) ("The essence of a constitutionally formulated federalism is the *division* of political and legal powers between two systems of government constituting a single Nation."); Bute v. Illinois, 333 U.S. 640, 650 (1948) ("One of the major contributions to the science of government that was made by the Constitution of the United States was its *division of powers* between the states and the Federal Government."). Perhaps without realizing the distinction, even Chief Justice Rehnquist used "division of power" at one point in *United States v. Morrison*: "As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the *division* of power." United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (emphasis added).

[42] 469 U.S. 528 (1985).

signed to protect our fundamental liberties.[43]

Justice Powell never explained where our how the Constitution "mandates" a balance of power between states and the federal government. He relied primarily on the Tenth Amendment,[44] as well as well as language in the Federalist Papers alluding to the role of the states within the federal system.[45] But nowhere do these sources describe—much less "mandate"—a balance of power between co-equal or joint sovereigns. Nevertheless, Justice Powell's dissent is the source of the Rehnquist Court's thesis that the *design* or *structure* of the federal system requires a balance of power between states and the federal government.[46]

Under the balance of power thesis courts are required to weigh the competing interests of the states and the federal government, rather than upholding federal supremacy. As Justice Powell explains in his dissent in *Garcia*:

> In undertaking such balancing, we have considered, on the one hand, the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach. Central to our inquiry into the federal interest is how closely the challenged action implicates the central

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[43] *Id.* at 571-572 (Powell, J., dissenting).

[44] *See, e.g., Garcia*, 469 U.S., at 568 (Powell, J., dissenting) (emphasis added):

> In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, *the States'* ratification of the Constitution of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Of course, it was "*the People of the United States*" who ratified the Constitution, not the States. *See* McCulloch v. Maryland, 17 U.S. 316, 403 (1819) ("The government proceeds directly from the people; is 'ordained and established' in the name of the people. . . ."); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 840 (1995) (Kennedy, J., concurring) ("It might be objected that because the States ratified the Constitution, the people can delegate power only through the States. . .But in *McCulloch v. Maryland*, the Court set forth its authoritative rejection of this idea. . . ."). Clearly the States could not act out of self preservation, as Powell suggests, since they weren't empowered to ratify the Constitution.

[45] *See generally Garcia*, 469 U.S., at 568-572 (Powell, J., dissenting).

[46] *See, e.g.*, United States v. Morrison, 529 U.S., at 616; Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); *see also*, Printz v. United States, 521 U.S. 898, 921 (1997) (citing *Gregory v. Ashcroft*).

> concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the States.[47]

This kind of standardless, judicial second-guessing on a matter of federal policy can hardly be squared with Congress' "plenary authority" over interstate commerce[48]and it is also reminiscent of the judicial heavy handedness in *Lochner v. New York*[49]. Whenever Congress is acting within the scope of its legislative authority, the judicial balancing described by Powell exceeds the proper bounds of judicial review and is plainly inconsistent with the federal scheme adopted by the Founders.[50]

Inevitably, disputes arise within the overlapping areas of federal-state powers. The conflict is not resolved, however, by "balancing" the interests of the states against those of the federal government. Nor is the conflict resolved based on some constitutional obligation to preserve a role for states within the federal system. If both the states and the federal government are operating within the scope of their respective powers, the Supremacy Clause *requires* that the conflict be resolved in favor of the federal interest.[51] On the other hand, if the federal

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[47] *Garcia*, 469 U.S. at 568-572 (Powell, J., dissenting).

[48] *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 196-197 (1824):

> The power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several States is vested in Congress as absolutely as it would be in a single government. . . .

[49] 198 U.S. 45 (1905).

[50] As previously discussed, "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, *although it should interfere with the laws, or even the Constitution of the States.*" JAMES MADISON, II ANNALS OF CONGRESS 1897 (1791).

[51] *See* Gregory v. Ashcroft, 501 U.S. 452, 475 (1991) (White, J., concurring) (citation omitted):

> "[S]tate law is preempted to the extent that it actually conflicts with federal law." [Citation omitted]. The majority's federalism concerns are irrelevant to such "actual conflict" pre-emption. "'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'"

government lacks the constitutional authority to act, no balancing is required since the federal action is void.

Contrary to Justice O'Connor's suggestion in *Gregory v. Ashcroft*,[52] the system of "checks and balances" within the federal government operates between three *co-equal* branches government and, therefore, is inapposite to the relationship between states and the federal government. Federal supremacy is the governing principle in the division or allocation of powers between states and the federal government.[53] As the Supreme Court noted in *Sperry v. Florida Bar*[54]:

> Congress having acted within the scope of the powers "delegated to the United States by the Constitution," it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. "*Interference with the powers of the States was no constitutional criterion of the power of Congress.* If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."[55]

Clearly, in Madison's view state sovereignty *was not* a counter-balancing limitation on the powers of Congress. Where Congress is empowered to act, state sovereignty does not restrain it.

The Rehnquist Court's view of federalism differs radically from Madison's

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[52] *See supra* note 38 and accompanying text..

[53] *See, e.g.,* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 2 (5th ed. 1883) (emphasis added):

> In American constitutional law . . . there is a division of the powers of sovereignty between the national and State governments *by subjects*: the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power, within their respective territorial limits, over *other* subjects. *In regard to certain other subjects*, the States possess powers of regulation *which are not sovereign powers*, inasmuch as they are liable to be controlled, or for the time being to become altogether dormant by the exercise of a superior power vested in the general government in respect to the same subjects.

[54] 373 U.S. 379 (1963).

[55] *Id.* at 403 (citing JAMES MADISON, II ANNALS OF CONGRESS 1897 (1791) (emphasis added)). *See also* discussion of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) *infra* notes 64-71 and accompanying text.

earlier view. The Rehnquist Court rejects the notion that the federal government can intrude into areas remaining under state regulation, in the absence of an overriding federal interest. To be sure, "State sovereignty as a restraint on federal power is hardly the creation of the Burger Court in 1976, or of the Rehnquist Court that succeeded it," as Laurence Tribe observes.[56] But throughout his tenure on the bench – first as an Associate Justice and now as Chief Justice – Rehnquist has remained steadfast in his commitment to resurrect and reinstate the Court's pre-1937 view "that the two levels of government occup[y] independent, inviolable, and fully co-equal spheres."[57]

1. THE TENTH AMENDMENT: SPEAKING TRUISMS TO FEDERAL POWER

While scoring some important, though minor victories[58] in its Tenth Amendment campaign, the Rehnquist Court has largely failed in its efforts to reestablish the Tenth Amendment[59] into both an affirmative limitation on federal powers – operating in the same way that the "negative implications" of the Commerce Clause restrict state powers – as well as a bastion of intergovernmental immunity from federal regulation. The Rehnquist Court suffered a major setback in the overruling of the Chief Justice's capstone opinion in *National League of Cities v. Usery*,[60] which had held that "sovereign" states could not be made

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[56] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 865 (3d ed. 2000).

[57] *Id.* at 862.

[58] For example, in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997), the Court reaffirmed the "residuary and inviolable sovereignty" of the states, 521 U.S., at 919, in holding that they could not be "commandeered" into enforcing federal laws or regulations. In the New York case, the Court (per O'Connor, J.) struck down a provision of the federal Low Level Radioactive Waste Policy Amendments of 1985, requiring states to "take title" to abandoned radioactive waste within their borders and to dispose of it in accordance with federal regulations. In *Printz*, the Court (per Scalia, J.) invalidated a federal requirement under the Brady Handgun Violence Prevention Act that local law enforcement agencies perform background checks on handgun purchasers.

[59] "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." U.S. CONST. amend. X.

[60] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 US. 528 (1985). Written while he was an Associate Justice, *Usery* was a precursor of Rehnquist's states' rights activism as Chief Justice. In *Usery*, he overruled the Court's prior decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), which had upheld application of the federal Fair Labor Standards Act to state and municipal employees. *Wirtz* was reinstated with the subsequent overruling of *Usery* by *Garcia*.

subject to the minimum wage requirements of the federal Fair Labor Standards Act (FLSA) of 1938.[61] In *Usery*, the Court had held —for the first time in forty years – that the Tenth Amendment was an independent limit on Congress' Article I powers.[62] Significantly, Justice Blackmun—who provided the crucial fifth vote—wrote in a separate concurrence that Rehnquist's opinion "adopts a *balancing* approach," which was the reason he joined the opinion.[63] Blackmun later changed his mind in writing to overrule *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*.[64]

In *Garcia*, Justice Blackmun observed that, "The central theme of National League of Cities was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."[65] While agreeing that "States unquestionably do retain a significant measure of sovereign authority," Blackmun wrote, "They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[66] Thus, "the Constitution does not carve out express elements of state sovereignty

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[61] 52 Stat. 1060, as amended, 29 U.S.C. § 201 (2000).

[62] *See* TRIBE, *supra* note 56 at 863.

[63] *Usery*, 426 U.S. at 856 (Blackmun, J., concurring) (emphasis added):

> I may misinterpret the Court's opinion, but it seems to me that it adopts a *balancing* approach, and does not outlaw federal power in areas such as environmental protection, *where the federal interest is demonstrably greater* and where state facility compliance with imposed federal standards would be essential. . . . With this understanding on my part of the Court's opinion, I join it.

[64] 469 U.S. 528, 557 (1985).

[65] *Id.* at 547.

[66] *Id.* at 549. Blackmun also invokes Madison:

> In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."

Id. (citing JAMES MADISON, II ANNALS OF CONGRESS 1897 (1791)).

that Congress may not . . . displace."[67] Moreover, the Court has "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[68] As a consequence, Blackmun concluded, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[69] That is:

> [T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system *than by judicially created limitations on federal power.*[70]

Thus, the Court in *Garcia* declined "to dictate a 'sacred province of state autonomy.'"[71]

Although the Tenth Amendment itself remains a "tautological truism,"[72] the

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[67] *Id.* at 550.

[68] *Id.* at 550.

[69] *Id.*

[70] *Garcia*, 469 U.S. at 552 (emphasis added). More specifically, Blackmun refers to such things as constitutional provisions governing state participation in the selection of the President (i.e., control over voter qualifications and the electoral college), the direct election of senators (although later repealed by the Seventeenth Amendment), and the effectiveness of state participation in the political process as evidence by receipt of billions in federal funding and exemptions from other federal regulations. *Id.* at 550-554.

[71] *Id.* at 554. *See also* Gregory v. Ashcroft, 501 U.S. 452, at 477 (White, J., concurring):

> The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in *Garcia v. San Antonio Metropolitan Transit Authority*, . . .and *South Carolina v. Baker*, 485 U.S. 505 (1988). In those cases we made it clear "that States must fined their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." . . . The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal regulation.

[72] *See* United States v. Darby, 312 U.S. 100, 124 (1941) ("The [tenth] amendment states but a truism that all is retained which has not been surrendered"); New York v. United States, 505 U.S. 144, 156-157 (1992) (". . .the Tenth Amendment . . . is essentially a tautology").

Rehnquist Court remains intransigent in its commitment to *Usery*'s core premise—i.e., that state sovereignty affirmatively limits federal power.

2. THE COMMERCE CLAUSE: ECONOMIC FEDERALISM

In *United States v. Lopez*,[73] the Supreme Court invalidated the federal Gun-Free School Zones Act of 1990,[74] finding that Congress had exceeded its authority under the Commerce Clause. Writing for a 5-4 majority, Chief Justice Rehnquist reminded Congress that the Constitution withholds from it "a plenary police power that would authorize enactment of every type of legislation."[75] This case, the Chief Justice pointed out, involves "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[76] "Under our federal system," Chief Justice Rehnquist noted, "'States possess primary authority for defining and enforcing the criminal law,'" "'except as Congress, acting within the scope of those delegated powers, has created an offense against the United States.'[77]

On the surface, *Lopez* is noteworthy for being the first Supreme Court decision in 59 years to strike down a federal law based on the Commerce Clause. However, it affected virtually no significant doctrinal change in Commerce Clause jurisprudence,[78] nor did it serve to shift power to the states. Its principal conclusion was that Congress had exceeded the scope of its commerce powers.

Still, Rehnquist could not avoid the temptation to suggest that Congress had also intruded state sovereignty in writing that, "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*."[79] Ever the states' rights advo-

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[73] 514 U.S. 549 (1995).

[74] 18 U.S.C. § 922(q).

[75] *Lopez*, 514 U.S. at 566.

[76] *Id.* at 561.

[77] *Id.* at 561 n.3 (citations omitted).

[78] Chief Justice Rehnquist did clarify the so-called affectation doctrine by holding that only activities having a "*substantial*" affect on commerce may be regulated by Congress. *Lopez*, 514 U.S. at 559. Moreover, only intrinsically *economic* activities are subject to regulation under the test. The mere possession of a handgun, according to Rehnquist, is neither commerce "or any sort of *economic* enterprise." *Id.* at 561.

[79] *Id.* at 564.

cate, the Chief Justice rarely forgoes the opportunity to interject his thesis that state sovereignty is a counterbalance to congressional power.

3. USING THE ELEVENTH AMENDMENT TO IMMUNIZE STATES FOR VIOLATIONS OF FEDERAL RIGHTS

As pointed out by one legal scholar and historian, the Eleventh Amendment also received an expansionist states' right interpretation by the post-Reconstruction Supreme Court:

> After 1877, however, the Supreme Court . . . gave the Amendment a broad interpretation. . . . Giving the Eleventh Amendment a generous interpretation the Supreme Court deprived federal courts of jurisdiction over suits by creditors. Because states may close their own courts to claimants by virtue of the doctrine of sovereign immunity, the creditors were left without a remedy and therefore without a right. This sea change in constitutional interpretation coincided with the Compromise of 1877, the compromise that ended Reconstruction in return for Southern acquiescence in the inauguration of President Rutherford B. Hayes.[80]

> Louisiana and North Carolina, the two most heavily indebted states, led the way in invoking the Eleventh Amendment and sovereign immunity to protect themselves against suits by their creditors. . . .[81]

> The Compromise of 1877 was the bondholders' Appomattox. With Congress and the President committed to end Reconstruction there was no means by which the Supreme Court, even if it had been willing, could have forced Southern states to pay. . . .

> After 1890, as the Supreme Court became more and more concerned about the threat that state governments . . . posed to corporate capitalism, it again reinterpreted the Eleventh Amendment. Once the politico-legal problems caused by the end of Reconstruction had been solved, the Court was free to reconstruct the Amendment. During the years from 1890 to

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[80] *See* discussion "The Compromise of 1877" *infra* notes 445-50 and accompanying text

[81] *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890).

> 1908 it accepted two principal theories for avoiding the Eleventh Amendment: consent to suit and suit against state officers.[82]

The Rehnquist Supreme Court, however, has reversed direction. The Court has given unprecedented expansion to the immunity of states against private suit in federal court, based on its view that "the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States."[83] The Court's radical shift in Eleventh Amendment jurisprudence, however, contrasts sharply with the earlier view expressed by an Associate Justice Rehnquist when writing for the Court in *Fitzpatrick v. Bitzer*.[84] There the Justice discussed the then traditionally recognized relationship between the Eleventh Amendment and Congress' powers under section five of the Fourteenth Amendment:

> [T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing provisions of the Fourteenth Amendment, *provide for private suits against States or state officials* which are constitutionally impermissible in other contexts.[85]

By contrast, Chief Justice Rehnquist has begun rewriting Eleventh Amendment jurisprudence with an attack on Congress' authority under Articles I and III

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[82] JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 7-8, 10 (1987).

[83] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). In his opinion for the Court, Justice Powell asserted that, "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties,'" citing his own dissenting opinion in *Garcia*, 469 U.S. at 572. "By guaranteeing the sovereign immunity of the States against suit in federal court," the Justice concluded, "the Eleventh Amendment serves to maintain this balance." *Scanlon*, 473 U.S. at 242.

[84] 427 U.S. 445 (1976).

[85] *Id.* at 456.

of the Constitution to subject states to private suit in federal court.

a. Seminole Tribe of Florida v. Florida

Seminole Tribe of Florida v. Florida,[86] illustrates how the Rehnquist Court's Eleventh Amendment decisions are predicated on the Chief Justice's fallacious views of federalism. In *Seminole Tribe*, the Court overruled *Pennsylvania v. Union Gas*,[87]which held that Congress could abrogate the Eleventh Amendment immunity of states under the Commerce Clause. In a 5-4 decision for the Court, Chief Justice Rehnquist charged that the plurality opinion in *Union Gas* "deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*."[88] The Chief Justice, however, was wrong on both counts.

While it was "well established" at the time *Union Gas* was decided that the Eleventh Amendment limited the *judicial* power under Article III, as the Chief Justice maintained,[89] Article III also confers *legislative* power on Congress "to ordain and establish" lower federal courts with jurisdiction to hear "all Cases, in law and Equity, arising under this Constitution, [and] the Laws of the United States. . .," including controversies "between a State and Citizens of another State."[90] Did the Eleventh Amendment also restrict the *legislative powers* of Congress, as well as the judicial powers of the courts? The answer depends on whether the Amendment imposes either an absolute or a waivable jurisdictional bar to private suits in federal courts. If the Amendment absolutely divests federal courts of jurisdiction to hear such suits, Congress would be foreclosed from using its legislative powers to circumvent that constitutional restriction per the reasoning of *Marbury v. Madison*.[91] On the other hand, if the Eleventh Amendment does not create an absolute bar to suit – as *Hans* and its progeny hold – the question of whether Congress can authorize private suits against states, where "necessary and proper" to the exercise of its enumerated powers, remains open.

There are at least two theories supporting the view that Congress' legislative authority to authorize private suits against states in federal court remained intact

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[86] 517 U.S. 44 (1996).

[87] 491 U.S. 1 (1989).

[88] *Seminole Tribe*, 517 U.S. at 64.

[89] *Id.* at 64.

[90] U.S. CONST. art. III, § 1, § 2.

[91] 5 U.S. 137 (1803).

after ratification of the Eleventh Amendment. The first is the "surrender of sovereignty" view of federalism, discussed in greater detail below.[92] Specifically, if states were required to surrender their sovereignty over certain subjects to Congress,—e.g., interstate commerce—pursuant to "the plan of the [constitutional] convention," then "over the subjects thus surrendered, the sovereignty of the states ceased to exist."[93] It became vested in the federal government. Consequently, states retained neither sovereignty, nor sovereign immunity over those subjects. The Eleventh Amendment, therefore, does not immunize states as to subjects over which the federal government has plenary authority. It immunizes states only for those subjects over which they retain either exclusive or concurrent sovereignty.

Under the second theory, even if *Hans* was correctly decided, its reading of the Eleventh Amendment can be harmonized with the continuing authority of Congress to abrogate state immunity pursuant to its legislative powers under Articles I and III. The Eleventh Amendment bars private claims against states in federal court, but only where Congress has not expressly abrogated state immunity and authorized the suit, pursuant to an enumerated power.

Obviously, neither theories comports with Chief Justice Rehnquist's repudiated "balance of power" view of federalism. Unlike the Chief Justice's view, however, the two theories are grounded in longstanding precedent. Chief Justice Rehnquist, on the other hand, looked to his own opinion in *Pennhurst State School and Hospital v. Halderman*,[94] as well as Justice Scalia's dissent in *Union Gas*, to support use of the Eleventh Amendment as a restraint on the legislative powers of Congress: "As the dissent in *Union Gas* recognized, the plurality's conclusion – that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III – 'contradict[ed] our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction."[95] Taking that lead, Chief Justice Rehnquist goes on to argue in *Seminole Tribe*:

> Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it

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[92] *See* discussion *infra* notes 132-39 and accompanying text .

[93] Tennessee v. Davis, 100 U.S. 257, 266-67 (1880).

[94] 465 U.S. 89, 97-98 (1984) ("the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III").

[95] Seminole Tribe of Florida v. Florida, 517 U.S. 44, 65 (1996) (quoting Justice Scalia's dissent in *Pennsylvania v. Union Gas*, 491 U.S. 1, 39 (1989)).

> had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803).[96]

Distinguishing *Fitzpatrick v. Bitzer*[97]—which recognized Congress' power to abrogate state immunity under section five of the Fourteenth Amendment—Chief Justice Rehnquist observed that "the Fourteenth Amendment [was] adopted well after the adoption of the Eleventh Amendment," and that it "operated to alter the *preexisting balance between state and federal power* achieved by Article III and the Eleventh Amendment."[98] However, the Eleventh Amendment cannot be limited "through appeal to antecedent provisions of the Constitution."[99]

Rehnquist's balance of power argument presupposes that—similar to the Fourteenth Amendment—the Eleventh Amendment was also intended to fundamentally alter relations between states and *Congress*, as distinct from the federal judiciary. Clearly, however, that view far exceeds even *Han*'s reading of the Eleventh Amendment. Nothing in the Eleventh Amendment *restores* state sovereignty that was "surrendered in the design of the convention." Only that sovereignty which was "retained" by the states after ratification of the Constitution is protected.

Moreover, since it has not been construed as a jurisdictional bar to federal suit, nothing in the Eleventh Amendment restrains the *legislative* power of Congress to abrogate state immunity—even assuming some residual sovereignty of the states. Unlike the issue in *Marbury v. Madison*, Congress' abrogation of state immunity does not result in an impermissible expansion of federal court jurisdiction contrary to Article III. Thus, as noted in Justice Breyer's dissent in *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*:[100]

> The precedents that offer important legal support for the doctrine of sovereign immunity do not help the *Seminole Tribe* majority. They all focus

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[96] *Id.* While Chief Justice Rehnquist went on to accuse the *Union Gas* plurality of the "misreading of precedent," the Justice himself clearly misread and misapplied *Marbury v. Madison*—which held only that Congress could not expand the Supreme Court's *original* jurisdiction beyond that specified in Article III.

[97] 427 U.S. 445 (1976).

[98] *Seminole Tribe*, 517 U.S. at 65-66.

[99] *Id.* (quoting Justice Scalia's dissent in *Union Gas*, 491 U.S. at 42).

[100] 527 U.S. 666 (1999).

> upon a critically different question, namely, whether *courts*, acting without legislative support, can abrogate state sovereign immunity, not whether *Congress*, acting legislatively, can do so. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Chisholm v. Georgia*, 2 Dall. 419, 429 (1793) (Iredell, J., dissenting); *Seminole Tribe*, *supra*, at 119 (Souter, J., dissenting) ("Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation").[101]

In short, nothing in the text or legislative history of the Eleventh Amendment, nor in *Hans v. Louisiana* and it progeny, altered the plenary powers of *Congress* under Articles I and III in authorizing suit against states. The Rehnquist Court's expansive reading of the Eleventh Amendment is no more justifiable than its expansive reading of the Tenth Amendment, which was also ratified subsequent to Articles I and III.

b. Alden v. Maine

In *Alden v. Maine*,[102] the conservative members of the Rehnquist Court abandoned all "strict constructionist" pretense in extending Eleventh Amendment immunity to bar private suits *in state courts* against states for vindication of federal rights.[103] Eschewing the plain language of the Amendment,[104] the 5-

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[101] *Id.* at 700. *See also* Nowak, *supra* note 14, at 1101-1102 (second emphasis added) (citations omitted):

> [T]he views of the Federalists who voted for the Eleventh Amendment seem to be clear. They were voting only to stop the federal courts from assuming jurisdiction over debt actions *without congressional authorization*. There is no reason to believe that the Federalists sought to restrict the scope of federal *legislative* authority. Most, though not all, of the scholars who have looked at the Eleventh Amendment history in the past quarter-century have, for a variety of reasons, concluded that the Amendment left Congress with a great scope of power to create causes of actions against state governments in the federal courts. All of that history was disregarded by the Gang of Five's majority opinions in *Seminole Tribe* and *Alden*.

[102] 527 U.S. 706 (1999).

[103] From the beginning, the Constitution contemplated prosecution of federal claims in state courts. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. 304, 342 (1816):

> It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which

member majority decreed:

> To rest on the words of the Amendment alone would be to engage in the type of historical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm [v. Georgia, 2 U.S. 419 (1793)]. Seminole Tribe [of Fla. v. Florida]*, 517 U.S., at 68; see also, id., at 69 (quoting *Principality of Monaco [v. Mississippi]*, supra, 292 U.S. at 326, and *Hans [v. Louisiana]*, 134 U.S., at 15) ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of'").[105]

Like Seminole Tribe, *Alden* also relies heavily on recent Rehnquist Court precedent to support its tenuous conclusions.[106] It is also premised on the balance of power thesis: "The principle of sovereign immunity as reflected in our

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> might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet, to all these cases the judicial power, by the very terms of the constitution, is to extend.

[104] "The Judicial power *of the United States* shall not be construed to extend to any suit in law or equity . . . against one of the United States. . . ." U.S. CONST. amend. XI (emphasis added).

[105] *Alden*, 527 U.S. at 730.

[106] *Seminole Tribe* and *Printz* provide the sole bases for many of the central points in *Alden*. For example, Justice Kennedy cites only *Printz* in support of his claim that the "founding generation" rejected the idea of the central government acting "upon and through the States." *Id.* at 714. The Justice cites *Seminole Tribe* and *College Savings Bank* as overruling prior decisions upholding the use of Congress' Article powers to authorize private suits against states. *Id.* at 732. Kennedy quotes *Printz* for the proposition:

> When a "Law . . . for carrying into Execution" the Commerce Clause *violates the principle of state sovereignty* reflected in the various constitutional provisions . . . it is *not* a "Law . . . proper for carrying into Execution the Commerce Clause," and is, thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserve[s] to be treated as such."

Id. at 732-733 (emphasis added) (citations omitted). *Lopez, Printz,* and *New York v. United States*, provide the sole bases for Kennedy's contention that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns *and joint participants* in the governance of the Nation." *Id.* at 748 (emphasis added) (citations omitted).

jurisprudence *strikes the proper balance* between the supremacy of federal law and the separate sovereignty of the States."[107] Moreover, the majority declared:

> We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.[108]

Note the subtle, but very significant sleight of hand – the *Eleventh Amendment* now requires federal law to be implemented "consistent with" state *sovereignty*. In other words, *Alden* holds that the Eleventh Amendment immunity of states *overrides* the Supremacy Clause.

Alden was initially filed in federal court in 1992, by a group of probation officers claiming that the State of Maine was violating the overtime provisions of the FLSA.[109] The federal action was ultimately dismissed[110] in response to the Supreme Court's decision in *Seminole Tribe of Fla. v. Florida*,[111] which held that Congress could not abrogate the states' Eleventh Amendment immunity under laws enacted pursuant to the Commerce Clause. The probation officers refiled their suit in state court.[112] However, the state trial court also dismissed the case on the basis of sovereign immunity, and the Maine Supreme Judicial Court affirmed.[113] The U.S. Supreme Court granted certiorari, citing a conflicting decision of the Arkansas Supreme Court,[114] and affirmed.[115] In a 5-4 decision, the Court held that "the powers delegated to Congress under Article I of the United

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[107] *Id.* at 757.

[108] *Id.* at 732.

[109] *Alden*, 527 U.S. at 711.

[110] *Id.* at 712.

[111] 517 U.S. 44 (1996).

[112] *Alden*, 527 U.S. at 711.

[113] *Id.*

[114] 527 U.S., at 712 (citing *Jacoby v. Arkansas Dept. of Ed.*, 331 Ark. 508, 962 S.W.2d 773 (1998)).

[115] *Id.*

States Constitution do not include the power to subject non-consenting States to private suits for damages in state courts."[116]

To get around the restrictive wording of the Amendment, Justice Kennedy's lengthy opinion for the Court purports to "derive" the sovereign immunity of states "not from the Eleventh Amendment, but from the structure of the original Constitution itself."[117] Indeed, the Justice argued, "the sovereign immunity of the States neither derives from *nor is limited by* the terms of the Eleventh Amendment."[118] Instead, "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] Justice Kennedy's qualification here is an important one because it begs the critical questions he never squarely answers: Did the "plan of the Convention" alter "the sovereignty which the States enjoyed *before* the ratification of the Constitution," and if so *to what extent*? The bulk of Justice Kennedy's opinion is little more than a polemic about state sovereignty and the "constitutional role of the States."[120] Occasionally, Justice Kennedy hinted that states *did* relinquish some degree of sovereignty, but he never explores the implications.[121]

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[116] *Id.* *See* 29 U.S.C. § 216(b) ("An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . . .) and § 203(x) ("Public agency" means the Government of the United States; the government of a State or political subdivision thereof. . . .).

[117] *Id.* at 728. The ease with which the Rehnquist Court can look beyond the constitutional text and "derive" *states'* rights from the constitution's "structure," stands in stark contrast to its innate inability to derive *individual* rights from the same constitutional structure.

[118] *Id.* at 713 (emphasis added).

[119] *Id.* (emphasis added).

[120] Justice Kennedy engages in all the usually unhelpful posturing by declaring, for example: "any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." *Id.* at 713-714. Of course, unlike the first eight Amendments, the Tenth Amendment is *not* an affirmative restraint on federal power – although clearly Justice Kennedy and the other conservative members of the Rehnquist Court would like it to be.

[121] Repeatedly, Justice Kennedy refers to the important caveat that states retained their sovereign immunity, "save where there has been a 'surrender of this immunity in the plan of the convention.'" *See, e.g., id.* at 716-717 (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 81), 729 (*Principality of Monaco*, quoting ALEXANDER HAMILTON, FEDERALIST NO. 81), 730. At no time is the caveat discussed by Kennedy.

In earlier decisions, however, the Supreme Court expounded on the theory that states relinquished some of their sovereignty under the Constitution. For example, in *Tennessee v. Davis*[122]—which upheld a federal statute authorizing removal of federal officers from state court criminal prosecutions to federal courts[123]—the Court observed :

> The United States is a government with authority extending over the whole territory of the Union, *acting upon the States and upon the people of the States*. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.[124]

Citing only *Printz* and *New York v. United States*, Justice Kennedy rejects the notion of the federal government "acting upon the States":

> [T]he constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "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.'" *Printz [v. United States]*, 521 U.S., at 919-920 (quoting The Federalist No. 15, at 109); accord, *New York [v. United States]*, 505 U.S., at 166 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States").[125]

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[122] 100 U.S. 257 (1880).

[123] Although the removal of state-initiated cases from state to federal court falls within a recognized exception to Eleventh Amendment immunity, a *surrender* of state sovereignty is – to use Justice Kennedy's words – a "separate and distinct *structural* principle . . . not directly related to the scope of the judicial power established by Article III, [that] inheres in the system of federalism established by the Constitution." *Alden*, 527 U.S., at 730 (emphasis added).

[124] *Davis*, 100 U.S. at 263.

[125] *Alden*, 527 U.S. at 714. *But see* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 83-84 (1928) (citations omitted):

> While the Constitution operates upon individuals, it also operates upon the States in their corporate capacities. "It is crowded," said Justice Story, "with provisions which

However, in *Tennessee v. Davis* the Court observed:

> The founders of the Constitution never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution?[126]

Alden allows states to effectively frustrate Congressional objectives under both the FLSA and the Commerce Clause by simply refusing to waive sovereign immunity in their courts. As one commentator concludes, the Rehnquist Court "has created a variation of South Carolina's Senator John C. Calhoun's 'nullification doctrine' that was a precursor to the Civil War."[127] Even if some states permit such actions, the resulting inconsistency in state enforcement would undermine Congress' supremacy over interstate commerce. Moreover, *Alden* "indirectly reduce[s] federal sovereignty by eliminating one of its most effective remedial weapons – giving individuals the right to sue to protect their own federal and constitutional rights."[128] Finally, *Alden* "creates a profoundly disquiet-

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> restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. . . . The courts of the United States can, without question, review the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity." . . . It is evident that without the power to maintain the supremacy of the Federal Constitution over State legislation the Constitution would have been a dead letter in some of its most important applications.

[126] *Id.* at 266.

[127] Wilson, *supra* note 11, at 1717. As Wilson explains:

> The modern Eleventh Amendment doctrine creates a similar veto over the original constitution as it applies to individual sovereignty. Any state legislature can cripple any federal law and any pre-Fourteenth Amendment part of the Constitution by enacting a statute asserting state sovereign immunity. Admittedly, the veto will not be absolute. The federal government can still sue and individuals can still seek injunctive relief (so long as *Ex parte Young* remains good law under this neofederalist revival), but the basic structure remains quite similar.

Id.

[128] Wilson, *supra* note 11, at 1702. *See* Roger C. Hartley, *Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323, 373-75 (2000):

ing enforcement gap that threatens to undermine the rule of law values in our constitutional scheme, particularly the principle that for every right there ought to be a remedy."[129] "[E]liminating the remedy effectively eliminates the sub-

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> Over a quarter-century ago, at a time when a majority of state and local employees were not covered by the FLSA, the Solicitor General of the United States argued in an amicus brief in *Employees v. Missouri Public Health Department* that the United States Department of Labor could investigate less than four percent of the employing establishments. In 1974, Congress similarly determined, based on the Department of Labor's experience enforcing the FLSA, "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily." The problem was compounded, Congress concluded, by the inclusion in 1974 of additional state government employees, making it "all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights." In *Alden*, the Solicitor General advised the Court that "[w]e have been informed by the Department of Labor that its more recent experience confirms Congress's judgment that private enforcement is necessary to ensure that state employees receive the wages to which they are entitled by federal law." Notwithstanding this evidence, the *Alden* Court included government enforcement of federal rights as one of the "ample [alternative] means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause."
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> . . . The government enforcement model is unrealistic, as the dissent in *Alden* suggests, both because of the absence of resources and the absence of political will. With 4.7 million employees employed by the fifty states, it is difficult to disagree with the dissent's conclusion that "there is no reason today to suspect that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with [the FLSA]."

See also, Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1303 (2000): "For the vast majority of federal laws, the federal government has no authority to sue on behalf of individuals." Moreover, "Federal agencies, such as the Department of Labor, have very limited prosecutorial resources." Finally, "Injunctive relief [under *Ex parte Young*] obviously can prevent future violations, but it does nothing to provide redress for past infringements" of federal rights." *Id.* at 1304.

[129] Hartley, *supra* note 128, at 328; *see also*, Chemerinsky, *supra* note 128 , at 1299:

> [T]he Court's [*Alden*] decision means that state employees have a federal right, but no remedy is available to them. This violates a basic principle of law expressed long ago in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

stantive right" and is a denial of due process.[130]

In rejecting the assumption that the States "are completely and in all respects sovereign," the Court in *Tennessee v. Davis* explained:

> [W]hen the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States *ceased to extend.* Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested *it was withdrawn from the sovereignty of the State.* Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted.[131]

Despite the opposing theories of federalism presented by the Supreme Court in *Tennessee v. Davis* and the Rehnquist Court, the two views converge at one crucial point. As Justice Kennedy notes, "In exercising its Article I powers Congress may subject the States to private suits in their own courts only *if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design.*"[132] History certainly presents

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[130] Hartley, *supra* note 128, at 366; *see also* Chemerinsky, *supra* note 128, at 1305-1306.

[131] Tennessee v. Davis, 100 U.S. 257, 266-267 (1880) (emphasis added). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 457-458 (1976) (Brennan, J., concurring):

> [T]he question is whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII. In my view Connecticut may not assert sovereign immunity for the reason I expressed in dissent in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 298 (1973): The States surrendered that immunity, in Hamilton's words, "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. . . . Congressional authority to enact the provisions of Title VII at issue in this case is found in the Clause, . . ., and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution. . . . I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver."

[132] *Alden*, 527 U.S. at 730-731.

"compelling evidence" that the states surrendered sovereignty over interstate commerce to Congress "pursuant to the constitutional design." Congress' power over interstate commerce is "plenary."[133] As a consequence, the Eleventh Amendment does *not* stand as a bar to private suits against states under authority of the Commerce Clause, *since nothing remains of state sovereignty over interstate commerce.*[134] It also follows that the Rehnquist Court reached a non sequitur in *Seminole Tribe of Florida v. Florida*, since Congress has no need to abrogate state immunity in the absence of state sovereignty.

Justice Kennedy opined that "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."[135] Yet later he wrote:

> The language of the Eleventh Amendment . . . was directed toward the only provisions of the constitutional text believed to call the States' immunity from private suits into question. *Although Article III expressly contemplated* jurisdiction over suits between States and individuals, nothing in the Article or in any other part of the Constitution suggested the States could not assert immunity from private suit in their own courts or that Congress had the power to abrogate sovereign immunity there.[136]

In one paragraph, Justice Kennedy flatly contradicted the two core premises of his opinion. First, he acknowledged that there is express language in Article III authorizing private suits against states, which means the states did in fact

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[133] *See* Gibbons v. Ogden, 22 U.S. 1, 197 (1824).

[134] *See* Parden v. Terminal R. Co., 377 U.S. 184, 191 (1964):

> While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," . . . the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. 'This power, like all other vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . .' *Gibbons v. Ogden* . . . [T]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. . . . [I]t must follow that application of the [Federal Employers' Liability] Act to [a state owned railroad] cannot be precluded by sovereign immunity.

[135] *Alden*, 527 U.S. at 727.

[136] *Id.* at 742-743 (emphasis added).

"*knowingly* relinquished their sovereign immunity." Second, Justice Kennedy recognized that the Eleventh Amendment "was directed toward" the specific language of Article III, and therefore was not drafted to constitutionalize complete sovereign immunity of the states.

Finally, Justice Kennedy's discourse on the role of state courts within the federal system[137] also deviated from longstanding precedent. Kennedy wrote:

> In some ways, of course, a congressional power to authorize private suits against nonconsenting 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.[138]

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[137] *See id.* at 748-754.

[138] *Id.* at 749. Justice Kennedy's citation to his prior opinion in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276 (1997), is puzzling, since *Alden* also departed from its view of federalism and the role of state courts. As Justice Kennedy wrote in *Coeur d'Alene Tribe*:

> Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts *where Eleventh Amendment immunity would be applicable in federal court*. . . . For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court. Federal courts, after all, did not have general federal-question jurisdiction until 1875.
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> . . . A doctrine based on the inherent inadequacy of state forums *would run counter to basic principles of federalism*. In *Stone v. Powell*, 428 U.S. 465 (1976), we expressed our "emphatic reaffirmation . . . of the *constitutional obligation* of the state courts to uphold federal law. . ."
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> . . . The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law "together form *one system of jurisprudence*." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876).

Coeur d'Alene Tribe, 521 U.S. at 274-76.

Exactly two years later, however, Justice Kennedy concluded in *Alden* that the Eleventh Amendment itself is "problematic" in having federal claims against states resolved in state courts. Moreover, despite "basic principles of federalism," state courts do have an "inherent

Moreover, Kennedy asserted, "If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State . . . would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very constitution from which its existence derives."[139]

Justice Kennedy's apprehensions about Congress "commandeering" state courts were dismissed by the Supreme Court long ago. In *Testa v. Katt*,[140] the Court upheld a provision of the federal Emergency Price Control Act of 1942 permitting damage recoveries for overcharges in state courts. The Rhode Island Supreme Court held such actions could not be maintained in state court. In reversing, Justice Black said:

> [W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI, § 2 of the Constitution [i.e., the Supremacy Clause].[141]

Justice Black noted that, "Enforcement of federal laws by state courts did not go unchallenged," and that "after the fundamental issues over the extent of federal supremacy had been resolved by [civil] war," the Court reviewed "the controversy concerning the relationship of state courts to the Federal Government"[142] in *Claflin v. Houseman*.[143] There, the Supreme Court "repudiated the

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inadequacy" in meeting their "constitutional obligation" to "uphold federal law" against states. Kennedy simply ignored the flagrant inconsistencies in his two opinions.

[139] *Id.* at 752. Kennedy cites no supporting authority for these claims.

[140] 330 U.S. 386 (1947).

[141] *Id.* at 389.

[142] *Id.* at 390.

[143] 93 U.S. 130 (1876). Claflin was an assignee in bankruptcy who had initiated proceedings in New York state court to recover assets previously collected by Houseman through a judgment against the bankrupt. Houseman claimed the state court had no jurisdiction under the federal Bankruptcy Acts of 1841 and 1867. The state trial and appellate courts rejected the claim and the U.S. Supreme Court affirmed.

Justice Black also cites *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912), where the Court reversed a decision of the Connecticut Supreme Court barring enforcement of rights un-

assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign."[144]

In *Claflin*, Justice Bradley for a unanimous Court observed that, "The disposition to regard the laws of the United States as emanating from a foreign jurisdiction *is founded on erroneous views of the nature and relations of the State and Federal governments*."[145] "It is," he continued, "often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country."[146] He discussed "the structure and true relations of the Federal and State governments" and the role of state courts:

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, – concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under ei-

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der the federal Employers Liability Act of 1908. In response to the Connecticut court's holding that enforcement of the federal law would be contrary to state law, the U.S. Supreme Court responded:

> The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people *and all the states*, and thereby established a policy for all. *That policy is as much the policy of Connecticut as if the act had emanated from its own legislature*, and should be respected accordingly in the courts of the state.

Mondou, 223 U.S. at 57 (emphasis added). *See also* Hughes, *supra* note 125, at 152-153:

> [Under the Employers' Liability Act of 1908] Congress established its own measure of liability, and the State courts, as well as the Federal Courts must recognize it. Congress thereby established a policy for all, and that policy became as much the policy of the States as if the act had emanated from their own legislatures.

[144] *Testa*, 330 U.S. at 390-391.

[145] *Chaflin*, 93 U.S. at 137 (emphasis added).

[146] *Id.*

> ther system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. . . . The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the States as it is to recognize the State laws. The two together form *one system of jurisprudence*, which constitute the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.[147]

Clearly, Justice Kennedy's contention that Congress cannot "press a State's own courts into federal service to coerce the other branches of the State,"[148] "is founded on erroneous views of the nature and relations of the State and Federal governments" and radically departs from settled views of federalism established by a long line of Supreme Court precedent – including *Testa v. Katt* (1947), *Mondou v. New York, N.H. & H.R. Co.* (1912),[149] and *Claflin* (1876).[150] Under those cases, the federal Fair Labor Standard Act *is also the law of Maine* and every other state in the Union. Thus, as previously discussed, the Eleventh

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[147] *Id.* at 136-137. As supporting authority, Justice Bradley cited Federalist No. 82, which includes Alexander Hamilton's observation, "When . . . we consider the State governments and the national government, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." *Id.* at 138 (citation omitted).

[148] Alden v. Maine, 527 U.S. 706, 749 (1999).

[149] *See supra* note 143.

[150] Justice Kennedy is well acquainted with this line of precedent, having cited *Claflin* in his opinion in *Coeur d'Alene Tribe*, 521 U.S. 261, at 276 (*see also supra* note 138), and *Testa* in his *Alden* opinion, 527 U.S., at 744 and 752.

Amendment is not a bar to private suits in federal courts since the states have surrendered sovereignty – and, accordingly, sovereign *immunity* – over interstate commerce.[151] Moreover, being part of "one system of jurisprudence," state courts are not commandeered into federal service against other state branches, since the federally adopted policies they enforce are also the policies of the states.

In short, the Rehnquist Court's expansive reading of the Eleventh Amendment "presupposes what in legal contemplation does not exist"—i.e., a conflict between state and federal sovereignty whenever valid federal laws or regulations are applied to the states. By definition, no such conflict can exist, since the two sovereignties are one. Given *that* understanding of federalism, an Eleventh Amendment which bars only *private, diversity jurisdiction claims* against states in federal courts, makes perfect sense.

As a palliative afterthought, Justice Kennedy suggested that since states are duty bound to uphold the Constitution and laws of the United States, it is enough to rely on their good faith[152]:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI.[153]

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[151] *See* discussion *supra* notes 102-21 and accompanying text .

[152] By contrast, the Rehnquist Court has little faith in and great disdain for Congress. *See, e.g.*, College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 690 (1999) (emphasis added):

> Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course – but only within the bounds of federal power established by the Constitution. Beyond those bounds (the theory of our Constitution goes), *it is a menace.*

[153] Alden v. Maine, 527 U.S. 706, 754-55 (1999).

In the final analysis, that is precisely what the Rehnquist Court's states' rights jurisprudence comes down to – a plaintive plea that states *voluntarily* respect federal law, knowing as they do the many constraints on effective monitoring and enforcement by the federal government.[154]

Contrary to *Alden's* contorted reading of the Constitution, Congress could have authorized private suit against the State of Maine for violation of the FLSA under any one of three theories which are either historically recognized or based on the plain text of the Constitution. First, since Maine surrendered its sovereignty over interstate commerce upon ratifying the Constitution, the Eleventh Amendment is inapplicable since it has no sovereignty over the subject matter to immunize.[155] Second, even assuming some residuary, concurrent, or joint state sovereignty over a subject, Congress can abrogate the state's sovereign immunity in exercising its Article I powers, since the Eleventh Amendment bars federal suit against states *only in the absence of abrogating legislation by Congress*. Third, the federal rights created under the FLSA are "privileges or immunities of citizens of the United States,"[156] and therefore Congress can abrogate state immunity under section five of the Fourteenth Amendment.

B. THE STATES' RIGHTS ASSAULT ON CONGRESS' FOURTEENTH AMENDMENT POWERS

Section one of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens of the United States and of the State wherein they reside.* No State shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction the *equal protection of the laws*.[157]

The Court has recently extended its balance of power thesis to the Fourteenth Amendment, despite its clear language to the contrary. Chief Justice Rehnquist

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[154] *See supra* note 153.

[155] See *supra* text accompanying notes 136-37.

[156] *See* discussion concerning expansion of the privileges and immunities of national citizenship through the legislative powers of Congress *infra* note 423.

[157] U.S. CONST. amend. XIV, § 1.

argues in *United States v. Morrison*[158]:

> [T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government.[159]

While committed to preserving a role for states within the federal system,[160] maintaining a "balance of power" between the states and the federal government was neither an objective, nor a paramount concern of Congress in framing the Fourteenth Amendment. As Rehnquist himself observed in writing for the Court in *Fitzpatrick v. Bitzer*:[161]

> The impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States, and the reach of congressional power under § 5, were examined at length by this Court in *Ex parte State of Virginia*, 100 U.S. 339 (1880). . . . It . . . addressed the relationship between the language of § 5 and the substantive provisions of the Fourteenth Amendment:
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> > The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however, put forth, whether that action be executive, legislative, or judicial. Such enforcement *is no invasion of State sovereignty*. . . . [A] State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, *though they may interfere with the full enjoyment of rights she would have if those powers had not been granted.* Indeed, every addition of power to the general government *involves a corresponding diminution of the governmental powers of the States*. It

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[158] 529 U.S. 598 (2000). *See* discussion of *Morrison supra* notes 246-336 and accompanying text.

[159] *Id.* at 678.

[160] *See infra* note 162.

[161] 427 U.S. 445 (1976).

is carved out of them. . . Id., at 346-348.

> *Ex parte State of Virginia's* early recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. [Citations omitted]. There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carv(ing) out" in *Ex parte Virginia*. . . .[162]

Clearly, nothing in the text of the Fourteenth Amendment is directed toward maintaining a balance of power, when the "expansion of Congress' powers" necessarily means a "corresponding diminution of state sovereignty."

In language that emphasizes the *supremacy* of federal rights over competing state interests,[163] the Fourteenth Amendment prohibits state interference with "the privileges or immunities" of U.S. citizens.[164] Additionally, section one of the Fourteenth Amendment also guarantees all "persons" due process and equal protection *under state laws*. And finally, section five invests Congress with the power to enforce the terms of the Amendment with "appropriate legislation" – meaning that Congress is empowered to enact "all laws . . . necessary and proper"[165] for effectuating Fourteenth Amendment guarantees against state inter-

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[162] *Id.* at 453-456 (emphasis added).

[163] "All persons born or naturalized in the United States . . . are *citizens of the United States* . . . . No *State* shall . . . abridge the privileges or immunities of *citizens of the United States* . . . ." U.S. CONST. amend. XIV. (emphasis added).

[164] "*No State shall* make or enforce *any law* . . .; *nor shall any State* deprive . . . ; nor deny . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added).

[165] *See* U.S. CONST. art. I, § 9, cl. 18; *see also* Katzenbach v. Morgan, 384 U.S. 641, 650-651 (1966):

> By including § 5 the draftsmen sought to grant to Congress . . . the same broad powers expressed in the Necessary and Proper Clause. . . . "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." . . . Thus, the *McCulloch v. Maryland*

ference.[166] In short, the Fourteenth Amendment neither requires nor contemplates a "balance of power" between states and the federal government.

In addition to its erroneous balance of power thesis, the Rehnquist Court has also challenged Congress' lawmaking authority under section five of the Fourteenth Amendment in three critical respects.

First, in complete disregard of the Necessary and Proper Clause, the Court has fashioned yet another "balancing" test for reviewing Congressional enactments under section five—i.e., "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[167] The Necessary and Proper Clause expressly applies to the grant of legislative power to Congress under section five of the Fourteenth Amendment.[168] As Chief Justice Marshall explained in *McCulloch v. Maryland*,[169] the choice of means is for Congress, not the courts: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[170] There no reason to assume that section five's specifying of "appropriate" legislation is any more restrictive than Marshall's use of the term in describing the Necessary and Proper Clause.[171]

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standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment.

[166] *See* Gregory v. Ashcroft, 501 U.S. 452, 480 (White, J. concurring):

"[W]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on State authority." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Indeed, we have held that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980). . .

[167] United States v. Morrison, 529 U.S. 598, 625-26 (2000).

[168] *See supra* note 165.

[169] 17 U.S. 316 (1819).

[170] *Id.* at 421 (emphasis added).

[171] *See Katzenbach v. Morgan*, 384 U.S. 641, 650 n.9 (1966):

In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187—190 (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, e.g., Cong.Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

See also Katzenbach, 384 U.S, at 650:

By including § 5 the draftsmen 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, Art. I, § 8, cl. 18. The classic formulation of the reach of those powers was established by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Ex parte Com. of Virginia, 100 U.S., at 345—346, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

651 Strauder v. West Virginia, 100 U.S. 303, 311; Virginia v. Rives, 100 U.S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in State of South Carolina v. Katzenbach, 383 U.S. 301, 326, that "(t)he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in McCulloch v. Maryland. See also James Everard's Breweries v. Day, 265 U.S. 545, 558-559 (Eighteenth Amendment). Thus the McCulloch v. Maryland standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether s 4(e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the McCulloch v. Maryland standard, whether s 4(e) may be regarded as an enactment to enforce the Equal Protection

Second, the Court's application of the "congruence and proportionality" test is reminiscent of *Lochner v. New York*[172] and its discredited mode of judicial review.[173] While recognizing Congress' authority to act, the test permits the Court to decide whether Congress' policy choices outweigh state interests.[174] Moreover, Congress is held to the evidentiary rules of *judicial* fact finding in determining whether it has offered sufficient justification for its policy choices.

Third, the Court has reinstated the previously abandoned state action requirement as a predicate for congressional legislation.[175] As a majority of the Court previously recognized, attacking private discrimination is clearly necessary and proper to effectuate the purposes of the Fourteenth Amendment.[176] Ad-

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Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."

[172] 198 U.S. 45 (1905).

[173] In *Lochner*, the Court struck down a New York health and safety regulation limiting the number of hours employees could work in bakeries. The Supreme Court's non-deferential review and criticism of the regulation was and has been the subject of widespread criticism, causing the Court to later abandon its method of review. *See, e.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 131-137 (1987):

> "Lochnerism" and "Lochnerian" have come to symbolize an era of conservative judicial intervention under the Due Process Clause, seeking to stem the flow of social and economic reform. . . .
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> The Lochnerian decisions are often characterized as "activist." Plainly the Justices in the majority did not hesitate to substitute judicial opinions for the judgments of elected representatives of the people. . . . The term "activist" is also fairly applicable to some of the Justices in the majority insofar as it implies a self-conscious will to reach a social or political result, giving scant weight to recognized sources of law.
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> [T]he Court of the *Lochner* era was activist in the sense that in interpreting the Due Process Clauses the majority of the Justices substituted their views of the proper balance between individual liberty and public regulation for the views expressed by the elected representatives of the people.

[174] *See* Gregory v. Ashcroft, 501 U.S. 452, 477 (White, J., concurring): "[I]t is one thing to limit judicially created scrutiny, and it is quite another to fashion a restraint on Congress' legislative authority, as does the majority; the latter is both counter-majoritarian and an intrusion on a coequal branch of the Federal Government."

[175] *See* United States v. Morrison, 529 U.S. 598, 622-24 (2000).

[176] *See* United States v. Guest, 383 U.S. 745, 782 (Brennan, J., concurring in part:

ditionally, it has long been recognized that Congress can protect the privileges and immunities of U.S. citizens against private action.[177]

1. CITY OF BOERNE V. FLORES[178]

At issue in *City of Boerne* was the constitutionality of the Religious Freedom Restoration Act (RFRA) of 1993, which was enacted by Congress in response to the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith.*[179] City officials in Boerne, Texas had refused to permit the ex-

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> A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy. . . [Section] 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.

[177] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 498 (1999) ("[T]he right to travel is so important that it is 'assertable against private interference as well as governmental action. . .a virtually unconditional personal right, guaranteed by the Constitution to us all.'"); *see also* United States v. Williams, 341 U.S. 70, 77 (1951) (emphasis added):

> Congress can beyond doubt constitutionally secure [certain rights] against interference by private individuals. Decisions of this Court have established that this category includes rights which arise from the relationship of the individual and the Federal Government. The right of citizens to vote in congressional elections, for instance, may obviously be protected by Congress from individual as well as from State interference. *Ex parte Yarbrough*, 110 U.S. 651. On the other hand, we have consistently held that the category of rights which Congress may constitutionally protect from interference by private persons excludes those rights which the Constitution merely constitutionally guarantees from interference by a State. . . . The distinction which these decisions draw between *rights that flow from the substantive powers of the Federal Government* and may clearly be protected from private interference, and interests which the Constitution only guarantees from interference by States, is a familiar one in American law. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 310.

[178] 521 U.S. 507 (1997).

[179] 494 U.S. 872 (1990). In *Oregon v. Smith* the Court held that strict scrutiny did not apply to "generally applicable" laws that only incidentally burdened religious practices. RFRA was an attempt by Congress to overrule *Smith* and reinstate strict scrutiny as the test for generally applicable laws that indirectly burdened religious practices.

pansion of a mission style Catholic church located within an historic district.[180] The Archbishop of San Antonio sued under RFRA, arguing that denial of a building permit unduly burdened religious freedom and that City officials must prove a compelling interest for the denial.[181] The federal district court held that RFRA was unconstitutional, Congress having exceeded its authority under section five of the Fourteenth Amendment.[182] The Fifth Circuit Court of Appeals reversed.[183] The Supreme Court reversed, concluding that RFRA exceeded Congress' power.[184]

Since *Oregon v. Smith* involved a constitutional interpretation of the First Amendment, the Court simply could have invalidated RFRA on separation of powers grounds, as Justice Kennedy suggested in his opinion for the Court in *City of Boerne*.[185] However, Justice Kennedy went much further. He also used the case to impose new and major restrictions on Congress' legislative powers under section five of the Fourteenth Amendment. First, he concludes that Congress' enforcement power under section five is limited to "remedial, rather than substantive" legislation,[186] in clear contrast to earlier decisions holding that, "It is for Congress in the first instance to 'determin[e] whether *and what* legislation is needed to secure the guarantees of the Fourteenth Amendment,' *and its con-*

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[180] *Flores*, 521 U.S. at 512.

[181] *Id.*

[182] City of Boerne v. Flores, 877 F.Supp. 355 (W.D. Tex. 1995).

[183] City of Boerne v. Flores, 73 F.3d 1352 (5th Cir. 1996).

[184] *Flores*, 521 U.S. at 512.

[185] *See id.* at 536:

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control. . . . RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

[186] *Id.* at 520-521.

clusions are entitled to much deference."[187] While Congress cannot use its enforcement power to alter the substantive guarantees of the Constitution, it can create new substantive rights by statute to effectuate Fourteenth Amendment guarantees.

Second, Justice Kennedy imposed the unprecedented requirement that "there must be a congruence between the means used and the ends to be achieved."[188] In other words, he explained, "The appropriateness of remedial measures must be considered in light of the evil presented."[189] Again, this far more exacting "means-end fit" represents a substantial departure from the choice of means standard available to Congress under the Necessary and Proper Clause.[190] Moreover, the Court is now guilty of violating the separation of powers by abandoning deferential review and substituting its judgment of "appropriate" means for that of Congress.

2. FLORIDA PREPAID POSTSECONDARY EDUC. EXPENSE BD. V. COLLEGE SAVINGS BANK[191]

In *Florida Prepaid*, the Rehnquist majority held that Congress could not use its section five powers to abrogate state immunity under federal patent laws.[192] College Savings Bank held a federal patent for the special financing of college savings certificates of deposit, known as CollegeSure CD's.[193] However, the State of Florida administered a similar tuition prepayment contract program for state residents and their children.[194] The Bank brought a patent infringement action in federal court under the Patent and Plant Variety Protection Remedy Clarification Act,[195] seeking declaratory and injunctive relief as well as damages.[196]

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[187] *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (emphasis added). The same passage is quoted by Justice Kennedy in *City of Boerne*, 521 U.S., at 536.

[188] *Flores*, 521 U.S. at 530.

[189] *Id.* at 530.

[190] *See infra* notes 169-70 and accompanying text.

[191] 527 U.S. 627 (1999).

[192] *Florida Prepaid*, 527 U.S., at 630.

[193] *Id.* at 630-31.

[194] *Id.* at 631.

[195] 35 U.S.C. §§ 271(h) and 296(a). These amendatory provisions of the Patent Remedy

The district court denied Florida Prepaid's motion to dismiss on sovereign immunity grounds[197] and the Federal Circuit affirmed,[198] finding that Congress had properly abrogated state immunity under section five of the Fourteenth Amendment.[199] The U.S. Supreme Court reversed.[200]

Agreeing that Congress had clearly expressed its intent to abrogate state immunity in the Patent Remedy Act,[201] Chief Justice Rehnquist concluded, nevertheless, that the provision was not "appropriate" legislation under section five.[202] Citing *City of Boerne*, the Chief Justice wrote that to be "appropriate" the legislation must reflect "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[203] Without such a connection, he said, the legislation "may become *substantive* in operation and effect."[204] Accordingly, Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[205]

Act of 1990 were passed in response to the Supreme Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which required a clear statement of congressional intent to abrogate state immunity.

[196] College Savings Bank also filed a separate action against Florida Prepaid alleging false advertising in violation of the federal Trademark Act of 1946. See *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999), where the Supreme Court affirmed dismissal of the Bank's case against Florida Prepaid. Finding no property interest under the Due Process Clause of the Fourteenth Amendment, Justice Scalia concluded in that case that Congress could not abrogate state immunity under § 5. The Court also overruled *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964) and its "constructive waiver" doctrine. Since Florida had not unequivocally and expressly waived immunity, Scalia found that the case had been properly dismissed.

[197] 948 F.Supp. 400 (D.N.J. 1996).

[198] 148 F.3d 1343 (Fed. Cir. 1998).

[199] *Florida Prepaid*, 527 U.S. at 633.

[200] *Id.* at 634.

[201] *Id.* at 635.

[202] *Id.* at 637, 645-46.

[203] *Florida Prepaid*, 527 U.S. at 637, 639.

[204] *Id.*

[205] *Id.*

Despite College Savings Bank's claim that Florida Prepaid had *willfully* infringed its patent, Chief Justice Rehnquist found that Congress had exceeded its section five powers because it came up with "little evidence" showing a "*pattern* of patent infringement by the States."[206] Absent a pattern of state infringement, he maintained, the legislative record provided little support that Congress was remedying a Fourteenth Amendment violation.[207] He pointed to House subcommittee testimony that "states are willing and able to respect patent rights,"[208] as well as to a statement by the bill's sponsor that there was no "evidence of massive or widespread violation of patent laws by the States." The legislative record, Rehnquist found, "contains no evidence that unremedied patent infringement by States had become a problem of national import."[209] Accordingly, he concluded, the record "suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting' deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation."[210]

In other words, since Congress failed to prove *to the Court's satisfaction* that the problem was sufficiently pervasive, Congress lacked the authority to pass the Patent Remedy Act as *prophylactic* legislation under section five. While it may have been that under the Necessary and Proper Clause "Congress need not make particularized findings in order to legislate,"[211] that clearly is no longer true under the Rehnquist Court's "congruence and proportionality" test. Congress – once a coequal branch of the federal government – now stands as a mere litigant before the Bench who first must prove its case before exercising its legislative powers.

Unfortunately, the overreaching of the Rehnquist Court in *Florida Prepaid* does not end there. The Chief Justice grafted yet another repudiated condition on the exercise of Congress' section five power:

> Congress, however, barely considered the availability of *state remedies* for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment. . . . Congress itself said nothing about *the existence or adequacy of*

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[206] *Id.* at 640 (emphasis added).

[207] *Id.* at 642.

[208] *Florida Prepaid*, 527 U.S. at 640.

[209] *Id.* at 641.

[210] *Id.* at 645 (citing *City of Boerne*, 521 U.S., at 526).

[211] *See* United States v. Lopez, 514 U.S., at 563.

> *state remedies* in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report. . . . The need for uniformity is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.[212]

The Chief Justice's conclusion that Congress' authority to legislate under section five is also contingent upon the availability and adequacy of *state* remedies to secure *federal* rights, followed his flawed analysis and misapplication of *Zinermon v. Burch*.[213]

In *Zinermon*, the Court explained that there are *three* distinct due process claims under the Fourteenth Amendment that may be raised in an action pursuant to 42 U.S.C. § 1983:

> First, the [Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under § 1983 for state official's violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a *substantive* component that bars certain arbitrary, wrongful government actions, *"regardless of the fairness of the procedures used to implement them."* [Citation omitted]. As to these two types of claims, *the constitutional violation . . . is complete when the wrongful action is taken.* . . . A plaintiff . . . may invoke § 1983 *regardless of any state-tort remedy that might be available* to compensate him for the deprivation of these rights.
>
> The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies *is relevant* in a special sense. In *procedural* due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. *Parratt*, 451 U.S., at 537.[214]

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[212] *Florida Prepaid*, 527 U.S. at 643, 644, 645.

[213] 494 U.S. 113 (1990). *See also Florida Prepaid*, 527 U.S. at 642-643.

[214] 494 U.S., at 125 (emphasis added).

The Chief Justice erred by assuming that the patent infringement suit brought by College Savings Bank was of the third type—i.e., a *procedural* due process violation.[215] Clearly, it was not. The Bank was *not* claiming injury as a result of being denied notice and opportunity for hearing – i.e., fair procedure. Instead, the Bank's patent infringement claim fell into the second category – i.e., Florida Prepaid had engaged in wrongful government conduct which had done injury to the Bank's federally created property right. The claimed constitutional violation was "complete" when Florida Prepaid began marketing its tuition prepayment program, utilizing the Bank's patented special financing method.[216] Thus, since a patent infringement suit under the Patent Remedy Act is not predicated on a *procedural* due process violation, the availability of state remedies is irrelevant per *Zinermon*.

Finally, even where it seeks to remedy procedural due process violations, requiring Congress to consider the adequacy of state remedies to protect federal rights is plainly contrary to longstanding principles of federalism,[217] Congress' power to preempt state regulations under the Supremacy Clause, and the deference traditionally accorded to Congress' choice of means under the Necessary and Proper Clause.

3. KIMEL V. FLORIDA BOARD OF REGENTS[218]

Kimel v. Florida Board of Regents involved three cases from Florida and Alabama, which were consolidated by the U.S. Court of Appeals for the Eleventh Circuit. In each case, state employees alleged age discrimination in em-

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[215] *See* 514 U.S., at 642-643:

> This Court has . . . held that "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . Is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

[216] *See Florida Prepaid*, 527 U.S. at 631 ("College Savings claims that, *in the course of administering its tuition prepayment program*, Florida Prepaid directly and indirectly infringed College Savings' patent").

[217] *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 812 (1995): "As we concluded in *Murdock v. Memphis*, 20 Wall. 590 (1875), federal questions are generally answered finally by federal tribunals because rights which depend on federal law 'should be the same everywhere' and 'their construction should be uniform.' Id., at 632."

[218] 528 U.S. 62 (2000).

ployment against the Florida Board of Regents,[219] the Florida Department of Corrections,[220] and the University of Montevallo, a public university in Alabama.[221] A divided panel of the Eleventh Circuit struck down 1974 amendments to the Age Discrimination in Employment Act (ADEA), which authorized state employees to sue their employers in federal court, as unconstitutional.[222] The Supreme Court affirmed five to four, agreeing that Congress had exceeded its authority under section five of the Fourteenth Amendment.[223]

Finding a clear expression of congressional intent to abrogate state immunity,[224] Justice O'Connor for the Court concluded that application of the ADEA to states failed *City of Boerne*'s "congruence and proportionality" test on two grounds.[225] First, the Justice found that the substantive requirements imposed on states by the ADEA "are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[226] Justice O'Connor reasoned that since age is a "non suspect" classification under the Equal Protection Clause, states are not required "to match age distinctions and the legitimate interests they serve with razorlike precision."[227] Since age is "presumptively rational," the burden of proof is on the individual claimant to show that the age classification is irrational.[228] Thus, the Justice concluded:

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[219] *Kimel v. Florida Bd. of Regents*, No. TCA 95-40194-MMP (N.D. Fla., May 17, 1996).

[220] *Dickson v. Florida Dept. of Corrections*, No. 5:9cv207-RH (N.D. Fla., Nov. 5 1996).

[221] *MacPherson v. University of Montevallo*, 938 F.Supp. 785 (N.D. Ala. 1996).

[222] *Kimel*, 528 U.S. at 71.

[223] *Id.* at 67.

[224] Justices Thomas and Kennedy dissented from this part of the Court's opinion, concluding that Congress failed to make its intent to abrogate "unmistakably clear." *Id.* at 99 (Thomas, J., Kennedy, J., concurring in part, dissenting in part).

[225] *Id.* at 82-3, 89.

[226] *Id.* at 82.

[227] *Id.* at 83.

[228] The Court has found that invidious discrimination on the basis of other "nonsuspect" classifications is *per se* irrational and a violation of the Equal Protection Clause. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado constitutional amendment banning remedial civil rights legislation on behalf of gays and lesbians); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (reversing denial of special use permit for group home for mentally retarded individuals).

> Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, *unconstitutional* behavior.... The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard. The ADEA makes unlawful, in the employment context, all "discriminat[ion] against any individual ... because of such individual's age.[229]

In short, Justice O'Connor employed a judicially created *presumption* of rationality to constrain Congress' express *constitutional* authority under section five of the Fourteenth Amendment.[230] Moreover, the Justice elevated a state's "presumptively rational" use of age in employment over Congress' contrary concern that the use may discriminate in violation of the Equal Protection Clause.[231] Both the Fourteenth Amendment and the Supremacy Clause, however, require a presumption favoring Congress' view of the "reasonableness" of age discrimination over that of the states. As Justice O'Connor observed:

> Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers.... State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.[232]

Thus, the states themselves have acknowledged that age discrimination in state employment is a sufficiently widespread concern to warrant protective civil rights legislation. Yet, Justice O'Connor concluded that Congress is powerless to authorize victims of invidious age discrimination[233] to sue state employers in

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[229] *Kimel*, 528 U.S. at 86.

[230] *Kimel*, 528 U.S. at 87 ("Measured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers").

[231] *Id.* at 88 ("Under the Constitution. . .States may rely on age as a proxy for other characteristics").

[232] *Id.* at 91-92.

[233] Despite the Court's upholding of mandatory retirement ages in *Gregory v. Ashcroft*,

federal courts, based solely on a judicially created *presumption* that the ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[234]

Second, Justice O'Connor further found that "Congress' 1974 extension of the Act to the States was an unwarranted response to a *perhaps* inconsequential problem."[235] "Congress never identified," the Justice continued, "any *pattern* of age discrimination by the States, much less any discrimination whatsoever that rose to the level of [a] *constitutional* violation."[236] Justice O'Connor concluded that the anecdotal evidence which was considered – "consist[ing] almost entirely of isolated sentences clipped from the floor debates and legislative reports" – "falls well short of the mark."[237] Moreover, the Justice noted, "State employees are protected by state age discrimination statutes, and may recover money dam-

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501 U.S. 452 (1991), *Vance v. Bradley*, 440 U.S. 93 (1979), and *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), it has held in other contexts that *invidious* discrimination on the basis of "non suspect" classifications violates the Equal Protection Clause. *See* note , *supra*.

[234] *Kimel*, 528 U.S. at 86. Justice O'Connor's reasoning here is troubling for a number of reasons. First, she assumed rational review would apply to statutory claims under the ADEA. However, in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-611 (1993), Justice O'Connor wrote for a unanimous Court that "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," and that "the ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.'" Thus, the statutory standard is far less deferential to employers than the constitutional standard applicable to claims based directly on the Equal Protection Clause. Second, O'Connor seemed to assume that discrimination by state employers is entitled to greater deference than similar discrimination by private employers – a distinction that is not drawn by the ADEA itself. Third, O'Connor's speculation about the *unlikely* validity of potential claims against states under the ADEA seemed advisory in nature, and therefore contrary to Article III's "case or controversy" requirement. She assumed that most suits against states under the ADEA would *probably* lack merit under the constitutional standard and concluded, therefore, that the ADEA is a disproportionate response to age discrimination in state employment. O'Connor's unsubstantiated speculation serves to illustrates the wisdom and importance of the case or controversy requirement. Fourth, O'Connor's reasoning lacks focus – that is, it's unclear whether she argued that Congress lacks authority under Section Five to regulate age discrimination by the states, or that it simply lacks the power to abrogate the states' immunity to suit. She appears to draw both conclusions.

[235] *Id.* at 89 (emphasis added).

[236] *Id.* at 89.

[237] *Id.*

ages from their state employers, in almost every State of the Union."[238]

Through either design or oversight, Justice O'Connor ignored prior Court decisions that flatly contradicted her reasoning. Time and again the Court has recognized and upheld Congress' use of less stringent *statutory* standards of proof under section five,[239] recognizing—as O'Connor purports to—that "Congress' power 'to enforce' the Amendment includes the authority both to remedy and deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, *including that which is not itself forbidden by the Amendment's text.*"[240] As Justice Marshall observed in *City of Rome v. United States*:[241]

> Other decisions of this Court also recognize Congress' broad power to enforce the Civil War Amendments. In *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), the Court held that legislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment "is plainly adapted to [the] end" of enforcing the Equal Protection Clause and "is not prohibited by but is consistent with the 'letter and spirit of the constitution,'" regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause. 384 U.S., at 651.... The Court stated that, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise *its discretion* in determining whether *and what* legislation is

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[238] *Id.* at 91.

[239] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (distinguishing less stringent statutory "disparate impact" standard under Title VII, from "intent" standard required to prove constitutional violation); Newport News, Shipbuilding and Drydock Co. v. EEOC, 462 U.S. 669 (1983) (recognizing that discrimination on the basis of pregnancy amounted to sex discrimination under Title VII, but not under the Equal Protection Clause); *see also*, City of Rome v. United States, 446 U.S. 156 (1980) (proof of discriminatory effects can establish violation of Voting Rights Act, even though proof of intentional discrimination required for constitutional violations under Fifteenth Amendment). Writing for the Court in *City of Rome*, Justice Marshall said: "We hold that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect." 446 U.S., at 173. "Congress' authority under § 2 of the Fifteenth Amendment... was no less broad than its authority under the Necessary and Proper Clause, see *McCulloch v. Maryland*, 4 Wheat. 316 (1819)." *Id.* at 175.

[240] 120 S.Ct., at 644 (emphasis added).

[241] 446 U.S. 156 (1980).

needed to secure the guarantees of the Fourteenth Amendment.[242]

Thus, the fact that age discrimination by state employers might not always amount to a *constitutional* violation does not, in and of itself, preclude Congress from addressing age discrimination in state employment under a different *statutory* standard,[243] or from addressing the aggregate discriminatory effects of age discrimination in state employment on the national economy.[244] Certainly the discriminatory termination of employment or employment benefits of otherwise capable and competent individuals age 40 and over[245] – including those in state employment—can, in the aggregate, have substantial economic consequences for both the individual and the nation.

3. UNITED STATES V. MORRISON [246]

To date, the Rehnquist Court's most far reaching assault on Congress' Commerce Clause and section five powers takes place in *United States v. Morrison*, where it struck down newly created civil rights remedies under the federal Violence Against Women Act ("VAWA" or "§ 13981") of 1994.[247] The Act ex-

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[242] *Id.* at 176 (emphasis added).

[243] *See* discussion of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-611 (1993), *supra* note 234.

[244] *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (reference to "our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, *which viewed in the aggregate*, substantially affects interstate commerce") (emphasis added). In *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), the Court upheld Congress' extension of the ADEA to the states as a valid exercise of the commerce power.

[245] *See Kimel*, 528 U.S. at 67-69 ("the Act now covers individuals age 40 and over, 29 U.S.C. § 631(a)").

[246] 529 U.S. 598 (2000).

[247] 42 U.S.C. § 13981 (2001) creates a federal civil remedy for victims of gender-motivated violence:

> (b) All persons within the United States shall have the right to be free from crimes of violence motivated by gender.
>
> (c) A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section

pressly created a federal civil rights cause of action, "[p]ursuant to the affirmative power of Congress . . . under section five of the Fourteenth Amendment to the Constitution, as well as under section eight of Article I of the Constitution."[248]

Christy Brzonkala claimed she had been sexually assaulted repeatedly by two males—Antonio Morrison and James Crawford—in September 1994, while all three were students at Virginia Polytechnic Institute.[249] Suffering severe emotional depression as a result of the rapes, Brzonkala initiated an administrative complaint in early 1995 against Morrison and Crawford, under the University's Sexual Assault Policy.[250] Virginia Tech's Judicial Committee found insufficient evidence against Crawford, but found Morrison guilty and sentenced him an immediate two semester suspension.[251] However, following an appeal by Morrison, the University's Provost set aside the suspension, finding it "excessive" in comparison to other cases.[252] When Brzonkala learned that Morrison would be returning for the Fall 1995 semester, she withdrew from the University.[253]

In December 1995, Bronzkala filed suit in federal district court against Morrison, Crawford, and Virginia Tech, alleging violations of her civil rights under § 13981 of the VAWA and Title IX of the Education Amendments of 1972.[254] The United States was permitted to intervene to defend the constitutionality of § 13981.[255] The district court dismissed Brzonkala's Title IX claims against the University.[256] It also granted Morrison and Crawford's motion to dismiss

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shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

[248] 42 U.S.C. § 13981(a) (2001). *See also Morrison*, 529 U.S. at 606-7.

[249] *Morrison*, 529 U.S. at 602.

[250] *Id.* at 603.

[251] *Id.* at 601.

[252] *Id.*

[253] *Id.* at 602-3.

[254] 20 U.S.C. §§ 1681-1688 (2001).

[255] *Morrison*, 529 U.S. at 604.

[256] *See* Brzonkala v. Virginia Polytechnic and State Univ., 935 F.Supp. 772 (W.D.Va. 1996).

Brzonkala's § 13981 claim under VAWA, finding that Congress had no authority under either the Commerce Clause or section five to create the civil remedy.[257] A divided panel of the Fourth Circuit Court of Appeals reversed, reinstating both the § 13981 and Title IX claims.[258] However, in a divided decision, the Fourth Circuit en banc affirmed the district court's initial holding that Congress lacked authority to enact § 13981.[259] The Supreme Court granted certiorari.[260] Chief Justice Rehnquist wrote the majority opinion striking down § 13981, in yet another 5-4 decision.[261]

The Chief Justice began his analysis by separately addressing Congress' authority under the Commerce Clause and section five of the Fourteenth Amendment.[262] Congress, however, had two *related* objectives in mind – i.e., mitigating the substantial effects of gender motivated violence on interstate commerce, while also protecting the rights of U.S. citizens who were not being adequately protected under state and local law.[263] As Justice Douglas wrote in his concurring opinion in *Heart of Atlanta Motel, Inc. v. United States*,[264] "In determining the reach of an exertion of legislative power, it is customary to read various granted powers together."[265]

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[257] *Id.* at 772.

[258] *Morrison*, 529 U.S. at 604.

[259] Brzonkala v. Virginia Polytechnic and State Univ., 169 F.3d 820 (4th Cir. 1999).

[260] *Morrison*, 529 U.S. at 604-5.

[261] *Id.* at 601.

[262] *Morrison*, 529 U.S. at 606.

[263] *Id.* at 607, 619-20.

[264] 379 U.S. 241 (1964).

[265] *Id.* at 280 (Douglas, J., concurring). *See also* Norman v. Baltimore & O.R. Co., 294 U.S. 240, 302 (1935) (emphasis added):

> The Power of the Congress to Establish a Monetary System. It is unnecessary to review the historic controversy as to the extent of this power . . . . We need only consider certain postulates upon which that conclusion rested. The Constitution grants to the Congress power "To coin Money, regulate the Value thereof, and of foreign Coin." Article I, § 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority *in all the related powers* conferred upon the Congress and appropriate to achieve "the great objects for which the government was

In *Heart of Atlanta* the Court upheld the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964.[266] There as well, "Congress based the Act on § 5 . . . of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution."[267] Writing for the Court, however, Justice Clark left open the question of Congress' authority under section five, concluding the commerce power alone provided an adequate basis for the Act.[268]

Today, however, Justice Clark could not have left the question open. Today, the Eleventh Amendment would prevent civil rights claimants from suing states in *either* federal or state courts, were the 1964 Civil Rights Act based solely on the Commerce Clause.[269] On the other hand, the private discriminatory conduct of business owners, targeted by Congress under the Act, can be reached only under the Commerce Clause, according to the Rehnquist Court's most recent decisions.[270] Today, if Congress wants to address the combined effects of discrimi-

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framed"—"a national government, with sovereign powers." McCulloch v. Maryland, 4 Wheat. 316, 404-407. . . . The broad and comprehensive national authority over the subjects of revenue, finance, and currency *is derived from the aggregate of the powers granted to Congress*, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers.

[266] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

[267] *Id.* at 249.

[268] *Id.* at 250. While noting that in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court held that Congress lacked authority under § 5 to enact the public accommodations provisions in the Civil Rights Act of 1875, it is significant to note that Justice Clark did not simply reaffirm the 1883 decision. Instead, the Court left open the question of whether *The Civil Rights Cases*' "state action" requirement still applied to Congress' § 5 power:

> Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power [under the Commerce Clause], and we have therefore not considered the other grounds relied upon. *This is not to say that the remaining authority upon which it acted was not adequate*, a question upon which we do not pass, but merely that since the commerce is sufficient for our decision here we have considered it alone.

Heart of Atlanta, 379 U.S. at 250 (emphasis added).

[269] *See* discussion of *Alden v. Maine supra* notes 102-155 and accompanying text.

[270] *See* Morrison v. United States, 529 U.S. 598 (2000).

natory conduct by states and private individuals, its commerce and section five powers must *necessarily* be read jointly.

In *Morrison*, therefore, the Court should have given consideration to Congress' *combined* exercise of its Commerce Clause and section five powers, in enacting § 13981. That is, having found a substantial affect on interstate commerce *and* pervasive state bias against victims of gender-motivated violence[271]—which also served to facilitate the adverse affects on commerce—Congress could exercise its commerce and section five powers *conjointly*[272] by creating a privately enforceable federal right against private, gender-motivated violence which the states were failing to adequately address. Indeed, Congress took that same approach in addressing the effects of racial discrimination on interstate commerce under Title II of the Civil Rights Act of 1964.[273] Rehnquist's approach in *Morrison*, however, was to analyze Congress' commerce and section five powers independently.

Congress found that gender-motivated violence substantially affects interstate commerce:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting business, and in places involved in interstate commerce . . .[,] by diminishing national productivity, increasing medical an other costs,

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[271] *Id.* at 619-20:

> Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. *See* H.R. Conf. Rep. No. 103-711, at 385-386; S.Rep. No. 103-138, at 38, 41-55; S.Rep. No. 102-197, at 33-35, 41, 43-47.

[272] *See supra* notes 191-217 and accompanying text.

[273] *Morrison*, 529 U.S. at 635 (Souter, J., dissenting):

> [G]ender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets – women – from full participation in the national economy." [S. Rep. No. 103-138], at 54.

> and decreasing the supply of and the demand for interstate products. H.R. Conf. Rep. No. 103-711, p. 385 (1994), U.S. Code Cong. & Admin. News 1994, pp 1803, 1853.[274]

Significantly, the Rehnquist Court did not question Congress' finding of a substantial affect on interstate commerce,[275] nor its legislative authority to create new federal rights and remedies.[276] Instead, the Court's objections to § 13981 of the VAWA were all grounded in its most recent states' rights decisions.

Citing *Lopez*, Chief Justice Rehnquist said that Congress' authority to regulate "intrastate activity" is "based upon the activity's substantial effects on interstate commerce," and whether "the activity in question has been some sort of *economic* endeavor."[277] Thus, only *economic* intrastate activity having a substantial effect on interstate commerce can be regulated. Even if shown to have a substantial effect on interstate commerce, *non-economic* intrastate activity cannot be regulated by Congress. According to Rehnquist: "[O]ur cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature."[278] "Gender-motivated crimes of violence are not, in any sense of the phrase," Rehnquist wrote, "economic activity."[279]

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[274] *Id.* (Souter, J., dissenting).

[275] The congressional findings are summarized in Justice Souter's dissenting opinion, id. at 628-34. As Justice Souter noted:

> One obvious difference from *United States v. Lopez*, 514 U.S. 549 (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.

Id. at 628-31. *See also id.* at 631 n.2-8 (Souter, J., dissenting).

[276] *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1975) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute").

[277] *Morrison*, 529 U.S. at 611 (emphasis added).

[278] *Id.* at 613 (emphasis added).

[279] *Id.*

While acknowledging that "§ 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families," the fact that Congress might conclude it has a substantial effect on interstate commerce, according to Rehnquist, "does not necessarily make it so."[280] Whether a particular activity sufficiently affects interstate commerce so as to fall under Congress' power to regulate "is ultimately a judicial, rather than a legislative question, and can be settled only by this Court."[281] In this case, Rehnquist argued, Congress relied too heavily "on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[282] That is, according to the Chief Justice, Congress' findings in this case validated the Court's concern expressed in *Lopez* that "Congress might use the Commerce Clause to *completely obliterate* the Constitution's distinction between national and local authority."[283]

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[280] *Id.* at 614.

[281] *Id.* (quoting Heart of Atlanta Hotel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring)). The passage quoted by Chief Justice Rehnquist above, begins with Justice Black saying that, "The choice of policy is of course within the exclusive power of Congress... ." *Id.* Justice Black goes on to write in his *Heart of Atlanta* concurrence:

> [I]n deciding the constitutional power of Congress in case like the two before us we do not consider the effect on interstate commerce of only one isolated, individual local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow.

Heart of Atlanta, 379 U.S. at 275 (Black, J., concurring).

[282] *Morrison*, 529 U.S. 615.

[283] *Id.* (emphasis added). History, of course, does not support the Chief Justice's hyperbole. Virtually the same claim was made more than 80 years ago in *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918):

> The far reaching result of uphold the [Child Labor A]ct cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

However, *Hammer* was overruled in 194. *See* United States v. Darby, 312 U.S. 657 (1941). The Supreme Court went on to uphold extensive federal regulation of the workplace—as well as other "local" activities affecting interstate commerce—for more than 50 years thereafter. Yet, states and their role within the federal system have endured.

It appears Congress learned the lesson of *Lopez* too well. For Rehnquist, its exhaustive legislative findings posed a different threat to state sovereignty:

> [The United States'] reasoning . . . will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy *is undoubtedly significant.* Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. . .Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.[284]

To *Lopez*'s three-part test of the commerce power, Rehnquist now added his states' rights balance of power thesis. "The Constitution," the Justice insisted, "*requires* a distinction between what is truly national and what is truly local."[285] The Constitution, of course, imposes no such requirement.[286]

Clearly Congress is not about to federalize marriage and divorce laws, or directly regulate child bearing and family relations. These activities always have been and always will be matters left *primarily* – though not *exclusively*—to state or local control. Many "local" activities implicate federal rights or concerns. States may not, for example, ban interracial marriage,[287] condition divorce on the ability to pay court filing fees,[288] outlaw all abortions,[289] or deny the right of extended family members to live together,[290] absent compelling reasons. Neverthe-

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[284] *Morrison*, 529 U.S. at 615-16 (citation omitted).

[285] *Id.* at 617 (emphasis added).

[286] *See, e.g.*, Fry v. United States, 421 U.S. 542, 547 (1975) ("Congress' power under the Commerce Clause is very broad. Even activity that is *purely intrastate* may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States. . . ."); New York v. United States, 505 U.S. 144, 158 (1992) ("As interstate commerce has become ubiquitous, activities once considered *purely local* have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power."). It is also worth noting that nothing in these pre-*Lopez* cases restricted the commerce power to local *economic* activities.

[287] Loving v. Virginia, 388 U.S. 1 (1967).

[288] Boddie v. Connecticut, 401 U.S. 371 (1971).

[289] Roe v. Wade, 410 U.S. 113 (1973).

[290] Moore v. East Cleveland, 431 U.S. 494 (1977).

less, despite varying degrees of federal oversight or regulation under the Fourteenth Amendment, state or local authority over marriage, divorce, childbearing, family relations, education, law enforcement, property, occupational licensing, business organizations, wills and estates, and a host of other subjects remains intact. Local authorities face no greater threat of "complete obliteration" under the Commerce Clause, than they have under the Fourteenth Amendment.

In the final analysis, Rehnquist simply rejected "the argument that Congress may regulate *non-economic*, violent criminal conduct *based solely on that conduct's aggregate effect on interstate commerce.*"[291] "The regulation and punishment of intrastate violence," he continued, "that is not directed at *the instrumentalities, channels, or goods involved in interstate commerce*, has always been the province of the States."[292] So much for the efficacy of the *Lopez* substantial affects test. The Chief Justice arbitrarily applied a *per se* rule that local, non-economic activity cannot be regulated by Congress, regardless of its substantial and adverse affects on interstate commerce. However, if Congress deems it "necessary and proper" to regulate non-economic activity in order to eliminate adverse affects on commerce and the national economy, there really is no principled basis for placing those activities beyond the reach of the commerce power.

Rehnquist concluded his Commerce Clause analysis with the *non sequitur*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication."[293] Section 13981 was enacted on the basis of "numerous findings" about the impact of gender-motivated violence on interstate commerce.[294] Clearly, Congress had learned the lesson of *Lopez*.[295] It did not presume to have some generalized police power in creating the civil remedy under VAWA.

Turning to the Fourteenth Amendment, Rehnquist perfunctorily acknowledged that "Section 5 is 'a positive grant of legislative power' . . . that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into 'legislative spheres of autonomy previously reserved to the

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[291] *Morrison*, 529 U.S. at 617 (emphasis added).

[292] *Id.*

[293] *Id.* Congress does, of course, regulate criminal behavior affecting commerce under the Commerce Clause. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (where the Court upheld a criminal conviction under the Consumer Credit Protection Act for purely local "loan-sharking" activities).

[294] *See Morrison*, 529 U.S. at 614; *see also id.* at 628-36 (Souter, J., dissenting).

[295] *See supra* notes 73-77 and accompanying text.

States.'"[296] However, he claimed, "several limitations inherent in § 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted." Moreover, "[t]hese limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."[297] The Chief Justice relied on the post-Reconstruction decisions in *United States v. Harris*[298] and *The Civil Rights Cases*,[299] as well *City of Boerne v. Flores*, in cutting back Congress' authority under section five.

Rehnquist acknowledged that "a voluminous congressional record" supports the claims of "pervasive bias in various state justice systems against victims of gender-motivated violence."[300] Since that bias results in a denial of Equal Protection, the United States argued that Congress acted within the scope of section five "in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts."[301] Congress' action also comported with long-recognized principles that it may protect the federal rights of U.S. citizens against inadequate protection or discriminatory treatment in the administration of justice by the states,[302] as well as against *private* actors.[303] [304]

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[296] *Morrison*, 529 U.S. at 619 (citations omitted).

[297] *Id.* at 620.

[298] 106 U.S. 629 (1883).

[299] 109 U.S. 3 (1883).

[300] *See Morrison*, 529 U.S. at 619-20.

[301] *Id.*

[302] "[T]he equal protection of the laws is *a pledge of the protection* of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added). *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT THE FIRST HUNDRED YEARS, 1789-1888 397 (1985):

> A strong argument can be made, on the basis of the origins of the equal protection clause, that private lynching was among the evils that Congress was meant to have power to forbid. Although none of the prohibitory clauses of the amendment speaks directly to private action, the equal protection clause seems to impose upon the states a unique duty to take affirmative action to protect black persons from private attack. That, as I have argued above, was the clear sense of a parallel provision in the 1866 Civil Rights Act for which the clause was evidently intended to assure a constitutional base; and, as Justice Miller acknowledged in *Slaughter-House*, the failure of states to protect blacks was one of the problems that prompted the adoption of the fourteenth amendment.

Currie also notes:

> The third feature of the 1866 act was to give nonwhites "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens." [Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27]. As Miller recognized in the introductory part of his *Slaughter-House* opinion, there were two distinct problems with which the mere abolition of slavery did not deal: the southern states had adopted Black Codes denying blacks a variety of privileges and immunities, and "[i]t was said that their lives were at the mercy of bad men, either because of the laws for their protection were insufficient or were not enforced." [83 U.S., at 70]. Against this background, equal protection seems to mean that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury.

Id. at 349. *See also* TENBROEK, *supra* note 1, at 180:

> [T]he "full and equal benefit" provisions of both the civil rights bill and the Freedmen's Bureau bill immediately broadened their coverage to include state inaction as well as state action. "Full and equal benefit" of all laws and proceedings for the protection of person and property often can be afforded only by extending protection to the unprotected rather than withdrawing protection from those who have it. Invasion of civil rights made possible by the failure of the state to supply protection, consequently, falls within the language set forth.

Thus, the failure of states to provide equal *and affirmative* protection of the laws *in response to unlawful private conduct*, violates the Equal Protection Clause.

[303] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 498 (1999): "[T]he right [to travel] is so important that it is 'assertable against *private interference* as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'"

[304] In the legislative history of VAWA, Congress specifically found that gender motivated violence "deter[s] potential victims from traveling interstate." Thus, there is private interference with the fundamental right to travel and *Saenz* suggests that Congress has the power to respond. *See also* United States v. Williams, 341 U.S. 70, 77-78 (1951), *overruled in part by* United States v. Price, 383 U.S. 787 (1966):

> Congress can beyond doubt constitutionally secure against interference by private individuals . . . rights which arise from the relationship of the individual and the Federal Government. The right of citizens to vote in congressional elections, for instance, may obviously be protected by Congress from individual as well as from State interference. *Ex parte Yarbrough*, 110 U.S. 651 [(1884)]. On the other hand, we have consistently held that they category of rights which Congress may constitutionally protect from interference by private persons excludes those rights which the Constitution merely guarantees from interference by a State.

As Justice Frankfurter also observed in *Williams*, "The history of the times – the lawless ac-

Chief Justice Rehnquist responded that "the Fourteenth Amendment, by its very terms, prohibits only state action" and "erects no shield against merely private conduct, however discriminatory or wrongful."[305] Moreover, he points out, in *United States v. Harris*[306] and in the *Civil Rights Cases*,[307] the Court held that section two of the Civil Rights Act of 1871 and the public accommodation provisions of the Civil Rights Act of 1875—both of which applied to private conduct—were beyond Congress' section five enforcement powers. Rehnquist then went on to reject the contrary view of six Justices in *United States v. Guest*.[308]

At issue in *Guest* was the validity of a federal indictment under 18 U.S.C. § 241,[309] charging six white defendants, *inter alia*, with privately conspiring to violate the Fourteenth Amendment rights of African Americans to the equal use and enjoyment state-owned facilities in Athens, Georgia.[310] The U.S. District Court dismissed the indictment[311] for failing to allege state action.[312] The government took a direct appeal to the Supreme Court, which reversed.[313] A question implicated by the case as argued was whether Congress could authorize fed-

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tivities of private bands, of which the Klan was the most conspicuous – explains why Congress dealt with both State disregard of the new constitutional prohibitions *and private lawlessness*." *Williams*, 341 U.S. at 76.

[305] *Morrison*, 529 U.S. at 621.

[306] 106 U.S. 629 (1883).

[307] 109 U.S. 3 (1883).

[308] 383 U.S. 745 (1966).

[309] 18 U.S.C. § 241 (2001) provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
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> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

[310] *Guest*, 383 U.S. at 753.

[311] United States v. Guest, 246 F.Supp. 475 (M.D. Ga. 1964).

[312] *Guest*, 383 U.S. at 754.

[313] *Id.* at 749.

eral prosecution of private conspiracies under section five of the Fourteenth Amendment.[314]

In his opinion announcing the judgment of the Court, Justice Stewart sidestepped the issue by finding – contrary to the arguments of both sides – that "the indictment in fact contain[ed] an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss."[315] However, with specific reference to the right of travel, Justice Stewart also wrote in Part III of his opinion:

> The right to interstate travel is a right that the Constitution itself guarantees, as the cases in the text make clear. Although these cases in fact involved governmental interference with the right of free interstate travel, their reasoning fully supports the conclusion that *the right of interstate travel is a right secured against interference from any source whatever, whether governmental or private.* In this connection, it is important to reiterate that the right to travel freely from State to State finds constitutional protection *that is quite independent of the Fourteenth Amendment.*[316]

On the other hand, in two separate concurring opinions, six Justices con-

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[314] In his decision announcing the judgment of the Court, Justice Stewart avoided the question by concluding, "*contrary to the argument of the litigants*, the indictment in fact contain[ed] an express allegation of state involvement sufficient at least to required the denial of a motion to dismiss." *Id.* at 756 (emphasis added). While accepting Justice Stewart's reading of the indictment, Justice Clark - joined by Justices Black and Fortas - opined nevertheless that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies - with or without state action - that interfere with Fourteenth Amendment rights." *Id.* at 762. On the other hand, Justice Brennan - joined by Chief Justice Warren and Justice Douglas - questioned the need to find state action in the indictment, writing that Congress could reach private conspiracies under Section Five and 18 U.S.C. § 241 "without regard to whether state officers participated in the alleged conspiracy." *Id.* at 776-77. Only Justice Harlan flatly rejected "the Court's opinion. . .[t]o the extent that it is there held that 18 U.S.C. § 241 reaches conspiracies, embracing only the action of private persons. . ." *Id.* at 762-63.

[315] *Guest*, 383 U.S. 745, 756.

[316] *Id.* at 759 n.17. What Justice Stewart is suggesting is worth noting. The "privileges or immunities" of U.S. citizens are not created by the Fourteenth Amendment. The Amendment merely precludes states from infringing federal rights "which owe their existence to the federal government, its national character, its Constitution, or its laws," (*Slaughter-House*), in addition to imposing the constitutional requirements of due process and equal protection with respect to rights created under state law. *See* discussion *infra* notes 363-87 and accompanying text. As Stewart suggests, the state action requirement does not apply to federal enactments protecting rights "independent of the Fourteenth Amendment."

cluded that Congress was not subject to the state action requirement in exercising its enforcement powers under section five. Justice Clark, joined by Justices Black and Fortas, wrote: "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies – *with or without state action* – that interfere with Fourteenth Amendment rights."[317] Justice Brennan, joined by Chief Justice Warren and Justice Douglas, pointed out that, "A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, *whether or not state officers or others acting under the color of state law* are implicated in the conspiracy."[318] Justice Brennan continued:

> I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases*, 109 U.S. 3, have declared that Congress' power under § 5 is confined to the adoption of "appropriate legislation for correcting the effects of . . . prohibited state law and state acts, and thus to render them effectually null, void, and innocuous." I do not accept – *and a majority of the Court today rejects* – this interpretation of § 5. . . . Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. . . . I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals – not state officers themselves and not acting in concert with state officers – who engage in the same brutal conduct for the same misguided purpose.[319]

The significance of the *Guest* concurrences was not lost on Justice Harlan, who wrote in partial dissent, "To the extent that it is . . . held that 18 U.S.C. § 241 . . . reaches conspiracies, embracing only the action of private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent."[320]

In *Morrison*, however, Chief Justice Rehnquist flatly dismissed the import of

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[317] *Id.* at 762 (Clark, J., concurring) (emphasis added).

[318] *Id.* at 782 (Brennan, J., concurring in part and dissenting in part) (emphasis added).

[319] *Id.* at 782-784 (Brennan J., concurring in part and dissenting in part).

[320] *Guest*, 383 U.S. at 762-63.

the two concurring opinions in *Guest*. He criticized Justice Clark's concurrence for "opin[ing] on matters note before the Court in *Guest*" and for giving "no explanation whatever" for its conclusion that Congress could punish private conspiracies under section five of the Fourteenth Amendment.[321] In Justice Brennan's "reasoned explanation" that the *Civil Rights Cases* were wrongly decided he simply dismissed:

> To accept petitioners' argument, moreover, one must add to the three Justices joining Justice Brennan's reasoned explanation for his belief that the *Civil Rights Cases* were wrongly decided, the three Justices joining Justice Clark's opinion who gave no explanation whatever for their similar view. This is simply not the way that reasoned constitutional adjudication proceeds. We accordingly have no hesitation in saying that it would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to case any doubt upon the enduring vitality of the *Civil Rights Cases* and *Harris*.[322]

It is, however, Chief Justice Rehnquist who erred in his curt dismissal of the *Guest* concurrences.

Since the indictment in *Guest* contained no specific allegation that the defendants had acted "under color of state law," the case squarely called into question Congress' authority to reach private conduct under section five, contrary to Rehnquist's assertion that the Justices "saw fit to opine on matters not before the Court."[323] The fact that Justice Stewart was satisfied that the indictment contained a "sufficient" allegation of state involvement – "*contrary to the argument of the litigants*"[324] – did not mean the other Justices were of a similar view. For the six concurring Justices in *Guest*, the question of Congress' authority to reach private conduct under section five remained open. That issue, in turn, called into question the continuing validity of the *Civil Rights Cases*.

It is also clear that Justice Clark concurred with Justice Brennan's reasoning as to why Congress *could* target private conduct under section five. Justice Clark did not join the opinion because he *disagreed* with Brennan's conclusion that Stewart's opinion for the Court amounted to "an acceptance" of the defen-

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[321] *Morrison*, 529 U.S. at 623.

[322] *Id.* at 624.

[323] *Id.* at 623.

[324] *Guest*, 383 U.S. at 756.

dants' claim that the indictment was invalid.[325]

Thus, six Justices in *Guest* concluded that Congress could target any private conduct under section five deemed "necessary and proper" to enforcement of Fourteenth Amendment guarantees.[326] *Guest* represented a clear and "reasoned" abandonment of that portion of the *Civil Rights Cases* which extended the state action requirement – still applicable to private claimants under section one of the Fourteenth Amendment—to Congress' enforcement powers under section five.

As Justice Brennan explained in his concurring opinion in *Guest*:

> [Section] 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under [the Fourteenth] Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such rights is necessary to its full protection.[327]

Moreover, as Justice O'Connor acknowledged in *Kimel v. Florida Board of Regents*, "Congress' power 'to enforce' the Amendment includes the authority both to remedy and deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, *including that which is not itself forbidden by the Amendment's text.*"[328]

The holding in *Guest* was followed by the Supreme Court in *United States v. Johnson*,[329] where it reversed (5-3)[330] dismissal of another private conspiracy indictment under 18 U.S.C. § 241.[331] Moreover, Congress relied on *Guest* in en-

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[325] *Id.* at 762 (Clark, J., concurring).

[326] *See also* District of Columbia v. Carter, 409 U.S. 418, 424 n.8 (1973) (citing *Guest* and again indicating that Congress can proscribe purely private conduct under § 5).

[327] *Guest*, 383 U.S. at 782 (Brennan, J., concurring).

[328] *Kimel*, 120 S.Ct., at 644 (emphasis added).

[329] 390 U.S. 563 (1968).

[330] Justice Marshall did not participate in the consideration or decision of the case.

[331] In *Johnson*, several white defendants were charged with conspiracy to violate the civil rights of three African-Americans under Title II of the Civil Rights Act of 1964, while they were attempting to patronize a restaurant. The district court dismissed the federal criminal indictment on the ground that Title II provided an exclusive civil remedy for the alleged victims. United States v. Johnson, 269 F.Supp. 706 (N.D. Ga. 1967). The Supreme Court reversed, holding that the exclusive civil remedy applied only to the restaurant owner, not to private "outside hoodlums."

acting additional criminal sanctions under the Civil Rights Act of 1968.[332] 18 U.S.C. § 245(b) (emphasis added) provides: "Whoever, *whether or not acting under color of law*, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with" any persons federal civil rights "shall be fined under this title, or imprisoned . . ., or both." At least one federal appellate court upheld the constitutionality of section 245(b) under both section five of the Fourteenth Amendment and section two of the Thirteenth Amendment.[333]

Despite the deference traditionally accorded Congress under the Necessary and Proper Clause,[334] the Rehnquist Court refuses to recognize the distinction

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[332] *See* S. Rep. No. 721, 90th Cong., 2nd Sess. 1968, 1968 U.S.Code.Cong. & Admin. News 1837 (1967):

> Only recently the Supreme Court had occasion to interpret two of the still existing criminal provisions - sections 241 and 242. In *United States v. Guest*, the Court was faced with a Federal indictment based on the shooting of a Negro educator, Lemuel Penn, while he was driving through the State of Georgia; *United States v. Price* involved the 1964 killings of the three civil rights workers in Neshoba County, Miss.
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> . . .
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> [T]he opinions indicate that section 241 may not cover purely private actions which interfere with 14th Amendment rights. At the same time, a majority of the Justices made it clear that Congress could, under section 5 of the 14th Amendment, enact a statute reaching private conduct denying such rights. H.R. 2516 [which "adds a new section 245 to title 18, United States Code"] is such a statute and would - as six Justices said was constitutionally possible - cover racially motivated acts of violence which do not involve participation or connivance of public officials.

[333] *See* United States v. Bledsoe, 728 F.2d 1094, 1097 (8th Cir. 1984), *cert. denied* 469 U.S. 838 (1984) ("In addition to the binding precedent [including *Guest*] which upholds congressional power to reach this type of activity under the fourteenth amendment, in our opinion the statute is constitutional as applied under the thirteenth amendment.").

[334] *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 175 (1980) (emphasis added):

> Congress' authority under § 2 of the Fifteenth Amendment, we held, was no less broad than its authority under the Necessary and Proper Clause, see McCulloch v. Maryland, 4 Wheat. 316, 421 (1819). This authority, *as applied by longstanding precedent to congressional enforcement of the Civil War Amendments*, is defined in these terms:
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> "Whatever legislation is appropriate, that is, adapted to carry out the objects the

between the claims of private litigants under section one and the sovereign enforcement authority of Congress under section five.[335] This too is in plain disregard of precedent.[336]

III. PRESERVING FEDERAL PROTECTIONS FOR INDIVIDUAL AND EQUAL RIGHTS

A. THE PRE-CIVIL WAR CONSTITUTION

During the pre-Civil War era, only a few provisions of the Constitution restricted state interference with *national* rights – *i.e.*, rights secured against state infringement by the Constitution. Article I, section ten created *federal* guarantees against state interference with contracts, as well as forbidding ex post facto laws and bills of attainder. In addition, the "interstate" Privileges and Immunities Clause of Article IV, section two created a federal guarantee against state legislation discriminating against visiting citizens from other states. These provisions allowed persons to seek *federal* declaratory and injunctive relief against enforcement of conflicting state laws.[337]

It has been asserted—incorrectly it seems– that the Supremacy Clause pro-

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> [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. Ex parte Virginia, 100 U.S. [339,] 345-346."

South Carolina v. Katzenbach, supra, 383 U.S., at 327, 86 S.Ct., at 818.

[335] *See also* Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (discussed *supra*) (where the Court used the rational basis standard under § 1, together with its recently contrived "congruence and proportionality" test, to void Congress' extension of the Age Discrimination in Employment Act to the states under § 5).

[336] For example, the Court has declined to extend the Fourteenth and Fifteenth Amendments' intent standard to Congress' remedial powers under those Amendments, even though proof of intent is required for private litigants. *See, e.g.*, City of Rome, 446 U.S. at 173 ("We hold that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect").

[337] Prior to ratification of the Eleventh Amendment, such federal challenges could be raised in either state or federal court.

tected federal rights prior to the Civil War.[338] The Supremacy Clause, however, was of no assistance to Mr. Barron when waterfront construction by the City of Baltimore rendered his wharf unusable. In *Barron v. Baltimore*,[339] Chief Justice Marshall did not address the distinct proposition that the City might have infringed Barron's rights as a U.S. citizen, even though such a query would have been fully consonant with then existing notions of dual citizenship.[340] While it was true that Barron's property rights arose under state law, the clear import of the Fifth Amendment was that —as a U.S. citizen—Mr. Barron had a *federal* right to due process and compensation. Chief Justice Marshall concluded, however, that the Fifth Amendment did not apply directly to the states or their subdivision.[341] Aside from the question of the Amendment's direct applicability, however, the result also seemed to suggest that states had no inherent duty to respect the national rights of U.S. citizens, beyond the mandates of Article I, section ten and Article IV. Chief Justice Marshall gave no consideration to the Supremacy Clause as a separate guarantor of Barron's federal rights. Consequently, Mr. Barron was left with no federal claim to prosecute against Baltimore—thereby

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[338] *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1415 n.116 (1992): "The Supremacy Clause already protected federal rights." In support of the assertion, Harrison cites Justice Field's dissent in *Slaughter-House*:

> [I]f the [privileges or immunities] clause refers only to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. 83 U.S., at 96 (Field, J., dissenting).

See also CURRIE, *supra* note 302, at 345 n. 119. The Supremacy Clause, however, applies only to the *Constitution*, *laws*, and *treaties* of the United States—no mention is made in Article VI of the *rights* of national citizenship which weren't made *expressly* applicable to the states through the Constitution, laws, or treaties of the United States. Thus, the guarantees of Article I, § 10 and Article IV, § 2 applied to the states, but not those referenced in the Bill of Rights, per *Barron v. Baltimore.*

[339] 32 U.S. 243 (1833).

[340] *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 429 (1819): "Those powers [of Congress] are not given by the people of a single state. They are given by the people of the United States. . . ."

[341] *Barron*, 32 U.S. at 250-51.

revealing a significant gap in the protection of *national* rights against state infringement.

That gap, however, was not perceived as particularly problematic during the pre-Civil War era, since states were regarded as the principal protectors of individual rights.[342] Moreover, the notion of national rights was just as amorphous as its corollary, national citizenship.[343]

B. THE THIRTEENTH AMENDMENT & THE CIVIL RIGHTS ACT OF 1866

Constitutional scholar and historian Jacobus tenBroek argued that the framers

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[342] *See, e.g.*, Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164 (1992):

> [U]nder the original Constitution the powers of the various states over their own citizens were subject (as a matter of federal constitutional law) to only a few limitations listed in Article I, Section 9 [sic]. . . . All else was left to state law. The transfer of power over rights from the state to the federal level was (along with the end of slavery) the greatest change wrought by the Civil War.

[343] *See* HAROLD M. HYMAN AND WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 412 (1982):

> Except for abolitionists, legal commentators had long shunted aside questions of national rights with generalities. As recently as 1862, Lincoln's Attorney General Edward Bates, in a widely circulated opinion, could offer only this puzzled nonreply to a request for a definition of the rights adhering to national citizenship:
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> > I have often been pained by the fruitless search in our law books and the records of our courts for a clear and satisfactory definition of the phrase citizen of the United States. . . . Eighty years of practical enjoyment of [the rights of national] citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word or the constituent elements of the thing we prize so highly. U.S. Attorney General, *Opinions*, X, 383.

See also TENBROEK, *supra* note 1, at 95, 96:

> The conception of national citizenship and of certain privileges and immunities attaching to it, though vague, rudimentary, and ill defined, was yet basically present in abolitionist constitutional theory as early as 1834-1835. . . . [Up] to that point, however, the doctrine of national citizenship superior to state citizenship and possessing attributes of its own remained unformulated

actually intended the Thirteenth Amendment, rather than the Fourteenth, to effect a "revolution in federalism."[344] The principal purpose of the Fourteenth Amendment, in his view, was to address any remaining doubts about Congress' intent and authority in framing the Thirteenth Amendment.[345] Thus, an understanding of the Fourteenth Amendment is necessarily predicated on an understanding of the Thirteenth.[346]

Both opponents and supporters of the proposed Thirteenth Amendment perceived it as a threat to the states' rights federalism of the past and the precursor to a "revolution in federalism." According to tenBroek:

> The principal argument put forward by the congressional opponents of the Thirteenth Amendment, accordingly, was that the measure constituted an unwarrantable invasion of the rights of the states and a corresponding unwarrantable extension of the power of the central government. In fact, so unwarrantable was the invasion and the extension as to violate the basic conditions of the federal compact, destroy the federal character of the government, and subvert the whole constitutional system.[347]

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[344] *See* HYMAN AND WIECEK, *supra* note 343 , at 387; *see also*, TENBROEK, *supra* note 1, at 160.

[345] TENBROEK, *supra* note 1, at 196-97 and 201:

> [T]he Thirteenth Amendment. . .was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense. . . .The amendment was seen by its drafters and sponsors as doing the whole job - not merely cutting loose the fetters which bound the physical person of the slave, but restoring to him his natural, inalienable, and civil rights, or, in other words, guaranteeing to him the privileges and immunities of citizens of the United States.
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> . . .
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> [T]he Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills, particularly the latter, beyond doubt. . . .The doubt related to the capacity of the Thirteenth Amendment to sustain this far-reaching legislative program. . . .

[346] *Id.* at 202 ("Thus the Thirteenth Amendment played an important part in the evolution of the Fourteenth Amendment. . .").

[347] *Id.* at 160.

The "basic conditions" of the Constitution, the argument went, were the compromises over slavery – without which the Constitution never would have been ratified. Opponents argued, therefore, that the proposed Amendment itself was "unconstitutional."[348]

Supporters agreed that the Thirteenth Amendment would mean far more than simply the abolition of slavery:

> [T]he slavery which was to be abolished by the amendment consisted of the incidents of the system which impaired and destroyed the rights of the whites. . . . [The amendment] was meant to be a direct ban against many of the evils radiating from the system of slavery as well as a prohibition of the system itself. It would bring to end the "kidnapping, imprisoning, mobbing, and murdering" of "white citizens of the United States, guilty of no offense." It would make it possible for white citizens to exercise their constitutional right under the comity clause to reside in southern states regardless of their opinions. It would carry out the constitutional declaration that each citizen of the United States shall have equal privileges in every other state. It would protect citizens in their rights under the First Amendment and the comity clause to freedom of speech, freedom of press, freedom of religion, and freedom of assembly.[349]

Following ratification of the Thirteenth Amendment in December 1865, the Thirty-ninth Congress immediately set about the task of effectuating the "revolution in federalism." Responding to the legal disabilities imposed on the former slaves under the Black Codes,[350] as well as to state toleration of white racist vio-

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[348] *Id.* at 160-161.

[349] *Id.* at 168. In short, supporters believed that the Thirteenth Amendment would fundamentally change the federal system, by "[taking] from the states what hitherto had been constitutionally reserved to them, the power to protect or promote slavery; [and by] abolish[ing] slavery throughout the country, nationaliz[ing] the right of freedom, and [making] the national Congress the organ of enforcement." *Id.* at 172-173.

[350] *Id.* at 180: "[T]he infamous Black Codes . . . were only less rigorous than the slave codes they had replaced. Under them the freedman was socially an outcast, industrially a serf, legally a separate and oppressed class. Slavery, abolished by the organic law of the nation, was in fact revived by these statutes of the states." *See also* Curtis, *supra* note 16, at 30-31:

> In the South, the newly freed slaves faced laws and ordinances restricting their liberties – the Black Codes. They were denied the rights to bear arms, to hold public meetings without prior approval, to hold unauthorized religious services, etc. For violation of these provisions they faced cruel punishments. In addition, their freedom of movement was limited and they were often denied the rights to testify in cases to which

lence and terrorism, Congress passed the Civil Rights Act of 1866, over a presidential veto.[351] The Act provided, in part:

> An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication. Be it enacted. . ., That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of servitude, except as punishment for a crime . . ., shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . .[352]

The Act reflected the views of most supporters that the Thirteenth Amendment not only abolished slavery, but also had effected fundamental changes in the federal system.

To be sure, the Act did not attempt to federalize state laws of contract, property, or civil action.[353] These remained, first and foremost, the prerogatives and responsibilities of the states. Moreover, the states retained primary responsibility for insuring the civil rights of all their residents – citizens and non-citizens alike—under state law.[354] The Republican leadership of the Thirty-ninth Con-

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whites were a party, to own property, to contract, etc.

[351] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 250-51 (1988).

[352] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.

[353] *See* Harrison, *supra* note 338, at 1403-04:

> Advocates of the Civil Rights Bill [maintained] that it was limited to racial equality and did not represent federal interference with the substance of state law. The states would remain free to create whatever rights they pleased, as long as they gave them to all citizens. Their argument relied on the realization that congressional power to require equality did not necessarily have to rest on a claim of plenary power to make private law. A power limited to requiring equality would be enough to authorize the bill.

[354] *See* McConnell, *supra* note 342, at 1167 (emphasis added):

gress was strongly committed to federalism and maintaining a role for the states.[355]

Nevertheless, the Civil Rights Act of 1866 embodied at least three major changes in federalism. First, it defined national citizenship and made clear that the federal government would protect the rights of U.S. citizens, where the states failed to do so.[356] U.S. citizenship carried the reciprocal obligations of allegiance *and protection*.[357] Second, the Act created new *federal* civil rights to

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> [T]he belief in states' rights (in their place) was an element of Reconstruction constitutional theory as well. Proponents of the Fourteenth Amendment, too, respected states' rights (while rejecting the extreme Southern doctrine of *exclusive state sovereignty*) and attempted to confine federal power to that necessary to achieve their goal of protecting rights.

[355] *See* HYMAN AND WIECEK, *supra* note 343, at 400 and 403-404:

> Republicans were prisoners of their own tenacious respect for state-based federalism. . . . Almost every Republican, however disposed in favor of the broadest view of the Thirteenth Amendment, could not overcome an assumption that the states would obey state and federal law and themselves punish violators of residents' rights; could not diminish the Republicans' traditional priority to preserving federalism.

See also Curtis, *supra* note 16, at 44:

> It is hardly surprising that immediately after the Civil War the nation, guided by the Republican party, chose the liberty model of the Constitution – federalism bounded by nationally guaranteed basic rights plus a guarantee of equality – over the semi-sovereign state model of a pro-slavery compact. Nor is it surprising that the Republicans rejected the alternative of a unitary government with the states immediately or potentially reduced to administrative units of the central government. . . . Both slavery and the extreme version of states' rights were in bad repute after the carnage of the Civil War, and most Republicans still saw an improved federal system as protecting liberty.

Curtis further notes, "It is absolutely true that Republicans were unwilling to destroy state governments or the federal system. They did not assume, however, that requiring states to obey basic protections for individual liberties like those in the Bill of Rights would destroy state governments or federalism." *Id.* at 56.

[356] *Id.* at 400: "[I]n the Republican constitutional view of 1865 and 1866, federalism no longer meant that the nation possessed only disabilities. Federalism meant that states, like individuals, bore responsibilities; that wrongs that threatened the nation's stability by diminishing individual rights were unacceptable."

[357] *See* TENBROEK, *supra* note 1, at 87.

equality of rights and equality of protection *under state law*, and afforded a federal remedy to enforce those rights.[358] Third, the Act presumed a fundamental change in federal-state relations. No longer was a state's treatment of its own residents beyond federal purview.

In abolishing slavery, the Thirteenth Amendment effectively nullified most of the *Dred Scott* decision. However, doubts persisted as to whether the Amendment provided Congress with the power to declare the former slaves citizens[359] and to nationalize the civil rights of all persons,[360] through the 1866 Civil Rights Act. That concern led to the framing and ratification of the Fourteenth Amendment.

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[358] *See* HYMAN AND WIECEK, *supra* note 343, at 402:

> The Republican-abolitionist judgment was that the nation must supply security for person, property, and society when states did not, though the states' own Constitutions and laws required them to do so. In a secure society, some authority must insulate individuals against wrongful actions, whether those actions were perpetrated by a private individual, by officials, or by conspiracies or mobs unrestrained by officials. . . . Simple justice required that federalism no longer deny individuals some remedy against wrongs when wronged individuals wished to seek remedies.

[359] *See e.g.*, The Slaughter-House Case, 83 U.S. 36, 73 (1873):

> [I]t had been held by this court, in the celebrated *Dred Scott* case . . . that a man of African descent, whether slave or not, was not and could not be a citizen of a State or of the United States. . . . [I]f it was to be accepted as a *constitutional* limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

[360] *See* TENBROEK, *supra* note 1, at 183, quoting Pennsylvania Senator Edgar Cowan:

> The Thirteenth Amendment "never was intended to overturn this government and revolutionize all the laws of the states everywhere." If under color of this constitutional Amendment, we have a right to pass such laws as these, . . . we have a right to overturn the states themselves completely.

See also HYMAN AND WIECEK, *supra* note 343, at 416:

> The [Civil Rights] bill created a latent national presence within all the states, a presence triggered into action when a state resident, who was, by the bill's definition, also a national citizen, . . . became frustrated by inequitable state procedures or by private injustices that states failed to punish, and sought an alternative national forum.

C. THE FOURTEENTH AMENDMENT

While it is often said that the Fourteenth Amendment created no new substantive rights, it profoundly altered the constitutional order by greatly expanding federal power over states, as well as creating new federal *protections* for individual rights created under both national and state law.[361] Section one of the Fourteenth Amendment was first interpreted by the Supreme Court in *The Slaughter-House Cases*[362] in 1873.

1. THE SLAUGHTER-HOUSE CASES

Despite its generally acknowledged importance, *The Slaughter-House Cases* is probably the most misread, misconstrued, and misapplied case in U.S. constitutional history. Liberals and conservatives alike have criticized the decision for eviscerating the Fourteenth Amendment's Privileges or Immunities Clause.[363] Yet, despite near universal condemnation, *Slaughter-House* has never been overruled and remains authoritative in its interpretation of the Privileges or Immunities Clause. Still, all nine members of the present Supreme Court recently have indicated a willingness to revisit both the decision and the Privileges or Immunities Clause in an appropriate case,[364] as indeed they should. Such a reassessment is long overdue.

Contrary to the traditional view, the author shares the minority view that Justice Miller envisioned a "substantial role for the [privileges or immunities] clause in adjudicating constitutional rights."[365] Indeed, as discussed below,

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[361] *See* Curtis, *supra* note 16, at 24-25: "The Fourteenth Amendment did not create new privileges. It created new methods of protecting old and inadequately secured privileges." *See also* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and* The Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 688 n.6 (1994) ("The legislative history makes it clear that the framers of the Fourteenth Amendment did not mean to 'establish' any new substantive rights; rather, they intended it to be a procedure through which they could enforce existing substantive rights.").

[362] 83 U.S. 36 (1873).

[363] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).

[364] *See supra* note 22.

[365] Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 740. *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST 196-197 n. 59 (1980):

> It is generally assumed that "[a]mong the broad interpretations of the 14th Amendment

Miller's construct of the Clause was potentially far broader in its protection of federal rights than any of the alternative theories offered by the *Slaughter-House* dissenters.[366] Moreover, when viewed within the broader historic context, it is evident that Miller's opinion was purposefully distorted in subsequent decisions of the Supreme Court to bring an end to Reconstruction and, ultimately, to effectuate the terms of the Compromise of 1877. Thus, the actual demise of the Privileges or Immunities Clause began with *subsequent* Supreme Court decisions misconstruing *both* the Clause and *Slaughter-House.*[367]

To be sure, there were serious flaws in Justice Miller's analysis—but flaws *other* than those traditionally ascribed to the opinion. Critics, for example, often point to Justice Field's dissent in attacking Miller's failure to read the Clause as establishing the federal government as the principal protector of all rights of citizenship, state as well as national.[368] However, as Justice Miller correctly noted,

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implicitly rejected by the Slaughter-House Cases was the position that the Bill of Rights guarantees had been made applicable to the states. . . ." However, a close reading of the various opinions in that case suggests at least the possibility that *all nine* justices meant to take exactly that position! . . . The majority indicated that "lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws." . . . [I]n the course of the ensuing list the Court says, "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution." No other provision of the Bill of Rights is mentioned, *but the import of this sentence seems unmistakable*: if it's a right guaranteed elsewhere in the Constitution – if, in particular, it's a right previously guaranteed only against the federal government – then it belongs on the list of privileges and immunities protected against state denial by the Fourteenth Amendment. . . . [A]s regards a proposition all nine appear with varying degrees of clarity to have endorsed – that whatever else it did, the Privileges or Immunities Clause at least applied to the states the constitutionally stated prohibitions that had previously applied only to the federal government – there may be something in the point.

[366] *See* discussion *infra* notes 417-22 and accompanying text.

[367] *See, e.g.*, Palmer, *supra* note 365, at 740:

The Court's reasoning in *Slaughter-House* . . . demands a substantial role for [the privileges or immunities] clause in adjudicating constitutional rights. . . . In *United States v. Cruikshank*, [92 U.S. 542 (1876)], only three years later, a somewhat differently constituted Supreme Court ignored the problem of original intent and misconstrued *Slaughter-House*. The inferior reasoning in *Cruikshank* thereafter prevented accurate interpretation and acceptance of the careful reasoning of *Slaughter-House*.

[368] *See, e.g.*, Harrison, *supra* note 338, at 1416: "The natural interpretation of the text is that the privileges and immunities of citizens of the United States *include the privileges and immunities of both of the citizenships* that the Constitution confers." (Emphasis added). Un-

there were two major problems with that theory. First, the framers of the Fourteenth Amendment were committed to federalism and preserving a distinct role for the states within the federal system.[369] Second, the text of the Amendment itself expressly recognizes two levels of citizenship, and not one all encompassing category of citizenship.[370] Moreover, the text specifically prohibited states from abridging "the privileges or immunities of *citizens of the United States*," rather than "the privileges or immunities of citizenship" generally.

Still, having recognized dual citizenship and a corresponding role for the states, Justice Miller failed utterly to recognize section one's corresponding protection of individual rights arising under state law, afforded by the Due Process and Equal Protection Clauses.[371] There is an obvious symmetry to section one.

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der Harrison's interpretation, all rights of *state* citizenship become federalized and enforceable under the Privileges or Immunities Clause. However, rights of state citizenship vary significantly from state to state. Some rights may be unique to one state. Recognition of a right in one state may conflict with prohibitions on the right in other states. Nevertheless, if the privileges or immunities of national citizenship were coextensive with the privileges or immunities of state citizenship, as Harrison suggests, the Clause would compel states to adopt uniform rights of state citizenship. To insure equality of rights among U.S. citizens, the citizens of one state could claim entitlement to rights recognized in other states. Thus, all states would have to uniformly recognize—or not recognize—rights existing in some states, such as the right to same sex marriages or "civil unions," or the right of minor females to obtain abortions without parental consent. *See e.g.*, VT. STAT. ANN. tit. 15, § 1201 (1999) (Vermont's new civil union statute). *Cf., e.g.*, Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997) and Pro-Choice Mississippi v. Fordice, 716 So.2d 645 (Miss. 1998). Such compelled uniformity under the Privileges or Immunities Clause would eliminate constitutionally permissible variation and experimentation among the states. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[369] *See Slaughter-House*, 83 U.S. at 82:

> [W]e do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feelings growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights – the rights of person and of property – was essential to the perfect working of our complex form of government. . . . .

[370] *Slaughter-House*, 83 U.S. at 73: "[T]he distinction between citizenship of the United States and citizenship of a State is clearly recognized and established."

[371] For example, Justice Miller wrote: "The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is a little remarkable, if this clause is intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out. . . ." While Miller was correct that the Privileges or Immunities Clause served no such purpose, his statement should have served as a segue to the Equal Protection Clause.

While the Privileges or Immunities Clause protects the *national* rights of U.S. citizens against state infringement, the Due Process and Equal Protection Clauses protect the *state-based* rights of "all *persons* within the jurisdiction of the states." So construed, section one fills the gaps in coverage left by the Bill of Rights—which applies only to the federal government – and the interstate Privileges and Immunities Clause, which protects only visiting citizens from other states.

This broader and symmetrical view of section one is also consistent with its wording. On the one hand, the Privileges or Immunities Clause forbids state interference with uniform national rights shared in common with other U.S. citizens throughout the nation. On the other hand, states are also prohibited from denying persons *within their jurisdictions*,[372] due process and equal protection with respect to rights under state law.

Thus, Mr. Barron could have sued Baltimore for injury to his state-created property interests, by claiming violations of his *federal* rights to due process and/or equal protection – he could have sued, that is, had Justice Miller been as meticulous in construing the Due Process and Equal Protection Clauses, as he had been in construing the Citizenship and Privileges or Immunities Clauses. Given Justice Miller's overly restrictive reading of the Due Process and Equal Protection Clause, it is probable that Mr. Barron would have fared no better than the butchers. Miller did, in fact, eviscerate the Due Process and Equal Protection Clauses.[373]

There are other aspects of Justice Miller's opinion which may serve to explain the subsequent slaughtering of *Slaughter-House*. Miller's repeated emphasis on "the one pervading purpose" behind the Civil War Amendments—i.e., "the freedom of the slave race"[374]—has lent credence to the erroneous view that the Fourteenth Amendment's sole purpose was to constitutionalize only the specific rights mentioned in the Civil Rights Act of 1866.[375] Additionally, Miller's

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[372] It is interesting to note that the "within its jurisdiction" language appears to relate only to the Equal Protection Clause. This might have been a drafting error. On the other hand, it could mean that the Due Process Clause embodies a national right that is guaranteed to citizens and non-citizens alike. Since the Fifth Amendment Due Process Clause applies only against the federal government, per *Barron v. Baltimore*, the Fourteenth Amendment Due Process Clause provides a separate guarantee against the states.

[373] *See Slaughter-House*, 83 U.S. at 80-81; *see also* discussion *infra* notes 441-44 and accompanying text.

[374] *Id.* at 72.

[375] *See* text of Act, *infra* note 420. *See also* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 39-40, 41-42 (1989):

understandable but misunderstood attempt to suggest "some" privileges or immunities of national citizenship seems to have confused, rather than clarified his interpretation of that Clause. Although he made it perfectly clear that his partial listing of privileges and immunities was both *dictum* and for illustrative purposes only,[376] his contemporaries and others down through history have treated his partial list as exhaustive and have insisted that Miller had a very narrow view of the federal rights encompassed by the Clause.[377]

> [T]he Civil Rights Bill had been fueled by the Black Codes, which "convinced" the Republican majority that "white Southerners intended to reinstitute slavery by denying newly freed blacks the rights to contract, to hold property and sue," precisely the particularized rights enumerated in the Bill. This was the "limited category" of rights which the framers considered were "identical" with and incorporated in the Amendment.. . .[T]he Ratification debates confirm the legislative history with respect to the view that the Civil Rights Act and the Fourteenth Amendment were "identical," that the Amendment, like the Act, aimed to protect the rights to contract, hold property, and have access to the courts, and have the rights of locomotion. . . .

In short, Berger insists – quite wrongly, of course – that "the Amendment did not go beyond the Act." *Id.* at 20. As previously discussed, the Amendment also vindicated the constitutional rights of white citizens – North and South – who had faced criminal sanctions or worse for daring to write or speak out against slavery. See discussion *supra* notes 344-60 and accompanying text.

[376] *See Slaughter-House*, 83 U.S. at 78-79 (emphasis added):

> [W]e may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, *until some case involving those privileges may make it necessary to do so*. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture *to suggest some* which owe their existence to the Federal government, its national character, its Constitution, or its laws.

[377] *See, e.g.*, JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 371 (6th ed. 1995):

> The privileges or immunities clause of the Fourteenth Amendment protects very few rights. The Supreme Court [in *Slaughter-House*] held that this clause neither incorporated any of the Bill of Rights nor protected all right of individual citizens. The Court, instead, decided that the provision only protected those rights peculiar to being a citizen of the federal government [sic]; it does not protect those rights which relate only to state citizenship. Therefore, the clause only refers to uniquely federal rights such as the right to petition Congress, the right to vote in federal elections, the right to interstate travel or commerce, the right to enter federal lands, or the rights of a citizen while in the custody of federal officers.

Apart from the endless debate over what constitute privileges or immunities of national citizenship, are the conflicting views of federalism under the Fourteenth Amendment. As one scholar observed:

> In the 1830s and in following years, the constitutional paradigm was that of the semi-sovereign state. The federal government had power to pursue common objectives, but the great mass of day-to-day governmental power was exercised by the states, sovereign within their domain. . . . As against state and local governments . . . citizens of states and visitors from other states got just as much liberty as state constitutions and laws provided.[378]

By contrast, " Advocates of the liberty model read the Constitution as ultimately committed to the goals of liberty and equality in life, liberty and the pursuit of happiness,"[379] which meant "federalism bounded by *nationally* guaranteed basic rights plus a guarantee of equality."[380] In distinguishing state and national citizenship, most have read Miller's opinion as a reaffirmation of the "semi-sovereign state" model, with the doctrine of "exclusive state sovereignty"[381] standing as a barrier to federal protection of individual rights. Thus, the right to petition for redress of grievance is protected under the Privileges or Immunities Clause only when a state interferes with a citizen's right to petition *Congress*,[382] but not when a citizen seeks to petition his own state legislature.[383] Miller's opinion has been misconstrued to mean that the latter is a right of state citizenship which the framers did not intend to federalize *under the Privileges or Immunities Clause*. That interpretation, however, fails to distinguish two separate guarantees in section one of the Fourteenth Amendment, and therefore does not

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But see, John Hart Ely, *supra* note 365.

[378] Curtis, *supra* note 16, at 16.

[379] *Id.* at 14.

[380] *Id.* at 44.

[381] *See* McConnell, *supra* note 342. *See also* Curtis, *supra* note 16, at 35: "The motive for refusing to apply the Bill of Rights and broader, vaguer liberties to the states was also structural: a concern to preserve a version of federalism more like the sort which existed before the Civil War."

[382] *See, e.g.*, Crandall v. Nevada, 73 U.S. 35 (1867), striking down Nevada capitation tax for transiting the state as infringing rights of U.S. citizens to travel to seat of national government.

[383] *Cruikshank*, 92 U.S. at 551-552.

accurately reflect Miller's view. Indeed, the rights of *state* citizenship are *federally* guaranteed rights under the Citizenship Clauses of the Fourteenth Amendment.[384]

As Miller pointed out, the Citizenship Clauses—wholly apart from the Privileges or Immunities Clause—serve a distinct function.[385] Specifically, they overruled *Dred Scott*.[386] Thus, the Fourteenth Amendment also creates constitutional guarantees of national and state citizenship, along with their corresponding rights. Since the definition of state citizenship was also intended to overturn the disabilities of the Black Codes, state action infringing the guarantee of state citizenship also violates the Fourteenth Amendment, even though rights of state citizenship are not encompassed within the separate Privileges or Immunities

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[384] Saenz v. Roe, 526 U.S. 489, 506-7 (1999):

> [T]he citizenship Clause of the Fourteenth Amendment expressly equates [state] citizenship with residence: "That Clause does not provide for, *and does not allow for*, degrees of citizenship based on length of residence." *Zobel*, 457 U.S. at 69. It is equally clear that the Clause does not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence.

Moreover, "[c]itizens of the United States, whether rich or poor, have the right to choose to be citizens 'of the State wherein they reside'. . . . *Saenz*, 526 U.S. at 510-511. "As Justice Jackson observed, 'it is a privilege of citizenship of the United States, protected from state abridgment, to enter any State of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.'" *Id.* at 511 n.27 (citing Edwards v. California, 314 U.S. 160, 183 (1941)).

[385] Note that the definitions of national and state citizenship appear in a separate sentence and, therefore, weren't written for the specific purpose of modifying the Privileges or Immunities Clause, as Miller's opinion suggests: "All persons born or naturalized in the United States . . . are citizens of the United States and the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .". U.S. CONST. amend. XIV, § 1.

[386] *See Saenz*, 526 U.S. at 502 n.15:

> The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV. . . .In *Dred Scott v. Sanford*. . .this Court had limited the protection of Article IV rights under state law and concluded that free blacks could not claim citizenship. The Fourteenth Amendment overruled this decision. The Amendment's Privileges and [sic] Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any state in which they resided and by precluding that State from abridging their rights of national citizenship.

Clause.[387]

Given the never-ending debates over the intended scope of the Privileges or Immunities Clause, its underlying theory of federalism, and the nuances of Miller's *Slaughter-House* opinion, a reassessment of all three is warranted—even 128 years later.

a. The Citizenship Clauses

> *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."*

As Miller noted, section one begins with definitions of U.S. and state citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside." This provision performs several important functions.

First, it serves to make U.S. citizenship primary over state citizenship. As Miller observed, under the prior view "no man was a citizen of the United States except as he was a citizen of one of the States composing the Union."[388] In other words, under the prior view, state citizenship was primary, while U.S. citizenship was derivative of state citizenship. The Citizenship Clauses, however, make national citizenship primary.

Second, the Citizenship Clauses overruled *Dred Scott*,[389] which held that neither slaves or *free* African Americans were citizens of the states or of the United States. The Thirteenth Amendment had abolished slavery, but did not confer citizenship on free and freed blacks.[390]

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[387] *See, e.g.*, Harrison, *supra* note 338, at 1395: "All the substantive readings [of the Privileges or Immunities Clause], however, contain important flaws. First, by focusing on the rights of national citizenship, they ignore the state citizenship guaranteed by the first sentence of Section 1 and therefore provide at most an incomplete account of the citizenship rights protected by the clause."

[388] *Slaughter-House*, 83 U.S. at 72.

[389] *Id.* at 73.

[390] This was one reason for questioning the constitutionality of the Civil Rights Act of 1866, which purported to declare African Americans citizens of the United States and of the states they resided in. However, *Dred Scott* declared that they were precluded from citizenship by the Constitution. Thus, the exclusion could only be changed by amendment and not by Act of Congress.

Third, "citizenship" itself conferred certain rights as well as federal protections on African Americans, as well as all other state residents. In terms of state citizenship, blacks – as a matter of federal right – now enjoyed all the same legal rights of white citizens.[391] The state citizenship clause, in other words, provides another federal guarantee of equality against discriminatory legislation such as the Black Codes.[392]

More importantly, as U.S. citizens the freedmen enjoyed *additional*, federally created "civil rights" which states could not abridge. This is a key feature of Miller's interpretation of the Citizenship Clauses. Rather than ignoring the federal-state dichotomy and conferring on the federal government complete authority over all *rights* of citizenship – as the dissenters urged – Miller took a different tact. Picking up on the supremacy principle underlying both the Citizenship and Privileges or Immunities Clauses, Miller concluded that the federal government could act to protect citizens of the states *as citizens of the United States*. In other words, the federal government not only has concurrent, *but supreme* jurisdiction over *the persons* of citizens within the states. Thus, there was no need to destroy federalism by giving the federal government exclusive jurisdiction over all the rights of citizenship.

Concluding his discussion of the Citizenship Clauses, Miller stated: "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[393] Given the commitment of most Republican supporters of the Fourteenth Amendment to preserve the role of states within the federal system,[394] there seems little reason to question Miller's

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[391] Harrison argues that the state citizenship clause "makes the possession of the rights of state citizenship into a right of *national* citizenship" as well, and therefore a right covered by the Privileges or Immunities Clause. Harrison, *supra* note 338, at 1415. However, since the right of state citizenship is a distinct federal guarantee of the Citizenship Clauses, there's no need to make it a right of national citizenship in order to secure constitutional protection. The Constitution bans other state laws infringing individual rights that are not necessarily conditioned on national citizenship. Article I, section 10 prohibits state laws impairing the obligations of contracts, for example. Like the Contract Clause, the state citizenship clause of the Fourteenth Amendment operates directly upon the states, independent of national citizenship.

[392] Some have postulated that the Privileges or Immunities Clause does nothing more than guarantee equality, rather than substantive rights. *See, e.g.*, Harrison, *supra* note 338, at 1396 ("How does the Fourteenth Amendment place the antidiscrimination rule of the Civil Rights Act of 1866 into the Constitution? My answer is that it does so through the Privileges or Immunities Clause."). In fact, the Citizenship and Equal Protection Clauses secure equality of rights and equality of protection under the laws.

[393] *Id.* at 74.

[394] *See supra* note 355.

heavy emphasis on the distinction between national and state citizenship in construing the Privileges or Immunities Clause. Still, Miller did not go so far as to say that national and state citizenship were *separate* – only distinct.[395]

Of even greater import, however, is the initial focus of both the Clause's and Miller's analysis on the *citizen*, rather than rights. The Privileges or Immunities Clause is not about the natural, inherent, or fundamental rights of *the individual.* Nor is it limited to the specific rights of citizen*ship*. The Clause encompasses *all* rights flowing to the individual by virtue of his legal relationship to the polity – i.e., his status as a *citizen*. Thus, the rights embodied by the Clause are all those rights granted the individual by virtue of his legal connection to the United States. The *status* defines the scope of the rights – i.e., "the privileges or immunities *of citizens*," not the "privileges or immunities of *the individual*," nor the "privileges or immunities of citizenship."

What critics of *Slaughter-House* seem to miss is that a citizen has certain basic and presumptive rights that are attributes of both his state and national citizenship, even though they are separately guaranteed. For example, both state and national citizenship should carry a guarantee of free speech, as a basic presumptive right. It is conceivable, however, that a state's guarantee of speech might be broader than the federal guarantee. Nothing forecloses an individual state from conferring greater or additional rights of citizenship beyond the minimum requirements of the Constitution or laws of the United States,[396] or with respect to matters reserved solely to the states.[397]

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[395] *See* Palmer, *supra* note 365, at 744 n. 28.

[396] *See, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-550 (1986):

> As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law. . . . [T]he Supreme Court formulates a national stand which . . . must represent the common denominator to all for diversity and local experimentation. . . . [T]he Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and . . . the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor. Experimentation which endangers the continued existence of our national rights and liberties cannot be permitted; a call for that brand of diversity is . . . antithetical to the requirements of the Fourteenth Amendment. While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment. This reconciliation of local autonomy and guaranteed individual rights is the only one consistent with our constitutional structure.

[397] As previously discussed, nothing in the Fourteenth Amendment attempts to federalize

Rights under state law must satisfy the minimum guarantees of *national* citizenship, otherwise the state would "abridge the privileges or immunities of citizens of the United States." That's because state and national citizenship are an inseparable duality. Every state citizen is *first and foremost* a citizen of the United States. Thus, if a state citizen is prosecuted in state court and state law permits the jury to consider the defendant's refusal to testify as evidence of guilt, the state law would abridge the state defendant's concurrent *and preeminent* rights as a U.S. citizen, in violation of the Privileges or Immunities Clause.[398] The distinction between state and national citizenship does *not* constitute a jurisdictional divide between federal and state authority to protect individual rights.

Additionally, since the states and the federal government are allocated specific areas for regulation under the Constitution, each may create—through postive laws, for example—additional rights, beyond the basic rights of citizenship. Thus, some rights may be exclusive to either national[399] or state[400] citizenship.

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rights under state law relating to professional or business licensing, business organization, contracts, title to property, marriage, adoption or family relations, wills or estates, provided no federal rights are implicated. *See e.g.*, discussion *supra* notes 288-90 and accompanying text.

[398] *See* U.S. CONST. amend. V: ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . ." Accordingly, Twining v. New Jersey, 211 U.S. 78 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964), was wrongly decided, again based on a misreading of *Slaughter-House*. In *Twining*, Justice Moody opined that, based on Miller's distinguishing of national and state citizenship, the privilege against self incrimination was a right of *state* citizenship only: "If , then, it be assumed . . . that an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government . . . it is, so far as the States are concerned, a fundamental right inherent in state citizenship, *and is a privilege or immunity of that citizenship only. . . .*" *Twining*, 211 U.S. at 97. Miller drew no such conclusion in *Slaughter-House*. While Miller said that rights of state citizenship had not been federalized under the Privilege or Immunities Clause, he did not conclude that states were therefore free to ignore a *separate* constitutional guarantee of the privilege against self-incrimination as a right of national citizenship. As Justice Moody noted, all of the states recognized the privilege against self-incrimination, *except* New Jersey and Iowa. *Id.* at 92. However, the two states should have been required by the Privileges or Immunities Clause to recognize it as a preeminent right of national citizenship. Instead, Moody concluded New Jersey wasn't obligated to recognize the right.

[399] Interstate travel and the Privileges and Immunities Clause are examples of exclusively federal rights, along with rights or entitlements created under federal law, such as Social Security, Medicare, and food stamp benefits, or civil rights remedies, or employment related rights to collective bargaining, workplace safety, or minimum wages under the federal Fair Labor Standards Act.

[400] For example, an annual dividend paid to state residents – i.e., state "citizen" – similar to that involved in *Zobel v. Williams*, 457 U.S. 55 (1982)—provided it doesn't discriminate between state citizens based on length of residency.

b. The Privileges or Immunities Clause

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.. . ."

Starting from his premise of dual citizenship, Miller began by noting that only the privileges or immunities of U.S. citizens are covered.[401] The clause "does not speak of [the privileges or immunities] of citizens of the several states."[402] Thus, in order to fall within the protection of the clause, the butchers were required to show that the pursuit of their occupation was a privilege or immunity of U.S. citizenship. Miller's rejection of the claim seems unexceptionable. The right to pursue an occupation, he concluded, is a privilege or immunity "which belong[s] to citizens of the States as such, and . . . they are left to the State governments for security and protection, and [are] not by this article placed under the special care of the Federal government."[403] Now, as then, states are primarily responsible for business creation, certifying teachers, licensing doctors and lawyers, marriage and family relations, titling of property, zoning restrictions, and a range of other matters too extensive for efficient federal administration and generally beyond the proper scope of federal governance.[404] On the

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[401] *Slaughter-House*, 83 U.S. at 74.

[402] *See id.*:

> Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the state, . . . it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

Miller's use of the term "paragraph" is confusing. Since all of section one is a single "paragraph," Miller apparently means "clause." Initially, he refers to the Privileges or Immunities Clause, but concludes with a reference to "this paragraph." If by "paragraph" Miller meant the whole of section 1 in this quoted passage, the statement is plainly wrong. The guarantee of state citizenship, as well as the Due Process and Equal Protection Clauses, all apply to the privileges or immunities of state citizenship.

[403] *Id.* at 78.

[404] *See e.g.*, D. O. McGovney, *Privileges or Immunities Clause Fourteenth Amendment*, 4 IOWA L. BULL. 219, 222-3, 224 (1918) (internal citations omitted):

> [T]his clause of the constitution has almost a one hundred per cent. record of at-

other hand, state regulation of the practice of law, for example, would still be subject to the Equal Protection Clause.[405]

By contrast, Miller noted that the rights to travel, to peaceably assemble, to petition for redress of grievances, and to writs of habeas corpus are rights of national citizenship, "guaranteed by the Federal Constitution."[406] He also mentioned the "right to use the navigable waters of the United States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State."[407] Since other rights are also guaranteed by "the Federal government, its National character, its Constitution, or its laws," Justice Miller's listing was intended to be illustrative, rather than exhaustive.

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tempted misapplications. Though over forty cases have come before the Supreme Court of the United States in which a contention has been made of State abridgement of an alleged privilege or immunity protected by this clause, in not a single instance has the court so held. . . . The Supreme Court has had to point out that: – it is not a privilege of a citizen of the United States to use the American flag "as an advertisement on a bottle of beer"; it is not a privilege of a citizen of the United States, when sentenced to capital punishment, to be hanged rather than electrocuted; nor is any sacred immunity of the citizen invaded by a State law abolishing Greek letter fraternities in a university maintained by the State; nor is it a privilege of a citizen to sell intoxicating liquor or to possess it for personal use, *non obstante,* State prohibition thereof. Some of the more foolish contentions which other courts have been called upon to deny are that it is one of the protected privileges of a citizen to play baseball on Sunday with a charge for admission; and that a miscegnation [sic] statute invades a citizen's privilege of being unrestricted by law in the choice of a spouse; that a statute forbidding persons not members to wear badges of fraternities and societies invades the citizen's privilege of ornamenting his person in accordance with his own taste.

Today, of course, some of these subjects might well be considered privileges and immunities of U.S. citizenship, in light of more recent case law. Thus, the guarantee against cruel and unusual punishment is probably a right of national citizenship that is enforceable against state punishments—even though electrocution for capital murder has yet to be declared "cruel and unusual." The right to interracial marriage might also be deemed a fundamental right of national citizenship or, alternatively, secured by the equal right guarantees of the state citizenship and Equal Protection Clauses.

[405] Thus, even though the Supreme Court concluded in *Bradwell v. State*, 83 U.S. 130 (1872) that the right to practice law is not a privilege or immunity of U.S. citizenship – and perhaps not even a right of state citizenship—excluding women from the profession would violate their federal right to equal protection.

[406] *Id.* at 79.

[407] *Id.* at 80. Ultimately, Miller concludes "it is useless to pursue this branch of inquiry," since the rights being asserted by the butchers clearly were not national rights. *Id.*

Presumably, if the Louisiana law *had* infringed a privilege or immunity of national citizenship, it would have been struck down. *Slaughter-House* really left opened a number of questions concerning both the *scope* of rights protected under the Clause, as well as the *context* within which a violation of those rights might occur. Critics have charged that Justice Miller left some fundamental rights of citizenship unprotected against state interference.[408] The criticism may be based, in part, on a misreading of Miller's discussion concerning the traditional role of states in enforcing the privileges and immunities of citizenship under the Articles of Confederation,[409] as well as Article IV, section two of the Constitution.[410] Justice Miller concluded that the intent of the two prior privileges and immunities clauses were the same, based on Justice Washington's description in *Corfield v. Coryell*:

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[408] For example, in dissent Justice Bradley cited Justice Washington's broader description of "privileges and immunities" in *Corfield v. Coryell*:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right a citizen of one State to pass through, or to reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.

Slaughter-House, 83 U.S. at 116-17. To these, Justice Bradley added religious freedom, peaceful assembly, security against unreasonable searches and seizures, "and above all. . .the right of not being deprived of life, liberty, or property, without due process of law." *Id.* at 118. These and others, he wrote, are "among the privileges and immunities of citizens of the United States." *Id.* at 118-19.

[409] Article IV of the Articles of Confederation read in part:

> the free inhabitants of each of these states . . . shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively. . . .

[410] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, §2, cl. 1.

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union. . . . What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be all comprehended under the following general heads: Protection by the government. . . with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[411]

Miller noted that, "This definition of the privileges and immunities *of citizens of the States* is adopted in the main by this court in the recent case of *Ward v. The State of Maryland*. . . ."[412] Citing *Paul v. Virginia*, Miller concluded:

> The constitutional provision there alluded to [i.e., Art. IV, § 2] did not create those rights, which it called privileges and immunities of citizens of the States. . . . [N]o claim or pretence was set up that those rights [i.e., the privileges and immunities of *state* citizenship] depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States. . . . But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens *of the States*, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights . . . from the States to the Federal government? . . .[W]as it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?[413]

Was Miller distinguishing the earlier privileges and immunities clauses, along with the states' role in enforcing them, from the Fourteenth Amendment clause? Or did he conclude that the Fourteenth Amendment clause simply guaranteed the same rights as it predecessors,[414] which were left to the states protection? The

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[411] 6 Fed. Cas. 546, 551-52 (E.D. Pa 1823).

[412] *Slaughter-House*, 83 U.S. at 76 (emphasis added).

[413] *Id.* at 77.

[414] Justice Thomas draws this conclusion in his *Saenz* dissent:

traditional and erroneous view is that Miller reached the latter conclusion.[415]

There were, of course, other interpretations about the scope of the rights encompassed by the Privileges or Immunities Clause. As one legal scholar noted:

> There was also . . . legislative history to support no fewer than three other interpretations of the privileges or immunities clause, all of which were put forward by the dissenting Justices. In presenting the proposal to the Senate, Senator Howard had said among other things that it was designed, as Justice Black later argued, to make the Bill of Rights applicable to the States. Still other passages in the debates seemed to suggest that Congress meant to give federal protection to all privileges or immunities that were "fundamental" in the sense described by Justice Washington in his famous circuit court interpretation, in *Corfield v. Coryell*, of the privileges or immunities clause of article IV. Finally, numerous legislators suggested that the principal aim of the amendment was to provide a firm constitutional basis for the Civil Rights Act of 1866, which had outlawed racially discriminatory state action.[416]

It is important to note, however, that Justice Miller's interpretation offered

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> When Congress gathered to debate the Fourteenth Amendment, members frequently, if not as a matter of course, appealed to *Corfield* [v. Coryell, 6 Fed. Cas. 546 (CCED Pa 1825)], arguing that the Amendment was necessary to guarantee the *fundamental rights* that Justice Washington identified in his opinion. . . .
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> . . .[T]heir repeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, supports the inference that, at the time the Fourteenth Amendment was adopted, *people understood that "privileges or immunities of citizens" were fundamental rights,* rather than every public benefit established by positive law. Accordingly, the majority's conclusion – that a State violates the Privileges or Immunities Clause when it "discriminates" against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefit appears contrary to the original understanding and is dubious at best.

Saenz v. Roe, 526 U.S. 489, 526-527 (Thomas, J., dissenting) (emphasis added). Justice Thomas construes the Privileges or Immunities Clause to protect only certain – albeit "fundamental" – *rights* against state interference, while Miller read the clause to protect *U.S. citizens* and all their rights.

[415] *See, e.g.*, quote from Justice Wait's opinion in *United States v. Cruikshank*, 92 U.S. 542 (1876) *infra* note 425.

[416] CURRIE, *supra* note 302, at 345-346 (internal citations omitted).

the greatest protection for the rights of national citizenship. By restricting the Privileges or Immunities Clause to only those rights mentioned in the Bill of Rights, for example, the incorporation theory disregards other national rights reflected elsewhere in the Constitution,[417] as well as rights which "owe their existence to the Federal government, its national character, . . . or its laws." On the other hand, restricting the scope of the Clause to only those rights of national citizenship deemed "fundamental" would foreclose protection of lesser rights or entitlements within the Constitution,[418] or as created by the laws of the United States.[419] Finally, limiting the Clause to only those civil rights embodied in the Civil Rights Act of 1866[420] simply ignores the broader language of the Amendment,[421] as well as the intent of the framers to remedy state violations of the constitutional rights of white Americans,[422] which had also prompted ratification of

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[417] *See, e.g.*, U.S. CONST. art. I, § 10 (ban on bills of attainder, ex post facto laws, and laws impairing obligations of contracts); Article IV (interstate privileges and immunities); U.S. CONST. amend. XIV (rights of national and state citizenship).

[418] For example, not all guarantees in the Bill of Rights are deemed "fundamental." Under the theory of "selective incorporation," the Supreme Court has held that neither the Fifth Amendment right to a grand jury indictment, the Seventh Amendment right to a jury in civil cases, nor the Eighth Amendment ban on excessive bails are fundamental. Not even the right to vote was deemed "fundamental" when the Fourteenth Amendment was ratified, since not all citizens had the right to vote and also because the right could be taxed.

[419] Supreme Court Justice Clarence Thomas supports a restricted "fundamental rights" interpretation of the privileges or immunities clause, exclusive of benefits "established by positive law." *See supra* note 414.

[420] Specifically, the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . ." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.

[421] By contrast, the Fourteenth Amendment prohibits state infringement of the full range of "privileges or immunities *of citizens of the United States*." The language is not restricted to simply "civil rights" as traditionally understood or defined under state law.

[422] While it was generally understood that the principal purpose of the Civil Rights Act of 1866 was to outlaw racial discrimination – *see, e.g.*, RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 23-24 (1989) and CURRIE, *supra* note 302, at 348 – § 1 of the Fourteenth Amendment served a broader remedial purpose. In banning the distribution of abolition materials, as well as anti-slavery speeches, the South had also violated the First Amendment rights of white Americans. "The argument for limiting the Fourteenth Amendment to equality under state law . . . entirely ignores the suppression of free speech and other civil liberties in the South before the Civil War." Curtis, *supra* note 16, at 52. As Curtis explains:

the Fourteenth Amendment.

By contrast, Miller's interpretation of the Privileges or Immunities Clause clearly contemplated expansion of federal rights through the legislative powers of Congress: ". . .[L]est it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, *or its laws.*"[423] Thus, Miller recognized that the privileges or immunities of U.S. citizens could be expanded through federal enactments, such as the Freedmans' Bureau Acts of 1865 and 1866, as well as the Civil Rights Acts of 1866, 1870, and 1871. The Clause's full potential, however, would not be realized until the New Deal and thereafter, following the Supreme Court's reinterpretation of the Commerce Clause and other federal powers. Consistent with Justice Miller's opinion, therefore, the Privileges or Immunities Clause includes the full range of federally created entitlements from Social Security, Medicare, and food stamp benefits, to civil rights remedies, to employment related rights such as collective bargaining, workplace safety, and minimum wages under the FLSA.

The Supreme Court also limited the Clause's protection to state interference with the rights of U.S. citizens only in relation to the federal government. Although Miller specifically identified the right of peaceful assembly as a privilege or immunity of national citizenship,[424] three years later Chief Justice Wait wrote in *United States v. Cruikshank*[425]:

The right of the people to peaceably to assemble for lawful purposes ex-

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Two basic themes dominate the history of the Fourteenth Amendment, and the themes are closely intertwined. The first was the problem of slavery and the status of the newly freed slaves. The second was protection for civil liberties of American citizens. . . . Parallel to the citizenship, liberty, and equality problems of blacks were the attacks on the civil liberties of whites who opposed slavery. . . . Southern state laws in effect made criticism of slavery a crime. Republicans could not campaign in the South, and a Republican campaign book produced indictments for Southerners who circulated it and a North Carolina indictment for some Northern Republicans who endorsed it.

Id. at 28. Thus, the Privileges or Immunities Clause encompassed far more than the specific civil rights identified in the Act of 1866. *See* text of Act *supra* 420.

[423] *See Slaughter-House*, 83 U.S. at 79 (emphasis added).

[424] *Id.* at 79.

[425] 92 U.S. 542 (1876).

> isted long before the adoption of the Constitution of the United States. In fact its is and always has been one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, *with the obligation on the part of the States to afford it protection.* As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, . . . *subject to state jurisdiction.* . . . The right was not created by the Amendment; neither was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.[426]

Wait concluded that only the right to assemble "*for the purpose of petitioning Congress for a redress of grievance* . . . is an attribute of national citizenship and, as such, under the protection of and guarantied by, the United States."[427] Otherwise, he wrote, "the people must look to the States" for its protection and enjoyment.[428] Nothing in Miller's opinion foreclosed a challenge to a state law banning peaceful assembly to petition a *state* legislature for redress of grievance.[429] In either case, the state would be infringing the right of U.S. citizens to

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[426] *Id.* at 551-552 (emphasis added) (internal citations omitted).

[427] *Id.* (emphasis added).

[428] *Id.* at 552.

[429] *See, e.g.*, Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939) (where the Court struck down a city ordinance forbidding the leasing of any hall to speakers advocating the obstruction of federal or state government). In a concurring opinion, Justice Roberts concluded that the right of Committee members to assemble and discuss rights under the National Labor Relations Act "is a privilege or immunity of a citizen of the United States secured against State abridgement," *id.*, at 512, even though the respondents weren't petitioning the national government. In a separate concurrence, Justice Stone concluded the ordinance violated the Due Process Clause, adhering to the restrictive construct that, "The privileges and immunities of citizens of the United States . . . are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws." *Id.* at 520 n.1. He offered the "semi-sovereign state" view of federalism in support:

> The reason for this narrow construction of the clause and the consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the *Slaughter-House Cases.* If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government . . . it would enlarge Congressional and judicial control of state action and

peaceably assemble, in violation of the Privileges or Immunities Clause.

There are two major flaws in Wait's opinion. First, he presumes to completely segregate state and national citizenship: "The people of the United States resident within any State are subject to two governments: one State and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions."[430] However, the duality of state and national citizenship is non-severable, with national citizenship being paramount[431] As section five of the Fourteenth Amendment makes clear, Congress is primarily responsible for the privileges and immunities of national citizenship, as well as being primarily responsible for ensuring due process and equal protection for persons within the jurisdictions of the states. When the state takes *any* action with respect to one of its own citizens, it is necessarily taking action with respect to a U.S. citizen. A state can no more sever state citizenship from national citizenship, than it can sever the intrastate component of interstate commerce for purposes of separate regulation. Contrary to Wait's premise, there are no separate state and federal jurisdictions over citizens. Moreover, since national citizenship is paramount, states must accord their citizens the minimum protections of national citizenship, as mandated by both the Fourteenth Amendment and the Supremacy Clause. Of course, nothing forecloses a state from providing *greater* protections than those required by the Constitution and laws of the United States. Moreover, rights of state citizenship may encompass subject matter reserved to

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multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension *for the rightful independence of local government.*

Id. (emphasis added). The irony, of course, is that Stone still voted to void the ordinance under the Due Process Clause.

[430] *Cruikshank*, 92 U.S. at 550.

[431] Harrison makes the same point, but based on a different premise: "[A]lthough Section 1 recognizes that there are separate citizenships of the states and the United States, the Amendment does not divide those citizenships, but staples them together." Harrison, *supra* note 338, at 1415. Harrison argues that, as a *legal* matter, state citizenship is a right of national citizenship under the Privileges or Immunities Clause. The alternative premise is based on the simple fact that a person cannot be physically separated into a state citizen and a national citizen, nor can a state simply ignore a person's national citizenship. Accordingly, whenever the state infringes *basic* rights of citizenship common to both state and national citizenship, it necessarily violates the privileges or immunities of a U.S. citizen. On the other hand, states are free to provide rights above and beyond those inhering in national citizenship. Those rights are not subject to the Privileges or Immunities Clause, but the discriminatory denial of those rights to some state citizens would violate either or both the state citizenship or equal protection guarantees of the Fourteenth Amendment.

the states for regulation.[432]

The second flaw in Wait's analysis is his failure to recognize that while some rights of citizenship may not be *created* by the Constitution,[433] they are all *guaranteed* by the Constitution and are protected against federal and state infringement. Contrary to Wait's opinion in *Cruikshank*, Miller in *Slaughter-House* expressly identified the right to peaceful assembly as a privilege or immunity of national citizenship because it is expressly "*guaranteed* by the Federal Constitution."[434] In Miller's view it was not necessary for the right to be "created" by the Constitution, as Wait opined. By definition, the rights of national citizenship "*owe their existence* to the Federal government, its National character, its Constitution, or its laws," because without these there would be no *citizenship*, hence no rights flowing through citizenship.

As a consequence, it was Chief Justice Wait's erroneous "created by" thesis in *Cruikshank* – rather than Justice Miller's opinion in *Slaughter-House* – that provided the theoretical basis for eliminating the Bill of Rights and other liberty guarantees from the purview of the Privileges or Immunities Clause. Justice Miller was clearly referring to the Bill of Rights when he wrote, "The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution."[435] Miller's phraseology is virtually a direct quote taken from the First Amendment.[436] He obviously read the Privileges or Immunities Clause as including the Bill of Rights guarantees.[437]

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[432] *See* discussion *supra* notes 338-400 and accompanying text.

[433] While Wait is correct that some fundamental rights predate the Constitution, others are created by the document. The interstate privileges and immunities clause, for example, serves no purpose outside the context of the federal union.

[434] *Slaughter-House*, 83 U.S. at 79. *See also* Daniel J. Levin, *Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and An Interpretive Truce*, 35 HARV. C.R.-C.L. L. REV. 569, 582 (2000): "The drafters considered the right to assemble to be a privilege or immunity of the Fourteenth Amendment. . . . Yet, the Supreme Court, only nine years later, saw the right to assemble quite differently. In *United States v. Cruikshank*, the Court held that the right to assemble was a fundamental, natural right and was not within the scope of the Privileges or Immunities Clause, which contained only more positive rights of citizenship."

[435] *Slaughter-House*, 83 U.S. at 79.

[436] "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[437] *See* ELY, *supra* note 365. Still, commentators resist this very obvious reference to the Bill of Rights by Justice Miller. *See, e.g.*, Aynes, *supra* note 361, at 654 (Miller's "obvious omission of free speech and the limitation of the privilege or immunity to assembly and petition suggest the type of 'structural' right recognized in *Crandall v. Nevada*, instead of the First

The commentary and scholarship on the Privileges or Immunities Clause is voluminous. It includes exhaustive research of the legislative record of the Thirty-eighth and Thirty-nine Congresses, as well as other contemporaneous sources, in an effort to ascertain the framers' intent. Unfortunately, this great body of work has yielded little in the way of consensus on the meaning of the clause.[438] There seems to be little point in rehashing old debates which are, at best, inconclusive.[439] There also seems to be little merit in doing so, since contemporary views of the Constitution differ in some significant ways from mid-nineteenth century views.[440] Today, the primary focus of any reconsideration of

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Amendment.").

[438] *See, e.g.*, Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 812-813 (1997) ("Although a number of scholars have attempted to determine what was originally meant by the terms 'privileges' and 'immunities' as used in Section 1 of the Fourteenth Amendment and Article IV, Section 2, no consensus has been reached"); *see also Saenz*, 526 U.S. at 522 n. 1 (Thomas, J., dissenting) ("Legal scholars agree on little beyond the conclusion that the [Privileges or Immunities] Clause does not mean what the Court said it meant in 1873").

[439] *See* Brown v. Board of Education, 347 U.S. 483, 489 (1954) (emphasis added):

> Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. *At best, they are inconclusive.* The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind *cannot be determined with any degree of certainty.*

[440] For example, Justice Thomas argues that "at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights," based on Justice Bushrod Washington's interpretation of the Privileges and Immunities Clause of Art. IV, §2, in *Corfield v Coryell*, 6 Fed. Cas. 546 (CCED Pa. 1825). *Saenz*, 526 U.S., at 527 (Thomas, J., dissenting); *see also*, Smith, *supra* note 438. However, *Corfield's* interpretation of Art. IV, section 2 does not accord with the modern "nondiscrimination" view of the clause. *See, e.g.*, Hague v. Committee for Industrial Organization, 307 U.S. 496, 511 (1939):

> [I]t has come to be the settled view that Article IV, Section 2, does not import that a

the clause's meaning should begin with the language itself,[441] as well as its relationship to the broader constitutional text and context.

c. *The Due Process and Equal Protection Clauses*

While the pursuit of an economic livelihood may not nave been a national right under the Privileges or Immunities Clause, the Fourteenth Amendment's Due Process and Equal Protection Clauses certainly applied to the *state-based* interests of the New Orleans butchers. The Louisiana law at issue deprived hundreds of butchers of vested property interests in existing businesses, while granting to a single company a monopoly over all slaughterhouse operations in New Orleans. The state law clearly implicated due process and equal protection concerns. Unfortunately, Justice Miller failed to grasp the conceptual and structural importance of the Due Process and Equal Protection Clauses in the framers' redesign of the federal system. While the Fourteenth Amendment did not federalize all legal and civil rights created under state law, the framers did create *federal* protections for those rights. Specifically, states were now constitutionally required to provide their own citizens and residents with fair procedures before depriving them of state-created rights. Moreover, states were now required to insure equal treatment under, as well as the equal protection of state laws. In *Slaughter-House*, however, Justice Miller simply declared that "under no construction of that provision . . .can the restraint imposed by the State of Louisiana

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citizen of one state carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the state first mentioned, but, on the contrary, that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own.

[441] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST, 27-28 (1980):

[T]he legislative history argument is one neither side can win. It really shouldn't be critical, however. What is important here, as it has to be everywhere, is the actual language of the provision that was proposed and ratified.

. . .

Thus, the most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language – that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.

upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."[442] Clearly, however, the Act was more than a land use restriction, since it required the closure of existing businesses. Equally erroneous was Miller's insistence that "the pervading purpose" of the Equal Protection Clause was to protect "emancipated negroes" from the discriminatory Black Codes. He further opined: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[443] Of course, Miller was wrong on both counts. Despite his fidelity to the written text of the Citizenship and Privileges or Immunities Clause, Miller simply disregarded the guarantee of equal protection to "any person" within a state's jurisdiction.

In subsequent decisions, the Court abandoned Miller's narrow views of the due process and equal protection guarantees.[444]

2. THE COMPROMISE OF 1877 AND STATES RIGHTS DURING THE POST-RECONSTRUCTION ERA

Five members of the U.S. Supreme Court,[445] serving in their individual capacities, were appointed to a specially created electoral commission charged with resolving the disputed Hayes-Tilden presidential election of 1876. Ultimately, the presidency went to Republican candidate Rutherford B. Hayes[446] under the

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[442] *Slaughter-House*, 83 U.S. at 81.

[443] *Id.*

[444] NOWAK & ROTUNDA, *supra* note 377, at 405-08.

[445] Associate Justices Nathan Clifford (term: 1858-1881), Samuel F. Miller (1862-1890), Stephen J. Field (1863-1897), William Strong (1870-1880), and Joseph P. Bradley (1870-1892). The remaining members of the Court in 1877 were: Chief Justice Morrison R. Waite (1874-1888) and Associate Justices Noah H. Swayne (1862-1881), Ward Hunt (1873-1882) and John M. Harlan (1877-1911), who replaced U.S. Senator-elect David Davis (1862-1877). Additionally, chief Republican negotiator Stanley Matthews (1881-1889) was later appointed to the Court. *See* LEO PFEFFER, THIS HONORABLE COURT, 186-87, 191-92, 427 (1965).

[446] *See* BURT, *supra* note 13, at 222:

> The Commission's deliberations turned out to be almost a caricature of partisanship. On every disputed issue, the Commission voted solidly along party lines; on every disputed issue, Justice Bradley voted with the Republicans. By a one-vote margin on the Commission, Rutherford B. Hayes prevailed. Hayes thus has a unique status in American political history: he was not simply inaugurated, he was directly elected by a Supreme Court Justice.

terms of a clandestine agreement that ended Reconstruction, "redeemed" states' rights, reaffirmed white supremacy, abandoned African-Americans to state-sanctioned racism and Klan terrorism, and effectively repealed the Civil War Amendments – the Compromise of 1877.[447] While the Justices themselves did not participate in the negotiation of the Compromise, Justice Bradley apparently sealed the deal when fellow Republicans persuaded him to change his vote from Tilden to Hayes, literally at the eleventh hour.[448] Undoubtedly, the entire Court was familiar with the terms of the Compromise and was guided by it in its subsequent deliberations.[449] Just as the compromise over slavery was crucial to the

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[447] *Id.* at 224-25. *See also* HYMAN AND WIECEK, *supra* note 343, at 493:

> As threats and fears of crisis grew in the first weeks of 1877 a compromise procedure was patched up by terms of which an Electoral Commission, including five Supreme Court justices among its members, accepted the Hayes electoral count. The price of southern acquiescence included the Republican's commitment to end Reconstruction; to withdraw the remaining troops from the South . . .; and to cease enforcing civil rights laws including the brand-new one of 1875.

[448] *See, e.g.*, PFEFFER, *supra* note 445, at 186-87:

> The day before the decision on the Florida contest was to be announced, Bradley had prepared an opinion in Favor of the Democratic electors. This would have resulted in an eight to seven vote in favor of Tilden in that state, and any one of the four contested states would have been enough to elect him. However, when Bradley read his opinion the next day, the second half of it had been changed and it now ended with a decision for the Republican electors.
>
> What was the explanation for the midnight switch? . . . At midnight or later, Bradley was visited by two top Republican party leaders. . . . What [they] told Bradley that helped him change his mind is of course not known. Yet it may well have been news that a settlement had been worked out between the Republican leaders and the Democratic leaders in the South under which the South would accept the election of Hayes in return for the withdrawal of all remaining federal troops from the South and the end of Reconstruction.

See also C. VANN WOODWARD, REUNION AND REACTION 155-56 (1966).

[449] PFEFFER *supra* note 445, at 187:

> If the President and the leadership of both political parties were now willing to leave the destiny of the southern Negro in the hands of the southern white-controlled state governments, it would have been unrealistic to expect the Supreme Court successfully to challenge that decision. That not only Bradley but a least the other four Justices

birth of the nation, compromising the newly acquired rights of African-American citizens was deemed crucial to its reunification.[450]

As a consequence, many of the seminal cases construing the Civil War Amendments—from 1877 up to and including *Plessy* in 1896—were tailored to the conspiratorial Compromise. That is, they were purposefully crafted to curtail federal protection of individual rights and restore states' rights, while also preserving white supremacy and the subjugation of African-Americans. While there were notable anomalies among the Court's decisions, even those were respectful of white supremacy. The Court readily endorsed the artificial distinction between the federally protected *civil* or *legal* rights of African-Americans on the one hand, and state regulated *social* rights on the other. Thus, in *Strauder v. West Virginia*,[451] the Supreme Court struck down a state law barring blacks from

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who served on the electoral commission became aware of the settlement and its terms is more than merely probable. And if they knew, it is almost equally certain that the other Justices knew too. In any event, the settlement of the Hayes-Tilden dispute marked the beginning of the decline and fall of civil rights, and the Supreme Court played a significant role in that process.

See also, BURT, *supra* note 13; Michael J. Horan, *Political Economy and Sociological Theory as Influences Upon Judicial Policy-Making: The* Civil Rights Cases *of 1883*, 14 AM. J. LEGAL HIST. 71, 74 (1972) (quoting Louis B. Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 75-76 (1938)):

The smoothing over of bitter feeling between North and South included the necessity of sacrificing the rights of the Negro guaranteed by the Fourteenth Amendment; "the Supreme Court decided that the sacrifice should be made, and it acted on that decision in interpreting these [post-Civil War] amendments."

[450] *See* HYMAN AND WIECEK, *supra* note 343, at 494:

[I]t is clear that the 1877 "deal" manifested itself almost at once in the form of contradictory imperatives the justices felt toward the nation's, and their, duty under the Reconstruction Amendments and laws.

What were these contradictory imperatives. . .?. . .[T]he Court was a major implementer of federally protectable civil rights. But, after the 1877 Compromise, what rights should the justices define as within the nation's ambit? Which should they seek to protect? And how to proceed obediently to the Amendments and laws in light of the Compromise's commitment against further federal interventions? In brief, the Court could help in the sectional reconciliation so obviously desired by the great majority of white Americans. . . . But blacks would have to pay the price.

[451] 100 U.S. 303 (1879)

jury service, holding that the racial exclusion violated a "legal right" under the Fourteenth Amendment.[452] On the other hand, in striking down the public accommodations provisions of the 1875 Civil Rights Act, former electoral commissioner and Associate Justice Bradley wrote for the Court in the *Civil Rights Cases*,[453] "Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the *social* rights of men and races in the community."[454] The Court was even more pointed in drawing the distinction thirteen years later in *Plessy v. Ferguson*:

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races *before the law*, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce *social*, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[455]

"Legislation," continued the Court, "is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[456]

Thus, in 1896—even though a "citizen" and no longer a slave—the African-American still "had no rights which the white man was bound to respect."[457]

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[452] *Id.* at 309.

[453] 109 U.S. 3 (1883).

[454] *Id.* at 22 (emphasis added).

[455] Plessy v. Ferguson, 163 U.S. at 538, 543-44 (1896) (emphasis added).

[456] *Id.* at 551-52.

[457] Dred Scott v. Sanford, 60 U.S. 393, 407 (1856):

> They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . .

Moreover, in less than thirty years the Supreme Court had transformed the Fourteenth Amendment into a shield for white supremacy. It would take 58 years for the Court to abandon the legal right/social right distinction, initially in the public schools.[458] In the meantime, Fourteenth Amendment jurisprudence continued to favor states' rights over federal protection of individual rights and the rights of racial minorities – the shameful and abandoned legacy lying at the core of the Rehnquist Court's states' rights jurisprudence.

3. *SAENZ V. ROE*[459] AND THE PRIVILEGES OR IMMUNITIES CLAUSE

Saenz involved a constitutional challenge to California's federally approved Temporary Assistance to Needy Families welfare program,[460] which imposed a one-year durational residency requirement on new residents for receipt of full benefits. The Court struck down the durational residency requirement under the Privileges or Immunities Clause, in a 7-2 decision.[461]

Unlike the durational residency requirements struck down in *Shapiro v. Thompson*[462]—which denied new residents welfare benefits altogether for the first year of residency – the California program capped benefits for one year at the amount received in the recipient's former state of residence.[463] Despite California's higher cost of living, Justice Stevens agreed that its program "does not

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Thus, the fundamental premise of *Dred Scott* was reaffirmed by the Supreme Court in its post-Reconstruction decisions.

[458] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[459] 526 U.S. 489 (1999).

[460] In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. 2105, Congress expressly authorized states receiving welfare block grants to "apply to a family the rules (including benefit amounts) of the [welfare] program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. §604(c) (2000).

[461] Significantly, only Chief Justice Rehnquist and Justice Thomas dissented, while the Court's other conservative members—i.e., Justices O'Connor, Scalia, and Kennedy—joined Stevens' opinion.

[462] 394 U.S. 618 (1969). In *Shapiro*, the Court held that the one-year denial of all welfare benefits to new residents of a state amounted to a penalty for having exercised the fundamental right to travel or migrate, and that states had no overriding compelling interest to justify the burden on the liberty interest.

[463] *Saenz*, 526 U.S. at 493.

directly impair the exercise of the right to free interstate movement," unlike the challenged regulations in *Shapiro*.[464] Nevertheless, there remained the question of whether California's durational residency requirement infringed "the right of the newly arrived citizen to the same *privileges and immunities* enjoyed by other citizens of the same State" – a right "protected not only by the new arrival's status *as a state citizen*, but also by her status *as a citizen of the United States*."[465] Stevens concluded that it did.[466]

The fact that Congress authorized the discrimination against new state residence doesn't save it because, as Stevens wrote, "we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment."[467] "Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States."[468]

Finally, Stevens made another interesting observation about the right to travel: "the right is so important that it is 'assertable against *private interference* as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all'."[469] If the unenumerated right to travel is secured against *private* action as a privilege or immunity of U.S. citizenship, it follows that – contrary to the Court's recent holding in *United States v. Morrison*[470]— Congress' powers under section five of the Fourteenth Amendment should extend to private conduct, since such would be "necessary and proper" to enforcing the Amendment.

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[464] *Id.* at 501.

[465] *Id.* at 502 (emphasis added).

[466] What is interesting about Stevens' analysis is his reliance on the Privileges or Immunities Clause, rather than the Equal Protection Clause which normally applies when a state discriminates between its own citizens. For example, in *Zobel v. Williams*, 457 U.S. 55 (1982), the Supreme Court struck down Alaska's annual distribution of dividends, from an oil reserve trust fund, based on a citizen's length of residence. The Court held that distribution of state benefits on the basis of length of residency would "divide citizens into expanding numbers of permanent classes," in violation of the Equal Protection Clause. *Zobel*, 457 U.S. at 64.

[467] *Saenz*, 526 U.S. at 507.

[468] *Id.* 507-508.

[469] 526 U.S., at 498 (quoting Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)) (emphasis added).

[470] *See* discussion of *Morrison supra* notes 246-326 and accompanying text.

4. THE PRIVILEGES OR IMMUNITIES CLAUSE AND THE BILL OF RIGHTS

While the Court in *Slaughter-House* said that the Citizenship Clauses had overruled *Dred Scott*, it said nothing about the Fourteenth Amendment's impact on *Barron v. Baltimore*. Did the framers intend the Privileges or Immunities Clause to overrule *Barron* and "incorporate" the Bill of Rights into the Fourteenth Amendment? The incorporation doctrine has been heavily and heatedly debated since the ratification of the Fourteenth Amendment in 1868.[471] Overruling *Barron*, however, wasn't required for securing the privileges or immunities of U.S. citizens against *state* interference. What was necessary was a separate and additional guarantee to fill the void left by *Barron* – specifically, the Privileges or Immunities Clause. *Barron*, therefore, remains the law – i.e., the Bill of Rights operates against the federal government only.[472]

The Bill of Rights, however, is not *the source* of the liberties referenced in the first eight amendments. As pointed out by Chief Justice Marshall in *Barron*, the first eight amendment must be understood as "restraining the power of the general government. . . ."[473] What purpose would be served by "incorporating" a restraint on federal power into the Fourteenth Amendment, which was designed to restrain *state* power? Had the Bill of Rights been the *source* of the claimed liberty interests, rather than merely a restraint on federal power, the Supremacy Clause might well have required Baltimore to compensate Mr. Barron for the damage to his property.

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[471] *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992).

[472] This construction also eliminates the vexing "duplication" of the Fifth and Fourteenth Amendment Due Process Clauses, often noted by commentators. *See e.g.*, Amar, *supra* note 471, at 1224:

> Many commentators (Raoul Berger most stridently) have claimed that if the privileges or immunities clause was designed to incorporate the rights and freedoms of the Bill, the clause would incorporate the Fifth Amendment's due process requirement and thereby render the Fourteenth Amendment's due process clause redundant.

However, the argument has merit only if one takes the "incorporation" theory literally. The non-incorporationist response to Berger *et al* is that the Fifth Amendment Due Process Clause restrains the federal government, while the Fourteenth Amendment Due Process Clause restrains states. End of duplication.

[473] *Barron*, 32 U.S. at 247.

Thus, the Bill of Rights really has no *direct* applicability to the guarantees of the Fourteenth Amendment. The liberty interests protected by the Bill of Rights are rights inhering in national citizenship. It is, therefore, the Citizenship clause – not the "incorporation" of the Bill of Rights—which secures "the privileges or immunities of citizens of the United States" against state infringement.

4. THE PRIVILEGES OR IMMUNITIES CLAUSE AND SUBSTANTIVE DUE PROCESS

Today, conservatives and liberals alike argue in favor of the Court's reliance on the Privileges or Immunities Clause to protect fundamental or basic liberties, instead of the Due Process Clause.[474] Indeed, one commentator argues that the misreading of Justice Miller's *Slaughter-House* opinion "led later Courts to construe expansively the Due Process Clause," which in turn "resulted in modern *exaggerated constructions* of the fourteenth amendment in decisions like *Roe v. Wade*."[475] Would resurrection of the privileges or immunities clause threaten or undermine the constitutional foundation of *Roe v. Wade* and abortion rights? There are two rejoinders to the argument.

First, the theory of substantive due process—i.e., using the Due Process Clause to void legislation infringing liberty or property interests, as distinct from the requirement of "fair procedure"—had become established constitutional doctrine well before ratification of the fourteenth amendment and its Privileges or Immunities Clause. Substantive due process was, after all, the basis of Chief Justice Taney's voiding of the Missouri Compromise in *Dred Scott*.[476] Moreover, it had its genesis in *state* constitutional law before its adoption by the U.S. Supreme Court.[477] Presumably, Congress was mindful of substantive due proc-

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[474] Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A.L. REV. 1143, 1147 (1992) (citing Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?"*, 1972 WASH. U. L.Q. 405, 418-20 and Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989)).

[475] *See* Palmer, *supra* note 365, at 740 (emphasis added).

[476] *See Dred Scott*, 60 U.S. at 450, 452. *See also* CURRIE, *supra* note 302, at 271: "Scholars have argued over the meaning of this passage, but it was at least very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*."

[477] *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856) (per Comstock, J.):

> I am brought, therefore, to a more particular consideration of limitations of power contained in the fundamental law: . . . "No person shall be deprived of life, liberty or

ess when in incorporated both the privileges or immunities and Due Process Clauses in drafting the fourteenth amendment. As a consequence, one clause does not supplant the other. Moreover, there are also important differences in coverage. The Privileges or Immunities Clause, for example, protects only citizens, while the Due Process Clause covers all "persons" within a state's jurisdiction.[478]

Second, in *Roe* Justice Blackmun concluded that the abortion decision is encompassed within the right of privacy, which was recognized as a fundamental liberty in *Griswold v. Connecticut*.[479] According to Justice Douglas in *Griswold*, the right of privacy lies within the "penumbras" of certain Bill of Rights guarantees.[480] Given that pedigree, reproductive freedom and the right to abortion are arguably privileges or immunities of U.S. citizenship, which – like the unenumerated right of travel – are essential to the constitutional order.

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property, without due process of law . . . ." These provisions have been incorporated, in substance, into all our state constitutions. . . . [T]hey are imposed by the people as restraints upon the power of the legislature.

. . . To say, as has been suggested, that the law of the land, or "due process of law," may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, *there is no power in any branch of the government* to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him – not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it cannot be created by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute the sentence. If this is the "law of the land," and "due process of law," within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation pass a law to take away the liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed, by the constitution, in the same category with liberty and life.

[478] *See* NOWAK & ROTUNDA, *supra* note 377, at 373-74.

[479] 381 U.S. 479 (1965).

[480] *Id.* at 484 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . .Various guarantees create zones of privacy").

IV. CONCLUSION

The states' rights jurisprudence and judicial activism of the Rehnquist Court pose a direct threat to the roles of Congress and the courts – both state and federal – in securing the privileges and immunities of national citizenship, as well as the guarantees of due process and equal protection. In their drive to erect a barrier of sovereign immunity around the states, the Court's five most conservative members have imposed significant new restraints on the law making authority of Congress and also seek to make permanent structural changes in the federal system. Although it has been suggested that the Rehnquist Court's states' right jurisprudence may be short-lived, depending on the next round of judicial appointments,[481] the Court's recent intervention into the 2000 presidential election[482] has cast a shadow on its institutional integrity and raised questions about the political motives of the Rehnquist majority.[483]

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[481] *See, e.g.,* Jackson, *supra* note 3, at 732: "The state sovereign immunity decisions this Term, coupled with the 1996 decision in *Seminole Tribe*, may well be short-lived. While they now constitute a relatively coherent body of decisions, that body dates only from 1996. The decisions are all by the narrowest of margins; history and reason suggest that the issue is not yet settled." *See also* Young, *supra* note 6, at 5:

> A final reason to worry about the Rehnquist Court's direction on federalism issues is the Court's inability to forge a consensus that can attract more than five votes. In many ways, we seem to be seeing "payback" for the *Garcia* decision in 1986, in which five liberal Justices dramatically cut back on judicial review of federalism issues over the vigorous dissent of four more conservative Justices who vowed not to accept that result as legitimate. Now the four Justices whom it seems fair to characterize as "nationalist" – Justices Stevens, Souter, Ginsburg, and Breyer – essentially refuse to accept the result in *Seminole Tribe*, promising another dramatic shift in the event of a fifth nationalist appointment to the Court.

See also, Gonzalez, *supra* note 8, at 682: "Justice Stevens and the other three dissenting justices in *Seminole* refuse to yield to the majority. . . . These justices are entrenched in their positions, and it would appear that a change in the composition of the Court will turn the tide again. This suggestion is particularly true upon the eve of an election that could result in a change in the composition of the Court as well as the Congress."

[482] *See* Bush v. Gore, 531 U.S. 98 (2000).

[483] *See, e.g.*, Tony Mauro, *Court's Election Brawl May Leave Lasting Scars - Splintered Ruling Reveals Tensions, Thrusts Justices Into Unwelcome Spotlight, Promises Controversy for Next Nominees*, LEGAL TIMES, December 18, 2000, at 13:

> In terms of the Court's own decision making, Bush v. Gore could turn out to be a one-time-only excursion, or it could affect a range of future cases – especially in the area

While the Court's independence is crucial to the constitutional scheme, its excesses can also pose a threat. However, as one commentator notes, "In the final analysis, judicial activism is not so much a case of judicial usurpation as it is of congressional abdication."[484] While neither court-packing schemes or impeachment are appropriate responses to the Court's current activism, Congress needs to investigate the implications of the Court's rulings curbing its law making and enforcement powers.

Supporters of the Court's states' rights jurisprudence will no doubt argue that the Court is no more "activist" than the Court of the New Deal or the Warren Court. There are, however, major differences. First, although it greatly expanded federal power through its reinterpretation of the powers given to Congress under Article I, the post-1937 New Deal Court brought to a close the judicial activism of the *Lochner* era. In expanding federal power, the New Deal Court was acceding to the political will of the President, Congress, and the nation. The Rehnquist Court, by contrast, is once again asserting the judicial activism and supremacy embodied in *Lochner*.

Another crucial distinction is history. The activism of the Warren Court was evolutionary and forward looking in its elevation of civil liberties and civil rights over the abuses of governmental power. The activism of the Rehnquist Court, on the other hand, seeks to reestablish the failed states' rights doctrines of the past which once led the nation to Civil War and the racial divide of separate but equal. Those divisive doctrines were interred by the New Deal and the Warren Court. They should stay buried.

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of federalism. The fact that the majority that rejected Florida's handling of the case is the same majority that usually defers reverentially to state sovereignty could take some wind out of the sails of the Court's resurrection of states' rights in other cases. "They traded in their federalism principles when it was convenient," says (former clerk Edward) Lazarus.

[484] GARY L. MCDOWELL, CURBING THE COURTS 11 (1988).