

THE ELEVENTH AMENDMENT, *GARRETT*, AND PROTECTION FOR CIVIL RIGHTS

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I. THE ELEVENTH AMENDMENT AFTER *GARRETT*

The Eleventh Amendment provides: "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."¹

This provision—and the case law interpreting it—acts as a bar to suits brought against state governments in federal court when they are sued by anyone other than the federal government or another state.² The bar applies to all types of suits for damages or retroactive relief for past wrongs. The "state," for purposes of the Eleventh Amendment, includes all agencies of the state, but not its political subdivisions such as cities and school boards.³

It is not unusual for the Supreme Court or commentators to refer to the Eleventh Amendment as a jurisdictional bar, but this term is not strictly correct because states can waive their Eleventh Amendment immunity.⁴ A true jurisdictional limitation (such as the requirement of

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1. U.S. CONST. amend. XI.

2. While the Amendment only purports to bar citizens of *other* states (or foreign nationals) from suing a state, the Supreme Court has held that, by implication, it also bars suits by citizens of the defendant state. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890). The language of the Eleventh Amendment hardly compels the holding in *Hans*, but the Court has given no indication that it intends to back away from that decision, which is now more than a century old.

3. *Mt. Healthy City Sch. Bd. v. Doyle*, 429 U.S. 274, 287 (1977) (holding the amendment inapplicable to a school board); *Maybanks v. Ingraham*, 378 F. Supp. 913, 918 (E.D. Pa. 1974) (holding the amendment inapplicable to a city).

4. *E.g.*, *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990); *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 186 (1964), *overruled by* *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). The complex law surrounding the Eleventh Amendment is discussed, for example, in 1 RONALD D. ROTUNDA &

diversity of citizenship, the requirement that the amount in controversy be in excess of a certain figure, or the requirement that the case "arise under" the Constitution, laws, or treaties of the United States) is not waiveable by the parties. Litigants cannot confer jurisdiction on the federal courts by consent. However, states may waive the bar of the Eleventh Amendment because, like the requirement of personal service of process, the Eleventh Amendment is designed to protect a litigant, so a litigant may choose to relinquish that protection if it does so *explicitly*.⁵ The requirement that the waiver be explicit is not surprising given the general requirement that waivers normally must be explicit.⁶ Nor should it be surprising that states may choose to voluntarily surrender this right. The citizens of the state may want the state to offer a remedy and, in a democracy, what the citizens want eventually becomes the law.

The Eleventh Amendment does not override the Supremacy Clause. If a valid federal law or the United States Constitution requires or forbids certain actions, the Eleventh Amendment does not authorize the states to violate the Constitution. But the Eleventh Amendment affects where the suit may be brought: If a *private* citizen sues to enforce those rights against a state, the suit cannot be filed in federal court.⁷

While this jurisdictional restriction is important, it is hardly a complete preclusion of a remedy. The Eleventh Amendment does not bar suits brought against state officials who are sued in their *personal capacity*.⁸ Federal courts can enjoin these state officials, or require them personally to pay damages. Nearly a century ago, the Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin a state attorney general from enforcing a statute alleged to violate the Fourteenth Amendment.⁹ When a state officer

JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.12 (3d ed. 1999).

5. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999), *overruling* Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964).

6. The standard principle is that a waiver is a "voluntary relinquishment of some known right." See, e.g., Hicks v. Talbott Recovery Sys., Inc. 196 F.3d 1226, 1238 (11th Cir. 1999) (citations omitted); see also, e.g., Rush v. United States, 33 Ct. Cl. 417 (Ct. Cl. 1898). One normally waives by saying that one waives the right. If a litigant does not voluntarily waive a known right and yet cannot raise it, the other party must be arguing that the litigant has "forfeited" the right. But that argument merely raises (and does not answer) the question of *why* the law should provide that a state has "forfeited" the right to raise an immunity that the Eleventh Amendment has granted.

7. The Eleventh Amendment, by its own terms, does not apply to, or purport to limit, the federal government when it brings suit. It applies to either U.S. citizens, or foreign citizens or subjects.

8. See Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1929 (2000); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1770-85 (1997).

9. *Ex parte Young*, 209 U.S. 123, 149, 168 (1908).

comes into conflict with constitutional guarantees, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."¹⁰ The state acts through its flesh and blood agents, and the Eleventh Amendment grants them no immunity from damages or injunctive relief in a federal action if they are sued in their personal capacities and are therefore asked to pay damages from their own funds (even if those state officers are acting under color of law).¹¹

Because of this metamorphosis, the offending state official is not treated as a representative of the state for Eleventh Amendment purposes when sued in his or her personal capacity. Any resulting judgment is against the official, not against the state.¹² Nevertheless, because he is acting *under color of law*, there is state action for purposes of the Fourteenth Amendment. The state official's actions are "state action" for purposes of the Fourteenth Amendment, but she is not "the state" for purposes of the Eleventh Amendment.

The Eleventh Amendment is sometimes called the "lawyer's amendment," because careful lawyers can avoid many of the hurdles it creates.¹³ That does not mean that the Eleventh Amendment is unimportant, for it reflects the fact that the states in the union are more than dotted lines on a map. But the Eleventh Amendment neither overturns the Supremacy Clause nor excuses states from the operation of federal law.

The states are entities that Congress must respect because their separate existence is a counterweight to the central government of limited powers. The federal structure is an important part of the structural safeguard that the Framers created to protect our civil rights. The Framers divided power between the states and the central government and then separated the powers of the central government into three branches. The point of that exercise was not to create an efficient government but a free people.

Thus, the Eleventh Amendment does not bar a suit against the state official in his or her *personal* capacity, even though the state official is

10. *Ex parte Young*, 209 U.S. at 160.

11. While the Eleventh Amendment grants state officials no immunity, section 1983 offers certain qualified and absolute immunities from damage suits under certain conditions. See 28 U.S.C. § 1983 (1989). These immunities are based on an interpretation of the statute, not on an interpretation of the Constitution. 4 ROTUNDA & NOWAK, *supra* note 4, §§ 19.21-19.30.

12. Because the judgment is not against the state treasury, the official is liable to pay from her own personal funds. However, even though the judgment is not against the state, the state may (if it wishes) reimburse the official.

13. Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 860 (2000) ("As I and others have argued, . . . [t]he existence of these alternative remedies suggests that the protections of the Eleventh Amendment are, to a significant extent, requirements of form rather than substance.").

really sued for actions taken under color of law, with the badge of state authority.¹⁴ Recently, former Solicitor General Walter Dellinger has suggested that a state, flush with Eleventh Amendment immunity, could set up a factory to manufacture knock-off Nikes, staff it with sweatshop labor, and fire any worker over forty years old.¹⁵ Professor Dellinger "told a legal conference in Washington recently that he was considering running for governor of his home state of North Carolina on just such a winning platform."¹⁶

With all due respect, that analysis is not a fair reading of the case law. The Supreme Court is not authorizing states to violate the law, and a closer reading of the case law shows that the supposed loophole creates no winning gubernatorial platform. If a state set up a factory to manufacture knock-off Nikes, the federal government could criminally prosecute the flesh and blood bureaucrats who ran the factory. It could also sue the state directly.¹⁷ And, if the state decided to create a system that would violate property rights, the federal government could then intervene by statute and override the Eleventh Amendment because it would be protecting property rights as authorized by section 1 of the Fourteenth Amendment.¹⁸

In addition, private plaintiffs may sue for federal injunctions requiring state officials to thereafter comply with valid federal law, even though such officials will be required to spend state funds in order to comply.¹⁹ The private plaintiffs—the sweat shop laborers—can also sue the individual state officials in their personal capacity for damages.²⁰ A huge damage remedy (like being hit by a 2" by 4") serves to get one's attention, as the experience of many Alabama defendants has shown. Thus, Nike need not sit by and see a state violate its trademark because federal case law gives it plenty of federal remedies.

However, if the plaintiff sues the state official for damages in his

14. *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

15. Patti Waldmeir, *Court Ruling Unites Diverse Group Fighting Theft that Goes Unpunished*, FIN. TIMES (London), Apr. 20, 2000, at 4.

16. *Id.*

17. That does not mean that a *private* citizen could sue on behalf of the federal government. See *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765 (2000). In this *qui tam* action, the Court said: "We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'a serious doubt' on that score." *Id.* at 787 (citations omitted).

18. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). Remember, in this case the Court held that Congress could not override the Eleventh Amendment merely because it preferred a uniform patent procedure, when the states offered constitutionally adequate procedures. *College Sav. Bank*, 527 U.S. at 682. However, if the state decides to violate patent rights, then Congress would be acting within its Fourteenth Amendment authority. The federal government did not seek to uphold the law invalidated in *Florida Prepaid* on property rights grounds.

19. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974).

20. *Ex parte Young*, 209 U.S. 123, 157 (1908).

official capacity, that really is another way of pleading an action against the state and, thus, is within the Eleventh Amendment.²¹ It is not necessary that the state be named as a party of record; for example, if a suit requests the courts to order the head of a state department of welfare to personally pay damages, that suit would be permissible, but if the suit seeks an order requiring him to pay past due amounts from the state treasury, that suit would be barred.²²

In addition, Congress cannot use its power under the Commerce Clause to remove a state's Eleventh Amendment immunity.²³ The Court has interpreted the Eleventh Amendment as modifying the earlier enacted provisions of the Constitution and not the other way around.²⁴ The Eleventh Amendment thus places some important, but not insurmountable, limits on the power of the federal government to impose restrictions on the states.

In contrast, Section 5 of the Fourteenth Amendment does not carry the same burdens that accompany exercise of federal power under the Commerce Clause or the Spending Clause. Section 5 of the Fourteenth Amendment *does operate* to abrogate the protections of the Eleventh Amendment. While the Commerce Clause does not authorize Congress to commandeer the states—that is, to impose requirements on the states that are not “generally applicable”²⁵ to private persons operating in interstate commerce—Section 5 *does authorize* Congress to impose requirements on the states even if those requirements are *not generally applicable*. Section 5 does not require Congress to spend money to “bribe” the states. And Section 5 is not limited to activities that are within interstate commerce. Thus, our Constitution gives Congress ample power to impose its will on the states in order to protect civil rights and suspect classes.

Nonetheless, federal power under Section 5 is not plenary. Congress cannot use Section 5 to treat the states as mere dotted lines on a

21. *Kentucky v. Graham*, 473 U.S. 159, 171 (1985).

22. *Edelman*, 415 U.S. at 677-78.

23. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996), *overruling* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

24. See *Ex parte Young*, 209 U.S. at 150-54.

25. The no-commandeering principle means that Congress cannot enact a federal law that singles out the state governor, state legislators, or state judges for a special minimum wage; the law would not be “generally applicable.” Even if certain state workers are in, or affecting, interstate commerce, Congress cannot impose on the states any restrictions that discriminate against state employees because such laws would not be generally applicable. For example, Congress could not constitutionally impose a higher minimum wage that is limited to state construction workers. In contrast, Congress could impose a minimum wage on construction workers in, or affecting, interstate commerce, even if some of those workers are state employees. See Ronald D. Rotunda, *The Power of Congress Under Section 5 of the Fourteenth Amendment after City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

map when the legislation does not involve protecting suspect classes from state action. That is the significance of *Board of Trustees v. Garrett*,²⁶ which follows in the wake of *Kimel v. Florida Board of Regents*.²⁷

Kimel considered the provision of the Age Discrimination in Employment Act (ADEA), which stated that it was subjecting the states to the ADEA and taking away their Eleventh Amendment immunity.²⁸ *Kimel* held that Congress could not constitutionally use Section 5 of the Fourteenth Amendment in this manner because the abrogation exceeded federal power.²⁹ Age is not a suspect class under the Equal Protection Clause and, therefore, an age classification is constitutional if it is rational. Congress cannot annul the states' Eleventh Amendment immunity merely by stating that it is enforcing the Fourteenth Amendment; the law must actually enforce (not redefine) Section 1.³⁰

The Court clarified this holding in *Board of Trustees v. Garrett*,³¹ which held (once again, by a vote of five to four) that Congress did not validly abrogate the states' Eleventh Amendment immunity from suits for money damages under Title I of the Americans with Disabilities Act (ADA). Chief Justice Rehnquist, for the Court, noted that *Cleburne v. Cleburne Living Center, Inc.*³² had previously held that mental retardation is not a "quasi-suspect" classification for equal protection purposes, so that a city ordinance requiring a special use permit for the operation of a group home for the mentally retarded incurred only the minimum "rational basis" review applicable to general social and economic legislation.³³

Thus, Section 5 of the Fourteenth Amendment does not authorize private parties to recover money damages from a state, unless Congress is protecting a suspect class or shows irrational state discrimination that violates the Fourteenth Amendment and offers a remedy that is "congruent and proportional" to the targeted violation.³⁴

Prior case law had already held that disabilities are not suspect. Hence, in *Garrett*, Congress had to satisfy the more difficult showing.

26. 531 U.S. 356 (2001).

27. 528 U.S. 62 (2000).

28. *Kimel*, 528 U.S. at 67.

29. *Id.* at 92.

30. Justice Stevens, joined by Justice Souter, Ginsberg, and Breyer, concurred in part, dissented in part, and rejected the Court's Eleventh Amendment jurisprudence. *Id.* Justice Thomas, joined by Justice Kennedy, also concurred in part and dissented in part, and argued that Congress had not made "unmistakably clear" its intent to abrogate the states' Tenth Amendment immunity. *Id.* at 99.

31. *Garrett*, 531 U.S. at 360.

32. 473 U.S. 432 (1985).

33. *Garrett*, 531 U.S. at 366.

34. *Id.* at 374.

Congress failed to show that states engaged in a history and pattern of irrational employment discrimination against the disabled. For example, the Court said it "would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities."³⁵ But the ADA would not outlaw that action because it imposes a higher duty of "reasonable accommodation."³⁶

The majority went on to state that, because the Eleventh Amendment only gives its immunity to "states" and not to units of local government, those entities "are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so."³⁷

One can read too much into *Garrett* and conclude that the Court has limited Congress's role in protecting racial minorities or the disabled. If we take a closer look at the prior law, it is easier to understand that *Garrett* is not a break with precedent but part of it, and that Congress still has plenty of power and alternative methods of exercising it.

Garrett is part of a triumvirate of cases that map out modern federalism jurisprudence. *Garrett* followed in the wake of *United States v. Morrison*,³⁸ decided the previous term, where the Court invalidated parts of the Violence Against Women Act on federalism grounds. After *Morrison*, the third part of the federalism triumvirate is *City of Boerne v. Flores*,³⁹ which built on earlier law and clarified the parameters of federal power under Section 5 of the Fourteenth Amendment.⁴⁰ All three cases are five to four decisions, and in all three, neither the majority nor the dissent shows hesitation in coming to their conclusions.

So, let us first turn to *Morrison*, and, after that, to *Flores*.

II. THE COMMERCE POWER AFTER *MORRISON*

Morrison illuminates and clarifies the Court's view of the scope of

35. *Id.* at 372.

36. *Id.*

37. *Id.* at 369. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented: "In my view, Congress reasonably could have concluded that the remedy before us constitutes an 'appropriate' way to enforce this basic equal protection requirement. And that is all the Constitution requires." *Garrett*, 531 U.S. at 377.

38. 529 U.S. 598 (2000).

39. 521 U.S. 507 (1997). Justice Stevens filed a concurring opinion. *Flores*, 521 U.S. at 536. Justice Scalia filed an opinion concurring in part, in which Justice Stevens joined. *Id.* at 537. Justice O'Connor filed a dissenting opinion, in which Justice Breyer joined in part. *Id.* at 544. Justice Souter and Justice Breyer each filed dissenting opinions. *Id.* at 565, 566.

40. The seminal article on this issue is William Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996), and is cited, *inter alia*, in *Flores*, 521 U.S. at 529, which invalidated the Religious Freedom Restoration Act, often called RFRA.

federal power under the Commerce Clause. The Court articulates, with a little more precision, the limits on what is commerce among the States. *Morrison* accepts a broad federal power when Congress regulates activities (even noncommercial activities) that cross state lines or use the channels or instrumentalities of interstate commerce. Thus, it signaled approval of the portions of the Violence Against Women Act that federalize "crimes committed against spouses or intimate partners during interstate travel,"⁴¹ and portions that regulate the "channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move."⁴²

But when Congress uses the *aggregation theory* (i.e., adding up or aggregating a series of individual acts that together "affect" commerce among the states), if the regulated activity neither crosses a state line nor affects a channel of interstate activity, then it must have a "commercial character."⁴³ It must affect "commerce." *Morrison*, in short, tells us that Congress may not aggregate a series of noncommercial actions (such as carrying a gun near a school) in order to reach the conclusion that those actions affect "commerce."⁴⁴

Second, *Morrison* undercuts the argument the Court should abdicate its role in federalism cases on the grounds that states can protect themselves.⁴⁵ This argument is treated as irrelevant because the *Morrison* Court recognizes (both the majority⁴⁶ and the dissent⁴⁷) that the doctrine of enumerated powers and the principles of federalism are designed, for the most part, to protect individuals, not the states.

The Framers of our Constitution anticipated that a self-interested "federal majority" would consistently seek to impose more federal control over the people and the states.⁴⁸ To deal with this problem, they created a federal structure designed to protect freedom by dispersing

41. S. REP. NO. 103-138, at 43 (1993). The provision is codified at 18 U.S.C.A. § 2261(a)(1) (2000), and the *Morrison* Court approves of it at 529 U.S. at 613 n.5.

42. *Morrison*, 529 U.S. at 613 n.5 (quoting *United States v. Lankford*, 196 F.3d 563, 571-72 (5th Cir. 1999)).

43. *Id.* at 611 n.4 (emphasis added).

44. *Id.* at 617-18.

45. The Court relied on institutional restraints to protect federalism interests in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833, 847-48 (1976). In that line of cases, however, all the justices agreed that the matters were within the scope of the Commerce Clause. See, e.g., *Garcia*, 469 U.S. at 537 (Blackmun, J., writing for the majority); *id.* at 583-85 (O'Connor, J., dissenting). The only issue was whether the interests in state sovereignty placed some limits on federal power to regulate matters that were within interstate commerce. See *id.* at 547.

46. *Morrison*, 529 U.S. 613-16 nn.5-7.

47. *Id.* at 655 (Breyer, J., joined by Stevens, J., dissenting). The dissent is discussed below. See also *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting).

48. See William T. Mayton, "The Fate of Lesser Voices": *Calhoun v. Wechsler on Federalism*, 32 WAKE FOREST L. REV. 1083, 1089 (1997) (quoting *Calhoun*). See also John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

and limiting federal power. They instituted federalism chiefly to protect individuals, that is, the people, not the "states *qua* states."⁴⁹

Justice Breyer's dissent in *Morrison* articulately acknowledged that the purpose of federalism and the purpose of the doctrine of enumerated powers are to protect *individual* liberty:

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home.⁵⁰

Chief Justice Rehnquist, writing for the majority, agreed. The "Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."⁵¹ The Framers sought to protect liberty by creating a central government of enumerated powers. They divided power between the state and federal governments, and they further divided power within the federal government by splitting it among the three branches of government, and they further divided the legislative power (the power that the Framers most feared) by splitting it between two Houses of Congress.

Morrison is significant for a third reason—the rationale of Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer. That sharply-worded dissent is the focus of this analysis. The four dissenters accused the Court of ignoring precedent⁵²—a charge that is hardly unusual for a dissent. However, what is noteworthy is that the dissent seeks to overturn precedent. For the first time in two centuries, these four justices would hold that the scope of federal power under the Commerce Clause is a political question, not one for the Court.⁵³

While the majority considers the Commerce Clause to be a major enumerated power subject to a few limitations, the dissent treats the Commerce Clause as a general power, not subject to any judicial re-

49. In *National League of Cities v. Usery*, the Court spoke in terms of federalism used to protect the states. 426 U.S. 833, 847-48 (1975) (stating, for example, that "[t]he Act, speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress."), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528 (1984). But in *Morrison*, the Court recognized that the real purpose of federalism is to protect the people, by dividing authority between the federal and state governments. 529 U.S. at 616.

50. *Morrison*, 529 U.S. at 655 (Breyer, J., joined by Stevens, J., dissenting). Justices Souter and Ginsburg joined only Part I.A of the Breyer dissent, and this quotation comes in an introductory, unnumbered section, shortly before Part I.A. Hence, Justices Souter and Ginsburg may not have joined this introductory portion. *Morrison* is discussed below.

51. *Id.* at 616 n.7.

52. See, e.g., *id.* at 637-52 (Souter, J., dissenting).

53. See, e.g., *id.* at 647.

view. This dissent, in effect, treats the other enumerated powers as superfluous.

The efforts of four justices of the Supreme Court to apply the political question doctrine to federal Commerce Clause questions and to treat all of these issues as nonjusticiable is a major break with precedent. To understand the significance of this endeavor, we first must turn to the parameters of the Violence Against Women Act, which Congress passed with the best of intentions, and which the Court (also with the best of intentions) invalidated as beyond federal power.

In *United States v. Morrison*, the Court—once again, by a vote of five to four—invalidated 42 U.S.C. § 13981.⁵⁴ This provision created a federal civil remedy for the victims of gender-motivated violence.⁵⁵ The law was popularly called “The Violence Against Women Act,” although the sex-neutral text of the statute (which only refers to “persons”) never mentions the sex of the victim:

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) 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.⁵⁶

State laws, of course, already criminalize violence whether or not the perpetrator is motivated by gender. The new federal law did not preempt such state laws. Instead, it defined a “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”⁵⁷ This law did not require a prior criminal conviction or even a prior criminal complaint. The civil plaintiff could file his or her cause of action in either state or federal court.⁵⁸

Congress made extensive factual findings to show that the violence affects commerce. The Court did not reject these findings; rather it ruled that they were irrelevant to the constitutional analysis under the Commerce Clause.⁵⁹ The Court concluded that sexual assaults—in the aggregate—do not affect commerce among the states because the aggregation doctrine simply does not apply when the matter that is regulated

54. *Id.* at 613.

55. *Morrison*, 529 U.S. at 605.

56. 42 U.S.C. § 13981(c) (1994).

57. § 13981(d)(1).

58. § 13981(e)(3).

59. *Morrison*, 529 U.S. at 614.

is not commercial in nature.⁶⁰

In *Morrison*, the plaintiff sued two persons who allegedly assaulted and repeatedly raped her.⁶¹ She could have sued in state court for the typical common law tort of assault and battery, but she chose to sue using section 13981. She also selected a federal forum, although the federal law authorized her to sue in state court, even though she was relying on a federal statute.⁶²

The major issue before the Court was whether, given the earlier decision in *Lopez v. United States*, this law was within the Commerce Clause.⁶³ In that case, a twelfth grader had carried a concealed handgun in a San Antonio high school.⁶⁴ This act of carrying the gun already violated state law, but the federal government prosecuted the twelve grader under the federal Gun-Free Zones Act of 1990.⁶⁵ The Court overturned the conviction and held that this action was not in interstate commerce.⁶⁶ The government had to prove some connection with interstate commerce.⁶⁷ It was not sufficient for the government merely to prove that the student carried the handgun.⁶⁸

The *Morrison* majority invalidated the Violence Against Women Act, emphasizing that it was like the law in *Lopez* because it did not regulate an economic or commercial activity⁶⁹ and did not have any other nexus with interstate commerce. For example, it did not regulate something that had crossed state lines or was an instrumentality of interstate commerce.⁷⁰ Earlier, in *Perez v. United States*, the Court had upheld a loan-sharking law,⁷¹ but, the Court said that was different: Loan-sharking is an extortionate credit transaction, and loan-sharking is

60. *Id.* at 617. The buying and selling of wheat is a commercial activity. Sexual assaults are not. Thus, if a substantial amount of wheat is home grown, in the aggregate, it affects interstate commerce because it competes with wheat that would otherwise have been purchased. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

61. *Morrison*, 529 U.S. at 602-04.

62. 42 U.S.C. § 13981(e)(3) provides that federal and state courts "shall have concurrent jurisdiction."

63. 514 U.S. 549 (1995).

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

65. *Id.*

66. *Id.* at 552.

67. *See id.* at 551-68.

68. *See id.* *See also* Ronald D. Rotunda, *Cases Refine Definition of Federal Powers*, NAT'L L. J., July 31, 1995, at C9, C12.

69. *Morrison*, 529 U.S. at 613.

70. *See, e.g., Scarborough v. United States*, 431 U.S. 563 (1977) (holding that proof was required that a firearm previously traveled in interstate commerce to satisfy the required nexus between possession and commerce).

71. 402 U.S. 146, 154-57 (1971). The Court upheld Title II of the Consumer Credit Protection Act, which forbade extortionate credit transactions. *Perez*, 402 U.S. at 148, 156-57. Only Justice Stewart dissented, on the grounds that there was no proof of interstate movement, use of the facilities of interstate commerce, or facts showing that the defendant's conduct affected interstate commerce. *Id.* at 157-58 (Stewart, J., dissenting).

a commercial crime.⁷² While sexual battery is an unusually offensive crime, it is not a *commercial* crime.⁷³

Undoubtedly, any crime imposes costs on society. Crime affects national productivity, and, when one aggregates the costs of individual crimes, from purse snatching to assaults (whether gender-motivated or not), one might conclude that they all affect commerce. Another way of rephrasing that argument is to assert that, in modern times, when we measure distances by time rather than miles (Los Angeles is only a few hours from Chicago; one can travel from New York to London on the overnight airline shuttle), *everything* is "commerce among the states" and we no longer have a government of limited or enumerated powers.

Under that theory, the Commerce Clause reaches everything, including barroom brawls. The Court has never accepted that argument in two centuries,⁷⁴ and all nine justices in *Lopez* explicitly rejected it. The majority acknowledged that, in "a sense, any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far."⁷⁵

Similarly, Justice Breyer's *Lopez* dissent, which Justices Stevens, Souter, and Ginsburg joined, agreed that there are limits to the Commerce Clause.⁷⁶ Although the dissent, at this point in the development of the case law, disagreed with the *Lopez* majority as to where to draw the line, all nine justices agreed that there was a line and, ultimately, that the judiciary will draw it.

Justice Breyer's *Lopez* dissent clearly disagreed with the argument that the Court should abdicate any role.⁷⁷ He acknowledged that there are limits to the reach of the Commerce Clause, and that the Court must decide where they are.⁷⁸ Indeed, in one intriguing paragraph, Justice Breyer even suggested what some of these limits might be. He stated that, given the important limits on the Commerce Clause, Congress could not regulate "any and all aspects of education:"

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local;" *nor is it to hold that the Commerce Clause permits the Federal Government*

72. *Morrison*, 529 U.S. at 610-11.

73. *Id.* at 613 ("[G]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

74. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (objecting to the "view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce").

75. *Lopez*, 514 U.S. at 580.

76. *See id.* at 615-16 (Breyer, J., dissenting).

77. *See id.* at 615-31.

78. *See id.* at 615-18.

to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education.⁷⁹

His choice of examples was surprising because there is a cabinet level U.S. Department of Education, and because federal statutes and agency rules already regulate many aspects of education from test taking to school lunch programs.⁸⁰

Though Justice Breyer did not explain what federal requirements on education, economic productivity, or family law would be invalid, the important point is that he (and the other three justices who joined his dissent) acknowledged that at some point the Court would draw the line.⁸¹ These four justices disagreed with the other five as to where to draw the line, but they all agreed that there is a line and the Court must draw it.⁸² After all, if the commerce power encompassed everything, then the considerable powers that are already enumerated in Article I, Section 8 (such as the war power) are equally unessential, unnecessary, redundant, and superfluous (as are the repetitive synonyms at the end of this sentence).

The dissent in *Morrison* is quite different from, and in fact repudiates, the dissent in *Lopez*.⁸³ The four justices who join this dissent are the same as in *Lopez*, but this time Justice Souter is the author.⁸⁴ Souter does not explicitly reject the Breyer opinion in *Lopez*, but he advances a competing and diametrically opposed theory.⁸⁵ What makes the *Morrison* dissent so unusual is that Justice Souter argues that the Court should treat Commerce Clause questions as nonjusticiable—a political question.⁸⁶

In contrast to Justice Breyer, who had agreed that there are limits to the commerce power and the only issue was whether the federal law at issue was within that power, Justice Souter rejects that framework and proposes complete judicial abdication: "[The majority rejects] the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased

79. *Id.* at 624 (Breyer, J., dissenting) (emphasis added) (citation omitted).

80. See, e.g., June Kronholz, *Bringing Accountability to Schools Could Be Tough*, WALL ST. J., Jan. 23, 2001, at A24.

81. *Lopez*, 514 U.S. at 615, 625-31 (Breyer, J., dissenting).

82. *Id.* at 628-31.

83. See *id.* at 615-31; *United States v. Morrison*, 529 U.S. 598, 628-55 (2000) (Souter, J., dissenting, joined by Stevens, Ginsburg, & Breyer, JJ).

84. *Morrison*, 529 U.S. at 628.

85. See *id.* at 628-55.

86. See *id.* at 625, 649-50.

through the expected growth of the national economy."⁸⁷ Later, he re-emphasizes this point: "[As to] supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics."⁸⁸ And yet again, the dissent underscores its unusual invocation of the political question doctrine:

Neither Madison nor Wilson nor Marshall, nor the *Jones & Laughlin*, *Darby*, *Wickard*, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. . . . If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and only a political choice.⁸⁹

Note that the last half of this paragraph, after the ellipses, takes back what the first half appeared to have conceded.

The dissent purports to accept "history's lessons" as its guide, but that history does not suggest that the limitations on the Commerce Clause "should be a political choice and [only] a political choice."⁹⁰ The lesson of history teaches the opposite.

Consider, for example, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,⁹¹ one of the cases that Justice Souter cites. The Court did not purport to abdicate its role in adjudicating Commerce Clause issues.⁹² Instead, the Court explained why the federal law regulated commerce among the states.⁹³ The New Deal Court rejected its earlier cases declaring that "manufacturing" is not commerce.⁹⁴ The manufacture of steel is commerce, the Court now said.⁹⁵ Transportation of steel across state lines is concededly commerce: "Of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!"⁹⁶

If Chief Justice Hughes were holding that the entire issue was a po-

87. *Id.* at 647.

88. *Id.* at 649.

89. *Morrison*, 529 U.S. at 651-52 n.19 (Souter, J., dissenting).

90. *Id.* at 652 n.19.

91. 301 U.S. 1 (1937).

92. *Jones & Laughlin*, 301 U.S. at 46-48.

93. *Id.* at 29-32.

94. *Id.* at 39.

95. *See id.* at 43.

96. *Id.* at 42.

litical question, he could have written a much shorter opinion, would have used the phrase "political question," and would not have bothered to articulate all the reasons why "industrial strife would have a most serious effect upon interstate commerce."⁹⁷ On the contrary, he warned:

[The commerce power] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.⁹⁸

Similarly, in *United States v. Darby*,⁹⁹ if the Court thought the issue was a political question, one would think that it might mention the phrase. Congress decides how far to exercise its considerable commerce power, within that power's outer bounds, but the Court decides if the power lies outside those bounds.

In *Wickard v. Filburn*,¹⁰⁰ which the majority in *Lopez* and *Morrison* cited with approval,¹⁰¹ one wonders why Justice Jackson's opinion elaborately explained why grain consumed on the farm where it is grown affects the amount of grain transported across state lines.¹⁰² Consumption on the farm where the wheat is grown accounts for "an amount greater than 20 per cent of average production."¹⁰³ "Home-grown wheat in this sense competes with wheat in commerce."¹⁰⁴

The *Wickard* Court did not defer to Congress and did not abdicate its role on the decision as to whether something is within interstate commerce.¹⁰⁵ Rather, it explained why transportation of wheat in commerce was substantially affected by home-grown wheat—a relationship that the Court concluded was neither attenuated nor implausible.¹⁰⁶ *Wickard* did defer to Congress's judgment on the question whether it should exercise this power as broadly as it did, not on the question whether the power was within the Constitution.¹⁰⁷

One significant opinion that Justice Souter's dissent did not mention

97. *Jones & Laughlin*, 301 U.S. at 41.

98. *Id.* at 37.

99. 312 U.S. 100 (1941).

100. 317 U.S. 111 (1942).

101. *United States v. Morrison*, 529 U.S. 598, 610 (2000); *Lopez v. United States*, 514 U.S. 549, 556-61 (1995).

102. *Wickard*, 317 U.S. at 124-29.

103. *Id.* at 127.

104. *Id.* at 128.

105. *See id.* at 118-29.

106. *See id.* at 119-28.

107. *See Wickard*, 317 U.S. at 128-29.

was that of Justice Hugo Black, in *Heart of Atlanta Motel, Inc. v. United States*.¹⁰⁸ That case upheld a federal law that prohibited motels and hotels from discriminating on the basis of race.¹⁰⁹ These businesses served transient guests moving in interstate commerce.¹¹⁰ The evidence supported the conclusion that hotels and motels advertised out-of-state, and accepted many of their guests from out-of-state, but refused to serve racial minorities, who therefore found it more difficult to travel in interstate commerce.¹¹¹ It was difficult for blacks to drive across the country because many private motels and restaurants refused to serve them.¹¹² The "vacancy" sign turned into "no vacancy" sign when the black family sought a room.¹¹³

Justice Black was never a part of the pre-1937 Court that read the Commerce Clause narrowly. He had no crabbed view of federal power. Yet, in *Heart of Atlanta Motel*, his concurring opinion emphasized an important caveat:

[T]he operations of both the motel and the restaurant here fall squarely within the measure Congress chose to adopt in the Act and deemed adequate to show a constitutionally prohibitable adverse effect on commerce. The choice of policy is of course within the exclusive power of Congress; but *whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.*¹¹⁴

Justice Black emphasized that the question whether an activity affects interstate commerce is "ultimately" a decision for the courts, not Congress. Though Justice Black's comments were labeled as a concurring opinion, there was no hint in the other opinions that any of the justices would reject his analysis.¹¹⁵ Justice Souter's dissent in *Morrison* is irreconcilable with Justice Black's concurring opinion in *Heart of Atlanta*.¹¹⁶

Perhaps Justice Souter is not arguing that all commerce clause issues are political questions, only that those that relate to the aggrega-

108. 379 U.S. 241, 268 (1964) (Black, J., concurring).

109. *Heart of Atlanta*, 379 U.S. at 261-62.

110. *See id.* at 243.

111. *See id.*

112. *See id.* at 252-53.

113. *See id.*

114. *Heart of Atlanta*, 379 U.S. at 273 (Black, J., concurring) (emphasis added).

115. *See id.* at 242-62; *id.* at 279-86 (Douglas, J., concurring); *id.* at 291-93 (Goldberg, J., concurring).

116. *See United States v. Morrison*, 529 U.S. 598, 628-55 (2000) (Souter, J., dissenting); *Heart of Atlanta*, 379 U.S. at 268-79 (Black, J., concurring).

tion theory: i.e., when Congress adds up a series of local actions, none of which cross state lines or involve the channels of interstate commerce, and concludes that, in the aggregate, these actions come under the commerce clause because they "affect" commerce among the states. Souter may be saying that the reach of the commerce clause is determined solely by a significant national economic effect and, hence, that the Court's efforts to carve out an area of noncommercial activities and traditional areas of state concern are unwarranted.

First, while the majority mentions that the activities that Congress seeks to regulate (carrying a gun near a school, a sexual assault, etc.) are areas that the states have traditionally regulated, the Court is not trying to create a list of activities that are part of "inherent" state sovereignty.¹¹⁷ Instead, the Court makes clear that Congress may regulate that which crosses state lines or involves the channels of interstate commerce, even if states primarily or traditionally regulate those actions.¹¹⁸

Second, Souter may be arguing that if something is within the scope of the commerce clause as defined by national economic effect, then the Court's role is at an end. In Souter's view, politics, not the Constitution, decides if Congress may regulate noncommercial activity that in aggregate affects the entire nation because there is no principled basis for the Court to decide if an activity is "noncommercial."¹¹⁹

There may be cases where it is difficult to determine if an activity is "noncommercial," and such a case could test this theory. Yet, that

117. See, e.g., Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 291-95 (1984); Ronald D. Rotunda, *Usury in the Wake of Federal Energy Regulatory Commission v. Mississippi*, 1 CONST. COMMENT. 43, 43-48 (1984).

118. See *Morrison*, 529 U.S. at 608-09. Less than a week after *Lopez*, the Court unanimously decided *United States v. Robertson*, 514 U.S. 669 (1995) (per curiam). The Government prosecuted Juan Robertson for various narcotics offenses and for violating a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) by investing proceeds of those unlawful activities in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Robertson*, 514 U.S. at 670 (quoting 18 U.S.C. § 1962(a) (1998 & Supp. V)). Robertson invested in a gold mine in Alaska. *Id.* He was convicted on both the narcotics count and the RICO count, but the Ninth Circuit reversed the RICO count because the Government had failed to introduce sufficient evidence that the gold mine was "engaged in or affect[ed] interstate commerce." *Id.* (quoting *United States v. Robertson*, 15 F.3d 862, 868 (9th Cir. 1994)). With no dissent, the Supreme Court reversed. *Id.* at 672. It was unnecessary to consider whether the activities of the gold mine "affected" interstate commerce, because the "affects test" or the "aggregation doctrine" is only necessary to "define the extent of Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effects." *Id.* at 671. In this case, there was proof that money, workers, and goods crossed state lines. See *Robertson*, 514 U.S. at 670-71. The activities were no longer purely intrastate. See *id.* For example, Robertson purchased at least some mining equipment in California that was transported to Alaska. *Id.* at 670. Robertson transported \$300,000 of gold (about 15% of the mine's total output) out of state. *Id.* at 671. He sought workers from out-of-state and brought them to Alaska. *Id.*

119. See *Morrison*, 529 U.S. at 638-40, 654-55 (Souter, J., dissenting).

has not happened in over two centuries. The *Morrison* majority pointed out that, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."¹²⁰

The dissenters were unable to undermine that conclusion.¹²¹ In "every case" where the Court has "sustained federal regulation under [*Wickard's*] aggregation principle . . . the regulated activity was of an apparent commercial character."¹²² Although some commentators expressed surprise at *Morrison's* holding, it is interesting that the Court overruled no precedent and cited *Wickard* with approval.¹²³

Lopez, as well, spoke of the noneconomic nature of the conduct at issue.¹²⁴ The law that *Lopez* invalidated did not regulate a commercial activity.¹²⁵ The statute "by its terms . . . [had] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."¹²⁶ *Lopez*, which did not overrule any prior case, assured us that, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹²⁷ The *Lopez* majority reaffirmed *Wickard v. Filburn*, and noted that it "involved economic activity in a way that the possession of a gun in a school zone does not."¹²⁸ The law in question is not even "an essential part of a larger regulation of economic activity."¹²⁹

Souter's test as a practical matter leaves no genuine limit to the Commerce Clause. His analysis, even limited to the aggregation theory, still makes the commerce power an unenumerated power. Recall that when people or things cross state lines or involve the instrumentalities or channels of interstate commerce, no one on the Court has a problem with a broad federal power.¹³⁰ Why bother with using the theory of crossing a state line or using the instrumentalities or channels of interstate commerce?

Hence, in rejecting Justice Black's view of the Commerce Clause, Justice Souter's dissent in *Morrison* also rejects the Breyer dissent in *Lopez*.¹³¹ Yet, the same four Justices who embrace the Souter dissent

120. *Id.* at 613.

121. See *id.* at 628-55 (Souter, J., dissenting); *id.* at 655-56 (Breyer, J., dissenting).

122. *Id.* at 611 n.4.

123. See *Morrison*, 529 U.S. *passim*.

124. See *United States v. Lopez*, 514 U.S. 549, 561 (1995).

125. *Lopez*, 514 U.S. at 561.

126. *Id.*

127. *Id.* at 560 (emphasis added).

128. *Id.*

129. *Id.* at 561.

130. *United States v. Robertson*, 514 U.S. 669, 670-72 (1995) (per curiam). *Robertson* is discussed above.

131. See *Morrison*, 529 U.S. at 628-55 (Souter, J., dissenting).

are the same four Justices who join the Breyer dissent in *Lopez*.¹³² Only the main author is different.¹³³ None of these justices (Breyer, Souter, Ginsburg, and Stevens) explain, or even acknowledge, the inconsistency.¹³⁴

The Breyer dissent in *Lopez* explicitly accepted the idea that the federal government is one of enumerated powers and that there are limits to the Commerce Clause, although disagreeing with the majority as to where to draw the line.¹³⁵ In contrast, Justice Souter rejects the idea that the federal government is one of enumerated powers.¹³⁶ Rather than disagreeing with the majority as to where the Court should draw the line, he explicitly objects to any role for the judiciary.¹³⁷

Souter's proposed abdication is the first time in two centuries that any of the Justices—in this case four of them—argued that there is no role for the judiciary in determining the metes and bounds of the commerce clause.¹³⁸ Even during the period from 1937 through *Lopez* no justice on the Court ever proposed that the Court abdicate a judicial role. The Justices upheld federal regulations, sometimes over dissents,¹³⁹ but they never argued that the issue was a political question, like the decision to declare war, or the decision as to whether Congress has properly accepted a state's ratification of a constitutional amendment.¹⁴⁰

Justice Souter would change all that and reject Justice Black's admonition and the Breyer dissent in *Lopez*. Souter urges judicial abdication, while simultaneously making the surprising claim that the majority

132. See *id.* at 628 (Souter, J., dissenting); *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting).

133. See *Morrison*, 529 U.S. at 628 (Souter, J., dissenting); *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting).

134. See *Morrison*, 529 U.S. at 628-55 (Souter, J., dissenting).

135. See *Lopez*, 514 U.S. at 615-18, 631 (Breyer, J., dissenting).

136. See *Morrison*, 529 U.S. at 637-40 & n.12 (Souter, J., dissenting).

137. See *id.* at 628 (Souter, J., dissenting).

138. *Garcia v. San Antonio Metropolitan Transit Authority* held that, in general, it is up to the political process to decide what are integral state functions and when states should be immunized from federal regulation under the Commerce Clause. 469 U.S. 528, 556-57 (1985). What the Federal Government regulated in that case, a city-owned mass transit system, is clearly interstate commerce, and federal regulation did not single out the states for any special burdens. See *Garcia*, 469 U.S. at 531, 537-47. No justice—in the majority or the dissent—argued that the question whether something is interstate commerce is not a judicial question. See *id. passim*. In fact, all nine justices agreed that the matter being regulated is interstate commerce, the same conclusion that all nine came to in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which *Garcia* overruled. See Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1660-67 (1987).

139. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (upholding federal law governing extortionate credit transactions, which is a commercial crime, after reviewing congressional record). Justice Stewart dissented, arguing that the matter was not within the Commerce Clause. *Perez*, 402 U.S. at 157.

140. See Ronald D. Rotunda, *Running Out of Time: Can the E.R.A. Be Saved*, 64 A.B.A. J. 1507 (1978).

is rejecting precedent.¹⁴¹ The Souter dissent also embraces a general federal police power that the courts (in his view) could not review, although the Framers and the representatives of the States at the time feared such a general police power.¹⁴² Because Breyer also joined the Souter dissent, one must assume that he too rejects his earlier opinion.

This position in the Souter dissent was a surprise to the Solicitor General, who agreed that there are limits to the commerce power and that the question whether a matter falls within that power is a decision for the Court.¹⁴³ The Solicitor General, in another case that same term, argued that if the Commerce Clause allows Congress to regulate "all activity that might have some indirect or remote downstream effect on interstate commerce," that would "[improperly] vest plenary power in the national government."¹⁴⁴ Later, he repeated this refrain: "If Congress were authorized to regulate all activity that could theoretically have some distant downstream effect on interstate commerce, its powers would be effectively unlimited."¹⁴⁵ The Souter dissent rejects the Solicitor's position.¹⁴⁶

Morrison shows that the Court is serious about policing the commerce power. Congress still has considerable legislative power, but it will be more difficult for Congress to enact legislation that is "more appropriate to county commissions than to a national government."¹⁴⁷ The law in *Morrison* created a federal tort that almost duplicated the state tort; the primary difference between the two was that the federal tort was more difficult for the plaintiff to use because it required proof of gender-based animus.¹⁴⁸

141. *Morrison*, 529 U.S. at 638 (Souter, J., dissenting).

142. *Id.* at 655.

143. Brief of the United States, *Jones v. United States*, 529 U.S. 848 (2000) (No. 99-5739).

144. Brief of the United States at 12, *Jones* (No. 99-5739). *Jones* was another Commerce Clause case that the Court decided that same term, although this time the Court decided on statutory grounds, in order to avoid the Commerce Clause problem. *Jones v. United States*, 529 U.S. 848, 850-51 (2000).

In *Jones*, Justice Ginsburg, speaking for the Court, reversed and held that, as a matter of statutory interpretation:

an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i). Our construction of § 844(i) is reinforced by the Court's opinion in *United States v. Lopez*, and the interpretative rule that constitutionally doubtful constructions should be avoided where possible.

Id. at 851. See also *Scarborough v. United States*, 431 U.S. 563 (1977) (holding that the government must prove that a firearm previously traveled in interstate commerce in order to satisfy the required nexus between possession and commerce).

145. Brief of the United States at 41, *Jones*, (No. 99-5739).

146. *Morrison*, 529 U.S. at 639.

147. Mary Deibel, *Court Cutting Federal Role*, CHICAGO SUN-TIMES, June 25, 1999, at 35 (quoting former acting Solicitor General Walter Dellinger).

148. 529 U.S. at 605-06. The arson law in *Jones v. United States* also duplicated state laws.

III. SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."¹⁴⁹ Section 1 of this amendment protects individuals against state action.¹⁵⁰ Accordingly, Congress can enact legislation to protect individuals from state action that violates the Privileges or Immunities Clause,¹⁵¹ the Equal Protection Clause, or the Due Process Clause of the Fourteenth Amendment.

When Congress exercises federal power, Section 5 is the preferable mode of regulating the states. First, under Section 5 there is no requirement that the state activity affect interstate commerce.¹⁵² In contrast, the Commerce Clause does require Congress to connect its regulation with interstate commerce.¹⁵³ As discussed above, while many activities are within the scope of interstate commerce, not all are.¹⁵⁴ Section 5 avoids that issue.

Second, when Congress exercises power under Section 5 (unlike its exercise of power under the Commerce Clause), it can create causes of action against the state and abrogate the states' protections of the Eleventh Amendment.¹⁵⁵ History supports this unusual federal power.¹⁵⁶ A major purpose of the Fourteenth Amendment was to give Congress the power to remedy state violations of individual rights, so it should not be too surprising that the Fourteenth Amendment modifies the earlier-

It did not authorize one extra dollar to hire more FBI agents to investigate residential arsons. States already criminalize arson and there was no suggestion that they needed federal help. If the law were interpreted to apply to residential arson, that interpretation would be largely symbolic; it would serve the purpose to convince voters that the federal government was against arson.

149. U.S. CONST. amend. XIV, § 5.

150. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); Ronald D. Rotunda, *Runyon v. McCrary and the Mosaic of State Action*, 67 WASH. U. L.Q. 47 (1989).

151. Initially, the Court eviscerated the Privileges or Immunities Clause. See *The Slaughterhouse Cases*, 83 U.S. 36 (1873). The Court appears to have breathed new life into that clause in *Saenz v. Roe*. See 526 U.S. 489 (1999); see also Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among State, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1 (1998).

152. U.S. CONST. amend. XIV, § 5.

153. U.S. CONST. art. I, § 8, cl. 3.

154. It is not true of course, that everything is in, or affects, interstate commerce, for, as *Lopez* demonstrated, the Commerce Clause power still has a few important limits. See Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997).

155. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); see also Ronald D. Rotunda, *Resurrecting Federalism Under the New Tenth and Fourteenth Amendments*, 29 TEX. TECH. L. REV. 953 (1998).

156. John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

enacted Eleventh Amendment.¹⁵⁷ In contrast, Congress cannot use the Commerce Clause to abrogate the Eleventh Amendment.¹⁵⁸

Third, when Congress is exercising power under Section 5 of the Fourteenth Amendment, it is the power to enforce Section 1, and Section 1 requires "state action."¹⁵⁹ As discussed above, there is no requirement that any regulation be "generally applicable." Under Section 5, federal laws can (indeed, they must) single out the states for special burdens.¹⁶⁰

And finally, Section 5 imposes no adverse budgetary consequences, because there is no need for Congress to spend money, which is a requirement that applies when Congress uses its Spending Clause Power.¹⁶¹ Consequently, it is becoming more common for Congress to make clear that it is using its special Fourteenth Amendment powers to regulate the states.¹⁶²

A. Katzenbach v. Morgan

In *Katzenbach v. Morgan*, the Supreme Court generously interpreted congressional power under Section 5, *if* Congress has used that power to remedy discrimination based on race and ethnic background—categories that the Court calls "suspect classes."¹⁶³ *Morgan* upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965.¹⁶⁴

The Voting Rights Act imposed various electoral reforms on the states.¹⁶⁵ Section 4(e), in particular, provided that no person who had completed the sixth grade in any accredited public or private American-flag school (i.e., a school within the jurisdiction of the United States, such as any Puerto Rican school) in which the predominant classroom language was not English could be denied the right to vote in any election because of his or her inability to read or write English.¹⁶⁶ The Act consequently prohibited New York from enforcing its state laws requir-

157. See U.S. CONST. amend. XIV.

158. *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

159. See U.S. CONST. amend. XIV, § 1.

160. 4 ROTUNDA & NOWAK, *supra* note 4, §§ 19.2-19.5.

161. See U.S. CONST. amend. XIV, § 5.

162. See, e.g., *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996) (noting that both the Americans with Disabilities Act and the Rehabilitation Act were enacted pursuant to Congress' authority under the Fourteenth Amendment).

163. 384 U.S. 641 (1966) (involving voting rights and invidious discrimination against Puerto Ricans). See also Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982).

164. *Morgan*, 384 U.S. at 641.

165. 42 U.S.C. § 1973 (1994).

166. *Id.* § 1973b(e)(2).

ing an ability to read and write English as a condition of voting.¹⁶⁷

The question in *Morgan* was whether the Congress could prohibit enforcement of the state law by legislating under Section 5 of the Fourteenth Amendment, even if the Court would find that the Equal Protection Clause itself did *not* nullify New York's literacy requirement.¹⁶⁸ In fact, the Court had earlier ruled that the Equal Protection Clause does not, by its own force, prohibit all literacy tests (only those that are administered in a racially discriminatory way).¹⁶⁹

Morgan utilized a two-part analysis to reach its conclusion that the federal statute was within Congress's Section 5 power.¹⁷⁰ The Court first construed Section 5 as granting Congress "the same broad powers expressed in the Necessary and Proper Clause."¹⁷¹ Under this interpretation, the Court held that it was within the power of Congress to determine that the Puerto Rican minority needed the vote to gain nondiscriminatory treatment in public services, and that this need warranted federal intrusion upon the states.¹⁷² Congress enforced the principle that the state must be nondiscriminatory in the provision of governmental services by granting the vote to the Puerto Rican minority.

Morgan reached the same result in what appears to be an additional part of, or an alternative holding to, its analysis.¹⁷³ Because it "perceived a basis" upon which Congress might reasonably predicate its judgment that the New York literacy requirement was invidiously discriminatory, the Court said that it was also willing to uphold the federal legislation on that theory.¹⁷⁴ This second part of the analysis is quite different in scope because it looked to Congress's fact-finding that the New York literacy test was discriminatory.¹⁷⁵ If the Court "perceived a basis" indicating that the federal law is not irrational, then some commentators read the Court to be saying that it would have to uphold any federal statute that reinterpreted what is a violation of equal protection, if that reinterpretation is not irrational.¹⁷⁶

167. *Morgan*, 384 U.S. at 643-44.

168. *Id.* at 649.

169. *Lassiter v. Northampton Election Board* refused to strike down state literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any showing of discriminatory use of the test. 360 U.S. 45, 53-54 (1959). The *Morgan* Court acknowledged *Lassiter* and refused to disturb its earlier ruling. *Morgan*, 384 U.S. at 649-50.

170. *Morgan*, 384 U.S. at 650-53.

171. *Id.* at 650.

172. *Id.* at 652-53.

173. *Id.*

174. *Id.* Congress, in the statute upheld in *Katzenbach v. Morgan*, explicitly relied on Section 5, but years later the Court made it clear that when Congress legislates under Section 5, it need not do so explicitly. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). The Court must determine what the intent of Congress is, but Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *Wyoming*, 460 U.S. at 243 n.18 (1983).

175. *Morgan*, 384 U.S. at 641.

176. See, e.g., Archibald Cox, *Constitutional Adjudication and the Promotion of Human*

If *Morgan* had limited its rationale to the first conclusion—that Congress may extend the vote to a class of persons injured by the state's racially discriminatory allocation of government services—*Morgan* would not offer support for arguments that legislation could redefine or restrict the reach of the equal protection guarantee. A court still would retain authority to determine whether discrimination exists and whether the legislative remedy is reasonably related to the proper goal of enforcing Section 1.

On the other hand, if the *Morgan* Court suggested that Congress can legislate to address what Congress concludes are specific violations of the Equal Protection Clause, then the Court may have conferred on Congress the power to *define* the reach of equal protection (i.e., to determine what "equal protection" means).¹⁷⁷ That is why Justice Harlan specifically attacked this portion of the majority's opinion as allowing Congress to demarcate or define constitutional rights "so as in effect to dilute equal protection and due process decisions of this Court."¹⁷⁸

Adding fuel to his concern was the fact that in later cases, various justices of the Supreme Court explicitly acknowledged and relied on *Morgan* as the reason to respect congressional accommodations of conflicting constitutional rights and powers.¹⁷⁹ Justice Harlan's fears bore fruit in the Religious Freedom Restoration Act of 1993 (RFRA),¹⁸⁰ which is discussed below.

In a provocative discussion of congressional power under Section 5, Professor Archibald Cox, a former Solicitor General, analyzed *Morgan*, read it very broadly, and concluded that Congress does indeed have broad power to determine what constitutes a violation of equal protection.¹⁸¹ Under this view Congress, has the power to define the

Rights, 80 HARV. L. REV. 91 (1966).

177. See *Morgan*, 384 U.S. at 653; Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 133 (1969). According to Burt, "Morgan allows a restrained Court, intent perhaps on undoing the work of its active predecessors, [to] permit a graceful and selective retreat limited to those areas where the political branch gives an explicit and contrary judgment." *Id.* Cf. John Yoo, *Recognizing the Limits of Judicial Remedies: Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

178. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting) (emphasis added).

179. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., with Blackmun & Powell, JJ., concurring) (citing *Morgan* in holding that white tenants should be given standing under § 8(10)(a) of the Civil Rights Act of 1968 despite doubts of case or controversy under Article III of the Constitution); *Welsh v. United States*, 398 U.S. 333, 371-72 (1970) (White, J., with Burger, C.J., & Stewart, J., dissenting) (discussing *Morgan* in support of an argument for respecting "congressional judgment accommodating the Free Exercise Clause and the power to raise armies"). See also *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (Burger, C.J., plurality, joined by White & Powell, JJ.) (relying on Section 5 of Fourteenth Amendment to justify congressional decision to set aside ten percent of funds for federal work projects for minority group members).

180. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994 & Supp. 2001).

181. Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80

wrong and not merely create the remedy. Cox argued that Section 5 makes it irrelevant whether the federal law would grant relief that is greater or lesser than the courts would order.¹⁸² He concluded that the *Morgan* rationale requires judicial deference to congressional judgments to limit rights as well as to the decisions to extend them.¹⁸³

Those commentators and justices who rely on *Morgan* to support the position that Congress has the power to define the reach of equal protection or due process base their analysis on three questionable predicates: (1) that congressional power to override state law under the Fourteenth Amendment is as broad as an expansive reading of *Morgan* would suggest; (2) that *Morgan* authorizes Congress to override not only state actions, but also judicial constructions of the Fourteenth Amendment that are incorrect in the view of Congress; and (3) that Section 5 permits Congress to interpret the various guarantees of the Fourteenth Amendment more broadly or more narrowly than the courts have done or might do.

However, Congress can rely on a broad reading of *Morgan* to define or change rights under Section 5 only if each of those premises is correct. The major cases elaborating on the reach of *Morgan*—*Oregon v. Mitchell* and, more recently, *Flores*, *Florida Prepaid*, *College Savings Bank*, *Alden*, and *Morrison*—reject those assumptions.¹⁸⁴ *Flores* and its progeny, in particular, have driven a stake through the heart of that broad reading of *Morgan*.

B. *Oregon v. Mitchell* and Reinterpreting *Morgan*

Morgan dealt with a federal statute that sought to protect ethnic minorities from state-sanctioned racial discrimination in voting.¹⁸⁵ Once passing beyond this category (which the judiciary has already declared “suspect”) the Supreme Court has been much less deferential to Congress.

The first major decision reinterpreting and limiting *Katzenbach v. Morgan* was *Oregon v. Mitchell*.¹⁸⁶ That case dealt with challenges to

HARV. L. REV. 91, 102-08 (1966).

182. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 259-61 (1971) [hereinafter *Role of Congress*]. See also Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

183. *Role of Congress*, supra note 182, at 259-60.

184. *Oregon v. Mitchell*, 400 U.S. 112, 128-35 (1970); *City of Boerne v. Flores*, 521 U.S. 507, 527-29 (1997); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638-40 (1999); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Alden v. Maine*, 527 U.S. 70 (1999); *United States v. Morrison*, 529 U.S. 598, 607-19 (2000).

185. *Morgan*, 384 U.S. at 643.

186. *Mitchell*, 400 U.S. 112 (1970).

various provisions of the Voting Rights Act Amendments of 1970.¹⁸⁷ Among other things, this law lowered the minimum voting age in state and local elections from twenty-one years of age to eighteen.¹⁸⁸ Congress, in purporting to enforce the Fourteenth Amendment, found that there was discrimination based on age, that the age group protected under the statute was a "discrete and insular minority" (those between eighteen and twenty-one years of age), and that it was necessary to remedy this denial of equal protection.¹⁸⁹ Congress did not invent the phrase "discrete and insular minority," but lifted it from identical language found in the famous footnote of *United States v. Caroline Products, Co.*¹⁹⁰

If that is all it takes for Congress to create new rights, the exercise of such a power will be habit-forming.¹⁹¹ Congress could simply parrot whatever the case law provides that it should say. If the Court will treat those "findings" the way it often treats findings when reviewing congressional power under the Commerce Clause, it will simply defer to Congress because the Court upholds such factual findings if the conclusion is "rational."¹⁹²

187. *Mitchell*, 400 U.S. at 117 (construing Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 42 U.S.C.))

188. *Id.* A majority of Justices, using different rationales, found that it was constitutional for Congress to abolish literacy tests (often used in a racist manner), to abolish state durational residency requirements in presidential elections (it affects the right to travel), and to enfranchise eighteen-year-olds in federal (but not state) elections. *Id.* at 117-19.

189. See *id.* at 240 (Brennan, White & Marshall, JJ., dissenting in part, concurring in part) (noting that Congress justified giving eighteen-year-olds the right to vote "in order to enforce the Equal Protection Clause of the Fourteenth Amendment").

190. 304 U.S. 144, 152-53 n.4 (1938) (Stone, J.).

191. It is increasingly common for Congress to make the necessary findings by enacting the appropriate language. For example, in the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1995 & Supp. 2001), Congress found, in particular, that:

individuals with disabilities are a *discrete and insular minority* who have been faced with restrictions and limitations, subjected to . . . a history of purposeful unequal treatment and relegated to . . . a position of *political powerlessness* in our society, based on characteristics that are beyond the control of such individuals and resulting from *stereotypic assumptions* not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(a)(7) (emphasis added). That is not to criticize Congress; it is only to point out that if such language is all that is necessary for Congress to act, then there are no substantial limits to federal power, and there is a danger, as Justice Harlan warned, that Congress may use the power to dilute constitutional rights. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

192. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Congress also made factual findings regarding interstate commerce in *United States v. Morrison*, discussed below. See 529 U.S. 598, 614 (2000). The Court, however, found the factual conclusions irrelevant to the Commerce Clause inquiry. *Morrison*, 529 U.S. at 614-19. The Court held that Congress cannot use the argument that sexual assaults—in the aggregate—"affect" commerce among the states because Congress cannot use the aggregation doctrine when the matter being regulated is not commercial in nature. *Id.* at 610-15.

For example, when a substantial amount of wheat is home grown, in the aggregate, it affects interstate commerce because it competes with wheat that would otherwise have been purchased.

If Section 5 of the Fourteenth Amendment really gives Congress *carte blanche* power to enact legislation to remedy what Congress regards as a denial of equal protection, the Court in *Mitchell* should have simply upheld the statute. Instead, the fragmented Court invalidated it.¹⁹³ While there was no opinion of the Court, a clear majority of the Justices agreed that Congress cannot define the substantive meaning of the Equal Protection Clause.¹⁹⁴ The Justices were unwilling to give up the ultimate power of judicial review, the power to say what the law is, a power first elaborated in *Marbury v. Madison*.¹⁹⁵

Justice Stewart, in *Oregon v. Mitchell*, joined by Chief Justice Burger and Justice Blackmun, concluded that Congress cannot usurp the role of the courts by determining the boundaries of equal protection.¹⁹⁶ Congress does not have "the power to determine what are and what are not 'compelling state interests' for equal protection purposes."¹⁹⁷ Nor does Congress have the power to "determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling.'"¹⁹⁸

Justice Harlan agreed that Congress could not define the reach of equal protection, because that power is at variance with the procedure for amending the Constitution.¹⁹⁹ Justice Black similarly agreed that Section 5 could not justify a federal law that set the voting ages in state and local elections.²⁰⁰

In short, Congress may not simply announce that people between

Wickard v. Filburn, 317 U.S. 111 (1942). The buying and selling of wheat is commercial activity; sexual assaults are not.

193. *Mitchell*, 400 U.S. at 117-19.

194. *Id.* at 124-31.

195. "It is, emphatically, the province and duty of the judicial department, to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

196. *Mitchell*, 400 U.S. at 293-96.

197. *Id.* at 295. Justice Stewart argued that the New York statute was "tainted by the impermissible purpose of denying the right to vote to Puerto Ricans," and "conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services." *Id.* at 295-96.

198. *Id.* at 296.

199. *Id.* at 205.

200. *Mitchell*, 400 U.S. at 117-35 (Black, J., plurality). Justice Black said:

In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers.

Id. at 130 (emphasis added). See also *EEOC v. Wyoming*, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) (concluding that allowing "Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government"). This case also involved age discrimination. *Id.* The majority, because of the way that it resolved the case, did not reach the issue discussed by the dissent. *Id.* at 243.

eighteen and twenty-one years of age are a "discrete and insular minority" who were discriminated against in voting and then use that announcement as the basis, under the authority of Section 5, to force the states to allow those people to vote. For the same reason, Congress could not simply declare that fetuses are a "discrete and insular minority," and then seek to limit abortion rights.

Congress responded to *Mitchell* by proposing the Twenty-Sixth Amendment, which the states then ratified. That amendment guarantees that the votes of citizens eighteen years of age or older may not be abridged by the United States or any state on account of age.²⁰¹ The correct response to *Mitchell*, in a nutshell, was the Twenty-Sixth Amendment. Congress cannot amend our Constitution by statute.

C. City of Boerne v. Flores

The fragmented opinion and unclear holding of *Oregon v. Mitchell* was cured in *City of Boerne v. Flores*.²⁰² This time a majority of the Court agreed on an opinion, and ruled that Congress exceeded its powers under Section 5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act of 1993 (RFRA).²⁰³ Congress enacted RFRA in order to overturn *Employment Division, Department of Human Resources of Oregon v. Smith*.²⁰⁴

In *Smith*, the Court allowed the state to enforce generally applicable neutral laws (in that case, a law banning the use of peyote, an illegal drug).²⁰⁵ The law in that case was applied to deny unemployment benefits to individuals who lost their jobs in a drug treatment center because of their illegal peyote use.²⁰⁶ The Court held that the law was constitutional, even where the users were members of a Native American Church, who claimed that they used peyote as a sacrament, and challenged the law banning peyote as an interference with their free exercise of religion.²⁰⁷

201. U.S. CONST. amend. XXVI.

202. 521 U.S. 507 (1997). Justice Stevens filed a concurring opinion. *Flores*, 521 U.S. at 536. Justice Scalia filed an opinion concurring in part, in which Justice Stevens joined. *Id.* at 537. Justice O'Connor filed a dissenting opinion, in which Justice Breyer joined in part. *Id.* at 544. Justice Souter and Justice Breyer each filed dissenting opinions. *Id.* at 565, 566. The seminal article on this issue is, William Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291(1996), and is cited, inter alia, in *City of Boerne v. Flores*, which invalidated the Religious Freedom Restoration Act. *Flores*, 521 U.S. at 529.

203. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended in scattered sections of 42 U.S.C.).

204. 494 U.S. 872 (1990).

205. *Smith*, 494 U.S. at 876-90.

206. *Id.* at 874, 890.

207. *Id.* at 890. *Smith* leaves unresolved the question of whether a state or county could de-

Congress sought to overturn *Smith* by enacting RFRA. The statute provided that neither a state nor the federal government can "substantially burden" a person's exercise of religion, even under a rule of general applicability, unless the government demonstrates that the burden (1) furthers a "compelling governmental interest" and, (2) is the "least restrictive means of furthering" that interest.²⁰⁸ The very purpose of RFRA was to overturn a decision of the U.S. Supreme Court that interpreted the meaning and reach of the Free Exercise Clause. The motive was clear—as President Clinton explicitly announced when signing RFRA: "this act reverses the Supreme Court's decision in *Employment Division* against *Smith*."²⁰⁹

Flores involved an application of RFRA.²¹⁰ Archbishop Flores applied for a permit to enlarge a church building to accommodate its congregation.²¹¹ The San Antonio Historical Landmark Commission denied the permit because the enlargement conflicted with a historical preservation plan.²¹² Archbishop Flores then sued under RFRA.²¹³ Justice Kennedy, writing for the Court, held that RFRA was unconstitutional and that Section 5 of the Fourteenth Amendment did not authorize Congress to enact it.²¹⁴

The Court concluded that Congress has power under Section 5 only to enforce the Free Exercise Clause, not the power to create or redefine what it means. Section 5 grants Congress a preventive power or a remedial power, not a power to delineate. Relying on *Oregon v. Mitchell*, the Court said that Section 5 does not give Congress the power to decree what the First Amendment means. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."²¹⁵

The line between remedial legislation and legislation that makes a

cide to enact prohibition (i.e., become a dry state or county, and forbid the consumption of any intoxicating liquor, including sacramental wine). During national Prohibition, the law made an exception for sacramental wine. If the state did not enact this exception, the members of a religious sect that uses wine in its sacrament (e.g., the Catholic Church) would be forbidden from practicing an essential part of their religious beliefs, but the law imposing this prohibition would be a generally applicable law. However, a court might invalidate the law if it were enacted pursuant to a bad, anti-religious, motive (e.g., to make life more difficult for Catholics). See *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating a law because the legislative motive was to advance particular religious beliefs).

208. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 42 U.S.C.).

209. Remarks of President William J. Clinton on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

210. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

211. *Flores*, 521 U.S. at 512.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 519.

substantive change in the law is not always clear, of course. The Court will give Congress "wide latitude" in deciding where to draw the line.²¹⁶ However, there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."²¹⁷ The Court will make the final decision as to whether the federal remedy is proportional to the alleged wrong.²¹⁸

For example, the *Flores* Court noted that when Congress enacted—and the Supreme Court in *Katzenbach*²¹⁹ affirmed the constitutionality of—various provisions of the Voting Rights Act of 1965, Congress had evidence (documented in the case law and in congressional testimony) of state-sponsored racial discrimination in voting.²²⁰ The factual record before the *Katzenbach* Court reflected "pervasive discriminatory" and "unconstitutional" use of literacy tests by some states.²²¹ In contrast, when one turns to RFRA, one finds no evidence of any pattern of state laws being enacted because of religious bigotry in the last forty years. There was evidence only that some generally applicable laws placed incidental burdens on religion, but those laws were not enacted or enforced *because of* animus or hostility to religion; nor did they indicate that there was any widespread pattern of religious discrimination in this country.²²² Certainly some *individuals* engage in religious bigotry, but the states were not the guilty parties and the Fourteenth Amendment is limited to state action.

The Court emphasized that, given the paucity in the factual record, the power of Congress under Section 5 must be correspondingly limited:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.²²³

RFRA, in short, was a major federal intrusion "into the States' traditional prerogative and general authority to regulate for the health and

216. *Flores*, 521 U.S. at 520.

217. *Id.* at 520.

218. See Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976).

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

220. *Flores*, 521 U.S. at 530-33.

221. *Id.* at 333-34 (citing *Katzenbach*, 384 U.S. at 33-34).

222. *Id.* at 526, 527.

223. *Id.* at 530 (citations omitted).

welfare of their citizens.”²²⁴ It is not a satisfactory answer to contend that Congress is merely trying to “over-enforce” the guarantees of the Free Exercise Clause. If a highway patrolman arrests you for traveling 55 m.p.h. in a 65 m.p.h. zone, you would not be satisfied by the patrolman’s response that he was merely “over-enforcing” the traffic laws. You would object to being subjected to phantom restrictions. Similarly, some states were upset with the phantom restrictions that RFRA imposed.²²⁵ Additionally, if Congress has this power to overrule Supreme Court decisions, why would it stop at RFRA? Could Congress “expand” and protect the rights of unborn children by prohibiting abortions and overrule Supreme Court cases that protect abortion rights? Expanding these rights would undercut the rights of others.

D. *The Post-Flores Case Law*

A trilogy of cases decided during the 1998-1999 Court term, followed most recently by *Garrett*²²⁶ in the 2000-2001 term, all indicate that *Flores* was not aberrational, and that the Court is serious about protecting federalism. While a narrowly-divided Court issued all of these decisions, the majority was not ambivalent about its views. Often, when there is a string of five to four opinions, at least one justice in the majority wavers in the steadfastness with which he or she adopts the legal principle. Not so in these cases. The five-person majority—Chief Justice Rehnquist and Justices O’Connor, Scalia, Thomas, and Kennedy—acts as one. Likewise, the four-person dissent—Justices Stevens, Souter, Ginsburg, and Breyer—is single-minded in rejecting the entire

224. *Id.* at 534. One of the interesting lower court cases applying RFRA to invalidate a state policy was *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995). The Ninth Circuit ruled that RFRA required a state elementary school to make exceptions to its “no weapons” policy, so that all Sikh children (seven years old and older) could carry knives to school. *Cheema*, 67 F.3d at 886. This knife (or “Kirpan”) has a seven-inch blade. *Id.* at 884, 886. The knives could not be made immovable for that would conflict with Sikh beliefs that require the children to carry and to use the knives to “propagate God’s justice.” *Id.* at 887.

225. RFRA applied both to federal and state laws that indirectly burden the free exercise of religion. To the extent that RFRA applied to federal laws, there is no issue under Section 5 of the Fourteenth Amendment because Congress is not relying on Section 5 as the source of its power. Congress is simply telling federal courts to read the law, as it is described in RFRA, to protect free exercise rights when interpreting federal law. However, RFRA would still raise a question of whether this free exercise exemption from the normal requirements of neutrally applicable federal law violates the Free Exercise Clause or separation of powers. Those issues were not before the Court in *Flores* and are not the subject of this Article.

To the extent that a state enacts its own state law patterned after RFRA, that also does not raise any issue under Section 5 of the Fourteenth Amendment because it is the state, and not Congress, that is enacting the restriction on the reach of its own laws. Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J. L. & PUB. POL’Y 411 (2000). Again, that issue was not before the Court in *Flores* and is also not the subject of this Article.

226. *Bd. of Trs. of The Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

line of cases that the majority has developed.

Consider *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.²²⁷ The Court held that Congress did not validly use Section 5 to abrogate Florida's Eleventh Amendment immunity.²²⁸ A patentee sued a state agency in federal court claiming that the state had infringed on its patent.²²⁹ Congress made clear in the relevant statute, the Patent Remedy Act, that it intended to revoke the states' Eleventh Amendment immunity.²³⁰ The Court, however, ruled that Congress lacked the authority to do so.²³¹

The Court's reasoning is a little involved but ultimately clear. First, Congress could use Section 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity to enforce Section 1 of the Fourteenth Amendment.²³² Moreover, Section 1 protects the right to property, and a patent is property.²³³ However, the Court decided that it was precluded from considering whether the abrogation could be justified under a just compensation theory: first, neither the language of the statute nor the legislative history indicated that Congress was trying to enforce the Just Compensation Clause;²³⁴ second, the United States specifically declined to defend the law as based on the Just Compensation Clause.²³⁵

Instead, the government defended the law on the ground that it protected *procedural* due process.²³⁶ This rationale was not tenable, the Court concluded, because state law already provided a fair procedure.²³⁷ Florida law already offered a judicial remedy through a takings or conversion claim.²³⁸ Hence, there was no violation of procedural due process because the state provided an adequate procedure. The federal statute offered a *different* procedure, but the state's procedure was satisfactory for constitutional purposes. Congress could not use Section 5 to abrogate the state's Eleventh Amendment immunity and force the state to litigate in federal court simply because the federal government wanted to impose uniform procedural rules regarding patent litigation.

In a companion case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court held that Florida

227. 527 U.S. 627 (1999).

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

229. *Id.* at 631.

230. *Id.* at 635.

231. *Id.* at 648.

232. *Id.* at 636-38.

233. *Florida Prepaid*, 527 U.S. at 642.

234. *Id.* at 642 n.7.

235. *Id.* at 642.

236. *Id.*

237. *Id.* at 647.

238. *Florida Prepaid*, 527 U.S. at 644 n.9.

could waive its sovereign immunity from suit in federal court if it did so explicitly and voluntarily.²³⁹ This ruling should not be surprising, given the fact that the Court has long defined a waiver as the "intentional relinquishment or abandonment of a known right or privilege."²⁴⁰ The Court would not presume that a state waived its rights, and the Court would not find a waiver by implication.²⁴¹ In this case, the facts did not show that Florida had waived its rights.²⁴²

*Alden v. Maine*²⁴³ was the third case in this trinity during the 1998-1999 term reestablishing federalism. The Court held that the sovereign immunity principles, which are derived from the structure of the Constitution, mean that Congress cannot force a state to be subject to suit in its own state courts without that state's consent.²⁴⁴ Just as the Eleventh Amendment prohibits Congress from forcing a state to accept suit in federal court, the structure of the Constitution (rather than any explicit language) prevents Congress from forcing a state to accept suit in its own court system.²⁴⁵

This decision marks the first time that the Court has so held. However, in reaching this conclusion so late in our constitutional history, the Court did not overturn any precedent. The decision of Congress to enact statutes that expressly subject the states to private damage suits (thus enlisting the aid of any citizen as a private attorney general) is a relatively recent phenomenon and thus the federal case law in this area is also relatively recent.²⁴⁶

During the 1999-2000 term, the Court reaffirmed that Section 5 of the Fourteenth Amendment—while a potent tool—does not give Congress *carte blanche*. In *United States v. Morrison*, discussed in more detail above, the Court held that Section 5 did not authorize Congress to enact those provisions of the Violence Against Women Act,²⁴⁷ which provided a private federal tort remedy for "gender-motivated violence."²⁴⁸ Section 5 did not validate this law because Section 5 requires

239. 527 U.S. 666, 675-76 (1999).

240. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

241. *College Savings Bank*, 527 U.S. at 680-81.

242. *Id.* at 691. In addition, the Court concluded that Congress could not abrogate Florida's immunity from suit in federal court because one's right to be free from a competitor's false advertising is not "property" for purposes of the Fourteenth Amendment. *Id.* at 675.

243. 527 U.S. 706 (1999). See Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J. L. & PUB. POL'Y 324, 366 (2000).

244. *Alden*, 527 U.S. at 754.

245. *Id.* To conclude that Congress does not have the authority to force states to be sued in their own state courts does not necessarily mean that states have complete sovereign immunity; in the appropriate circumstances, the Due Process Clause of the Fourteenth Amendment should come into play and require a remedy in some court. *Id.* at 756.

246. Hartley, *supra* note 243, at 346.

247. 42 U.S.C. § 13981 (1994).

248. 529 U.S. 598, 601-02 (2000).

state action (or state inaction, a decision not to act), whereas the law in question—creating a tort—had nothing to do with state action.²⁴⁹

The title of the "Violence Against Women" Act²⁵⁰ is beguiling. Who, after all, could support violence? The law's appealing title might lead one to think that it offered special protections for women. However, such a conclusion is incorrect. The only reference to "women" was in the title of this section. The substantive provision of section 13981 did not use that word or any similar one.²⁵¹

Nor did this law deal with state action. It did not prohibit states from discriminating against anyone because of sex.²⁵² It offered no special protection to women.²⁵³ Instead, it offered special protection to people, without reference to sex.²⁵⁴ In effect, it authorized anyone, male or female, to pursue what looked like a common law tort remedy for assault *if* the violence was gender-motivated.²⁵⁵ The statute authorized the litigant to file his or her tort action in either a state or federal court.²⁵⁶

The majority pointed out that the Fourteenth Amendment, by its very terms, refers only to state action and Section 5 authorizes Congress to enforce that which is protected by Section 1.²⁵⁷ But the Violence Against Women Act does not proscribe discriminatory *state* action.²⁵⁸ The law is directed not at any state or state actor.²⁵⁹ Instead it is directed at private tortfeasors—individuals who have committed violent acts motivated by gender bias.²⁶⁰ The Court explained: "In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting [the victim's] assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld."²⁶¹

On the Commerce Clause issue (discussed below) this decision was, once again, five to four. However, on the Section 5 issue, it is significant that only two justices dissented. Justice Breyer, joined by Justice

249. *Morrison*, 529 U.S. at 626.

250. 42 U.S.C. § 13981 (1994).

251. *See id.* § 13981(c).

252. *See id.*

253. *See id.*

254. *Id.*

255. 42 U.S.C. § 13981(c).

256. *Id.* § 13981(e)(3).

257. *Morrison*, 529 U.S. at 622.

258. *Id.* at 625-26.

259. *Id.*

260. *Id.*

261. *Id.* at 626. The Court added: "Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States." *Morrison*, 529 U.S. at 626.

Stevens, expressed "doubt" about the majority's reasoning involving Section 5, but also said that he "need not consider Congress' authority under § 5 of the Fourteenth Amendment."²⁶² Those two justices—and there were only two on this point—asked, the following regarding the state action issue: "But why can Congress not provide a remedy against private actors?"²⁶³

These two dissenters did not actually answer their question. Instead, they merely remarked: "Despite my doubts about the majority's § 5 reasoning, I need not, and do not, answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us."²⁶⁴

This is a tepid position, to be sure; it only garnered two votes—hardly a ringing endorsement of the Section 5 argument. Section 5 was unavailing because it only authorizes Congress to enact laws protecting the rights granted by Section 1, and Section 1 requires state action. Section 13981 of the Violence Against Women Act did not deal with state action at all. It just created a close duplicate²⁶⁵ of a common law sexual assault and battery action and allowed the victim to sue in either state or federal court. State courts are state actors, but the law did not deal with state courts (except for the clause that allowed the victim to sue in state court, which was a provision that undercuts the notion that Congress believed state courts were biased against the victims—whether male or female—who brought such claims).

If Section 5 of the Fourteenth Amendment authorizes Congress to create causes of action against *private* individuals (i.e., persons who are not state actors), one wonders where federal power would end. If a pickpocket stole my wallet, could Congress make that a federal crime on the grounds that the pickpocket took my property without just compensation? Could Congress forbid abortions on the ground that Congress is expanding the protection of "life" (a right found in Section 1 of the Fourteenth Amendment)? Could Congress authorize students to choose their own public schools on the ground that it is implementing and expanding freedom of association (another Section 1 right), even if, in context, that right would interfere with court-ordered busing man-

262. *Id.* at 664 (Breyer, J., dissenting, joined by Stevens, J., on this point). Justice Souter and Justice Ginsburg joined in part I-A of this dissent, but not part II that focuses on Section 5 of the Fourteenth Amendment. *Id.* at 655.

263. *Id.* at 665 (Breyer, J., dissenting, joined by Stevens, J., on this point).

264. *Id.* at 666 (Breyer, J., dissenting, joined by Stevens, J., on this point).

265. Unlike the common law tort, the plaintiff in a section 13981 action would have to prove a gender motivated assault. See 42 U.S.C. § 13981(c). Thus, the federal tort was not quite as protective as the state tort because the federal tort required the plaintiff to establish the gender-based motivation of the attacker.

dated to eliminate *de jure* racial segregation? Could Congress forbid private religious discrimination (freedom from religious discrimination is another Section 1 protection) even if doing so interferes with religious liberty? For example, could Congress outlaw (as religious discrimination) the refusal of the Episcopal Church to hire Lutheran ministers as Episcopal priests? The Court avoids these problems by giving the most natural reading to the language of Section 5, that is, by interpreting Section 5 to authorize Congress to enforce Section 1 of the Fourteenth Amendment. Because Section 1 requires *state* action, the enforcement power is limited to state action.²⁶⁶

With this background, *Garrett* should not be a surprise. It follows naturally in the wake of the cases decided the previous term. *Garrett* is a significant decision, to be sure, but it does not break with precedent.

IV. CONCLUSION

The Framers created federalism not simply or primarily to protect the states, but to protect the people. The Court's New Federalism should not be confused with the old states' rights federalism, because the New Federalism is about freedom, not about Jim Crow laws.

I think that it is incorrect to conclude that *Morrison*, *Jones*, and *Garrett* show that the present Court is deferential to the states. On the contrary, taken in context, they show quite the opposite. During the same term that the Court decided these important federalism cases, it also invalidated a state law that intruded on the parental relationship by mandating grandparents' visitation rights.²⁶⁷ This same Court threw out state laws that interfered with federal power over international affairs,²⁶⁸ and motor vehicles.²⁶⁹ The Court upheld federal privacy laws that regulated state motor vehicle departments and placed upon them the same restrictions imposed on private parties.²⁷⁰ The Court, in short, has shown that, when it is protecting civil rights and liberties, it is willing to override state laws and regulations to meet that goal.

These "new federalism" cases do not prevent the federal government from enacting any commercial regulation that would be necessary for a central government, as even liberal commentators concede, nor do they prevent Congress from using its considerable power under the Spending Clause when it speaks clearly. Indeed, these new federalism cases do not overturn any prior case law. But the significance of these

266. 4 ROTUNDA & NOWAK, *supra* note 4, § 19.5.

267. *Troxel v. Granville*, 530 U.S. 57, 75 (2000).

268. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000).

269. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000).

270. *Reno v. Condon*, 528 U.S. 141, 143 (2000).

cases should be emphasized because they reinvigorate first principles.

Narrow majorities have decided these new Commerce Clause cases. Often when there is a string of five to four opinions, at least one justice in the majority waivers in the steadfastness with which he or she adopts the legal principle. Not so in these cases. In all of them, the five-person majority—Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas and Kennedy—acts as one.

The new Commerce Clause cases also do not undermine federal power to enforce the guarantees of equal protection, but they do guard against a central government of unlimited powers. Although the Court in *Katzenbach v. Morgan* upheld a broad congressional power under Section 5 to determine that *state* practice interferes with Fourteenth Amendment rights, it also examined the federal statute for consistency with constitutional requirements.²⁷¹ The Court's analysis in later cases confirms that federal courts will scrutinize congressional action under Section 5 in order to protect basic principles of federalism.

Some commentators and lower courts have not accepted the important limits to Congress's Section 5 power. But the recent decisions in *Flores*, *Morrison*, and *Garrett* are proof that those limits exist. These precedents herald a greater protection for the structure of the federal system and for the liberty that this structure protects. They should not be read to proclaim a federal government stripped of the powers necessary to protect suspect classes.

Granted, some people are concerned that the Court's interpretation means that Congress cannot use Section 5 of the Fourteenth Amendment to regulate private conduct and thereby "expand" civil rights. The concept of "expanding" human rights, like motherhood, apple pie, and the flag, sounds magnificent and wonderful, but it is like a knife that cuts both ways. If Congress could use such a power to expand some rights, it does so by narrowing others.

It should not be difficult to draft creative legislation that recasts a simple dilution of one right as an expansion of another. A Congress bent on limiting desegregation, for example, would not simply enact a law authorizing states to establish racially segregated schools. Instead, the law might provide—in an effort to "expand" freedom of choice—that states should establish a variety of schools and allow people to transfer to their preferred schools, even if the result of such transfers meant that some schools became discriminatorily white or black. *Flores* and its progeny prevent that result.

The federal government is one of enumerated powers. Federalism is important because it is one of the structural designs that the Framers

271. 384 U.S. 641, 646 (1966).

created to help preserve our liberty. The Commerce Clause is also important not only because it gives Congress great power, but also because it grants that power within limits.

Thus, the majority in *Morrison* embraced the important principle that Justice Black earlier articulated in *Heart of Atlanta Motel, Inc. v. United States*: "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."²⁷² In so doing, it soundly rejected Justice Souter's novel and unprecedented argument that Commerce Clause limits are nonjusticiable.

Our federal structure is as old as our Constitution, but it is not outdated because it creates a framework that disperses power and increases liberty. If people were angels we would not need a government, and if the governors were angels we would not need a Constitution. Alas, neither is true, so we need both.²⁷³

272. 379 U.S. 241, 273 (1964) (Black, J., concurring).

273. James Madison said in the *Federalist Papers* that:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST No. 51, at 337 (James Madison).