Nostalgic Federalism

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The most provocative constitutional cases of the last several terms have raised troubling challenges to what were thought to be well-settled understandings of the appropriate constitutional roles of state and federal governments.[1] For the past half-century, it has been almost a constitutional cliche that the federal government has primary responsibility for the country's legislative program and has broad authority both to regulate economic activity[2] and to articulate social norms.[3] Today, however, the Court has cast serious doubts on the scope of Congressional authority, particularly in areas that impinge on state prerogatives, and in the process has revived old questions about the appropriate federalism balance.

Read together, these cases portend a jurisprudential sea-change. Not only do they re-envision the foundations of the federal-state relationship, but they also signal a newly activist role for the courts in

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1. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

2. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (2000) (upheld in *United States v. Darby*, 312 U.S. 100 (1941)); National Labor Relations Act, 29 U.S.C. § 151 (2000); Agricultural Adjustment Act of 1938, 7 U.S.C. § 1281 (2000) (upheld in *Wickard v. Fillburn*, 317 U.S. 111 (1942)).

3. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq. (2000); Migratory Bird Treaty, 16 U.S.C. § 703, et seq. (2000); Child Support Recovery Act, 18 U.S.C. § 228 et seq. (2000).

patrolling the boundaries of federal authority.[4] Interestingly, this restructuring is not based on constitutional text, but rather on the Court's vision of "fundamental postulates implicit in the constitutional design."[5] Neither scholars[6] nor the lower courts[7] have yet resolved whether these cases simply raise the threshold that Congress must cross before it can regulate in areas of state concern, or rather fundamentally alter structural constitutional relationships, not only between federal and state authority, but also between judicial and legislative prerogatives.

We do not purport to answer that question. Indeed, if, as it appears, we are in the midst of a structural revolution, the eventual outcome may remain unsettled for some time. The deluge of

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4. The Constitution "obviously" had drawn a line between the legitimate spheres of federal and state authority. *See* DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 29 (1991). The more contentious issue involved which institution was appropriate to decide which powers belonged to the federal and which to the state governments. *Id.* at 68-73. For a defense of the courts' role in policing the boundaries of the federal/state balance, see Stephen G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 799 (1995). For the contrary view see *United States v. Morrison,* 529 U.S. 598, 694 (2000) (Souter, J., dissenting) ("the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests").

5. Alden v. Maine, 527 U.S. 706, 729 (1999).

6. With regard to the significance of *Lopez,* for example, compare Calabresi, *supra* note 4, at 752 (stating that *Lopez* "marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers") with Louis H. Pollak, *Foreword: Symposium: Reflections on* United States v. Lopez, 94 MICH. L. REV. 533, 553 (1995) (saying that "there is less in *Lopez* than meets the eye") and Robert F. Nagel, *The Future of Federalism,* 46 CASE W. RES. L. REV. 643, 661 (suggesting that *Lopez,* properly understood, "recede[s] into relative insignificance"). With regard to *Boerne,* compare, for example, Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, (1998) (depicting *Boerne* as attacking "the core of the constitutional structure for protecting liberty") with, for example, Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right - Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 816-17 (1998) (suggesting that *Boerne* merely reflects the Court's response to congressional over-reaching).

7. *See, e.g.,* United States v. Gregg, 226 F.3d 253, 268-71 (3d Cir. 2000) (Weis, J., dissenting) (arguing that *United States v. Morrison* requires invalidation of the Freedom of Access to Clinic Entrances Act as exceeding Commerce Clause authority); Holman v. Indiana, 211 F.3d 399, 402 n.2 (7th Cir. 2000) (questioning whether the Equal Pay Act is a valid exercise of Congress' Fourteenth Amendment powers); West v. Anne Arundel County, 137 F.3d 752, 757-60 (4th Cir. 1998) (questioning whether the Fair Labor Standards Act can be applied to county public safety employees in light of the Court's recent Tenth Amendment cases); ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996) (holding provisions of the Lead Contamination Control Act violate Tenth Amendment limits); William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts,* 25 J. COLL. & UNIV. L. 501, 505-06 (canvassing conflicting case law).

inconsistent opinions from the lower federal courts[8] and the continuing array of cases on the Court's docket[9] leave no certainties except for the fact of upheaval. In any case, we are primarily interested, not in doctrinal prediction, but in exploring the yearnings that lie beneath the Court's attempts to set constitutional limits to the contemporary dominance of the federal voice and to carve out a meaningful constitutional role for the states. In particular, we suspect that the recent cases can best be understood as a reprise of the themes previously enunciated in *National League of Cities v. Usery*[10] and its progeny.[11] These decisions were motivated by concerns that the balance of the federal-state relationship had gone awry and that the political process could no longer be trusted to restore it. Today, as then, the Court looks backwards to what it perceives as the constitutional symmetry of nineteenth century notions of federalism, where state and federal governments each occupied separate and distinct "spheres" of regulatory authority.[12] Both then and now, the

8. For example, compare *Litman v. George Mason Univ.*, 5 F. Supp. 2d 366, 373-74 (E.D. Va. 1998) (finding Title IX an invalid exercise of Congress' powers under section five of the Fourteenth Amendment), *aff'd on other grounds*, 186 F.3d 544 (4th Cir. 1999), with *Franks v. Kentucky School for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (finding Title IX a valid exercise of section five).

9. On top of the spate of significant federalism cases addressed during the 1999 Term, the Court again has several important cases on its current docket. The Court has already heard oral arguments about whether the Americans with Disabilities Act validly abrogates state sovereign immunity. *See* Garrett v. University of Alabama Bd. of Trustees, 193 F.3d 1214 (llth Cir. 1999), *cert. granted in part*, 529 U.S. 1065 (2000). Moreover, the Court reversed, on statutory grounds, the Seventh Circuit's holding that the U.S. Army Corps of Engineers' assertion of control under the Clean Water Act over intrastate waters serving as a habitat for migratory birds was a valid exercise of Commerce Clause authority. *See* Solid Waste Agency, Inc. v. United States Army Corps of Engineers, 121 U.S. 675 (2001).

10. 426 U.S. 833 (1976) (holding that the Commerce Clause did not empower Congress to apply the Fair Labor Standards Act to the states).

11. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining Assoc., 452 U.S. 264 (1981).

12. Chief Justice Taney's language in a slavery case, *Abelman v. Booth*, 62 U.S. (21 How.) 506, 516 (1859), is often cited as the apothegm of this dual federalism jurisprudence "[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."

Abelman exemplified the notion that the slavery debate was more about federalism than about human rights. Eleven years later, Taney used almost identical language in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 126 (1870), upholding the right of a state probate judge to refuse to pay a federal income tax. For an interesting discussion of the contradictions in Taney's theories of federalism, see Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 847-52 (1998).

Court's discomfort with federal aggrandizement draws it toward a federalism that is more nostalgic than responsive to today's realities, and which ultimately may prove unable to sustain the constitutional pressures that the Court places upon it.

In Part I, we discuss the four major threads of case law that comprise the Court's recent federalism opus and suggest that each of them rests on the same idealized vision of how governmental responsibilities should be (re)allocated. In Part II, we ask how apocalyptic this new jurisprudence really is—by exploring how much the existing case law has changed, and what further changes the Court's vision portends. Finally, in Part III, we speculate about the practical and institutional viability of the Court's emerging direction, and suggest that the Court's nostalgic reliance on the metaphysics of nineteenth century federalism is doomed to collapse under the weight of twenty-first century realities.

I. Federalism Revived

A. The Cases

The story begins in its most natural place, with the constitutional locus of state power, the Tenth Amendment.[13] Before the Court's decision in *New York v. United States*,[14] the Tenth Amendment was widely agreed to be a truism,[15] simply memorializing the understanding that those powers not delegated to the federal government were preserved to the States.[16] However, in *New York*,

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The corollary to separate spheres of institutional responsibility was the notion of separate spheres of citizenship, of which *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), was the most heinous example. Even today, of course, one is both a citizen of the United States and of the state where she resides. *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999) (invalidating a California welfare law providing lesser benefits for newly arrived residents as interfering with the new arrival's status both as a state citizen and as a citizen of the United States).

13. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

14. 505 U.S. 144 (1992) (holding that the Tenth Amendment barred congressional commandeering of state authority in the Low-Level Radioactive Waste Policy Amendments Act).

15. In Justice Stone's famous words: "The amendment states but a truism that all is retained that has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). *Cf.* New York v. United States, 505 U.S. at 156-57 (holding that the Tenth Amendment is "essentially a tautology").

16. This tautological view of the Tenth Amendment was briefly brought into question some twenty years earlier by *National League of Cities v. Usery*, 426 U.S. 833 (1976)

the Court found within the Tenth Amendment a constitutional limit on federal power, specifically precluding Congress from "commandeering" the legislative authority of the states.[17] A few years later, the Court reinforced this reading in *Printz v. United States,* ruling that certain interim provisions of the Brady Handgun Violence Prevention Act unconstitutionally "dragooned" state law enforcement officials into the administration of a federal regulatory program.[18]

The next thread, arising from the holding of *United States v. Lopez*[19] that the Commerce Clause[20] itself imposes limits on congressional authority, represents a more dramatic, unexpected, and ultimately far-reaching judicial initiative. At least since the New Deal,[21] the plenary nature[22] of Commerce Clause authority has been virtually indisputable.[23] But in striking down a law as prosaic as the

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(holding that Commerce Clause did not empower Congress to enforce the Fair Labor Standards Act against the states).

17. 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977 because it did not "commandeer" state mining regulation)). One commentator has suggested that *New York* is a "symbiotic reading" of the Commerce Clause and the Tenth Amendment, where the two together achieve "what the Tenth Amendment alone could not." Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formulator for the Future,* 47 VAND. L. Rev. 1563, 1581 (1994).

18. 521 U.S. 898, 928 (1997).

19. 514 U.S. 549 (1995).

20. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce . . . among the several States.").

21. The Court essentially ceased using principles of federalism to strike Commerce Clause legislation in 1937. *See* William Marshall, *American Political Culture and the Failures of Process Federalism,* 22 HARV. J.L. & PUB. POL'Y 139, 140 n.7 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935 on grounds that Commerce Clause can be broadly used to protect interests of interstate commerce)).

22. The notion that congressional power over commerce is plenary actually long predates the New Deal. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824):

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Cf. United States v. Lopez, 514 U.S. at 609 ("The commerce power, we have often observed, is plenary.").

23. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (holding that the Civil Rights Act of 1964 which prohibited racial discrimination in hotel lodging was a valid exercise of Commerce Clause authority); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding application of the Agricultural Adjustment Act to the decisions of a

Gun Free School Zones Act, the *Lopez* Court deviated not only from this well-settled doctrine but also from its own rhetoric of restraint.[24]

The third line of cases, those involving state sovereign immunity, resonates with similar themes. In *Seminole Tribe v. Florida*,[25] the Court again departed from precedent[26] to rule that the Commerce Clause was no longer a valid source of authority for legislation allowing states to be sued in federal court. *Alden v. Maine* foreclosed the state court option as well, upholding the right of states not to be sued in their own courts for violations of federal law as "a fundamental aspect" of their pre-constitutional sovereignty.[27] To be sure, *Seminole Tribe* was limited to Congress' authority to abrogate state immunity when it was acting under its Article I powers, specifically preserving federal power under the Fourteenth Amendment "to intrude upon the province of the Eleventh Amendment."[28] That limitation may have suggested that *Seminole Tribe* was nothing more than a post-*Lopez* alignment of the Commerce Clause with the Eleventh Amendment.[29] However, *Alden*

single farmer producing wheat to meet his own needs as falling within Congress' power to regulate commerce); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act and holding that Commerce Clause authority extended to intrastate activities which substantially affect interstate commerce).

24. *See, e.g.*, North Dakota v. United States, 495 U.S. 423, 435 (1986) (deferring to "the primary role of Congress in resolving conflicts between National and State Governments"); Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 546 (1985) (cautioning against open-ended role for "unelected federal judiciary to make decisions").

25. 517 U.S. 44 (1996) (holding that Congress lacked authority under the Commerce Clause to abrogate the states' sovereign immunity in the Indian Gaming Regulatory Act).

26. *Seminole Tribe* expressly overruled the Court's eight-year old decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), notwithstanding the Court's asserted disinclination to repudiate its recent precedents. *See* Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996). *See also* Runyon v. McCrary, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring) (cataloguing interests that counsel against rushing to overrule recent precedent); Casey v. Planned Parenthood of S.E. Pennsylvania, 505 U.S. 833, 864-69 (1992) (discussing how overruling a decision as recent as *Roe* would undermine the legitimacy of the Court). Note that *Union Gas* was presaged by *Parden v. Terminal Railway*, 377 U.S. 184 (1964), which itself was specifically overruled in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999), as an "ill-conceived" experiment.

27. Alden v. Maine, 527 U.S. 706, 713 (1999) (holding that Congress could not abrogate a state's sovereign immunity in its own courts to enforce the Fair Labor Standards Act because "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution").

28. *Seminole*, 517 U.S. at 59.

29. U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

and its companion cases[30] belie that narrow reading.[31] A direct outgrowth of *New York* and *Printz, Alden* warns of the danger in the "power to press a state's own courts into Federal service and ultimately to commandeer the entire political machinery of the state against its will."[32] *Alden* and its companions and successors strongly suggest that the abrogation issue is secondary to the Court's real agenda, the resurrection of state autonomy.[33]

The last chapter in the story involves Section Five of the Fourteenth Amendment, hitherto a little used congressional power,[34] but one nonetheless significantly constrained in *City of Boerne v. Flores*[35] and in *Kimel v. Florida Board of Regents.*[36] *Boerne* struck down the Religious Freedom Restoration Act (RFRA),[37] a statute passed in response to the Court's holding in *Employment Division v. Smith* that neutral laws of general application which have an incidental effect on the free exercise of religion do not violate the

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the United States by citizens of another state, or by citizens or subjects of any foreign state.").

30. *See* College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999) (holding that Florida's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act nor voluntarily waived by the state's activities in interstate commerce); Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (holding that neither Commerce Clause nor Patent Clause provided Congress with authority to abrogate state sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act).

31. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act's clear intent to abrogate states' sovereign immunity was ineffective because the ADEA could not be sustained as an exercise of Congress' authority under Section Five of the Fourteenth Amendment), strongly reinforces *Alden*'s broader approach.

32. 527 U.S. at 749.

33. *See, e.g., Alden,* 527 U.S. at 713 (state immunity is "a fundamental aspect of... sovereignty"); *College Savings Bank,* 527 U.S. at 686 ("sovereign immunity... is a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends"); *Kimel,* 528 U.S. at 78-81 (sovereign immunity "exists today by [the] constitutional design" of federalism).

34. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. After a brief period of activity soon after the Civil War Amendments were ratified, Congress did not expressly exercise its Fourteenth Amendment enforcement power again until the Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000). The opinions on the constitutionality of that statute ushered in the modern era of case law about congressional power under the Civil War Amendments. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 920-64 (3d ed. 1999).

35. 521 U.S. 507 (1997).

36. 528 U.S. 62 (2000).

37. *Boerne,* 521 U.S. 507.

First Amendment even in the absence of a compelling state interest.[38] RFRA reimposed the *pre-Smith* "compelling state interest furthered by least restrictive means" standard.[39] The *Boerne* Court held that Congress exceeded its Section Five power because RFRA did not comport with the requirement of "congruence and proportionality" between remedies enacted by Congress under Section Five and state violations of Section One of the Fourteenth Amendment.[40]

Boerne's distinction between impermissible substantive and permissible remedial legislation echoes the infamous *Civil Rights Cases*,[41] and raises major impediments not only to congressional authority to abdicate state sovereign immunity under Section Five but also to federal legislative authority generally. Despite *Boerne*'s explicit recognition of Congress' "wide latitude"[42] to enact appropriate prophylactic legislation, the *Kimel* Court held that Congress lacked the power under the Fourteenth Amendment to apply the Age Discrimination in Employment Act to the states.[43] The Court, relying on its previous holdings that age was not a suspect classification for purposes of the Equal Protection Clause, barred any federal legislation that prohibited more state conduct "than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[44] Thus, perhaps the most augural import of *Boerne* and *Kimel* is the Court's insistence on the limited nature of Congress' legislative discretion and the importance of the judiciary as the ultimate guardian of "separation of powers and the federal balance."[45]

B. The Message – *Usery* Redux

Doctrinal niceties aside, all these cases clearly are grappling with the same issues which have always been at the core of constitutional inquiry, federalism, and separation of powers. But the particular analyses the Court deploys are often surprising and perplexing. Our

38. 494 U.S. 872, 878 (1990).

39. Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb-1.

40. 521 U.S. at 520.

41. Civil Rights Cases, 109 U.S. 3 (1883). The echo becomes tantamount to a holding in *United States v. Morrison*, 529 U.S. 598 (2000).

42. *Boerne*, 521 U.S. at 520.

43. *Kimel*, 528 U.S. at 91.

44. *Id.* at 647.

45. *Boerne*, 521 U.S. at 536.

project is to decipher the yearnings which underlie these doctrinal calculi, which we suggest are impelled by a nostalgia for a simpler era in which federal authority was naturally contained within clear constitutional boundaries.[46]

The Tenth Amendment cases represent cautious first steps on this journey into the past. We use the word "cautious" advisedly. The Tenth Amendment does at least contain the word "States,"[47] and, over the years, there has been lively doctrinal and scholarly debate about the amendment's scope and meaning.[48] In the wake of the Court's most recent failure in *National League of Cities* v. *Usery*[49] and its progeny[50] to create a robust Tenth Amendment jurisprudence that could carve out constitutionally significant spheres of state autonomy, *New York* and *Printz* propound a far more modest and circumscribed doctrine.[51] Rather than returning to an effort to sort out constitutional roles according to the subject being regulated,[52] *New*

46. *See, e.g.*, MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 17 (1992) ("Nineteenth-century political thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena."); FOREST MCDONALD, NOVOS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 278 (1985) (describing the view that the newly formed United States involved divided sovereignties, and that specific powers could be assigned to each).

47. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Professor Powell points out that to Thomas Jefferson the Tenth Amendment was the "foundation" of the Constitution, reflecting his "fundamental suspicion of national power." H. Jefferson Powell, *Essay: The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 724 (1994).

48. *See, e.g.*, Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 1033-52 (1982); Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. Rev. 1657 (1987); TRIBE, *supra* note 34, at 860-94.

49. 426 U.S. 833 (1976).

50. *See* EEOC v. Wyoming, 460 U.S. 226 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining Assoc., 452 U.S. 264 (1981).

51. The foundations of this more moderate Tenth Amendment doctrine were laid in *Gregory v. Ashcroft*, 501 U.S. 452, 463-64 (1991) (finding that the Age Discrimination in Employment Act did not apply to appointed state court judges absent a plain statement of congressional intent to intrude on state authority over selection of "most important officials") and *FERC v. Mississippi*, 456 U.S. 742, 762-65 (1982) (finding that Public Utility Policies Act did not violate the Tenth Amendment, because insofar as Congress required states to "consider" federal standards, it did not require states actually to adopt federal law).

52. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), marked the Court's first attempt to sort out the implications of Chief Justice Marshall's distinction in *Gibbons*

York and *Printz* merely invalidate congressional efforts to "impress" the organs of state government into federal service.[53]

The constraints these cases impose are relatively unproblematic. They limit the ways that Congress can pursue its ends, not the ends it can pursue.[54] But while *New York* and *Printz* do not propound significant shifts in the state-federal balance, we shouldn't underestimate the seriousness of the signals these cases send. After all, the distinction between the constitutional and unconstitutional regulatory incentives in *New York* is somewhat evanescent,[55] and yet Justice O'Connor seizes the opportunity to write a lengthy disquisition on federalism.[56] Additionally, the portions of the Brady Act considered in *Printz* were nearly extinct by the time of the Court's decision,[57] yet Justice Scalia embraces the occasion to lecture

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v. Ogden, 22 U.S. (9 Wheat.) 1, 208-10 (1824) between the commerce power and the subject to which it is being applied. The *Cooley* rule assigned Congress the power to regulate those areas requiring a uniform national rule, leaving the states free to regulate those subjects benefiting from a more diverse treatment. By the late nineteenth century, however, the Court had turned to a more formal approach. *See, e.g.*, United States v. Morrison, 529 U.S. at 598 (2000) (Souter, J., dissenting) (bemoaning the majority's return to this analysis). *Cf.* United States v. Lopez, 514 U.S. 549, 569-71 (1995) (Kennedy, J., concurring) (describing the demise of this approach); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (distinguishing between mining and commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (similar); Kidd v. Pearson, 128 U.S. 1 (1888) (distinguishing between manufacturing and commerce).

53. Printz v. United States, 521 U.S. 898, 922, 928 (1997) (holding that federal government cannot "impress" state law enforcement officers into filling federal law enforcement roles). The limitations on the Court's use of the Tenth Amendment are underscored by its summary refusal to apply *New York* and *Printz* to invalidate the Driver's Privacy Protection Act's restriction of a state's ability to disclose personal information without the driver's consent. *See* Reno v. Condon, 528 U.S. 141, 150 (2000). Historically, to "impress" means to "levy or provide (a force) for military or naval service," specifically to "compel men to serve in the Army or especially the Navy ." VII OXFORD ENGLISH DICTIONARY 740 (2d ed. 1989). "Dragoon," the other memorable verb in *Printz, see* 521 U.S. at 928, also has military origins: a "dragoon" is a carbine or musket or a mounted infantryman; hence, as a verb, it means to persecute or oppress or "force into a course of action by rigorous or harassing measures." *Id.* at 1014.

54. *Cf.* New York v. United States, 505 U.S. 144, 210 (1992) (White, J., dissenting) (suggesting that the Court's decision would force Congress to clear "several additional formalistic hurdles . . . before achieving exactly the same objective").

55. Justices O'Connor and White are both advocates of state sovereignty. At bottom, therefore, their debate in *New York* is really about how to best respect that sovereignty: by Congressional ratification of collective state agreements (White) or by forbidding federal directives to state officials (O'Connor). Professor Powell characterizes Justice O'Connor's federalism as "one of process, not of substance." H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 658 (1993).

56. 505 U.S. at 182-83 (offering the reader an "understanding of the fundamental purpose served by our Government's federal structure").

57. *See Printz*, 521 U.S. at 902-03. The provisions invalidated by the Court's 1997

about the dangers of federal aggrandizement.[58] Still, the chief mystery of these Tenth Amendment cases is not the new ground the Court is breaking, but rather how cautiously the Court makes use of what would appear to be the most available tool for its new federalism agenda.[59]

In *Lopez,* the scope of the Court's mission becomes clearer. By denying congressional authority to enact a run-of-the-mill statute criminalizing possession of guns in the vicinity of a school, the Court takes a sharp turn away from half a century's settled understanding of the scope of the Commerce Clause.[60] Although the Court goes to considerable lengths to disclaim any departure from its precedents,[61] *Lopez* (and its reaffirmation in *United States* v. *Morrison*) must be read as a direct analytic attack on federal legislative authority.

At the heart of this assault is *Lopez's* oft repeated mantra that a Constitution of enumerated powers "presupposes something not enumerated."[62] From this premise, the Court sets out to define concrete limits on the scope of "commerce," an enterprise the Court had deferred to Congress for many decades. In the face of precedents that forcefully demonstrate to the Court how fruitless such line drawing had proven in the past, what now leads the Court back to such a thankless task?

Justice Rehnquist's opinion answers that question with the assertion that the Commerce Clause only warrants congressional

decision were interim procedures, which were to lapse in 1998, when the Brady Act's federal instant background check system was to become operative. *See* Pub. L. 103-59 as amended, Pub. L. 103-322, 103 Stat. 2074.

58. *See, e.g.,* 521 U.S. at 918-25, 931-33. Professor Hills questions the validity of the historic foundations the Court enshrined in *New York* and *Printz,* arguing that the tradition that Congress cannot impress state officials to do its bidding is based on the Court's nationalistic contempt for state officials as untrustworthy and incompetent to carry out federal responsibilities, and thus the support it offers for modern theories of state autonomy is "deeply paradoxical." Hills, *supra* note 12 at 862, 878-94 (quote is at 888).

59. The Court's unanimous refusal in *Reno* v. *Condon,* 120 U.S. 666 (2000) to find a Tenth Amendment violation only deepens the mystery .

60. *See, e.g., United States v. Lopez,* 514 U.S. 549, 625 (1995) (Breyer, J., dissenting) ("[T]he majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence."); *id.* at 608 (Souter, J., dissenting) (criticizing the "inconsistency of [the majority's approach] with our rational basis precedents from the last 50 years").

61. *See, e.g., Lopez,* 514 U.S. at 560-61 (distinguishing facts of *Lopez* from those in *Wickard v. Filburn,* 317 U.S. 111 (1942)); *id.* at 574 (Kennedy, J., concurring) (emphasizing that the Court's modern precedents "are not called in question by our decision").

62. *Id.* at 553, 566-67 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

action in matters which "substantially affect" interstate commerce.[63] But this assertion itself arises as a conclusory pronouncement[64] that fits poorly with the constitutional history that Rehnquist's opinion laboriously recounts. Perhaps what drives the Court is better revealed by a recurring motif to which Rehnquist turns each time the argument seems to be leading back to the Court's characteristic deference to Congress. After describing the New Deal's Commerce Clause revolution, the opinion concludes with *Jones & Laughlin's* caution not to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[65] A bit later, it raises the spectre of extending federal authority "in areas such as criminal law enforcement or education where States historically have been sovereign."[66] The opinion concludes with the warning that a contrary approach "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local."[67]

The concern that resonates throughout *Lopez* is that, without limits on congressional authority, federal power threatens to overwhelm the significant constitutional role reserved for the states.[68] To the extent some may have thought *Lopez* a mere flash in the pan, *United States v. Morrison*[69] confirms the Court's determination to

63. *Id.* at 559.

64. The entire explanation offered by the Court follows:

> Within this final category admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare Preseault v. ICC, 494 U .S. 1, 17 (1990), with Wirtz, 392 U.S.183, 196, n. 27 (1968) (finding that the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Id.

65. *Lopez,* 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

66. *Id.* at 564.

67. *Id.* at 567-68 (citations omitted).

68. These same concerns are prominent in Justice Kennedy's concurring opinion, joined by Justice O'Connor, *see* 514 U.S. at 580, and animate Justice Rehnquist's majority opinion in *United States v. Morrison,* 529 U.S. 598 (2000).

69. 529 U.S. 598 (2000) (holding that the Violence Against Women Act exceeded the reach of congressional power under the Commerce Clause).

delimit federal authority. The Court's burden is to demarcate and patrol the boundary between state and federal realms in order to maintain the proper constitutional balance.[70] A constrained interpretation of Commerce Clause authority is simply a necessary element in that enterprise.

In essence, this is the same project on which the Court had embarked twenty years earlier in *Usery*.[71] In *Usery,* the Court struck down amendments to the Fair Labor Standards Act (FLSA) that had extended federal minimum wage and maximum hour provisions to state and municipal employees.[72] There, the Court acknowledged that the FLSA regulations were "undoubtedly within the scope" of the commerce power,[73] but congressional exercise of that power had unconstitutionally interfered with the integrity of the states and their "ability to function effectively in a federal system."[74] In other words, the fatal constitutional flaw was not that the wages and hours of state employees failed to affect interstate commerce, but rather that wage and hour determinations with respect to those employees were so "essential"[75] to state sovereignty that they were beyond the reach of federal regulatory authority.[76]

In *Usery,* the Court used a concept of state sovereignty grounded in the Tenth Amendment as its primary tool, and therefore saw its primary task as the delineation of the contours of state autonomy.[77] By contrast, in *Lopez,* the focus has shifted to narrowing the definition of "enumerated" federal powers. But the basic ambition is the same - to etch sharp boundaries between federal and state spheres of authority. Our suggestion is that the Court's recent federalism

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70. *Lopez,* 514 U.S. at 564-67. Ironically, the Court cites *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), as authority for the proposition that the Court's task is to limit congressional authority to the powers enumerated in Article I.

71. 426 U.S. 833 (1976).

72. *Id.*

73. *Id.* at 841.

74. *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).

75. *Id.* at 845.

76. By so ruling, the *Usery* Court overruled the part of *Maryland v. Wirtz,* 392 U.S. 183 (1968), which had upheld the extension of the FLSA to employees of state hospitals, schools and institutions. *Usery,* 426 U.S. at 840. *See also, id.* at 845 ("We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.")

77. *See id.* at 844 (holding that the Court's role is to define "the essential role of the states in our federal system of government").

cases, of which *Lopez* was the harbinger, represent a return to the seductive challenge, first unveiled in *Usery,* of realigning federalism by rediscovering the independent sovereign power of the states.

The central vision underlying all these cases depicts state and federal sovereignty as occupying distinct and discrete spheres, a vision that had its heyday in the late nineteenth century. Indeed, when the *Usery* Court sought precedential support for this paradigm, it resuscitated a trio of antique cases that had languished in doctrinal and rhetorical obscurity.[78] *Texas* v. *White,* the primary case the *Usery* Court revived, involved the rights of non-Texans to collect on federal bonds misused by the rebel government of Texas during the Civil War.[79] In deciding whether Texas could sue in federal court for the return of the bonds, the Court had to consider whether Texas had ceased being a state when it had seceded in January 1861. Holding that it had not, the Court invoked the "perpetuity and indissolubility of the Union [which] by no means implies the loss of distinct and individual existence, or of the right of self-government by the States."[80] In other words, the Constitution confers equal sovereignty on the states and the national government: "[T]he Constitution, in all its provisions looks to an indestructible Union, composed of indestructible States."[81] *Usery* turns back to this quaint language from

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78. *See id.* at 844, (citing Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926)); Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868); Texas v. White, 74 U.S. (7 Wall.) 700 (1868). Justice Rehnquist's opinion seemed to place more importance on the federal law's interference with state sovereignty than on the allegations that compliance would significantly increase state costs. *See Usery,* 426 U.S. at 851. As Professor Tribe points out, Justice Rehnquist was "careful to avoid" basing his opinion on this type of empirical data. TRIBE, *supra* note 34, at 866 n.41.

79. 74 U.S. (7 Wall.) 700 (1868). Historians Forest and Ellen McDonald tell the story this way: Congressional radicals retreated from their position that the states which had seceded be treated as "conquered provinces." In exchange for the votes of those states to ratify the Fourteenth Amendment, they agreed that the Southern states had never left the Union, an agreement confirmed by the Court in *Texas v. White,* despite the earlier unchallenged creation of West Virginia in 1863, which had "dismembered" Virginia. FOREST MCDONALD AND ELLEN SHAPIRO MCDONALD, REQUIEM: VARIATIONS ON EIGHTEENTH-CENTURY THEMES 200 (1988).

80. *Texas,* 74 U.S. at 725. The Court went on to explain:

> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.

81. *Id. Accord* Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) ("[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers"); Lane County v. Oregon, 74 U.S. 71, 76 (1868) ("[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the

the *ancien regime* to reassert the constitutional centrality of state autonomy, and the Court's more recent federalism cases have referenced it repeatedly.[82] Underlying the Court's contemporary efforts to set limits to what it sees as federal over-reaching is a wistful longing for a simpler world where state and federal roles are readily distinguished and clearly respected.

Naturally, the *Usery* Court started this effort with the Tenth Amendment. But the Tenth Amendment proved an unsatisfactory construct for delineating when congressional regulatory authority trampled upon the sovereign integrity of the states. As every constitutional law student now knows, the decade-long attempt to craft the particular contours of the essence of state sovereignty did not succeed.[83] As the Court ultimately acknowledged in *Garcia v. San*

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independent authority of the States, is distinctly recognized.").

82. The Court had cited to *Texas v. White* with some frequency until 1937. *See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548, 598 (1937); Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936). Thereafter, up until *Usery*, the majority of the Court cited *White* only infrequently, and not for its notions of federalism. *See* United States v. Louisiana, 363 U.S. 121, 132 (1960) (citing *White* as part of a history of reconstruction era constitutional evolution); Baker v. Carr, 369 U.S. 186, 226 (1962) (citing *White* on the issue of state standing); CaleroToledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 672 (1974) (quoting a lower court opinion citing *White* in assessing the status of Puerto Rico). Following *Usery*, the Court has cited *Texas v. White* repeatedly in its federalism cases. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742, 777 (1982); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898, 919 (1997).

The chronology is similar with respect to *Lane County v. Oregon*. Before *Usery*, the Court had not cited this case since 1938. Following *Usery*, the Court cited *Lane* in *Monell v. Department of Social Services*, 436 U.S. 658, 676 n.32 (1978), *FERC v. Mississippi*, 456 U.S. 742, 765 (1982), *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548 (1985). After *Garcia*, *Lane* has continued to appear in, for example, *Gregory v. Ashcroft*, 501 U.S. at 457; *New York v. United States*, 505 U.S. 144, 156 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

83. In the years following *Usery*, the Court struggled with defining what areas are "traditional" state functions, and what areas can be regulated by federal law. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226 (1983) (holding the Age Discrimination in Employment Act applicable to states because states could work around several exceptions); FERC v. Mississippi, 456 U.S. 742 (1982) (holding that the federal requirement that state utility commissions adopt federal rules regarding energy regulation does not intrude on state regulation where Congress could have simply preempted state law); United Transportation Union v. Long Island Railroad, Co., 455 U.S. 678 (1982) (holding that commuter rail service provided by a state-owned railroad was not a traditional state governmental function shielded from federal regulation); Hodel v. Virginia Surface Mining Ass'n., 452 U.S. 264 (1981) (holding that federal regulation of strip-mining did not interfere with state's interest in land use planning).

Despite the Court's efforts to clarify such key concepts as whether "particular governmental functions [were] 'integral' or 'traditional'" to states, *Garcia v. San Antonio*

Antonio Metropolitan Transit Authority,[84] the *Usery* formulation that "States *qua* States"[85] were immune from federal regulation was "unsound in principle and unworkable in practice."[86]

Still, as an attempt to reassert the Court's primacy in making constitutional sense of a world run amok and in resurrecting the notion of a sacrosanct state sphere, *Usery* marked a critical turning point. *Garcia* was widely viewed as a rejection of these ambitions,[87] but in retrospect it was but a tactical retreat.[88] As Justice Rehnquist observed in his dissent, the constitutional protection of a sphere of state autonomy was "a principle that will, I am confident, in time again command the support of a majority of this Court."[89]

It was the Court's inability to reduce the metaphysical notion of "States as States" to accessible doctrine which ultimately led in *Lopez*

Metropolitan Transit Authority, 469 U.S. 528, 547 (1985), the circuit courts' efforts to apply these concepts underscored their problematic character. Regulation of ambulatory services, licensing of drivers, and operation of municipal airports were all held to be traditional state functions by various Circuits, while regulation of traffic on public roads, operation of mental health facilities and provision of in-home domestic services to aged and handicapped persons were held to fall outside of the protection created by *Usery. See generally id.* at 538 (reviewing circuit court cases).

84. 469 U.S. 528 (1985).

85. *Usery,* 426 U.S. at 847 (1976).

86. *Garcia,* 469 U.S. at 546-47. *See also id.* at 567 (characterizing *Usery's* approach as "impracticable and doctrinally barren").

87. *See, e.g.*, Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine,* 99 HARV. L. REV. 84 (1985); Bernard Schwartz, National League of Cities *Again—R.I.P. or a Ghost That Still Walks,* 54 FORDHAM L. REV. 141 (1985); Thomas H. Odom, *The Tenth Amendment After* Garcia: *Process-Based Procedural Protections,* 135 U. PA. L. REV. 1657 (1987).

88. Our point is this: Although *Garcia* overruled *Usery* doctrinally, it did not end the debate over whether the federal political process sufficiently safeguarded the states or whether judicial intervention was needed to do so. Writing for the majority in *Garcia,* Justice Blackmun lauded the efficacy of the political process in shielding the states from unduly burdensome federal legislation: "[T]he model of democratic decision making the *[Usery]* Court . . . identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States." *Garcia,* 469 U.S. at 556. For a succinct analysis of the "process model" of federalism, see Deborah Jones Merritt, *supra* note 17 at 1567. *Compare* Hills, *supra* note 12 at 820 (characterizing political process theories as theories of judicial review, not federalism). Dissenting, Justice Powell charged the majority with ignoring its constitutional responsibilities: "The fact that Congress generally does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so." *Garcia,* 469 U.S. at 556. With equal passion in his *Usery* dissent, Justice Brennan accused the majority of usurping the legislative role, labeling its opinion "a transparent cover for invalidating a congressional judgment with which they disagree." *Usery,* 426 U.S. at 867.

89. *Garcia,* 469 U.S. at 580.

to the other side of the federal-state equation. The enumeration of congressional powers in Article I provides the alternative vehicle upon which to predicate judicially enforceable boundaries to what the Court fears is becoming boundless federal authority.[90] Undoubtedly, it is the sorry history of the Court's struggles to spell out *Usery's* premise that informs the Court's cautious approach to the Tenth Amendment in its more recent case law.[91]

The sovereign immunity cases resonate with identical themes. Indeed, Justice Kennedy commands in *Alden* that Congress "accord the states the esteem due them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central government and the separate States."[92]

It is not our purpose to plumb the depths of the often impenetrable complexities of Eleventh Amendment jurisprudence and sovereign immunity doctrine.[93] Instead, we want to suggest that *Seminole Tribe,*[94] *Alden,*[95] and their companions[96] are more properly understood as part of the Court's newly revived effort to patrol the boundaries between state and federal roles. *Seminole Tribe,* when it first appeared, seemed nothing more than a new wrinkle on the Court's tortuous Eleventh Amendment exercise,[97] clarifying that

90. While the Commerce Clause is, of course, only one source of federal legislative authority, alongside, *inter alia*, the Spending Clause and Section Five of the Fourteenth Amendment, it has been perhaps the most versatile source of post-New Deal federal authority, and the one least restrained by the case law. Prior to *Lopez,* the Court had not struck down a single law as exceeding Commerce Clause authority in over fifty years. *See* Marshall, *supra* note 21, at 139-40.

91. For the most recent and clearest example of the Court's caution in deploying Tenth Amendment restrictions on congressional enactments, see *Reno v. Condon,* 528 U.S. 141 (2000). Despite its restrained use of Tenth Amendment analysis, the Court's rhetoric in its Tenth Amendment cases still echoes the same themes, as when Justice Scalia excoriates Congress for interfering with "our constitutional system of dual sovereignty" in *Printz,* 521 U.S. 898, 935 (1997).

92. Alden v. Maine, 527 U.S. 706, 758 (1989).

93. *See, e.g.*, David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997); William Burnham, *"Beam Me Up, There's No Intelligent Life Here?": A Dialogue on the Eleventh Amendment with Lawyers from Mars*, 75 NEB. L. REV. 551 (1996).

94. 517 U.S. 44 (1996).

95. 527 U.S. 706 (1999).

96. *See* College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).

97. *See, e.g.*, Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 103 (1996) ("despite [its] symbolic statement to the contrary, little has

Congress, acting under its Article I powers, could not endow the federal courts with jurisdiction over suits against the states.[98] Only when viewed through the subsequent lens of *Alden* does it become clear that the Eleventh Amendment was secondary to the Court's renewed fascination with separate-spheres federalism. Indeed, the Court in *Alden* essentially dismissed the Eleventh Amendment as little more than a historical footnote to what it sees as the natural immunity of states from federal dictates.[99] In discovering this fundamental principle, the majority was singularly untroubled by the absence of any textual anchor.[100] Indeed, the tone of the majority's opinion was almost mystical in its obeisance to a vision of "dual sovereignty" in which the states are coequals of the federal power:

> The federal system . . . reserves to [the States] a substantial proportion of the Nation's primary sovereignty. . . . The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."[101]

The Court sees *Alden* as a logical outgrowth, not only of *Seminole Tribe,* but of its emerging federalism jurisprudence. Viewed in this light, it is no surprise that the majority paints its holding as of a piece with *New York* and *Printz,* characterizing the FLSA as "commandeering" the state courts in the same way that the earlier cases "impressed" the state legislative and executive branches,[102] notwithstanding the concession that Congress retains the authority, when acting under the Reconstruction Amendments, to open the state courts to federal claims.[103] Indeed, although the Court connects *Alden* to *New York* and *Printz,* its language harks back to *Usery,* with

changed after the *Seminole Tribe* decision").

98. *Seminole Tribe,* 517 U.S. at 54.

99. *Alden,* 527 U.S. at 713 ("the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment").

100. *See Alden,* 527 U.S. at 728-30; *id.* at 760-61 (Souter, J., dissenting) (noting the irrelevance of the constitutional text to the majority's opinion). *See also Kimel,* 528 U.S. at 97 (Stevens, J., dissenting) (criticizing the absence of textual support for the majority's sovereign immunity doctrine); Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges and Immunities Revival Portend the Future – or Reveal the Structure of the Present?,* 113 HARV. L. REV. 110 (1999) (noting the Court's growing reliance on "structural inference" rather than "explicit text").

101. *Alden,* 527 U.S. at 714 (quoting THE FEDERALIST No. 39 (James Madison)).

102. *Compare Alden,* 527 U.S. at 749 ("commandeer") *with* Printz v. United States, 521 U.S. 898, 922, 928 (1997) ("impress") *and* New York v. United States, 505 U.S. 144, 176 (1992) ("commandeer").

103. *Alden,* 527 U.S. at 730-32.

its invocation of the Tenth Amendment's assurances "regarding the constitutional role of the States as sovereign entities,"[104] and its citations again draw on its nineteenth century "separate spheres" opinions.[105] The crux of separate spheres federalism, after all, is that there is a clear constitutional demarcation between state and federal prerogatives[106] and that the "residuary and inviolable sovereignty"[107] of the states depends on respect for this boundary. State sovereign immunity is but a corollary to this principle.

Alden thus achieves the hoped for return to *Usery* of Chief Justice Rehnquist's *Garcia* dissent.[108] *Alden* overrules *Garcia,* practically if not doctrinally.[109] After all, the political process relied on in *Garcia* to protect the states from federal meddling had failed in *Alden.* Through the building blocks of sovereign immunity, the *Alden* Court rehabilitates the constitutional Chinese wall around the separate sphere of state autonomy.

Together, *Lopez* and the Court's sovereign immunity cases significantly constrain the reach of the federal regulatory sphere. But

104. *Id.* at 713-14.

105. *See, e.g., id.* at 723 (citing *Hans v. Louisiana,* 134 U.S. 1 (1890)); *id.* at 746 (citing a string of antique cases redolent with the metaphysics of sovereignty); *id.* at 751 (citing *Louisiana v. Jumel,* 107 U.S. 711 (1883)).

106. A more contemporary, albeit chronologically baffling, image refers to the framers' intent to "split the atom of sovereignty" into "two political capacities, one state and one federal, each protected from incursion by the other." *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), *cited in Alden,* 527 U.S. at 751.

107. THE FEDERALIST NO. 39 at 245 (James Madison) (quoted in *Printz,* 521 U.S. at 919 and in *Alden,* 527 U.S. at 714). The Federalist Papers were, of course, advocacy documents, "designed to convert doubters" of the wisdom of the new constitution. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 22 (1993). Nonetheless, they do represent the range of abstract values shared by the Constitution's supporters, *id.,* and thus, not surprisingly, their parsing has become part of the common currency of the Court's federalism debates. But, also not surprising are the disparate readings given to the same language. Compare, for example, the various interpretations in *Alden* of THE FEDERALIST NO. 39, in which Madison wrote that the system of government created by the constitution was partly national and partly federal. Writing for the majority, Justice Kennedy cites THE FEDERALIST NO. 39 to note that the Constitution reserves "to [the States] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden,* 527 U.S. at 714. Justice Souter in dissent disagrees: "[M]atters subject to federal law are within the federal sphere, and so the States are subject to the general authority where such matters are concerned." *Id.* at 800 n.32.

108. *Garcia,* 469 U.S. at 580.

109. Indeed, *Alden,* without reinstating *Usery*'s Tenth Amendment holding, achieves much the same effect, rendering the FLSA, for all practical purposes, unenforceable in cases involving state employees.

the limits they impose apply only to Congress' Article I powers. *Lopez*, of course, only impacts Congress' Commerce Clause powers, and both *Alden* and *Seminole Tribe* specifically acknowledge that Congress retains the authority, when acting under Section Five of the Fourteenth Amendment, to subject the states to the jurisdiction of the federal and state courts.[110] As Justice Kennedy observes, there can be little question that the Reconstruction Amendments shifted the federalism balance toward a dominant federal role when questions of citizenship rights were involved.[111] But the result of this admission, together with *Lopez's* restrictive reading of the Commerce Clause, is to place extraordinary new stresses on Section Five. The Court's response in *Boerne*, *Kimel*, and *Morrison* is to impose parallel constraints in this area as well.

Until now, the Court had been able largely to fudge the parameters of Section Five,[112] because a vigorous Commerce Clause obviated reliance on the Fourteenth Amendment as a source of congressional authority and because both clauses supported similar invocations of judicial enforcement powers.[113] But, in the wake of

110. *See* Seminole Tribe v. Florida, 517 U.S. 44, 71 n.15 (1996) (noting that Congress' authority to abrogate Eleventh Amendment immunity under the Fourteenth Amendment is undisputed); *Alden*, 527 U.S. at 756 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 4456 (1976)) ("Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power").

111. *See Alden*, 572 U.S. at 756.

112. The delineation of the breadth of the enforcement power was never precise. According to *South Carolina v. Katzenbach*, the power extended beyond forbidding violations "in general terms, leaving specific remedies to the courts." 383 U.S. 301, 327 (1966). On the other hand, despite intimations to the contrary in *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section Five is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the 14th Amendment"), Congress did not have the right to share the interpretive power with the Court and to have the Court defer to its judgment. William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section Five of the Fourteenth Amendment*, DUKE L.J. 291, 312-14, 320 (1996). Nor did the various opinions, none commanding a majority, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), about congressional power to lower the voting age in both state and federal elections clarify matters. Professor Tribe describes *Oregon v. Mitchell* as "quite literally incomprehensible." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 342 (2d ed. 1988).

113. For example, the Civil Rights Act of 1964, the first omnibus approach to race discrimination in almost one hundred years, was enacted under the Commerce Clause and not under Section Five. Despite the obvious connection between race and the Fourteenth Amendment, the doctrinal limitations of that Amendment strongly influenced the choice of the commerce power. For interesting analyses of the moral implications of that choice, see *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 279-286 (1964) (Douglas, J., concurring); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW

Lopez and *Seminole Tribe*, the lower courts have been deluged with cases questioning whether Section Five can sustain Congress' adoption of a wide array of legislation.[114] *Kimel v. Florida Bd. of Regents,* the first of these cases to reach the Supreme Court, suggests that at least in the absence of legislation directed at suspect or quasi-suspect classifications, Congress' power is scarcely more extensive under Section Five than it is under Article I.[115]

But *Kimel* merely reinforces the significant evisceration of Section Five set forth in *City of Boerne v. Flores.* According to *Boerne,* under Section Five, Congress can only pass statutes that remedy "established" or "legitimate" violations of the Fourteenth Amendment's substantive first section.[116] The Court is clear that

201-203 (13th ed. 1997) and Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation,* 27 STAN. L. REV. 585, 592 (1975). And, of course, since 1937 the Spending Clause has been available as another broad grant of congressional power. *See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding the Social Security Act).

114. *See, e.g.*, Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (finding the state agency immune from suit under Family and Medical Leave Act because it was not validly enacted pursuant to Section Five of the Fourteenth Amendment); Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999) (holding that Title IX of the 1972 Education Amendments contained an unambiguous waiver of Eleventh Amendment immunity); In re NVR Homes, 189 F.3d 442 (4th Cir. 1999) (finding the Eleventh Amendment bars a debtor's motion under the Federal Rules of Bankruptcy Procedure because Bankruptcy Code was not validly enacted pursuant to Fourteenth Amendment); Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), *cert. granted in part* 529 U.S. 1065 (2000) (finding that the Americans with Disabilities Act abrogates state sovereign immunity and is a valid exercise of Congress' Fourteenth Amendment authority, but holding that the Family Medical Leave Act was not within the authority of Congress under the Fourteenth Amendment).

115. 528 U.S. 62, 80 (2000). Although predicated on a different doctrinal foundation, *Morrison* provides further evidence of the limited reach of Section Five. 529 U.S. 598, 621-24 (2000) (holding that Fourteenth Amendment enforcement power does not reach purely private conduct).

116. 521 U.S. 507, 519 (1997). This echoes, of course, the major import of the *Civil Rights Cases*, 109 U.S. 3, 11 (1883), that since Section One of the Fourteenth Amendment requires state action, Congress cannot enact legislation under Section Five which regulates private conduct, a holding which *Morrison* appears to revitalize. This analysis mirrors some of the inconsistent pre-*Boerne* issues involving the constitutional sufficiency under Amendments 13-15 of the nexus between the substantive provisions in each amendment's first section and the scope of congressional authority to implement those mandates. For example, since Section One of the Thirteenth Amendment does not apply to gender, legislation enacted under Section Two, such as 42 U.S.C. §§ 1981 and 1982, may not cover gender claims. *See, e.g.*, Bobo v. ITT, Continental Baking Co., 662 F.2d 340, 345 (5th Cir. 1981). But Section One does not cover religion and national origin either, yet the Supreme Court has held that both classifications are cognizable under sections 1981 and 1982. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987). One of the critical points at issue in the

judicially recognized violations meet this standard, but whether congressionally identified violations can do so is considerably more problematic.[117] (*Kimel* strongly suggests that they do not.) Read narrowly, *Boerne* could be seen to focus specifically on congressional enactments that intrude on "States' traditional prerogatives and general authority,"[118] a reading which links *Boerne* with the "separate spheres" imagery of *Alden*, *New York*, and *Printz*. *Morrison*, however, makes clear that the Court's purpose is to sharply curtail Congress' Section Five authority in order "to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."[119] Read this way, *Boerne* is the Fourteenth Amendment analogue of *Lopez*, a direct attack on the scope of federal legislative authority.

What is most remarkable about *Boerne* is its insistence on judicial prerogatives. Justice Kennedy's opinion repeatedly castigates Congress for passing a statute directly overturning the holding of the Supreme Court's decision in *Employment Division v. Smith*[120] and resonates with his indignation at the perceived legislative effrontery.[121] Justice Kennedy's reaction reflects the institutional concerns raised by RFRA that Congress was overstepping its appropriate role and that the Court needed to monitor congressional activity more

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various opinions in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), was the extent to which Section One of the Thirteenth Amendment and Section One of the Fourteenth Amendment circumscribed the coverage of 42 U.S.C. § 1985 (3).

117. *See* City of Boerne v. Flores, 521 U.S. 597, 519 (1997). For interesting theories, see, e.g., Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments,* 67 MINN. L. REV. 299 (1982) (finding that Congress may provide remedies for violations of rights arguably protected by the Constitution); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603 (1975) (distinguishing between decisions about contents of rights and decisions about federalism); Archibald Cox, *The Supreme Court 1965 Term Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966) (arguing Congressional superiority as fact-finder).

118. 521 U.S. at 534.

119. 529 U.S. 619-20.

120. 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not relieve an individual engaging in sacramental use of peyote from the sanctions of a generally applicable law penalizing the use of peyote).

121. *See, e.g., Boerne,* 521 U.S. at 536 ("RFRA was designed to control cases and controversies ... but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control."); *id.* at 532. (RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to ... unconstitutional behavior ... [RFRA]'s sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

closely.[122] Since *Marbury v. Madison*,[123] it has not been seriously debated that the Court's core function was to rule on legislative authority to enact statutes. Over the years, the debate has been about the propriety of the Court's second guessing of the substantive wisdom of legislation.[124] In *Boerne*, *Kimel*, and *Morrison*, it is often hard to tell which task the Court is pursuing. What is clear is that the Court is determined to (re)assert its institutional authority. These are cases as much about separation of powers as about federalism.

In fact, separation of powers concerns play a central, if occasionally implicit, role throughout the cases we have been discussing. The *Lopez* majority asserts its responsibility to perform an "independent evaluation" of the nexus between congressional activity and interstate commerce,[125] in light of the judiciary's duty "to say what the law is."[126] In addition, the *Morrison* Court rejects not only the exhaustive legislative findings documenting that nexus, but also the analytic method Congress used to make them,[127] reiterating the Court's role as the Constitution's "ultimate expositor."[128] In *Printz*, Justice Scalia warns that a congressional demand that state officials administer federal programs threatens "the separation and equilibration of powers between the three branches of the Federal Government itself."[129]

122. *See id.* at 519 (holding that RFRA was beyond the scope of Congress' enforcement power under Section Five because "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a Constitutional right by changing what the right is.").

123. 5 U.S. (1 Cranch) 137 (1803).

124. The issue is, of course, the scope of Chief Justice Marshall's famous assertion in *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) at 177-78. It is not debatable that the Court will not defer when the question includes the scope of congressional authority. Rather, the so-called "counter majoritarian difficulty," identified by ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962), arises in connection with the legitimacy of a broader exercise of judicial power, one which appears to usurp the decisions of the popularly elected legislature. *See generally id.* (arguing that since judicial review is antidemocratic it should be used sparingly) and LAURENCE TRIBE, CONSTITUTIONAL CHOICES (1985) (pointing out that judges cannot escape making substantive choices). In the *Boerne* context, the question becomes whether *Marbury* permits interpretations of the Constitution which are different from those made by the Court.

125. United States v. Lopez, 514 U.S. 559, 562 (1994).

126. *Id.* at 566 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

127. *See* United States v. Morrison, 529 U.S. 614-15 (2000).

128. *Id.* at 616 n.7.

129. *Printz*, 521 U.S. at 922. Here apparently the concern is that the use of state officials reduces the power of the president to execute federal laws.

In counterpoint, a series of impassioned dissents by Justice Stevens chastises the Court for continually overstepping its constitutional role. For example, he castigates the *Printz* majority for substituting its judgment for that of "the elected representatives of the people,"[130] when there is nothing in the record to suggest that the "political safeguards of federalism identified in *Garcia* need [to] be supplemented by a [judicially crafted] rule, grounded in neither constitutional history nor text."[131] This theme is reprised in his *Kimel* dissent, where he argues that the Framers intended the Constitution's structure (and not the judiciary) to safeguard the interests of the states from undue federal interference.[132] Most vivid is his *Seminole Tribe* dissent protesting "the shocking character of the majority's affront to a coequal branch of our Government."[133]

The convergence of the Court's nostalgic federalism and separation of powers concerns should be no surprise. Indeed, the cases between *Usery* and *Garcia* evinced a similar recurring worry that the Court had abdicated its responsibility for maintaining an appropriate federal-state balance.[134] A view of federalism predicated upon a presumed natural boundary between the proper spheres of state and federal authority inevitably invites a prescient diviner of the precise location of that boundary. The Court, convinced that the

130. *Id.* at 940 (Stevens, J., dissenting).

131. *Id.* at 957 (Stevens, J., dissenting). In *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, Justice Stevens condemns the "aggressive" nature of the Court's sovereign immunity jurisprudence, berating the majority for championing rights which "the States themselves did not express any particular desire in possessing." 527 U.S. 666, 693 (1999) (Stevens, J., dissenting).

132. *Kimel*, 528 U.S. at 91 (Stevens, J., dissenting).

133. *Seminole Tribe*, 517 U.S. at 78 (Stevens, J., dissenting). At times, even Justice Souter's more measured dissent reveals the depths of his concern with the majority's "reach(ing) so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision." *Id.* at 167 (Souter, J., dissenting). Several scholars have alluded to the separation of powers themes that undergird the case law. *See, e.g.*, Laura M. Herpers, *State Sovereign Immunity: Myth or Reality After* Seminole Tribe of Florida v. Florida, 46 CATH. U. L. REV. 1005, 1053-55 (1997) (adopting the criticisms from the Stevens and Souter dissents); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 884 (1999) (referring to the "unexpressed . . . but . . . quite plain" judicial belief in *New York* and *Printz* in the Court's "primary responsibility for both defining and protecting that system of dual sovereignty").

134. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742, 790-91 (1982) (O'Connor, J., dissenting and concurring) (accusing the Court of disregarding its role of patrolling the federal and state boundaries); Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 566-67 (1985) (Powell, J., dissenting) (criticizing majority for abandoning proper judicial role in enforcing federalism limits).

boundary is real, feels compelled to step in to defend it. As in *Lochner*,[135] the Court is drawn into an activist role by its belief that only it can see critical natural distinctions that the political branches of government are unable to recognize or respect as fully as the Court would have them do. Perhaps, as Justice Souter suggests in his *Seminole Tribe* dissent, the Court "seems to be going *Lochner* one better."[136]

II. Obstacle Course or Apocalypse?

The recent cases leave no doubt about the transformation in the Court's images - of both federalism and its role as its enforcer. What is far less clear is the practical impact of these abstractions. In one view, the nostalgic vision permeating the new cases creates little more than a series of procedural impediments to congressional action. A more apocalyptic perspective suggests that the scope of Congress' authority has been dramatically curtailed. It is surely too early for commentators[137] or courts[138] to attempt a definitive resolution of this question, but it is not too soon to identify the basic patterns of the debate.

A. How Far Have We Come?

Consider, first, the Commerce Clause. Does *Lopez* substantially alter the contours of this most expansive source of federal legislative authority? Or does it merely change the standards for judicial review of congressional action, thereby imposing a new burden on Congress to justify and explain its choices? A couple of points seem relatively clear. First, *Lopez* surely precludes Congress from using the Commerce Clause to bootstrap a range of largely hortatory, non-commercial measures. Second, *Lopez* underscores the critical importance of congressional findings about the nexus between its substantive enactments and its Commerce Clause authority to act. But beyond these observations, the impact of *Lopez* on congressional actions that bear less than direct connections to commerce remains considerably more complex and problematic.

At the least, *Lopez* appears to curtail Congress' ability to use its Commerce Clause power to declaim upon any and every topic of

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135. 198 U.S. 45 (1905) (striking down New York's regulation of bakery working hours as an arbitrary interference with freedom of contract).

136. 517 U.S. at 166 (Souter, J., dissenting).

137. *See supra* notes 6, 48, 87, 93.

138. *See supra* notes 7, 8, 114.

current political and social concern, in the absence of a suitably determinate connection between the topic of concern and national economic life. The Defense of Marriage Act ("DOMA") is but one recent example of the congressional predilection for pious pronouncements which may not survive in a post-*Lopez* world. DOMA, which was enacted in 1996, sets forth restrictive federal definitions of "marriage" and "spouse": "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[139]

In federalizing these definitions, Congress is acting both as regulator and as preacher. The regulatory aspect, which impacts those areas of federal law, such as the Internal Revenue Code,[140] which incorporate family law concepts, rests on a relatively straightforward Spending Clause foundation.[141] Much more problematic is the hortatory aspect. Before *Lopez,* one could imagine an argument that the Commerce Clause, in an age of a unified national economy and political system, empowers Congress to pass aspirational legislation on virtually any aspect of human behavior including those at the core of traditional state responsibility.[142] But *Lopez* clearly changes the rules of this game. A statute that addresses the gender of one's life partner clearly fails the *Lopez* test of "economic activity substantially affect[ing] interstate commerce."[143] The mere fact that marital status has clear economic consequences is no longer sufficient, especially in the context of an area traditionally reserved to the states. Similarly, the *Lopez* statute[144] itself, as well as

139. 1 U.S.C. § 7 (1994 Supp. IV 1998). Notice that this definition is limited to federal concerns. Query whether this limitation will suffice to save the statute, particularly after *Morrison's* concern about federal interference with areas of traditional state regulatory authority.

140. *See, e.g.,* 26 U.S.C. § 1 (1994 Supp. IV 1998) (determining federal income tax rates by marital status); 42 U.S.C. § 416 (1994) (relying on marital status to define benefits under Social Security).

141. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States.").

142. Indeed, this was sometimes the case even before the New Deal expansion of Commerce Clause authority. *See, e.g.,* Champion v. Ames, 188 U.S. 321 (1903) (affirming congressional authority to prohibit interstate transport of lottery tickets); Hoke v. United States, 227 U.S. 308 (1913) (upholding Mann Act's prohibition of transporting women in interstate commerce for immoral purposes). For post-New Deal case law, see, e.g., *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964) (upholding federal public accommodations law).

143. *Lopez,* 514 U.S. at 560.

144. 18 U.S.C. 922(q)(1)(a) (making it a federal offense "for any individual knowingly

the Violence Against Women Act ("VAWA") struck down in *Morrison,*[145] may best be seen as further examples of federal pious pronouncements, designed more to express congressional sentiment than to regulate economically significant conduct.[146]

For the large remainder of congressional enactments which bear a more plausible nexus to commerce, the clear message of *Lopez* is that the Court will no longer take that nexus for granted. Returning to an approach last seen before the New Deal,[147] the *Lopez* Court assigns a significant role in its analysis to the presence or absence of legislative findings. In fact, on one reading, Congress' mistake in the Gun Free School Zones Act was simply its failure to provide such findings.[148] Of course, the language of *Lopez* concerning findings is carefully couched as encouragement, not requirement,[149] but it seems obvious that, in future cases, a careful legislator would be wise to make findings.[150]

Still, two questions remain. First, precisely how should she do so? Are hearings necessary? How painstaking a factual record is required? To what extent does the statutory language have to mirror the record of the legislative process? Second, what do the findings

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to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.). *Cf. Morrison*, 529 U.S. 610 ("But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.").

145. *See Morrison*, 529 U.S. 613 (invalidating 42 U.S.C. § 13981(c), which created a federal cause of action for gender-motivated violent crimes, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity"). *Cf.* Rep. No. 103-138, at 38 (characterizing goals of VAWA as "both symbolic and practical").

146. For another example, consider legislation passed by the House of Representatives last year, H.R. 2260, to withhold federal recognition of any state law (like one enacted in Oregon) that permits assisted suicide or euthanasia. *See* 68 U.S.L.W. 2270 (Nov. 9, 1999).

147. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding the record insufficient to show the connection between a local wholesale poultry slaughterer and the interstate poultry business); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (refusing to defer to legislative findings about the impact of labor unrest on interstate commerce).

148. This appears to be the hopeful understanding of the *Lopez* majority that underlies Justice Breyer's dissent, which attempts to provide the findings that Congress neglected to establish. *See Lopez*, 514 U.S. at 618-619 (Breyer, J., dissenting).

149. *Lopez*, 514 U.S. at 562-63. *Cf. Morrison*, 529 U.S. at 614 ("But the existence of Congressional findings is not sufficient by itself, to sustain the constitutionality of the Commerce Clause legislation.").

150. Is this now an absolute requirement? Would the Court's separation of powers concerns now necessitate congressional finding to justify even a statute regulating, for example, aviation? Note the curious absence of findings or of any discussion about them, in *Reno v. Condon*, 528 U.S. 141 (2000).

have to be about? Can Congress simply recite that the regulated activity is commercial or that it has a substantial effect on commerce, or must it memorialize the specific steps that link the activity to interstate economic activity?[151]

The difficulties do not end here. Even if the substance of the findings is exactly what the Court would want, how strictly will the Court scrutinize them? If the Court intends to apply a relaxed, "rational basis" standard, then the requirement of findings seems a mere formality. Although it uses the language of deference,[152] the *Lopez* Court hardly appears to be deferring to Congress. In fact, the Court's tone trumpets the importance of its role as the ultimate arbiter of legislative authority,[153] cautioning that Congress has properly been relegated to a "framework of legal uncertainty" about the scope of its powers "ever since this Court determined that it was the judiciary's duty 'to say what the law is'."[154] *Morrison's* message is even more strident, resonating with the Court's perception that careful judicial scrutiny of the findings is critical, because those findings demonstrate that "the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded."[155]

Ultimately, however, findings do not solve the much deeper question of the substantive reach of the Commerce Clause.[156] If

151. While *United States v. Morrison*, 529 U.S. 598, 613-17 (2000), does not answer these questions, its refusal to honor the extensive congressional findings in support of the Violence Against Women Act strongly suggests that the standards the Court sets for Congress are far more than trivial.

152. *See, e.g.*, *Lopez*, 514 U.S. at 557 ("Since [the New Deal], the Court has . . . undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.").

153. *Cf.* Boerne v. Flores, 521 U.S. 507, 536 (1997):

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is . . . . When the political branches . . . act against the background of a judicial interpretation of the Constitution already issued, it must be understood that . . . the Court will treat its precedents with the respect due them under settled principles . . . and contrary expectations must be disappointed.

154. *Lopez*, 514 U.S. at 566 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

155. *Morrison*, 529 U.S. at 615. Justice Souter accuses the majority of discarding the rational basis scrutiny promised by *Lopez* in favor of a "new criterion of review." *Id.* at 637 (Souter, J., dissenting).

156. Nor is the deeper question addressed by the suggestion that *Lopez* merely mandates the inclusion of a jurisdictional element in federal criminal or regulatory enactments. *See Lopez*, 514 U.S. at 561-62. A jurisdictional element requiring, for

Lopez's purpose is to confine Congress' power in a way that respects the idea that not all powers be delegated to the national government,[157] then the Court's strategy must be to give a concrete and limited meaning to "interstate" and to "commerce."[158] But this is where the Court's intentions become most puzzling.

The logic of the *Lopez* decision, with its emphasis, first, on the notion that the constitutional structure of delegated powers necessarily presumes that some subjects are not delegated[159] and, second, on the states' primacy in fields such as education and family law,[160] suggests a major retrenchment. But, at the same time, the *Lopez* majority claims to preserve its more modern precedents concerning the Commerce Clause's reach.[161] These reassurances, however, seem a futile attempt to have it both ways. After all, if *Wickard's* logic[162] were applied consistently to the Gun-Free School Zones statute, *Lopez* would have reached the opposite result.[163]

Still, the *Lopez* decision offers little more by way of explanation than the assertion that regulated activities must "substantially affect" (and not merely "affect") interstate commerce.[164] The result in *Lopez*

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example, that the gun was shipped in interstate commerce would not appear to obviate the Court's skepticism about a "substantial effect" on interstate commerce due to the weapon's subsequent possession in a school zone.

157. *See id.,* at 553, 566-67.

158. These concepts provided the Court fertile ground for drawing rigid formal distinctions during the approximately fifty years from the late nineteenth century until 1937, in an effort to curtail congressional authority under the Commerce Clause, and were ultimately rejected in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), in favor of a more empirical approach.

159. *See Lopez,* 514 U.S. at 557, 566, 567.

160. *See id.* at 564.

161. *See id.* at 559-61 (emphasizing that prior cases involved activities that "substantially affected" interstate commerce and distinguishing *Wickard v. Filburn,* 317 U.S. 111 (1942)).

162. *See Wickard,* 317 U.S. at 125 ("[E]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'.").

163. See *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964), for reassuring references and *Lopez,* 514 U.S. at 559, seems equally disingenuous.

164. *Lopez,* 514 U.S. at 559. The Court, while acknowledging that the precedents are less than univocal, derives its newfound standard for scattered comments in, for example, *Jones & Laughlin Steel,* 301 U.S. at 37 ("a close and substantial relation to interstate commerce"), *Wickard,* 317 U.S. at 125 ("a substantial economic effect on interstate commerce"), and *Maryland v. Wirtz,* 392 U.S. 183, 197 n.27 (1968) ("a substantial relation to commerce").

tells us only that, when an activity is itself not commercial (here, the possession of a gun),[165] and when the specific regulated incident has only an attenuated connection to any interstate commercial activity,[166] and when the focus of congressional concern (here, the safety of school zones) lies outside the commercial sphere,[167] then the Commerce Clause does not authorize federal regulation.

Morrison carries the Court's analysis at least one step further. Despite the voluminous congressional findings documenting the substantial economic effects of violence against women, the Court rejects Congress' "method of reasoning," on the ground that a mere causal connection between aggregated non-economic activity and economic outcomes does not constitute a "substantial effect" on commerce.[168] Here, as in *Lopez* itself, the only ground for this principle is the fear that, otherwise, Congress could "completely obliterate the Constitution's distinction between national and local authority."[169] The result, despite the Court's continued refusal to acknowledge that it is overruling *Wickard*,[170] is to greatly reinforce the constitutional significance of the murky distinction between economic and non-economic activity.

Still, the Court declines to announce "a categorical rule against aggregating the effects of . . . noneconomic activity," retaining for itself the ongoing responsibility for deciding "the limitation of

165. *See Lopez*, 514 U.S. at 559-561 (explaining that the Court's prior cases all involved "economic activity" whereas the Gun Free School Zone Act "by its terms has nothing to do with 'commerce' or any sort of economic enterprise"). *Cf.* Reno v. Condon, 528 U.S. 141 (2000) (upholding the Driver Privacy Protection Act's restriction on state sales of drivers license information because it concerns the sale or release of marketable information into the interstate stream of commerce).

166. *See Lopez*, 514 U.S. at 561 (noting that the challenged provision "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one defines those terms."). The Court underscores the point by going on to note the absence of any express jurisdictional element. *See id.* at 561-62. Justice Breyer attempts to make the case that schools bear the requisite connection to commerce. *Id.* at 615, (Breyer, J., dissenting). Justice Breyer's focus on schools rather than on guns is perplexing, both because guns are more obviously objects that move in commerce than educational ephemera and because schooling, far more than guns, smacks of traditional state responsibilities.

167. *See Lopez*, 514 U.S. at 565-66 (arguing that impacts on schools do not constitute requisite connections to commerce).

168. *See Morrison*, 529 U.S. at 610-13.

169. *Id.* at 615. *Cf.* Jones v. United States, 529 U.S. 848, 859 (2000) (adopting narrow statutory construction in order not "to make virtually every arson in the country a federal offense").

170. *See Morrison*, 529 U.S. at 610-11.

congressional authority."[171] The remaining unanswered question is what the Court will say in future cases that reflect some, but not all, of *Lopez's* and *Morrison's* disconnections from the regulation of interstate commerce. If the regulated activity is itself commercial, or if a jurisdictional element requires a close nexus to interstate activity, or if Congress' regulatory concern is primarily economic, will that suffice to sustain a federal enactment?[172] Or must a statute differ from the Gun-Free School Zone Act and VAWA in all of these respects to meet the Court's substantial effects test?

For example, what will the Court say about the array of statutes, including Title VII,[173] the Age Discrimination in Employment Act,[174] and the Americans with Disabilities Act,[175] which prohibit discrimination in the workplace? These statutes surely bear a closer connection to commerce, since they deal with the employment relationship.[176] But they often apply in contexts where any connection to interstate economic activity depends on the sorts of cumulative and indirect effects which the *Lopez* and *Morrison* Court declined to countenance. Furthermore, the focus of these statutes is not on the commercial dimensions of the employment relationship, but rather on its social and attitudinal dimensions. If the Court's goal is to confine federal power to the bounds of its delegated authority over commerce, then, as in *Hammer v. Dagenhart*,[177] it might well conclude

171. *Id.* at 616 ("Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace.").

172. *Cf.* Jones v. United States, 529 U.S. at 857 (2000) (narrowly construing the arson provision of Organized Crime Control Act, 18 U.S.C. § 844(i), excluding application to owner occupied residences, lest "hardly a building in the land . . . fall outside the federal statute's domain"). Of similar import is *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001) (refusing to defer to the administrative interpretation of 33 C.F.R. § 328(a)(3)(1999), applying the "Migratory Bird Rule," 51 Fed. Reg. 412117 (1986) to an abandoned sand and gravel pit, in order to avoid constitutional questions about Congress' Commerce Clause authority to enact certain provisions of the Clean Water Act, 33 U.S.C. § 404(a)).

173. *See* 42 U.S.C. § 2000 (Supp. II 1996).

174. *See* 29 U.S.C. § 261 et seq. Note that while *Kimel* only restricts the enforceability of the ADEA against the states, and while it declines to revisit the Court's prior determination that the ADEA was a valid exercise of the Commerce Clause power, 528 U.S. at 76, its broad language suggests wider doubts about the propriety of congressional action in this area. *See id.* at 83-92.

175. *See* 42 U.S.C. §§ 12101-12213 (Supp. IV 1998).

176. Nor are anti-discrimination laws limited to the paid labor market. *See, e.g.*, Title II of the 1964 Civil Rights Act and Title VIII of the 1968 Civil Rights Act of 1968.

177. 247 U.S. 251 (1918) (holding that the Child Labor Law, which regulated the minimum age of workers in certain industries, was not a valid exercise of Congress' commerce power).

that these statutes aim to control, not "the means by which commerce is carried on,"[178] but rather the social problems of racism and other forms of discrimination.[179]

In an earlier era, one might have turned to the Tenth Amendment as the primary protector against federal incursions into undelegated regulatory spheres more properly belonging to the states. But, in this one corner of federalism jurisprudence, *Garcia* continues to play a substantial cautionary role.[180] Indeed, as interpreted in *New York* and *Printz,* the Tenth Amendment's mission is far less ambitious, restricting only the methods by which federal aims are achieved and not the aims themselves.[181] Thus, while the Tenth Amendment might preclude Congress from imposing enforcement responsibilities on state or local officials in furtherance of the mandates of VAWA or the ADA, it does not directly question congressional authority to regulate in these areas. Beyond questions of utilization of state officers to further federal aims, the Tenth Amendment appears relegated to its role as the tautologous echo of Article I's enumeration of federal legislative powers.[182]

Unlike the Tenth Amendment cases, the sovereign immunity decisions clearly raise significant issues of how far congressional authority is constrained. Here, as with *Lopez,* part of the Court's message is to clarify Congress' obligation to justify its choices to the Court. Before the Court will turn to the question of whether Congress has the authority to abrogate state sovereign immunity, it requires that Congress make its "intention unmistakably clear in the language of the statute."[183]

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178. *Id.* at 269.

179. Consider, for example, the proposed Employment Non-Discrimination Act of 1999, S.B. 1276, H.B. 2355 ("ENDA"), whose purpose was to extend several of the protections of Title VII to employees victimized because of their sexual orientation. While ENDA's coverage was coterminous with Title VII (employees in industries affecting commerce), its clear gravamen was to provide a federal remedy against homophobia in the workplace, thus raising significant *Lopez* problems, and suggesting that ENDA might better be rested on Fourteenth Amendment grounds. That path, however, runs afoul of the *Boerne*-based problems discussed at notes 112-125, *supra* and text accompanying notes 188-217, *infra.*

180. *Cf.* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formulator the Future,* 47 VAND. L. REV. 1563, 1573 (1994) (characterizing *New York* as a "surprisingly strong" departure from *Garcia*).

181. *See supra* text accompanying notes 47-59.

182. The latest confirmation of the Tenth Amendment's modest role comes in *Reno v. Condon,* 528 U.S. 141 (2000). For further discussion of that case, *see infra* text accompanying notes 307-10.

183. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000) (quoting Dellmuth v.

But much of the thrust of the recent cases goes far beyond this clear statement rule. As with the Tenth Amendment cases, the Court's strategy is to limit the means available to Congress in the enforcement of accepted federal ends, but, when the gravamen of the inquiry is the scope of judicial enforcement jurisdiction, the new limitations can be strikingly more far reaching. In the context of anti-discrimination statutes, for example, the effect of the sovereign immunity cases is that, while Congress may retain the authority to regulate private workplace behavior,[184] its authority over state employees is ephemeral at best.[185] Congress remains free to declare the rights of state employees to be free of workplace discrimination, but when those employees look for a way to vindicate their apparent rights, they find that Congress lacks the power to open the doors to either federal or state courts for them.[186] Of course, as Justice O'Connor cavalierly reminds us, *Kimel* "does not signal the end of the line for employees who find themselves subject to . . . discrimination at the hands of their state employers," although the remedies that remain – enforcement actions by federal regulatory

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Muth, 491 U.S. 223, 228 (1989) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985))).

184. This is particularly plausible if the regulation was enacted under the Commerce Clause, as elaborated in note 116, *supra*. Congressional authority to reach private behavior under Section Five was problematic even before *Boerne* and *Morrison*. *See* United States v. Guest, 383 U.S. 745 (1966) (discussing various theories of the constitutionality of statutes prohibiting private conspiracies which interfere with Fourteenth Amendment rights); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (holding that the constitutionality of prohibition of private conspiracies to interfere with civil rights, 42 U.S.C. § 1985(3), depends on whether it was enacted under the Thirteenth or Fourteenth Amendment).

185. For purposes of its sovereign immunity analysis, the Court makes clear that employees of local governments and other political subdivisions of the states are to be treated like private sector employees, not like state workers. *See* Alden v. Maine, 527 U.S. 706, 756 (1999) ("the principle of sovereign immunity . . . bars suits against States but not lesser entities"). By contrast, the Court's prior assault on federal protections of state and local workers, grounded in the Tenth Amendment, treated state and local workers alike. *See* Usery v. Charleston Cty. Sch. Dist., 558 F.2d 1169 (4th Cir. 1977).

186. The Equal Pay Act provides another possible example. Although the Act survived scrutiny in the *Usery* era, *see id.* at 1171 (holding that Congress' power to enforce the substantive provisions of the Fourteenth Amendment is not "circumscribed" by the Tenth Amendment), its applicability to state employers has again been brought into question in the wake of *Kimel*. *Compare* Hundertmark v. State of Florida Dep't of Transportation, 205 F.3d 1272 (11th Cir. 2000) (finding the Equal Pay Act was a valid exercise of Congressional authority under the Fourteenth Amendment, making Eleventh Amendment immunity unavailable as a defense) *with* Holman v. Indiana, 211 F.3d 399, 402 n.2 (7th Cir. 2000) (expressing doubts about the viability of an Equal Pay Act claim against a state after *Kimel*).

agencies and the vagaries of state law – are likely to provide little solace to most victims.[187]

The changes wrought in both the Commerce Clause and the sovereign immunity doctrines have one clear corollary: to place at center stage the scope of congressional authority under Section Five of the Fourteenth Amendment. By a process of doctrinal elimination, Section Five seems to have become the residual source for congressional authority to address vital national concerns which are not primarily economic, and the primary path by which Congress can supercede the states' sovereign immunity. Yet, it is here that the Court's new direction is perhaps least clear.

Boerne tells us little more than that Congress can only act remedially, to cure violations of the Fourteenth Amendment's substantive first section. This, in itself, is neither new nor shocking. After all, as early as 1883, the Court held in the *Civil Rights Cases* that congressional legislative power was circumscribed by the reach of Section One, so that Congress could not reach private discriminatory behavior under Section Five.[188] *Boerne* alone may add little new, since the Court perceived RFRA as a "direct response" contradicting its own most recent delineation of the existence and logic of First Amendment rights.[189]

On that view, *Boerne* merely clarifies and reinforces the Court's insistence that Congress must build upon the meaning of Section One consistently with the Court's interpretations. If Congress can connect its regulatory solution to a Section One concern that is not judicially foreclosed, and can document that connection with suitable findings, then this reading suggests judicial deference. For example, the Individuals with Disabilities Education Act (IDEA),[190] which regulates state programs to educate disabled students, could be justified as one programmatic approach to the rights of the disabled, a

187. *Kimel*, 528 U.S. at 91. The availability of prospective injunctive relief, under *Ex parte Young*, 209 U.S. 123 (1908) (holding that Eleventh Amendment immunity does not affect injunctive suits brought against a state's officers), likewise will typically offer little meaningful help. For further discussion of *Ex Parte Young*, see *infra* text accompanying notes 243-246.

188. 109 U.S. 3, 11 (1883). And of course, *Morrison* breathes new life into this constraint.

189. *See* Boerne v. Flores, 521 U.S. 507, 512 (1997) ("Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).").

190. 20 U.S.C. §§ 1400-1487.

group whose claims have been recognized under Section One.[191]

But this analysis leaves two open questions. First, to what level of scrutiny must a group be entitled[192] (or does a right invoke)[193] before Congress can regulate on its behalf? More specifically, can Congress only provide "remedial" protections for groups (or rights) that the Court has held entitled to something more than minimal rational basis scrutiny? If that is correct, can Congress act only on behalf of groups whose claims are strictly scrutinized? All that *Boerne* tells us is that Congress can neither change the level of scrutiny on its own, nor act where the Court has expressly found no constitutional violation. And all that the Court's prior Section Five holdings tell us is that Congress can act in matters affecting race or fundamental rights.[194]

Kimel v. Florida purports to answer some of these questions,

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191. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). We return shortly to the complexities surrounding *Cleburne's* recognition of such claims. *See infra* text accompanying notes 195-197.

192. For example, the level of scrutiny for gender claims is by no means clear or uniform. At the end of the spectrum closest to the rational basis test are cases like *Reed v. Reed*, 404 U.S. 71, 76, (1971) (characterizing issue as "whether a difference in the sex of competing applicants [bears] a rational relationship to a state objective"). At the other extreme, closest to race, is *United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that defenders of gender-based classifications must demonstrate "an exceedingly persuasive justification"). Squarely in the middle is *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that gender classifications must "serve important governmental objectives and must be substantially related to the achievement of these objectives"). In *Kimel* the Court appears to adopt the *Virginia* formulation.

193. For example, could Congress codify *Roe v. Wade*, 410 U. S. 113 (1973), under its Section Five power? *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), appears to overrule *Roe*, albeit sub silentio, not only by eliminating the trimester framework but by lowering the standard of proof from "important state interest," *Roe*, 410 U.S. at 154, to "undue burden," *Casey*, 505 U.S. at 886, and by reallocating the burden of meeting this standard from the government to the woman. Could Congress now turn the clock back to *Roe*'s formulation and how would the Court go about answering that question? Are reproductive rights as fundamental as the voting rights in *Katzenbach v. Morgan*, 384 U.S. 651 (1966)? Moreover, even though *Roe* did not depend on a gender analysis, Justice O'Connor has recognized that women's "ability to terminate their pregnancies [are] characteristics unique to the class of women." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 350 (1993). Would Justice O'Connor, the author of *Kimel*, then consider a *Roe* statute a gender classification? Justice Ginsburg has long been an advocate of this approach. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

194. Holding in *Oregon v. Mitchell*, 400 U.S. 112, 126, 128-130 (1970), that Congress had no authority to lower the voting age in state elections, Justice Black agreed that *Katzenbach v. Morgan*, 384 U.S. 651 (1966), should be limited to race discrimination, else congressional power to enforce the Equal Protection Clause would "blot out all state power, leaving the 50 states as little more than impotent figureheads."

holding that Congress, under Section Five, may not statutorily expand the minimal protections the Constitution affords to victims of age discrimination.[195] Since the Age Discrimination in Employment Act ("ADEA") prohibited more behavior than Section One condoned, it was the type of incongruent and out of proportion overreaching that *Boerne* forbade. Justice O'Connor's careful contrast of classifications which trigger a more heightened scrutiny implies significantly greater legislative latitude to act on behalf of race or gender.[196] In the case of the IDEA, the question is complicated further by the obscurity of the Court's identification, in *City of Cleburne v. Cleburne Living Center,* of disability's precise place on the scrutiny spectrum.[197]

The second question involves the nexus between the legislative "remedy" and the Section One "substance". In *Katzenbach v. Morgan,* Congress had restricted the use of English literacy tests for

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195. *See, generally, Kimel,* 528 U.S. 62. The cases about age discrimination, *Vance v. Bradley,* 440 U.S. 93 (1979) (foreign service officers) and *Massachusetts Bd. Of Retirement v. Murgia,* 427 U.S. 307 (1976) (police) had applied the rational basis test. In *EEOC v Wyoming,* 460 U.S. 226 (1983), the Court upheld Congressional power under the Commerce Clause to extend the ADEA to state and local governments. *Kimel* echoes Chief Justice Burger's dissent that the extension not only violated the Tenth Amendment but that Congress lacked the authority to enact similar legislation under Section Five, since the Court had never held that Section One prohibited age discrimination. "Congress may act only where a violation lurks." *Id.* at 260.

196. *See Kimel,* 528 U.S. 87-88. Ironically, this formulation reverses the commonly understood meaning of the distinction between strict and minimal scrutiny. "Strict scrutiny" is usually fatal to legislative experiments because few, if any, statutes pass the strict scrutiny test. On the other hand, rational basis review connotes extreme deference to the legislature; under this approach most statutes readily survive.

197. In *Cleburne,* the majority denied suspect or quasi-suspect classification status to the mentally retarded, although Justice Marshall, concurring in part and dissenting in part suggested that despite this denial, the Court had, in fact, heightened the scrutiny. 473 U.S. at 440, 458. Despite the majority's use of the words "rationally related," *Id.* at 446, Professor Tribe describes the majority's level of scrutiny as "intermediate." TRIBE, *supra* note 34, at 1612.

Indeed, in *Cleburne,* the Court specifically suggested that one of the reasons it was not elevating the scrutiny of disability-based distinctions was its belief that legislatures need flexibility and "freedom from judicial oversight in shaping and limiting their remedial efforts," and that legislators were better able to resolve problems faced by individuals with disabilities than the judiciary. 473 U.S. at 443-45. Congress subsequently responded to disability discrimination by enacting the Americans with Disabilities Act, 42 U.S.C.A. sections 12111 et seq., in part under its Section 5 authority. This Term, the Court has agreed to decide whether, under its *Kimel* analysis, Congress exceeded its authority passing the ADA, an argument that rests ironically on the theory that, since the Court failed to heighten the scrutiny for disability discrimination, Congress could not create new rights for the disabled. *See* University of Ala. Bd. of Trustees v. Garrett, *cert. granted in part,* 529 U.S. 1065 (2000). The notion that Congress cannot enact prophylactic legislation around rights that are subject to rational basis review is one of the major issues presented in *Garrett.*

voter qualification in state elections, even though the Constitution reserves to the states the authority to set voter qualifications and the Court had previously upheld the constitutionality of literacy tests.[198] Despite the absence of congressional findings,[199] the *Katzenbach* Court reasoned that Congress could have deemed increased Hispanic voter participation an appropriate remedy for potential racial discrimination in the provision of municipal services.[200] The nexus between literacy tests and race discrimination in municipal services, however presumed and/or attenuated, sufficed to authorize Congress to act.

In *Boerne,* by contrast, the Court found that RFRA, notwithstanding the legislative record documenting state and local impingements on free exercise of religion, lacked the appropriate remedial connection to First Amendment violations, primarily because the Court discredited the legislative justification.[201] The Court looked to the "congruence" and "proportionality"[202] between RFRA's prohibitions and the pattern of problems in the legislative record and concluded that Congress must have been pursuing, not its proper remedial role, but an exercise in independent interpretation of the Constitution.

What lessons do these cases impart when we turn, for example,

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

199. The lack of findings was especially troubling to Justice Harlan, who was unwilling to defer to Congress' judgments about the extent of its authority, particularly on a barren legislative record. *Id.* at 659-67 (Harlan, J., dissenting).

200. *See id.* at 641. There are two theories in *Katzenbach*: one addressing the federalism issue and the other the separation of powers problem. The latter, which suggests that Congress could reasonably conclude that English literacy tests violated the Equal Protection Clause, is perhaps more far-reaching because of the Court's prior caselaw upholding literacy tests in *Lassiter v. Northampton County Bd. Of Elections,* 360 U.S. 45 (1959). Justice Brennan's reasoning, known as the "ratchet theory," limited Congressional power to interpret the Fourteenth Amendment substantively to those instances where Congress was expanding and not contracting Constitutional rights: "We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach,* 384 U.S. at 651, n.10. But the ratchet theory does not satisfactorily explain why Congress has interpretive authority at all, let alone, in one direction. *See* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603 (1975). Nor does it address the reality that expanding the rights of "A" may well constrict the rights of "B." For example, whose rights are expanded and whose deleted by a fetal rights law? By anti-bussing legislation? By affirmative action? Moreover, Kimel appears to overrule the ratchet theory, at least with respect to non-suspect classes.

201. *See* Boerne v. Flores, 521 U.S. 507, 532 (1997).

202. *Id.* at 533.

to VAWA? Assuming a Section One concern for gender equality, how specific a nexus must there be between that concern and the specific protections provided by VAWA? Must there have been a determination that gender-motivated violence poses a sufficiently serious threat to gender equality to satisfy the Court's congruence and proportionality standard? If so, who must make that determination?[203] Must Congress have made express findings to that effect? Or must the courts have previously recognized a constitutional right to freedom from gender-motivated violence? Or can the Court draw reasonable inferences based on the legislative record and common knowledge? And finally, does nexus require that one or more of these institutions also find that the federal remedy addresses a problem that the states had failed to redress?[204]

Somewhat surprisingly, *Morrison* fails to provide direct answers to most of these questions. Although Rehnquist's opinion references *Boerne*'s insistence on congruence and proportionality, it is strangely silent about how and why the voluminous findings made in connection with VAWA succeed or fail to comply with that mandate. Even more enigmatic is the Court's failure to apply (or even discuss) *Kimel's* promised deference to gender classifications in the case of a statute directed at gender-motivated violence. Instead, *Morrison* (re)treads a far more ancient doctrinal path, holding that Congress lacks authority to enact the challenged portion of VAWA because it is directed not at states but at private actors.[205] Reaching one hundred and twenty years into its past, the Court revives the rule of the *Civil Rights Cases* that limits to state actors suits brought under Section One and legislation passed under Section Five.[206] As Justice Breyer cogently notes in dissent, the majority ignores the fact that the gravamen of VAWA was to remedy the behavior of those states which had failed to meet their Section One obligations, a fact that was

203. Unlike *Lopez's* relatively deferential approach to findings, *Boerne* specifically suggests that, even when Congress provides appropriate findings, the Court will not be particularly deferential in assessing them. 521 U.S. 507 (1997). *See also Kimel*, 528 U.S. at 89 (observing that congressional findings fell "well short of the mark."). Does this reflect a different standard for Article One and Section Five contexts?

204. Chief Justice Rehnquist had earlier warned that VAWA would clutter up the federal courts with domestic relations disputes, arguing that federal judicial resources should be "reserved for issues where important national issues predominate." William H. Rehnquist, *Chief Justices's* 1991 *Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 1-3.

205. 529 U.S. 621-22.

206. *See id.*

fully documented not only by Congress, but also by the states.[207]

Boerne, since it concerned a statute which applied particularly to states and their political subdivisions,[208] did not have occasion to address Section Five's authorization of congressional enactments that apply not only to governmental actors but to private entities as well, but *Morrison* appears to have foreclosed that option.[209] Even in advance of *Morrison, Boerne's* insistence on an almost mirror image conformity between Section One and Section Five surely laid the groundwork for a subsequent attack on a range of federal statutes which regulate private behavior.[210] Indeed, *Boerne's* discussion of the legislative history of the Fourteenth Amendment, which emphasized Congress' rejection of a broader precursor,[211] provides a stronger foundation for restricting Section Five's reach to public entities than for the substance/remedy distinction on which the Court focused. In the Court's retelling, the central objections to the prior draft were that it would have allowed Congress to legislate generally on "all subjects affecting life, liberty, and property,"[212] thereby displacing core state responsibilities. While construing the ensuing draft to restrict congressional authority to remedial concerns may offer some answer to these concerns, construing it to limit Congress to regulation of the states, and not of private actors, would seem a more convincing reading of the history, as well as one that finds greater support in the textual differences between the two versions.[213]

Morrison's invocation of the *Civil Rights Cases* in this context is

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207. *See id.* at 664 (Breyer, J., dissenting). As Justice Breyer also points out, this was not the kind of claim before the Court in the *Civil Rights Cases. Id.* at 664-65.

208. 42 U.S.C. § 13981 (1994).

209. Thus, the question remains whether RFRA is still in play as a restriction on private behavior. The theoretical basis for congressional authority to reach private behavior under Section Five is eloquently spelled out in Archibald Cox, *Forward: Constitutional Adjudication and Promotion of Human Rights*, 80 HARV. L. REV. 91, 116-21 (1966). Professor Tribe has suggested that this issue was "at least partly academic" because of the scope of congressional power under the Commerce Clause and the Thirteenth and Fourteenth Amendments. TRIBE, *supra* note 34, at 964. Obviously, the cases that have impelled the writing of this article have moved that issue back to center stage.

210. *See, e.g., supra* statutes cited in notes 173-176.

211. 521 U.S. at 520-21 (discussing defeat of Bingham draft).

212. *Id.* at 521 (quoting Sen. Stewart).

213. Indeed, there has been a lively scholarly debate over whether the 39th Congress intended to limit Section One to state action at all. *See, e.g.*, JACOBUS TENBROEK, EQUAL UNDER LAW (1965). *Cf.* Kimel, 528 U.S. at 90 (doubting whether congressional findings "with respect to the private sector could be extrapolated to support a finding of unconstitutional age discrimination in the public sector").

very much of a piece with the Court's solicitude for state sovereignty. One of the earliest theoretical justifications for the state action doctrine was predicated on federalism concerns, finding congressional regulation of private conduct impermissible because it "steps into the domain of local jurisprudence."[214] Yet, *Morrison's* Section Five analysis is more nostalgic than rigorous.[215]

Section Five remains a puzzle.[216] While *Boerne* does more to raise than to answer these questions, it, like *Lopez,* clearly assigns a new importance to congressional findings and signals a heightened sensitivity to separation of powers concerns.[217] The Court could reduce *Boerne* to little more than a series of technical hurdles readily overcome by careful findings and skillful drafting, except in the rare case where Congress seeks directly to reverse a Supreme Court constitutional precedent. At the other extreme, it could develop *Boerne* into a radical restriction on congressional power to determine its own agenda in matters pertaining to individual rights, leaving it only with the instrumentalist authority to specify remedies for judicially identified problems. *Kimel* adopts the latter approach, at least for rational basis classifications, and *Morrison* appears to follow a similar path, at least for legislation directed at private behavior. A third, albeit increasingly less likely, possibility is that the Court will grope toward some middle ground that leaves Congress (and the rest of us) perplexed and invites an expanding cottage industry of lower court litigation.

So, where does the federalism balance rest today? If the Court neither expands nor delimits its recent decisions, to what extent has

214. *Civil Rights Cases*, 109 U.S. at 14. In other words, limiting rights guaranteed by the Constitution and enforced by federal courts leaves a large area of activity for state regulation.

215. For example, the Court treats the ancient cases as particularly worthy because of their great age and because of their authors' contemporaneous familiarity with the Fourteenth Amendment. By contrast, the Court rather summarily dismisses the more modern cases (including those which cast significant doubt on the cases from the reconstruction period) because the failure of some of their authors to spell out their reasoning in great detail "is simply not the way that reasoned constitutional adjudication proceeds." *Morrison*, 529 U.S. at 622-24. The Court's approach in *Morrison* ultimately creates more problems than it solves. *See infra* text accompanying notes 323-327.

216. The puzzle is further complicated by the problems (or opportunities) presented by the Court's recent resuscitation of the Fourteenth Amendment's Privileges and Immunities Clause in *Saenz v. Roe*, 526 U.S. 489 (1999). The newly recognized citizenship rights of *Saenz* appear to expand the definition of the privileges of federal citizenship to include the right of interstate travel. Can Congress, therefore, now enact legislation under Section Five remedying violations of that right?

217. *See, e.g., Boerne*, 521 U.S. at 532, 535-36.

the scope of congressional authority shrunk from the longstanding New Deal consensus?

The Court's Tenth Amendment and sovereign immunity decisions, while they have not affected the scope of concerns that Congress can address, have introduced significant new limits on the tools that it can deploy to address those concerns.[218] The Tenth Amendment restrictions, which preclude Congress from requiring state and local executive and legislative officers to serve as agents of a federal program, may complicate the means for furthering federal policies. But, so long as Congress can employ its own agents and establish its own mandates, and particularly so long as Congress can exercise its spending power to condition financial assistance on state cooperation with federal programs,[219] these complications seem little more than an inconvenience. By contrast, the sovereign immunity limits by foreclosing both state and federal judicial relief for state violations of many federal requirements, eviscerate a core component of legislative power.[220] This foreclosure leaves the very real threat that federally defined rights against states will often go without meaningful remedies, although only the states themselves (and not other categories of state actors) benefit from this immunity, and even the states remain subject to prospective remedies and to federal administrative actions.

The Court's revanchist reading of the Commerce Clause cuts deeper still, introducing new, if still murky, limits on the range of substantive concerns Congress can address.[221] At the least, these new restraints, by requiring a "substantial effect" on commerce,[222] and by carefully reviewing congressional satisfaction of that requirement,[223] undermine Congress' presumed authority to pronounce federal policy on any matter of national concern that touches, however tangentially, on commercial activity. Even in cases where the connection to commerce is less attenuated, the post-*Lopez,* post-*Morrison* Congress will be well advised to lay a thorough evidentiary foundation dovetailing its concerns to the functioning of the national economy, in anticipation of judicial scrutiny of its findings. Further, if the Court is serious in its insistence that an "enumeration presumes something

218. *See supra* text accompanying notes 48-59, 91-110.

219. *See infra* text accompanying notes 229-236.

220. *See supra* text accompanying notes 91-110.

221. *See supra* text accompanying notes 59-70, 138-179.

222. *Lopez,* 514 U.S. at 559.

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

that is not enumerated,"[224] there remain doubts about whether even a documented and palpable connection to commerce will suffice to sustain enactments whose primary concerns are non-economic.[225]

Both the narrowing of Congress' Commerce Clause power and the unavailability of judicial remedies for state violations of Article I based enactments inevitably invite increased reliance on Congress' Fourteenth Amendment powers. But here, too, the scope of congressional authority has been sharply constrained.[226] The Court's insistence that Congress rest its enactments on well recognized violations of the Fourteenth Amendment's substantive protections may leave little latitude for measures addressing concerns other than race, gender, or fundamental rights. As with the Commerce Clause, the Court has placed a new emphasis on the need for, and the substance of, congressional findings.[227] At least with respect to state violations, the Court appears to be obviating any distinctions between the Commerce Clause and Section Five. *Morrison's* curtailment of Section Five's application to private behavior places new pressures on the Commerce Clause.

B. How Much Further May We Go?

The federalism landscape has changed dramatically. Still, if Congress steps carefully around and over the obstacles that the Court's recent decisions have placed in its path, it appears to retain much of its broad subject-matter authority, and even much of its ability to regulate and guide the behavior of states and their subdivisions. But the story is far from over,[228] and, if the Court's majority continues to pursue the nostalgic vision that has brought it to

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224. *Lopez,* 514 U.S. at 553.

225. The literature about the difficulty in establishing improper motive as a basis for invalidating legislation is extensive. *See, e.g.*, Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970), and Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

226. *See supra* text accompanying notes 110-121, 187-202.

227. *See supra* text accompanying notes 203-207.

228. The courts continue to consider a blizzard of cases testing the limits of the new federalism. *See, e.g., supra* notes 5-8, 114, 186. A growing body of scholarly writing also encourages the continued evolution of the Court's federalism agenda. *See, e.g.*, Bradford R. Clark, *Translating Federalism: A Structural Approach,* 66 GEO. WASH. L. REV. 1161 (1998); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle,* 111 HARV. L. REV. 2181 (1998); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996).

this point, the remaining doctrinal foundations for broad congressional authority may prove no more impregnable than those which recent case law has already swept away.

Consider first the Spending Clause,[229] the most significant source of congressional authority to avoid judicial retrenchment so far.[230] As the Court itself has acknowledged, as recently as *New York*,[231] Congress' freedom to condition federal financial assistance on state conformity with federal requirements empowers Congress to sidestep many of the Commerce Clause limits the Court has placed on it. Yet, at bottom, this empowerment relies on a permissive reading of the Spending Clause power, which, like the *pre-Lopez* permissive understanding of the Commerce Clause, grants broad discretion to Congress to determine what federal requirements are appropriately germane to a federal spending program.[232]

It would take but a small step for the Court, following the model of *Lopez,* to find new teeth in its existing requirements that the conditions be sufficiently related to the purposes and interests behind the federal program[233] or that the financial inducement not be "so coercive as to pass the point at which pressure turns into compulsion."[234] Indeed, if the Court found it necessary to build some limitations into the scope of commerce, in order to avoid conceding plenary power to the federal government, we perhaps should wonder whether the Court won't also find it necessary to revisit its long-

229. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to . . . pay the Debts and provide for the common Defence and general Welfare of the United States.").

230. Despite some earlier intimations to the contrary, challenges to federal spending on state autonomy grounds have met with little success. *See* South Dakota v. Dole, 483 U.S. 203 (1987). *Cf.* Pennhurst State Sch. Hospital v. Halderman, 451 U.S. 1, 17 (1981) (noting existence of limits on spending power, which "issue, however, is not now before us"). *Alexander v. Sandoval,* recently argued before the Court, may well provide an opportunity to revisit these Spending Clause issues. *See* 2001 U.S. Trans-Lexis 10 (Jan. 16, 2001).

231. 505 U.S. 144 (1992).

232. *See* South Dakota v. Dole, 483 U.S. 203, 207-08 (1987).

233. *See id.* at 207.

234. *Id.* at 211. *Cf. id.* at 218 (O'Connor, J., dissenting) (arguing that these requirements were violated by the provision reviewed in *Dole* itself). *See also* Bradley v. Arkansas Dept. of Educ., 189 F.3d 745, 757 (8th Cir. 1999) (finding the Rehabilitation Act excessively coercive to pass muster under the Spending Clause); Litman v. George Mason Univ., 186 F.3d 544, 556-57 (4th Cir. 1999) (inviting Supreme Court to revisit and narrow its interpretation of the Spending Clause); Virginia Dept. of Educ. v. Riley, 106 F.3d 559, 569-70 (4th Cir. 1997) (questioning whether threat to withhold all federal funding for special education for state's failure to provide services to a narrow class constitutes impermissible coercion).

standing view that the power to spend for "the general Welfare of the United States" extends beyond Article One's substantive grants of congressional authority.[235] Without such a delimitation of the Spending Clause, the specter of limitless federal legislative power, the primary target of *Lopez,* seems alive and well. So, perhaps, as some of the Justices hinted in *Alden,* this remaining central premise of the New Deal consensus is also ripe for revision.[236]

Similar retrenchment could easily diminish the scope of congressional power to preempt state regulation. Indeed, an unlikely coalition of justices, dissenting in a recent preemption case,[237] chose to emphasize the federalism consequences of the Supremacy Clause and to suggest the need for a clear-statement requirement, reminiscent of Justice O'Connor's opinion in *Gregory v. Ashcroft,*[238] as a

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235. *See* United States v. Butler, 297 U.S. 1, 66 (1936):

> While... the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section Eight which bestow and define the legislative powers of Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

236. 527 U.S. at 755. Consider too Justice Kennedy's dissent in *Davis v. Board of Education,* 526 U.S. 629 (1999), a case which appeared to involve only an exercise in the rules of statutory construction. One year earlier, *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 289 (1998), had held that a school district was not liable in damages under Title IX of the Educational Amendments of 1972, 20 U.S.C. section 1681 (a) (1999), for a teacher's sexual harassment of a student unless the school had actual knowledge of the misconduct and responded with deliberate indifference. *Davis* involved student to student harassment under the same statute and Justice O'Connor applied the same test. Dissenting, Justice Kennedy characterized the issue not as one of "routine statutory construction," but as a threat to state sovereignty. *Davis,* 526 U.S. at 657. "The Nation's schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator." *Id.* at 658. Kennedy castigates the majority's "watered-down version" of the Spending Clause clear statement rule, which he labels a poor substitute for the real protections of state and local autonomy that our constitutional system requires.

237. *See* Geier v. American Honda Motor Co., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting, joined by Souter, Thomas, and Ginsburg, J.J.) (quoting *Alden's* demand that "the constitutional role of the States as sovereign entities" be respected). Of course, the dissenters could easily have relied instead on the ample complexities of existing preemption law. *Cf.* Cipollone v. Liggett Group, 505 U.S. 504 (1992) (similar); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (discussing and deploying standard preemption analysis).

238. 501 U.S. 452. Query also whether *Lopez* also implicates the Dormant Commerce Clause, which prohibits States from regulating in areas of commerce which are properly regulated by Congress even when Congress has not yet acted. May states now be allowed to regulate more broadly as Congress can regulate less? Will restrictions imposed by the dormant Commerce Clause be narrowed concomitantly with Congress' Commerce Clause authority? *See, e.g.,* City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ("In the absence of federal legislation, these subjects are open to control by the States so long as

precondition for a finding of preemption.

The Court's sovereign immunity jurisprudence is another area that seems ripe for further evolution. We have noted four significant limitations on the scope of the Court's recent rulings: their inapplicability to congressional enactments under the Fourteenth Amendment, the continuing availability of suits against state officers under *Ex parte Young,* the inapplicability of sovereign immunity to suits against political subdivisions of the states, and the unchallenged legitimacy of the enforcement powers of federal agencies.[239] But, each of these limitations rests on foundations no more secure than those which the Court has eroded with impunity in its recent cases, and the nostalgic revisionism of the Court's contemporary federalism could easily be deployed to demolish them as well.

Consider first the distinctive treatment of congressional action under the Fourteenth Amendment. If the Court's sovereign immunity theories rested primarily on the Eleventh Amendment, then the argument that subsequent amendments escape its restrictions would make obvious sense. But, once the Court has made clear, as it does in *Alden,* that the Eleventh Amendment is no more than a textual harbor for a fundamental feature of the constitutional structure,[240] then singling out the Fourteenth Amendment for special treatment requires substantial further justification. Perhaps that justification can be found in arguments about the way in which the Reconstruction Amendments alter the fundamental constitutional design.[241] However, on a slightly narrower view, these amendments can be characterized simply as federalizing certain rights.[242] Such a view leaves open the question of their impact on state sovereign immunity.

Similar concerns face the availability of actions directed, not against the state itself, but against its officers. It is no novelty to

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they act within the restraints imposed by the Commerce Clause itself."). In other words, does doctrinal consistency demand that, as the Commerce Clause power recedes, the "restraints imposed by the Commerce Clause" on states recede.

239. *See, e.g., supra* text accompanying notes 116, 187.

240. 527 U.S. at 727.

241. *See, e.g., Seminole Tribe,* 517 U.S. at 59; *Alden,* 527 U.S. at 756; *Kimel,* 528 U.S. at 80-81; TRIBE, *supra* note 34, at 1302.

242. *See, e.g., The Slaughterhouse Cases,* 83 U.S. (16 Wall.) 36, 71 (1873) (holding that the purpose of amendments 13-15 was to guarantee federal protection to rights of newly emancipated slaves). For analysis of how the turn of the century Court reconciled federal protection of civil rights with autonomous state spheres, see TRIBE, *supra* note 34, at 1311-12.

observe that *Ex parte Young* depends at its core on a fiction,[243] the pretense that a judicial order directing an officer of the state to take some action in her official capacity is not an order directed against the state itself.[244] And there is little more substance to the suggestion that such prospective orders have a less immediate or significant impact on a state's resources than would a direct imposition of monetary damages.[245] So, if the Court is truly concerned with protecting its vision of state sovereignty, and if it justifies its mission as the vindication of principles of sovereign immunity implicit in the constitutional design (and if it continues to feel unconstrained by its own precedents), there is little in the reasoning underlying *Ex parte Young* to save it from repudiation.[246]

The distinction between the states and their political subdivisions rests on similarly tenuous ground. As the Court has long recognized, cities, counties, school districts, and other political subdivisions exist only as creatures of the states, possessing only those powers delegated to them by the state, and serving only as instrumentalities of the state.[247] While this subsidiary status can support the conclusion that such subdivisions are not themselves sovereigns, and hence are less deserving of special protections or deference than the states themselves,[248] it can equally lead to the opposite result. If the delegation of a certain state responsibility (such as education or public health) to a political subdivision is the state's chosen way of addressing that responsibility, then the actions of the subdivisions are in furtherance of the state's ends, and interference with those actions

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243. *See, e.g.*, Coeur d' Alene Tribe, 521 U.S. at 269, 272, 280-81 (referring to *Ex Parte Young* as resting on a fiction); *Halderman*, 465 U.S. at 114 n.25 (1984) (same).

244. *See* Ex parte Young, 209 U.S. 123, 159-60 (1908).

245. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 667-68 (1974).

246. Indeed, the Court may already have planted the seeds for such an assault in its 1997 decision in *Coeur d'Alene Tribe*. There, the Court found *Ex parte Young* inapplicable to a suit against state officials to clarify tribal and state rights to certain land, because a holding against the state officials would implicate "special sovereignty interests" of the state. *Coeur d'Alene Tribe*, 521 U.S. at 281. But, in fact, only a difference of degree separates the "sovereignty interests" implicit in state officials' actions regarding titles to land from the state interests involved in virtually any action undertaken by virtually any state officer acting in her official capacity. If the officer's actions are undertaken pursuant to state law and if they bear some relationship to the expenditure or protection of some state resource, it would take but a small step for the Court to conclude that the actual impact of litigation against her fell not on the officer but on the sovereign itself.

247. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 607-08 (1991).

248. *See, e.g.*, Community Communications Co., v. Boulder, 455 U.S. 40, 53 (1982) ("Ours is a 'dual system of government . . .' which has no place for sovereign cities.").

disturbs the state's pursuit of its sovereign interests. Longstanding precedent may support allowing suits against political subdivisions,[249] but the Court's recent sovereign immunity cases have not been particularly constrained by precedent. If the Court's objective is to respect the states' sovereignty, then a natural step would shelter from suit those political subdivisions to which a state chose to extend its sovereign immunity.[250]

The question of Congress' authority to authorize enforcement actions against the states when brought by federal agents raises a similar set of issues. While the *Alden* Court asserts that a suit brought on behalf of the federal government "differs in kind from the suit of an individual,"[251] the two differences it notes hardly afford a compelling warrant for federal authority. For one, the Court asserts that "the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures,"[252] but the Court identifies nothing in the constitutional text that expressly authorizes, or even explicitly contemplates, suits by the federal government against the states. Second, the Court notes that "suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State,"[253] but, as we have seen from the history of *Garcia,* the Court's deference to politically-based protections of state autonomy has been anything but constant. If these are the only foundations supporting the Court's continued acceptance of federal enforcement actions, it is not hard to imagine a future decision concluding that the resulting incursions on state sovereignty, in the absence of express constitutional warrant, exceeded congressional authority under the constitutional design.

III. Some Lessons Not Learned

At present, the ultimate contours of the Court's emerging federalism jurisprudence remain highly indeterminate. But the vision that informs its recent decisions certainly threatens to blossom into a

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249. *See, e.g.*, Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978); Mt. Healthy City Sch. Dist. Bd. v. Doyle, 429 U.S. 274, 280-81 (1977).

250. For a good overview of the history, and recent trends, of state grants of immunity to local political subdivisions, see Ann Judith Gellis, *Legislative Reforms of Governmental Tort Liability: Overreacting to Minimal Evidence*, 21 RUTGERS L.J. 375, 378-79, 392-98 (1990).

251. 527 U.S. at 755.

252. *Id.* at 755-56.

253. *Id.* at 756.

full-blown constitutional counter-revolution that returns us to a pre-New Deal world in which federal legislative authority is narrowly constrained. Whether, and to what extent, the Court goes down this path will be a central concern for Court watchers and constitutional scholars over the next several terms.

In this section, we consider two issues that are likely to be key determinants of the Court's actual course. First is the question whether the critical five Justice coalition, which has provided the core support for the Court's recent federalism decisions, shares a sufficiently coherent perspective or a sufficiently consistent agenda to sustain the constitutional transformation that they have begun. Second is the question whether the quaint "separate spheres" conception of federal state relations, which lies at the heart of the Court's emerging jurisprudence, will provide an adequate intellectual foundation for a constitutional framework that can withstand the centralizing pressures of contemporary American economic, social and political reality. While it remains far too early to draw definitive conclusions, these questions leave us with substantial doubts about whether the musty acorns that the Court has salvaged from its nineteenth-century cases will ever grow into the sturdy forest of a restrictive twenty-first century federalism.

A. Deconstructing the Court's Nostalgic Coalition

The Court's recent federalism decisions have rested on the narrowest of majorities. With the exception of the six-to-three decision in *Boerne,* each of the Court's significant federalism cases from *Lopez* to the present has been decided on a five-to-four vote, and, again with the exception of *Boerne,* each has relied on the same five-member bloc, consisting of Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O'Connor.[254] If the Court is to entrench and expand its nostalgic federalism, it will almost certainly

254. This stable five-four division is found in *Lopez, Seminole Tribe, Printz, Alden, College Savings Bank, Florida Prepaid, Kimel,* and *Morrison.* In *Boerne,* by contrast, Chief Justice Rehnquist and Justices Thomas, Scalia, Stevens, and Ginsberg joined in Justice Kennedy's majority opinion (although Justice Scalia declined to join in one non-determinative subsection), while Justices O'Connor, Souter, and Breyer each wrote separate dissents. Justice O'Connor, however, in her *Boerne* dissent, is careful to note that she agrees with the majority's interpretation of the scope of Congress' Fourteenth Amendment powers, *Boerne,* 521 U.S. at 544, and only dissents because of her disagreement with the Court's interpretation of the First Amendment's free exercise clause. 521 U.S. at 544-45. Only Justice Breyer raises express reservations concerning the majority's reading of Section Five of the Fourteenth Amendment. *See id.* at 566 (Breyer, J., dissenting).

have to do so without much support from the Court's other four members.[255]

On closer examination, however, it is far from clear that these five justices represent a stable bloc, working from shared assumptions and objectives. In fact, it appears more likely that two quite different sets of concerns are motivating various members of the group to join together in what may well prove to be an unstable coalition.[256] The primary concern of two members of the majority, Justices O'Connor and Kennedy, is the protection and restoration of the authority of the states as autonomous sovereigns. For the others, the primary concern instead appears to be the delimitation of the scope of federal, and particularly congressional, regulatory authority. Although these two concerns have found common ground in the recent series of federalism decisions, further expansions of the approaches developed by the Court in these cases are likely to reveal tensions that may fracture the coalition.

Signs of a fissure were already visible in *Lopez*. Chief Justice Rehnquist's opinion for the majority focused almost entirely on the limited scope of congressional authority over economic activity under the Commerce Clause, with only a passing reference to the potential impact of congressional overreaching on "areas . . . where States

255. Each of the four, aside from Justice Ginsberg, has written forceful dissents articulating his disagreements with several of the strands of the Court's new federalism. *See, e.g., Kimel,* 528 U.S. at 92 (Stevens, J., concurring and dissenting); *Alden,* 527 U.S. at 760 (Souter, J., dissenting); *Seminole,* 517 U.S. at 58 (Stevens, J., dissenting); *id.* at 102 (Souter, J., dissenting); *Lopez,* 514 U.S. at 602 (Stevens, J., dissenting); *id.* at 604 (Souter, J., dissenting); *id.* at 625 (Breyer, J., dissenting). While Justices Stevens and Ginsberg joined Justice Kennedy's opinion in *Boerne,* that decision rested heavily on RFRA' s direct contradiction of the Court's own recent interpretation of the First Amendment. Their concurrence probably should not be construed to commit them to a newly restrictive view of congressional authority under the Fourteenth Amendment, but only to a particular application of the pre-existing framework for Section Five issues, as is confirmed by their role as dissenters in *Kimel.*

256. This analysis assumes, of course, that these justices will attempt to decide future cases on the basis of consistent and principled views about the proper roles of state and federal authority. The recent opinions endorsed by the five justice majority in *Bush v. Gore,* 121 S. Ct. 525 (2000), raise serious doubts about this premise. Indeed, in *Bush v. Gore,* these five Justices showed themselves ready to radically depart from their established approaches to central issues concerning state autonomy, in order to reach a result of particular immediacy. Nonetheless, it is noteworthy that, even in *Bush v. Gore,* Justices O'Connor and Kennedy declined to join the portion of the majority's argument that most frontally assaulted state authority by dramatically widening the range of circumstances under which the Court would reserve the right to second-guess state court rulings on questions of state law. *See id.* at 533 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, J.J.).

historically have been sovereign."[257] Justice Kennedy, joined by Justice O'Connor, while concurring in what he characterized as the case's "limited holding,"[258] wrote separately to highlight the centrality of federalism to the Court's role and to emphasize that his decisive concern was "whether the exercise of national power seeks to intrude upon an area of traditional state concern."[259]

Although it was Justice Kennedy who authored the concurrence in *Lopez*,[260] it is Justice O'Connor who has long been the Court's most outspoken advocate for state autonomy.[261] Her dissent in *Garcia* is a forceful defense of the proposition that "the States *as* States have legitimate interests which the National Government is bound to respect even though its laws are supreme."[262] In a series of subsequent opinions,[263] she guarded the embers of *Usery's* federalism, until she could fan them back into flame in *New York*. Throughout, she has been the primary reviver of the Court's nineteenth-century federalism case law[264] and the leading proponent of a separate spheres vision of federalism.[265]

For both Justice O'Connor and Justice Kennedy, their solicitude for the constitutional prerogatives of the states reflects their professional experience before they joined the Court. Justice O'Connor spent virtually her entire career, before her appointment to

257. *Lopez*, 514 U.S. at 564.

258. *Id.* at 568 (Kennedy, J., concurring).

259. *Id.* at 580.

260. Justice Kennedy's concurrence draws heavily on Justice O'Connor's opinions for its federalism themes. *See, e.g.*, *Lopez*, 514 U.S. at 576-577 (citing Gregory v. Ashcroft, 507 U.S. 452 (1991); New York v. United States, 505 U.S. 144 (1992); FERC v. Mississippi, 456 U.S. 742, 777 (O'Connor, J., dissenting)).

261. *See* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. Rev. 1443, 1449 (1990).

262. 469 U.S. at 581 (emphasis in original).

263. *See*, e.g., South Dakota v. Dole, 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting); South Carolina v. Baker, 485 U.S. 505, 530 (1988) (O'Connor, J., dissenting); Gregory v. Ashcroft, 501 U.S. 452 (1991).

264. *See, e.g.*, New York v. United States, 505 U.S. at 156, 162 (citing Lane County v. Oregon, 74 U.S. 71 (1869) and Texas v. White, 74 U.S. 700 (1869)); FERC v. Mississippi, 456 U.S. 742, 777-78 (1982) (O'Connor, J., concurring and dissenting) (same); *Kimel*, 528 U.S. at 72-73 (citing Hans v. Louisiana, 134 U.S. 1 (1890)); *cf.* Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 2 (1984) (quoting United States v. Bekins, 304 U.S. 27, 53 (1937) for the phrase "our 'indestructible union of indestructible states'," which derives from Texas v. White, 74 U.S. 700, 725 (1868)). *See supra* text accompanying notes 78-82.

265. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. at 458; *Garcia*, 469 U.S. at 580-81; *FERC*, 456 U.S. at 777-78.

the Supreme Court in 1981, working in county and state government, first in California and then in Arizona. In the course of her career, she served in all three branches of state government, first as a county attorney and assistant attorney general, then as a state senator, and finally as a judge on the Arizona superior and appellate courts.[266] Justice Kennedy's career, before his appointment to the Ninth Circuit Court of Appeals in 1975, was spent in his family's law firm in Sacramento, where his practice emphasized lobbying California state government on behalf of business clients and also allowed him time to advise then-Governor Ronald Reagan on state fiscal policy.[267]

The other three members of the Court's majority, by contrast, arrived at the Court after careers that included significant roles in Republican administrations in Washington,[268] and their approaches to federalism issues often reflect the concerns about congressional overreaching that this background instilled. The dominant message that comes through their opinions in the federalism cases is the need to constrain federal regulation, and particularly congressional action, within the bounds of the Constitution's express authorizations.[269] Even when Justice Scalia, for example, presents an extended explanation of the principles of federalism in *Printz,* his focus is on the need to limit federal power, not the values of preserving state

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266. *See* Judith Olans Brown, Wendy E. Parmet, & Mary E. O'Connell, *The Rugged Feminism of Sandra Day O'Connor,* 32 IND. L. REV. 1219, 1220-23 (1999); Gelfand & Werhan, *supra* note 261, at 1448-49.

267. *See* Aaron Freiwald, *Portrait of the Nominee as a Young Man: As Lobbyist and Lawyer, Anthony Kennedy Thrived in Reagan's California,* LEGAL TIMES, Nov. 23, 1987, at 1.

268. Chief Justice Rehnquist, before his appointment to the Court in 1971, spent two years as assistant attorney general for the Office of Legal Counsel under President Nixon, defending the prerogatives of the executive branch. *See* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 67 (1989). Justice Scalia spent six years as an assistant attorney general in the Nixon and Ford administrations, including a time heading the Office of Legal Counsel, before his appointment to the Court of Appeals in 1982. Gelfand & Werhan, *supra* note 261, at 1447 and n.13; Robert Marguard, *High Court's Colorful Man in Black,* CHRISTIAN SCIENCE MONITOR, March 3, 1998. Justice Thomas served briefly as a legislative assistant to Sen. John Danforth, then joined the Reagan administration, first as assistant secretary in the Department of Education and then as director of the Equal Employment Opportunity Commission, where he served for eight years, before his appointment to the Court of Appeals. *See* <http://www.law.upenn.edu/fac/bwoodhou/vsc/Thomas 03.htm>.

269. *See, e.g., Lopez,* 514 U.S. at 556-57 (focusing on the need to constrain congressional power under the Commerce Clause); *id.* at 593 (Thomas, J., concurring) (similar); *Seminole Tribe,* 517 U.S. at 59-68 (focusing on the limits on Congress' power to abrogate sovereign immunity); *Printz,* 521 U.S. at 936 (Thomas, J., writing "separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the federal government is one of enumerated, hence limited, powers").

autonomy.[270] Whereas Justice Kennedy's majority opinion in *Alden* focuses on the centrality of state sovereignty to the federal design,[271] the majority opinions by Justice Scalia and Chief Justice Rehnquist in *Alden's* two companion cases instead focus on the constitutional limits on congressional authority.[272] Indeed, for Justices Scalia and Thomas, if not for Chief Justice Rehnquist, one could easily conclude that their commitment to federalism principles is nothing more than a corollary of their deeper interest in restraining governmental power.[273]

Often the different concerns that appear to motivate these two clusters of justices point in the same direction, toward restrictions on congressional enactments which intrude on state authority or autonomy. But, even when their interests coincide, the tensions remain, as is evidenced by the strains among the opinions of the majority justices in *Lopez* and by the divergent approaches in the Court's opinions in *Alden* and its companions.

The Court's recent decision in *United States* v. *Morrison* shows signs of a careful effort by the Chief Justice to smooth over these differences and preserve the coalition. Throughout his majority opinion's discussion of the Commerce Clause, the Chief Justice is careful to draw extensively from Justice Kennedy's *Lopez* concurrence, emphasizing the limited nature of the Court's incursion

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270. *Printz,* 521 U.S. at 918-22. For Justice Scalia, the ultimate argument for precluding federal authority to commandeer the efforts of state law enforcement officers is that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service at no cost to itself the police officers of the fifty States." *Id.* at 922. He finds it necessary to supplement even this argument with a discussion of the implications of such commandeering for the proper distribution of authority internal to the branches of the federal government. *Id.* at 922-24.

271. 527 U.S. at 713-20.

272. *See College Savings Bank,* 527 U.S. at 690 (Justice Scalia emphasizing core notion of federalism that "governmental power . . . had to be dispersed and countered"); *Florida Prepaid,* 527 U.S. at 638-39 (Chief Justice Rehnquist emphasizing that Congress' power is limited to enforcing rights and does not extend to determining constitutional violations).

273. *See, e.g.*, Stewart Baker & Katherine Wheatley, *Justice Scalia and Federalism: A Sketch,* 20 URB. LAW. 353 (1988) ("Justice Scalia is emerging as at best, an occasional—perhaps only an accidental—advocate of federalism."); Gelfand & Werhan, *supra* note 261, at 1456 (characterizing Justice Scalia's approach as "Federalism as a Byproduct"). Justice Thomas, before his appointment to the Court, has gone so far as to characterize "states' rights" as a "constitutional sideshow." Clarence Thomas, *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution – The Declaration of Independence in Constitutional Interpretation,* 30 HOW. L.J. 983 (1987). By contrast, federalism appears to play a far more significant role for Chief Justice Rehnquist. *See, e.g.*, DAVIS, *supra* note 268 (arguing that Rehnquist "places a preeminent value on federalism"); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293, 294 (1976) (identifying federalism as one of three ideological underpinnings of Rehnquist's jurisprudence).

on congressional authority.[274] And he repeatedly rests his Commerce Clause analysis on the necessity of protecting areas of traditional state authority from federal intrusion,[275] the theme that had been central for Justice Kennedy's concurrence, far more than for the majority opinion, in *Lopez*. Similarly, in addressing the Fourteenth Amendment issue, Chief Justice Rehnquist's decision to focus on state action, rather than on the *Boerne/Kimel* distinction between rights and remedies serves to avoid a confrontation with Justice O'Connor, who, in *Kimel,* had carefully protected congressional actions predicated on "race and gender" from the same scrutiny attaching to purportedly remedial measures on behalf of non-suspect categories.[276]

Future cases that offer opportunities to expand the Court's federalism agenda are likely to strain the majority's fragile coalition further. Justice O'Connor has clearly signaled that she is not prepared to extend the Court's strict scrutiny of Congress' Fourteenth Amendment powers to statutes concerned with race and gender.[277] So, when the Court confronts a challenge to enforcement of Title VII or of VAWA against state agents, the coalition may well fracture.[278]

Conversely, Justice O'Connor has already failed to attract support from the majority's other faction to her efforts to set limits on Congress' spending power[279] and to find substantive protections for state sovereignty in the Tenth Amendment.[280] In short, it remains less than clear how far some members of the coalition are prepared to go in identifying protected areas of substantive state autonomy, while it remains equally unclear how far others will go in enforcing narrow limits on Congress' enumerated powers. These doubts raise grave questions about how far the Court will be able to advance the project of its revived separate-spheres federalism.

274. *See, e.g., Morrison,* 529 U.S. at 607-08.

275. *See, e.g., id.* at 607-09.

276. *See Kimel,* 528 U.S. at 62.

277. *See id.*

278. *Cf.* Charles Lane, *Disabilities Act Challenge Divides Court,* WASH. POST, Oct. 12, 2000, at A15 (describing Justice O'Connor's critical role in oral arguments for *Alabama v. Garrett* concerning the Americans with Disabilities Act.).

279. *See Dole,* 483 U.S. at 213-14 (O'Connor, J., dissenting). Justice Kennedy had not yet joined the Court, and Justice O'Connor dissented alone, although Justice Brennan also dissented on Twenty-First Amendment grounds.

280. *See Baker,* 485 U.S. at 533-34 (O'Connor, J., dissenting). Again, Justice O'Connor dissented alone. Justice Kennedy took no part in the case.

B. Deconstructing the Court's Nostalgia

It is not our purpose to revisit the endless debates about different theories of federalism or the competing virtues of state-centered versus national federalism visions.[281] Rather, our project is to explore the ramifications of the Court's nostalgic return to a separate spheres image of government structure and to suggest that its imagery cannot sustain its jurisprudence. In fact, the underlying metaphor is neither historically sound nor workable in today's world.

Despite the Court's obeisance at the altar of the past, its federalism decisions are essentially ahistoric: the concept of separate spheres was as ephemeral in the nineteenth century[282] as it will be in the twenty-first.[283] In practical terms, the separation was always artificial; the roles of state and federal governments in regulating, for example, economic activity were intermingled and controversial from the start,[284] as were their modes of raising revenue.[285] In reality, the period surrounding the ratification of the Constitution resulted, not in a simple carving up of the responsibilities of government, but in a "new synthesis" of the concept of sovereignty.[286]

Specifically, the Framers reconceived sovereign power as residing, not in the individual states, but in the "whole body of the people," who could distribute and redistribute its elements as they saw fit among different governments and different branches of the same government.[287] This understanding sees the distribution of

281. *See, e.g.*, Barry Friedman, *Valuing Federalism,* 82 MINN L. REV. 317 (1997); H. Jefferson Powell, *The Oldest Question of Constitutional Law,* 79 VA. L. REV. 633 (1993); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis,* 41 UCLA. L. REV. 903 (1994); Michael W. McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. CHI. L. REV. 1484 (1987).

282. *See, e.g.*, Deborah Jones Merritt, *supra* note 17, at 1564-66 (noting the outmoded "territorial" model of separate spheres federalism).

283. *See, e.g.*, Vicki Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle,* 111 HARV. L. REV. 2180, 2196-97 (1998) (suggesting that the theory of separate spheres does not prohibit the federal government from imposing requirements on the states).

284. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). *See generally* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1934).

285. *See* Hills, *supra* note 12, at 851-52.

286. ELKINS & MCKITRICK, *supra* note 107, at 12-13. In THE FEDERALIST NO. 51, Madison described the purpose of the complex structural checks and power divisions in the constitution as controlling factions and preventing usurpations of power. In his words "the different governments will control each other."

287. ELKINS & MCKITRICK, *supra* note 107. This characterization is shared by a

governmental powers as contingent, concurrent and contextual, the very antithesis of separation into rigid, metaphysical spheres with conflicting agendas.

If this model was a poor fit for the framing period, it was even more procrustean after the Civil War when, in fact, the separate spheres imagery rose to judicial prominence.[288] Indeed, it is more than a bit ironic that it was precisely at the time when the national economy was expanding most rapidly[289] and when the constitutional foundations of state autonomy had been significantly undermined[290] that the Court found it appropriate to promulgate a vision of federalism that asserted a sacrosanct realm of state authority. When the contemporary Court harkens back to this vision, its nostalgia is not for a past reality but for a fantasy past to which it wishes it could return.

If this fantasy fails to reflect historical reality, it falls even further short in application to contemporary life. While economics and politics become ever more global, the Court seeks to revive a parochial, locally centered, Jeffersonian America. Appealing as that Rockwellian portrait might be,[291] the notion that some elements of our lives can be cut off from national and international regulation simply does not make sense when we buy our books over the Internet and trade shares in foreign securities from our bedrooms. The states cannot function as independent sovereigns when their fiscal fates are simultaneously utterly interdependent and dependent on the national and global economy. Family law, long the archetypal province of state responsibility, no longer respects state boundaries when the Internal Revenue Code and federal health care legislation are fundamental influences on family structure.[292] The newly-elected

leading anti-federalist historian, *see* MCDONALD & SHAPIRO MCDONALD, *supra* note 79, at 201.

288. United States v. Cruikshank, 92 U.S. 542, 550-51 (1876) ("[T]here need be no conflict between . . . the respective spheres of state and federal government.").

289. For a thorough discussion of the role of the railroads in the emergence of a national economy in this era, see JEAN STROUSE, MORGAN: AMERICAN FINANCIER 246-261, 319-324, 451-53, 563-65 (2000).

290. As Professor Tribe explains in analyzing the way the nineteenth century Court viewed the Reconstruction Amendments, "What the constitution placed in the federal sphere, it necessarily took from the state sphere." TRIBE, *supra* note 34, at 1310.

291. For further discussion of that imagery, *see* Judith Olans Brown & Phyllis Tropper Baumann, *Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell's America*, 15 VT. L. REV. 49 (1990).

292. *See* Libby Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 211 (1999). *Cf.* Ann C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1820, 1871-

Republican candidate for the presidency, instead of seeking abolition of the Federal Department of Education, campaigned on the vital federal role in public education, another "core" function of state and local government.[293]

In such a world, the effort to build a jurisprudence on a mythic vision of a vanished past is doomed to fail. In fact, the Court's nostalgia proves unworkable on a number of different levels - doctrinal, practical, and theoretical - all of which are ultimately traceable to the perceived need for a rigid categorical framework that can set sharp boundaries to congressional authority.

We begin, as we must, with the doctrine, because one of the High Court's most fundamental responsibilities is pedagogy: to teach the lower federal courts and the legal profession. As with *Usery,* the approaches the Court proposes in each branch of its new federalism rest on constructs and distinctions which have no grounding in reality. To start with the Commerce Clause, in the wake of *Lopez* and *Morrison,* the limits of federal regulatory power depend on a distinction between commercial and non-commercial activities. Traditionalists might suggest that education, for example, falls cleanly on the non-commercial side of the line.[294] In a post-agrarian society, schools are inextricably entangled with commercial life. Their function is, in large part, to equip students for successful participation in national, and indeed international, commercial employment.[295] The education industry represents a massive and expanding share of national economic activity.[296] Indeed, to a growing extent, schools are

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72 (1995) (arguing why family law ought to be an exclusively state concern). The *Morrison* Court uses family law as an example of an area of "traditional state regulation" that must be protected from federal intrusion. *Morrison*, 529 U.S. at 615-16.

293. *See, e.g.*, James Dao, *Bush Expands on Education Theme, Saying a Reading Crisis Endangers the Economy*, N.Y. TIMES, Sept. 26, 2000, at A20; Rachel Smolkin, *Education Goes to Head of the Class*, PITTSBURGH POST-GAZETTE, Sept. 24, 2000, at A1; Michael Kinsley, . . . *And His Wise-Fool Philosophy*, WASH. POST, Sept. 5, 2000, at A25.

294. *See Lopez*, 514 U.S. at 564-65.

295. *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 614 (1992) (documenting the economic implications of public education). *Cf.* Abbott v. Burke, 575 A.2d 359, 371, 384, 400 (N.J. 1990) (focusing on obligation of public education to prepare each student for his/her role as "a competitor in the labor market").

296. *See* Edward Wyatt, *Investors See Room For Profit In the Demand for Education*, N.Y. TIMES Nov. 4, 1999, at Al; (education and training accounts for 10% of U.S. gross domestic product). *Cf.* National Center for Education Statistics, *Digest of Education Statistics*, 1999, ch. 4, at 1 (documenting steep growth in federal funding of education from 1965 to 1999) <http://nces.ed.gov/pubs2000/Digest99/chapter4.html>.

themselves commercial enterprises, with public schools increasingly challenged to compete with for-profit alternatives.[297]

The education example is by no means unique. Attempts to distinguish between commercial and non-commercial activity in the First Amendment context have proven increasingly ephemeral,[298] and it is hard to imagine an area of modern life that is not entwined with or significantly impacted by the world of commerce. To belabor the obvious, if every potential topic of regulation is interconnected with commercial activity, then the Court's purported doctrine can only limit federal authority by pretending not to see connections that are obvious to all. The possible rejoinder that just because something is intertwined with commerce does not mean that it *is* commerce would rest constitutional consequences on an inscrutable metaphysics.[299]

The distinctions at the heart of the Court's Section Five jurisprudence are equally specious. Insofar as *Boerne* is about federalism, not about which branch of the federal government has authority to interpret the First Amendment,[300] it depends on a

297. *See, e.g.*, Edward Wyatt, *New York to Seek Private Managers for Worst Schools*, N.Y. TIMES July 27, 2000, at A1; Jerry Ackerman, *Cyberspace U*, BOST. GLOBE, Aug. 25, 2000, at F1; Jay Mathews, *New School of Thought: Making Education Pay, For-Profit Initiative Has Backing*, WASH. POST, Apr. 19, 2000, at E1.

298. Consider, for example, the Court's difficulty in applying its definition of commercial speech, where what is determinative is the content of the speech and not the speaker's profit motivation. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 758 (1976). *Compare* Bates v. State Bar of Arizona, 433 U.S. 350 (1977), *with* Florida Bar v. Went For It, 515 U.S. 618 (1995) (lawyer advertising); *also compare* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) *with* Greater New Orleans Broad. Assoc. v. United States, 527 U.S. 173 (1999) (casino gambling).

299. The commercial/noncommercial distinction is particularly elusive in *Reno v. Condon*, 528 U.S. 141 (2000). The Court's brief assertion that the personal information regulated by the Driver's Privacy Protection Act is a "thing in interstate commerce," *id.* at 148, reminds us that virtually anything government touches can easily take on a commercial aspect. Although the commercial/non-commercial distinction may be no easier to make in the sovereign immunity context, it is a distinction with increasing appeal in that context in the wake of *College Savings Bank*, where Justice Breyer argued in dissent that a state should be subject to suit when it "engages in ordinary commercial ventures . . . like a private person." 527 U.S. at 694-95 (Breyer, J., dissenting). *See also* William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 855 (2000) ("The distinction between sovereign actions and commercial actions turns out to be critical to Eleventh Amendment jurisprudence. . . .").

300. Notwithstanding the Court's separation of powers rhetoric, see *Boerne*, 521 U.S. at 535-36, *Boerne* leaves the scope of Congress' remedial power in the religious liberty context unclear. Although RFRA no longer constrains state laws burdening the exercise of religion, it appears to remain a viable constraint on conflicting federal law. Thus, in *Christians* v. *Crystal Evangelical Free Church* (In re *Young)*, the Eighth Circuit Court of Appeals held that, notwithstanding *Boerne*, RFRA protects an insolvent religious donor

dichotomy not unlike *Lopez's*. In defining the scope of congressional authority to regulate behavior under the Fourteenth Amendment, the Court's Section Five strategy is to circumscribe the sphere of constitutional rights, just as in *Lopez* the strategy was to delimit the sphere of commerce.[301] The difficulty here is not that the crucial boundary is anachronistic, but that it is simply unintelligible. After all, the very ratification of the Fourteenth Amendment posed a fundamental challenge to the separate-spheres vision, a fact that the nineteenth-century Court obscured by a host of interpretive manipulations that narrowed the amendment's impact.[302] A century later, the *Boerne* and *Morrison* Courts continue in pursuit of the same fruitless task.

Even more evanescent is the fence the *Boerne* Court attempts to erect between rights and remedies. The fiction of pure right abstractions separated from fact specific and practical remedies is simplistic and artificially acontextual.[303] Neither legislatures nor courts can realistically understand rights without reference to the remedies by which those rights are to be vindicated. Nor should they. Identifying a set of rights to remediate without considering the impact of the remedy on the scope of the right is an empty exercise. In fact, the Court itself often invokes remedial issues to define and delimit constitutional rights.[304]

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and his church from the generally applicable fraudulent conveyance provisions of the United States Bankruptcy Code. 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *aff'd*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998). *See also* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 650-57 (2000) (discussing *Young*).

301. *See, e.g., Kimel*, 528 U.S. at 85-86 (circumscribing the range of rights against age discrimination); *Boerne*, 521 U.S. at 533-36 (circumscribing the range of rights against state infringements on religious freedom).

302. *See The Slaughterhouse Cases*, 183 U.S. (16 Wall.) 36 (1873) (limiting the Privileges and Immunities Clause to the privileges and immunities of state, not national, citizenship), and the *Civil Rights Cases*, 109 U.S. 3 (1883) (requiring state action to violate Section One, thus holding that Congress may not reach private behavior under Section Five).

303. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

304. The school desegregation cases are illustrative. After describing plaintiff's right to a unitary school system in *Green v. County School Board*, 391 U.S. 430, 439-42 (1968) the Court narrowed the right in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971) to a right to maximum practicable desegregation.

The evanescence of the right/remedy separation becomes even more evident when we consider the libertarian basis of rights in our constitutional regime. Rights are not affirmative entitlements but only negative limitations on government. *See* Judith Olans Brown, Wendy E. Parmet & Phyllis Tropper Baumann, *The Failure of Gender Equality:*

Although perhaps overwrought, the *Boerne* Court's frustration and its distaste for Congress' confrontational RFRA tactics is certainly understandable. However, less easy to grasp, particularly after *Kimel* and *Morrison,* is the specific doctrinal catapult used to reassert its constitutional primacy. While *Boerne's* concern that Congress had redefined the scope of First Amendment rights is intelligible, the Court's efforts in *Kimel* to explicate why Congress' definitions of the parameters of age discrimination overreached the right/remedy boundary are far more mysterious. Equally opaque, particularly in light of the massive record of state acknowledged failure to remedy violence against women and the overwhelming state support for a federal remedy, is the *Morrison* Court's insistence that VAWA was constitutionally deficient because it was directed at private actors and thus threatened state sovereignty.[305] The Court seems to have forgotten *Usery's* lesson that doctrine predicated on contrived and irrational distinctions will be short lived.

The doctrinal distinctions required to make sense of the Court's new sovereign immunity jurisprudence are no less problematic. Indeed, it is in this area that the Court finds itself thrown back to the very conceptual difficulties that scuttled the *Usery* approach some fifteen years ago, difficulties that revolve around the elusive concept of a core sphere of state sovereignty.[306]

The logic of the Court's opinions in *Alden* and its companions hinges on the notion that states, when acting in their sovereign capacity, cannot be subjected to judicial interference without their consent, except where the Constitution expressly provides for such

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An Essay in Constitutional Dissonance, 36 BUFF. L. REV. 573, 618-19 (1987). This narrow *laissez-faire* approach denies any social responsibility to provide services or facilitate claims and thus further obviates any meaningful jurisprudential boundaries between rights and remedies.

305. Even the majority concedes the "voluminous" congressional record. *Morrison,* 529 U.S. at 619-20. *See also id.* at 652-54 (Souter, J., dissenting) (reviewing record of state support for VAWA). As Justice Souter notes, "the states will be forced to enjoy the new federalism whether they want it or not." *Id.* at 654.

306. *See Garcia,* 469 U.S. at 545-46.

> "There is not and there cannot be, any unchanging line of demarcation between the essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, the people - acting not through the courts but through their elected legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires."

Id. at 546 (quoting Helvering v. Gerhardt, 304 U.S. at 427).

interference.[307] And the same (il)logic underlies *Reno* v. *Condon,* holding that the Commerce Clause permits regulation of state sales of motor vehicle information makes sense only in terms of the ancient proprietary/governmental dichotomy, which postulated a different legal status for states when exercising their sovereign powers than when performing more quotidian functions.[308] In *Condon,* the Court's only rationale for upholding Congress' restrictions is that they regulate the states not "in their sovereign capacities," but as "owners of databases," a distinction only comprehensible to someone for whom the proprietary/governmental distinction comes naturally.[309] And, if sales of databases fall on the proprietary side of the line, why do infringements of patents lie on the sovereign side?[310]

In an era when public and private functions have thoroughly interpenetrated one another,[311] the Court, in trying to make sense of these contrasts, will be left with the unpalatable choice between an empty formalism that simply shelters all activities undertaken by a state and a hopeless endeavor that seeks to carve out a meaningful concept of core state sovereignty. The latter project is the one that failed in the *National League of Cities* debacle. The former approach suffers from not only its wooden irrationality, but also a serious disconnection from the historical precedent on which it purports to rest – the pre-constitutional world in which states supposedly played a circumscribed set of sovereign roles. It is questionable, at best, whether such an unprincipled boundary can long survive, particularly when it needs to justify such important decisions as whether to

307. 527 U.S. at 706.

308. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept,* 93 HARV. L. REV. 1059, 1099-1113 (1980) (explaining the rise of the nineteenth century distinctions between public and private corporations and between the governmental and proprietary rules of public corporations). One remaining, if ironic, vestige of the governmental/proprietary distinction is the Dormant Commerce Clause's "market participant exception," which shelters the proprietary activities of state and local governments from the scrutiny to which the Dormant Commerce Clause ordinarily subjects them. *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 446-47 (1980); White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 206 (1983); *see generally* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause,* 88 MICH. L. REV. 395 (1989).

309. *Condon*, 528 U.S. at 151.

310. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 636 (1999). The House of Representatives recently heard testimony urging the restoration to intellectual property owners of the right to sue states for infringement. Witnesses discussed the unfairness of the windfall to states shielded from infringement liability as well as arguing that states participating in the intellectual property system were acting in a proprietary and not a governmental way. 69 U.S.L.W. 2072 (Aug. 8, 2000).

311. This was the central problem for the cases applying *Usery*. *See supra* note 83.

restrict the rights of public employees to enforce their rights to reasonable working conditions or to equitable treatment.[312]

Of course, despite these difficulties, the Court may, by judicial fiat and without concern for the conceptual puzzles it is posing for Congress, the states, and the lower courts, insist on the reality of these critical categorical distinctions – between commerce and non-commercial activity, between rights and remedies, between public and private. However, if it does so, the resulting allocation of authority appears fated to prove, not only "unsound in principle," but "unworkable in practice."[313]

Consider, first, the impact of the Court's sovereign immunity doctrine on congressional regulatory capacity. What will become, for example, of such an explicitly and quintessentially congressional role as the regulation of patents,[314] if the states are truly immune from judicial remedies and if the boundaries of state sovereignty are left to state self-definition? What prevents a state, concerned about the high costs of prescription drugs, from simply deciding to manufacture and market the drugs itself without any royalties to the patent holders?[315] Once states have learned to circumvent patent protections in this manner, will those protections retain any significant value for the patent holders that cannot be expropriated at will by state action? The Court may conceive of its sovereign immunity cases as simply sheltering the states from the ordinary application of congressional enactments,[316] but, in practice, the states' immunity threatens a far broader evisceration of congressional authority.[317]

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312. These stresses on the Court's boundary will be further aggravated both by the proliferation of quasi-governmental entities, such as industrial financing agencies and port authorities, lurking at the borders of state sovereignty, and by the Court's attempt to exclude local entities from sovereign immunity's protection, despite the infinitely malleable variety of blendings of state and local roles.

313. *Garcia*, 469 U.S. at 546-47.

314. U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have the Power . . . to promote the Progress of Science and Useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and Discoveries.").

315. For that matter, could a state establish or authorize a separate, quasi-governmental entity to do so on its behalf?

316. *See Alden*, 527 U.S. at 758 ("When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations . . . Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.").

317. Of course, the evisceration could be sharply restricted if a dependable distinction could be drawn between the core governmental or public functions that are protected by sovereign immunity and the peripheral proprietary or private functions that are not. This is precisely the kind of conceptual distinction that the Court previously tried and failed to

Conversely, the Court's nostalgic federalism places a regulatory responsibility on the states that they are, in practicality, incapable of assuming.[318] Perhaps in an earlier time, when the web of economic interdependency was looser, and when the mobility of people, economic activity, and capital was more constrained, states could realistically be expected to make independent choices about whether and how they would regulate in areas of environmental, social or criminal conduct that impinge on, but do not directly affect, commercial activity. At present, however, states often are poorly positioned to exercise meaningful authority over actors and events that easily migrate across state boundaries.[319] And even when they might be able to regulate effectively, the states, cognizant of their precarious place in an increasingly competitive national and global economy, are often understandably reluctant to impose costs or burdens that might impair their competitive position.[320] In consequence, the Court's federalism threatens, not to shift regulatory power to the states, but to create a regulatory vacuum that neither Congress nor the states can fill.[321] Moreover, the Court's deployment of a set of unstable doctrinal distinctions will, in practice, invite both Congress and the states to manipulate the Court's categories in ways

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draw during the *Usery* era.

Alternatively, congressional authority could be sustained by reliance, not on private enforcement actions, which are barred by sovereign immunity, but on federal agency enforcement actions, which are not. *See supra* text accompanying note 187. But the availability of such a strategy reduces *Alden's* purportedly substantive protection of state sovereignty to an ironic formalism that adds little or nothing to state autonomy while exacerbating the state/federal friction that the Court claims to diminish. *Cf.* Solid Waste Agency of N. Cook County v. United States Army Corp. of Engineers, 121 S. Ct. 675 (2001).

318. Beyond the inappropriateness of the shift of regulatory responsibilities, conditioning an individual's constitutional rights on her status as a citizen of a particular state (as the Court's recent Fourteenth Amendment cases seem to suggest) mocks the notion of a national polity protected by Article Four, Section Two, and distorts the constitutional consequences of the incorporation doctrine, applying the guarantees in the Bill of Rights against state as well as federal infringement.

319. *See, e.g.*, Robyn Shields, *Can the Feds Put Deadbeat Parents in Jail?: A Look at the Constitutionality of the Child Support Recovery Act*, 60 ALB. L. REV. 1409, 1439 (1997) (noting the serious problem of deadbeat parents fleeing across state lines).

320. *Cf.* Peter D. Emich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 378, 389-97 (1996) (discussing the political pressures leading states to offer tax incentives to attract businesses); *see* Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN L. REV. 447 (1997) (arguing that such state practices are economically rational).

321. This consequence, of course, may be quite compatible with the objectives of one contingent of the Court's majority.

that may serve their own ends but will accentuate the incoherence of the Court's vision. For example, the boundaries of the Court's new sovereign immunity jurisprudence will encourage states both to redefine the distribution of responsibilities between state and local entities and to consider assuming formerly private functions that can now be more successfully pursued by a state entity immune from judicial interference. At the same time, Congress is likely to seek Spending Clause hooks upon which to hang a revived capacity to impose enforceable federal requirements on the states.[322]

The doctrinal and practical problems that promise to plague the Court's new federalism reflect its underlying theoretical incoherence. The Court's doctrinal ambitions are dependent on a set of boundaries that appear intellectually untenable, and the Court's defense - that these demarcations are constitutionally mandated - is little more than arid scholasticism. Let us be clear. The notion of preserving state sovereignty in a federally centered regime is not without appeal and the ongoing task of crafting and guarding a constitutionally meaningful role for the states is appropriate for the High Court. However, far less defensible is the methodology the Court employs to accomplish this task, one which is far too metaphysical and far too out of touch with current realities to serve as a basis for resolving real disputes between real parties or for allocating authority among complex institutional structures and prerogatives.

Consider, for example, the havoc the Court wreaks with the public/private distinction, a dichotomy that currently plays a variety of roles in a variety of doctrinal contexts. In the sovereign immunity cases, the Court, in its effort to protect states from liability, carves a deep gulf between state actors and the private sector, a gulf that depends on what the Court sees as the fundamentally distinctive

322. Similarly, Congress is already displaying its ingenuity in relation to the Court's new Commerce Clause and Fourteenth Amendment standards. A successor to RFRA, entitled the Religious Liberties Protection Act ("RLPA"), which restores many of RFRA's restrictions, but rests them on a Commerce Clause foundation, was the subject of favorable congressional hearings during the 1999 session. *See* 68 U.S.L.W. 2157 (Sept. 21, 1999) (describing hearings on RLPA). Also, subsequent to the decision in *Lopez*, Congress, on September 30, 1996, enacted 18 U.S.C. sect. 922(q)(1), articulating several legislative findings concerning the effects of guns in school zones on interstate commerce, with the intent of buttressing the provision of the Gun Free School Zones Act, 18 U.S.C. sect. 922(q)(2) struck down by the Court. Unless the Court is prepared to engage in an ongoing cat-and-mouse interchange, in which it repeatedly seeks to refine formulations that Congress cannot evade, its recent case law may leave nothing more than an increasingly irrelevant often internally contradictory corpus of technical rules that Congress can readily sidestep, or not, as the case may be.

character of sovereignty. In its rush to enfold itself in the seductive embrace of state sovereignty, the *Alden* and *Kimel* Courts must draw a sharp, if bizarre, distinction between the rights of otherwise similarly situated employees, depending solely on the Court's categorization of their employers. Ironically, in its efforts to sanctify the states, the Court commits itself to a framework that sacrifices the rights of the agents who carry out the states' functions.

Alden and *Kimel* are repugnant to other applications of the public/private distinction as well. For example, at the core of the Fourteenth Amendment state action doctrine is the notion that the state is bound by constitutional command, while the regulation of private entities is rarely of constitutional magnitude. Thus, those challenging governmental behavior rising to the level of state action have an additional and more magnificent set of rights than those whose claims depend on legislative grace, whereas in the sovereign immunity cases the opposite is true.

The *Morrison* Court also relies on the distinction between public and private actors, but ironically uses it to undergird a result contradictory to the sovereign immunity cases. *Morrison* denies congressional ability to reach private behavior under Section Five,[323] thus implying that a VAWA remedy against a state actor might be within the federal legislative purview.[324] That leaves the Commerce Clause as the primary source of authority for regulation of the private sector. Since VAWA was insufficiently economic to satisfy *Lopez,* victims of gender motivated violence are left to the tender mercies of the very states who have already admitted their inability to deal with the problem. *Morrison* thus accomplishes the ultimate disaggregation of right from remedy which so concerned the *Boerne* Court.

Separating the world into spheres of purely public and purely private activity may well have reflected the reality of the framing period,[325] but that reality was surely transformed by Reconstruction

323. 529 U.S. at 621-22.

324. Of course, substantial questions remain about whether such a remedy could pass muster under *Alden* and *Kimel.*

325. Of course, there is room for substantial doubt about the viability of a neat public/private distinction even during the framing period, a time when a private university like Harvard received special recognition in the Massachusetts Constitution, *see* Mass. Const., Pt. 2, cl. 5, sec. 2, when many American cities were organized as private corporate bodies. *See, e.g.,* Frug, *supra* note 308, at 1095-1099 (discussing, for example, Philadelphia), and when mercantile corporations like the East India Companies often assumed public powers and responsibilities, *see, e.g., International Trade:* 1614: *The East India Companies,* THE ECONOMIST, Dec. 25, 1999, at 3. *Cf.* Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege*

and the Industrial Revolution. The anachronism of the Court's revival of this sharp separation inevitably unleashes a welter of contradictions and perplexities. The abstract inflexibility of the Court's categories precludes the sensitivity to circumstance and context that rendered the pre-existing constellation of public/private dualities workable.[326] Similarly anachronistic – and similarly artificial – are the other central dichotomies on which the Court's new federalism rests: commercial/non-commercial, rights/remedies, state/federal.

After all is said and done, then, the foundation of the new rules—and the seeds of their failure—is little more than the Court's desperate insistence that things have essences, which must be judicially ascertained in the face of Congress' apparent inability or unwillingness to do so. Once discovered and identified, the remaining judicial task is to ensure that these essences are afforded their full measure of constitutional respect. Like the Philosopher's Stone, this process purports to be transformative, somehow achieving the longed-for end to federal aggrandizement.

A constitutional regime predicated on a metaphysical structure inevitably invites judicial over-reaching. If the proper limits on federal authority take the form of conceptual abstractions, then it is the "apolitical" judiciary that is best situated to discern them. If only the Supreme Court can intuit the natural boundaries between the spheres, legislative policy choices must necessarily be subject to rigorous judicial oversight. A Court convinced of the reality of fundamental categorical distinctions of course arrogates to itself the power and duty to enforce them. The result is a Court that acts as Congress' adversary, rather than its partner, in defining the contours of federalism.[327]

This quixotic search for categorical essences is a path the Court has trod before, perhaps most (in)famously in *Lochner* v. *New*

Distinction and 'Takings' Clause Jurisprudence, 60 SO. CAL. L. REV. 1, 67, n.341 (1986) (discussing the anomalous character of mercantile corporations in the late 18th century); *Note, Incorporating the Republic: The Corporation in Antebellum Political Culture,* 102 HARV. L. REV. 1883, 1889-92 (1989) (discussing the complex views of the role of corporations prevalent during the framing era).

326. For a particularly disingenuous recent discussion of public and private functions, in the context of political primaries, see *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

327. *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty after* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 95.

York.[328] The parallels between the *Lochner* fallacy and the federalism cases we have been discussing are striking. *Lochner* rested on a theoretical abstraction unsubstantiated by factual reality, legislative wisdom or contemporaneous scholarship.[329] *Lochner* looked backwards nostalgically to a preconstitutional order which never existed beyond the judicial imagination. In that world, rights and responsibilities were allocated not by the political process but by a predestined natural ordering discernible only to the Court. As every student of the Constitution knows, the *Lochner* revolution failed. It failed because of internal analytic inconsistencies[330] and because its metaphysical imperatives were contradicted by empirical reality. The ultimate *Lochnerian* heresy was the Court's denial of the legislative role and its use of the power it arrogated to itself in the service of an outdated fantasy. When the fantasy proved unsustainable, the Court found itself institutionally discredited and largely out of the game of second-guessing congressional authority, until *Usery's* attempted revival.

And here they go again!

328. 198 U.S. 45 (1905). For a lengthy discussion of these points see Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 467-77 (1996).

329. *See Lochner,* 198 U.S. at 75 (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics."). *See* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 552 (1933) or Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

330. Compare the *Lochner* Court's claim, 198 U.S. at 58-59, to preserve the right of the states to regulate the working conditions of miners acknowledged in *Holden v. Hardy,* 169 U.S. 366 (1896), with the *Lopez* Court's insistence, 514 U.S. at 559-60, on the continuing viability of *Wickard v. Filbum*, 317 U.S. 111 (1942) and *Heart of Atlanta Motel v. United States*, 374 U.S. 241 (1964).