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## Discussion: A Focus on Federalism

Jeffrey B. Morris

*Touro Law Center*, [jmorris@tourolaw.edu](mailto:jmorris@tourolaw.edu)

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## DISCUSSION: A FOCUS ON FEDERALISM

*Professor Erwin Chemerinsky*<sup>1</sup>

*Professor Jeffrey B. Morris*<sup>2</sup>

*Professor Martin A. Schwartz*<sup>3</sup>

PROFESSOR SCHWARTZ: Some decisions of the United States Supreme Court last term fall under the category of federalism.<sup>4</sup> This has been true now for a large number of years in the Supreme Court. And to pick up on something that Professor Chemerinsky said earlier, I think that when we have a Supreme Court review program, it sometimes may be a little dangerous to look at a recent case in isolation. Maybe it is necessary to look at how the case fits

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<sup>1</sup> Professor Erwin Chemerinsky is a former Sydney M. Irmas Professor of Law and Political Science, University of Southern California Law School. He is presently a faculty member of Duke Law School where he is an Alston & Bird Professor of Law. Professor Chemerinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law. This article is based on a transcript of remarks given at the Sixteenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

<sup>2</sup> Professor Jeffrey B. Morris is a Professor of Law, Touro Law School. A.B. Princeton University, 1962; J.D. Columbia University of Law, 1965; Ph.D. Columbia University, 1972.

<sup>3</sup> Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things, authored leading treatises entitled *Section 1983 Litigation: Claims and Defenses* (3d ed. 1997), *Section 1983 Litigation: Federal Evidence* (3d ed. 1999) and with Judge George C. Pratt, *Section 1983 Litigation: Jury Instructions* (1999). In addition, Professor Schwartz is the author of a bi-monthly column in the *New York Law Journal*, entitled "Public Interest Law."

<sup>4</sup> See, e.g., *Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *Pliler v. Ford*, 124 S. Ct. 2441 (2004); *Hibbs v. Winn*, 124 S. Ct. 2276 (2004).

into the bigger picture. That is what we hope to do with the federalism decisions from last term.

There was a particularly major federalism decision, *Tennessee v. Lane*,<sup>5</sup> which underscores the significance of trying to put the most recent cases into this bigger context. I was also thinking that over the last fifteen years, this term “federalism” has been thrown around a lot without an attempt to define it too precisely.

I think my first contact with the phrase goes back to the *Younger v. Harris* decision where Justice Black referred to “Our Federalism.”<sup>6</sup> I do not know if this concept appeared much before *Younger v. Harris*, the doctrine that normally prevents the federal courts from interfering with state judicial proceedings.<sup>7</sup> At present, I think the phrase has become a type of political slogan or euphemism for states’ rights, but that is not the accurate meaning. Professor Chemerinsky, I think you have a definition of federalism in your treatise.<sup>8</sup>

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<sup>5</sup> 124 S. Ct. 1978 (2004).

<sup>6</sup> 401 U.S. 37, 44 (1971) (stating that “[t]his perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism,’ and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of ‘Our Federalism.’”).

<sup>7</sup> *Id.* The doctrine represents the belief that the “National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” Although the government is responsible for protecting federal interests, it should do so in ways that will not “unduly interfere with the legitimate activities of the States.” *Id.*

<sup>8</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 1.1 (2d ed. 2002) (defining federalism broadly as the term used to refer to the Constitution’s vertical division of authority between federal and state governments).

PROFESSOR CHEMERINSKY: I think what is interesting here is at the time of the founding it was the federalists who favored strong national power and it was the antifederalists who favored states' rights positions.<sup>9</sup> Somehow, that has been turned around so that now we assume federalism to be the states' rights position. In terms of ideology, where did this come from? During the period from the late 19th Century to 1937, the phrase "dual federalism" referred to the division of power between the federal government and the states, but often became synonymous with restricting federal power and states' rights.<sup>10</sup>

*Younger v. Harris* in 1971 was where Justice Black spoke of "Our Federalism."<sup>11</sup> I think the proper definition of federalism is much more neutral. What federalism is about is the allocation of power between the national government and state and local governments. It can be descriptive in terms of how we allocate decisions between the national government and state law governments. It can be normative of how we should allocate power between the national and state governments, but there is no reason why we should favor the states' rights over federal power.<sup>12</sup>

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<sup>9</sup> See, e.g., THE FEDERALIST NO. 46 (James Madison) ("[T]he powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States as they are indispensably necessary to accomplish the purposes of the Union . . ."); JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 124 (1961) ("In the Pennsylvania ratifying convention Robert Whitehall asserted, 'This Article *eradicates* every Vestige of State govt — and was *intended* so — it was *deliberated.*' ") (emphasis in original).

<sup>10</sup> See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

<sup>11</sup> *Younger*, 401 U.S. at 44.

<sup>12</sup> See CHEMERINSKY, *supra* note 8, § 1.1.

But I think it is correct to say that over the last decade, we have focused on federalism as being about narrowing the scope of the federal government's power for the sake of expanding states' rights.

PROFESSOR SCHWARTZ: Professor Morris?

PROFESSOR MORRIS: The use of the term may be more recent, but the issues certainly do go back to 1787. The way I look at it, for the first hundred years of the history of the United States under the Constitution, the central issue of federalism was: Could the states get out of the union if they did not like what the federal government was doing?<sup>13</sup> And the answer to that was ultimately decided by a war.<sup>14</sup> But during that same period, from 1787 and continuing until 1886, the amount of governing that the federal government did was very, very limited; most governing went on within the states.

From 1886 up to perhaps 1990, there were two great issues that were resolved consecutively. The first was whether the federal government could effectively legislate for the entire country on matters affecting the economy, and that ultimately was decided in the affirmative in cases after 1937.<sup>15</sup> The question that

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<sup>13</sup> See, e.g., DAVID N. POTTER, *THE IMPENDING CRISIS 1848-1861* (1976).

<sup>14</sup> The Civil War, which lasted from April 12, 1861 to May 1865, was fought over issues of slavery and states' rights after the Southern states asserted their right to secede from the Union.

<sup>15</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (holding the National Labor Relations Act was a valid exercise of Congress' power under the

followed was whether the federal government could essentially protect the civil liberties of Americans from actions of the state. That issue was decided on behalf of the federal government over the period essentially from 1930 through 1969.<sup>16</sup> This is the background to where we are today.

PROFESSOR SCHWARTZ: I suppose the most neutral definition of federalism, Professor Chemerinsky, might be that the Constitution contemplates two different governments having potential authority over the same geographic scope and how that authority should be divided up.

PROFESSOR CHEMERINSKY: I think that is absolutely right. And I think if you define federalism that way, then it is not only about the extent of Congress' power under the Commerce Clause, we should also be talking about preemption cases: When can

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Commerce Clause for dealing with labor-management issues). *See* *United States v. Darby*, 312 U.S. 100, 123 (1941) (holding the Fair Labor Standards Act, which set minimum wages and maximum hours for employees, to be constitutional because the restrictions were permissible exercises of power under the Commerce Clause).

<sup>16</sup> *See* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 267-68 (1964) (holding the power of Congress to promote interstate commerce also included the power to regulate local incidents, which might have a substantial and harmful effect upon that commerce and therefore, it was within Congress' power to prohibit racial discrimination by motels serving interstate travelers); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (holding the Civil Rights Act of 1964 constitutional because Congress had the authority to prohibit racial discrimination in a restaurant which served food that is transported in interstate commerce).

federal law preempt state and local governments?<sup>17</sup> That is also an issue under federalism. And yet, if you say to a law professor, today I covered federalism in constitutional law, they would not all think of the preemption cases as being part of that. I do not think that is the common use of the term.

PROFESSOR SCHWARTZ: Over about the last fifteen years, what has been taking place in the United States Supreme Court is what many have called a federalism revolution.<sup>18</sup> That is pretty strong language and it is a phrase that is meant to summarize the fact that there have been a series of Supreme Court decisions that have had as their theme a fairly consistent cutting back of congressional power and fairly consistent protection of states' rights.<sup>19</sup> A lot of that has taken place simultaneously.

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<sup>17</sup> Under Article VI, Clause 2 of the United States Constitution, generally known as the "Supremacy Clause," federal laws take precedence over contrary state constitutional provisions, statutes, or common law. Where Congress and the State have regulated the same activity, federal law preempts state law. See generally Michael L. Russell, *Beyond Geier: Federalism Faces an Uncertain Future*, 11 SETON HALL CONST. L.J. 69 (2000).

<sup>18</sup> See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (discussing the Rehnquist Court's federalism revolution); Larry D. Kramer, *The Supreme Court 2000 Term: Forward: We the Court*, 115 HARV. L. REV. 4, 129 (2001) (referring to a "revolution" in federalism doctrine).

<sup>19</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act on the ground that it exceeded congressional power and invaded the states regulatory power); *United States v. Morrison*, 529 U.S. 598 (2000) (holding Congress lacked the authority to enact provisions of the Violence Against Women Act that authorized a civil cause of action because the activity was not economic in nature); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provisions of the Brady Act requiring State and local governmental officials to execute a federal regulatory program); *New York v. United States*, 505 U.S. 144 (1992) (holding the "take-title" provision of the

To summarize the different areas where this has occurred, it occurred quite dramatically in cutbacks by the Supreme Court on Congress' power to regulate interstate commerce in at least two major decisions setting forth some important limitations,<sup>20</sup> and cutting back on Congress' power under § 5 of the Fourteenth Amendment to enact legislation that is designed to enforce the protections of the Fourteenth Amendment.<sup>21</sup> Some of the decisions gave states protections either under the Tenth Amendment or some Tenth Amendment-type concept, which means that the Constitution provides some sovereignty protection to the states that is judicially enforceable by the states.<sup>22</sup>

There has also been a consistent bolstering of the Eleventh Amendment sovereign immunity defense that states have when they are sued in Federal Court.<sup>23</sup> I think that the Supremacy Clause decisions belong in that grouping also.<sup>24</sup> Federalism decisions

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Low-level Radioactive Waste Policy Act unconstitutional on the ground that Congress may not compel the states to assume liability).

<sup>20</sup> *Lopez*, 514 U.S. at 567 (holding that enactment of the Gun-Free School Zones Act of 1990 exceeded congressional power under the Commerce Clause); *Morrison*, 529 U.S. at 627 (holding that Congress' power under § 5 of the 14th Amendment did not extend to the enactment of the Violence Against Women Act of 1994).

<sup>21</sup> *See, e.g.*, *Bd. of Trustees v. Garrett*, 531 U.S. 256 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>22</sup> U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>23</sup> *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 520 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>24</sup> *See Gibbons v. Ogden*, 22 U.S. 1, 210 (1824) (holding that when state and federal laws conflict, the state must yield to the federal legislature); *Gade v.*



have been overwhelmingly five-to-four decisions, and I guess the next thing goes without saying, but it was the same five, and they became known as the Federalism Five.<sup>25</sup> There were four dissenters, and it was very consistently the same lineup of Justices. I would like to hear what both of you think about the fact that the Court came under quite a bit of criticism for these decisions and that the criticism ran a fairly wide range. Some of the criticism noted that this is a Court that is not deferring to congressional judgment, which became especially significant because the Federalism Five were supposedly the most conservative members of the Court whom you would think would defer to the Congress.

There was follow-up criticism that the power was being transferred from the Congress to the United States Supreme Court. Then there was also criticism in terms of insensitivity to individual rights because much of the congressional legislation was designed to protect individuals who seek to sue the state government in federal court.

If I might add two other bases for the criticisms, some of the decisions involve the utilization of standards by the Supreme Court, which I would say came almost out of nowhere. Under § 5

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Nat'l Solid Wastes Mgmt. Assoc., 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our preemption doctrine is derived, 'any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield.' ") (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

<sup>25</sup> Simon Lazarus, *Strategic Realignment on Sovereign Immunity and the Fourteenth Amendment?*, American Constitution Society, available at <http://www.acslaw.org/views/lazarus.htm> (discussing "a bare majority sometimes labeled the 'Federalism Five'"; Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O'Connor).

of the Fourteenth Amendment, the Supreme Court said, for congressional legislation to be constitutional and within Congress' power, the legislation had to be congruent and proportionate to some problem that Congress had identified pertaining to constitutional violations by the states.<sup>26</sup> I think it is just something that the Court created.

The last piece of this puzzle in terms of the criticism relates back to *Bush v. Gore*,<sup>27</sup> where the critics of the Courts' federalism decisions asked where the states' rights advocates were in *Bush v. Gore*. Why did they not care about the decision of the Florida Supreme Court? Why was that decision not upheld?<sup>28</sup> All of a sudden, the United States Supreme Court aggressively voted to overturn that decision.<sup>29</sup> There is a whole package of criticism here, and again I would like to hear what each of you have to say about that.

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<sup>26</sup> *City of Boerne*, 521 U.S. at 533-34.

<sup>27</sup> *Bush v. Gore*, 531 U.S. 98, 105 (2000) (holding "[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right").

<sup>28</sup> Bradley W. Joondeph, *Bush v. Gore, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1782-84 (2001) (describing criticisms of the *Bush v. Gore* decision, including that the Court "acted hypocritically," created a new "application of the Equal Protection Clause to interfere with the traditional state function of running elections," and infringed upon the Florida Supreme Court's authority to interpret the meaning of its own statutes).

<sup>29</sup> *Bush*, 531 U.S. at 101 ("We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based.").

PROFESSOR CHEMERINSKY: Let me present what the defense of this would be and then offer different criticisms from the ones you mentioned.

The defenders of this would say the Constitution is premised on the notion that Congress has limited powers. From 1937 to 1995, not a single federal law was held unconstitutional as exceeding the scope of Congress' commerce authority. The 1995 case Professor Schwartz referred to was *United States v. Lopez*, which involved a federal law prohibiting guns from being within a thousand feet of a school building.<sup>30</sup> In the oral argument, then-Solicitor General Drew S. Days III of the United States was asked just what Congress *cannot* do.<sup>31</sup> Given how it has been interpreted since 1937, where any activity taken cumulatively can have a substantial effect on interstate commerce, then what activity, taken cumulatively, does not have enough of an effect on interstate commerce?<sup>32</sup> He could not think of a single example.

Many have said that this is the moment at which the United States government lost *United States v. Lopez* because they could not articulate a stopping point on federal power.<sup>33</sup> I think that is

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<sup>30</sup> *Lopez*, 514 U.S. at 549.

<sup>31</sup> Transcript of Oral Argument at 5, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260) (asking "what's left of enumerated powers? What is there that Congress could not [do under] enumerated powers? What is there that Congress could not do, under this rubric, if you are correct?").

<sup>32</sup> *Id.* at 10 (asking "your rationale for this . . . that all violent crime, if Congress so desired, . . . could be placed in the Federal court for prosecution, all violent crime, or is there any stopping point? Is there any violent crime that doesn't affect interstate commerce on your rationale?")

<sup>33</sup> David B. Sentelle, *Lopez Speaks, Is Anyone Listening?*, 45 LOY. L. REV. 541, 544-46 (1999) (describing Drew Days, after being asked what is left of the doctrine of enumerated powers, as looking like "he had been kicked in the

the strongest case for the Supreme Court imposing the limits on Congress in the name of the Commerce Clause. I know many conservatives were very critical of the Supreme Court's expansion of sovereign immunity because it was not based on any text in the Constitution,<sup>34</sup> but I think that is the best defense.

I want to offer a different criticism than the ones that you mentioned because it goes back to your point about the definition of federalism. I said when we talk about federalism, we should be looking at both the powers of the federal government and the powers of state government. We should be talking about when federal law preempts state law as much as we are talking about the limits on the Commerce Clause and the limits on § 5 powers.

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stomach. I don't know what he thought the argument was going to be about . . . or what his moot bench had prepared him for, but it was evident both then and as the argument went on that he had no answer for that question."); Timothy Lynch, *Dereliction of Duty: The Constitutional Record of President Clinton*, 27 CAP. U. L. REV. 783, 834-36 (1999) (stating "the Court essentially would have to turn 'the Tenth Amendment on its head' " to accept Solicitor Days' argument that all power not expressly prohibited by the Constitution was reserved to the federal government) (quoting *Lopez*, 514 U.S. at 589 (Thomas, J., concurring)); William Banks, *At the Halfway Point: Light Docket Makes it Hard to Read Trends in Supreme Court Decisions*, 81 A.B.A. J. 50 (1995) (explaining that the Solicitor General was "hard-pressed to identify anything Congress could not federalize under his theory of the case.").

<sup>34</sup> Adam D. Thierer, *Federalism Reform: Seven Options for Congress*, HERITAGE FOUND. BACKGROUNDER, Jan. 27, 1999, at 3 (stating "[t]here remains a strong and continuing need to . . . protect the Founding Fathers' delicate balance of powers so carefully delineated in the Constitution" and "[s]everal decades of legislative abuse and judicial neglect have left the Founder's federalist system in disarray."). Supreme Court Justice Sandra Day O'Connor observed "[T]he Federal Government undertakes activities today that would have been unimaginable to the Framers . . . because the Framers would not have conceived that any government would conduct such activities; and . . . because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities." *Id.*

PROFESSOR SCHWARTZ: Professor Chemerinsky, if I could stop you there for a moment. If the federal law is held invalid because it is beyond Congress' power, would you say that there is no preemption issue in the sense of protecting states' rights?

PROFESSOR CHEMERINSKY: Yes, except that one would think that a Supreme Court that really cared about states' rights would narrow the preemptive reach of federal law. One way to empower state and local governments is to limit when there is federal preemption.<sup>35</sup> What is interesting is in virtually every preemption case in the last, perhaps, four years, the federal government has won on preemption grounds and the challenge based on the state and local interests is lost.<sup>36</sup> I will give a couple of examples.

In a case from two years ago, *American Insurance v. Garamendi*, California adopted a law that said insurance companies who did business during the Holocaust had to disclose

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<sup>35</sup> See *The Current State of Federalism in America: Hearings Before the Senate Comm. on Governmental Affairs*, 106th Cong. 5 (1999) (statement of Tommy G. Thompson, Governor, State of Wisconsin) (asserting that state and local governments have proven themselves "to be the innovators of the ideas and reforms that are improving the lives of all Americans" when given power and flexibility); Federalist Society Roundtable, *Federalism: A Tenth Amendment and Enumerated Powers Revival* (last visited Jan. 26, 2005), at <http://www.federalismproject.org/masterpages/publications/fedsoc.html> (explaining the intent of the founders to "limit the central sovereign's authority to a sphere of enumerated powers" which would "force the states to compete for their citizens' business, labor, capital, and affection.").

<sup>36</sup> See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Holocaust-era policies.<sup>37</sup> It was only a disclosure law. The Supreme Court held five-to-four that the implied dormant foreign affairs power of the President preempted California's law.<sup>38</sup> I have been a law professor for twenty-five years now; I have never heard of the implied dormant foreign affairs power of the President, but they found preemption on that basis.

In *Lorillard Tobacco v. Reilly*, Massachusetts adopted a law that said there cannot be tobacco advertising within a thousand feet of a school or playground.<sup>39</sup> Congress adopted a law that regulates the content of warning labels for cigarettes in cigarette advertisements; you know what those warnings have to be.<sup>40</sup> The Supreme Court, in a five-to-four decision, said that federal law preempts state and local governments from regulating the location of billboards.<sup>41</sup>

I would think that a court that is genuinely concerned about federalism would want a narrow preemption doctrine for state and local governments, so I have an alternative way to explain the cases. Many of the federalism cases where federal law has been struck down are federal civil rights laws: the Violence Against

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<sup>37</sup> 539 U.S. at 401.

<sup>38</sup> *Id.* at 427 ("The question relevant to preemption in this case is conflict, and the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.' ") (quoting *Crosby*, 530 U.S. at 386).

<sup>39</sup> *Lorillard*, 533 U.S. at 532-33.

<sup>40</sup> *Id.* at 540-41. See 15 U.S.C. §§ 1331, 1334 (2004).

<sup>41</sup> *Lorillard*, 533 U.S. at 565 ("We conclude that the Attorney General [of Massachusetts] has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use.").

Women Act, struck down on federalism grounds;<sup>42</sup> the ability to sue state governments, employment discrimination, people with disabilities, et cetera. But when businesses challenge state regulation on preemption grounds, state law loses.<sup>43</sup> So when you put together this panel, it does not always work. States' rights challenges to federal civil rights laws win; businesses' challenges to state business regulations win. Civil rights plaintiffs lose and business plaintiffs win. Is that really a federalism principle or is that just a description of a greatly conservative Court?

PROFESSOR SCHWARTZ: That is a very powerful argument that the Court is engaged in policymaking possibly not of the most wholesome nature.

PROFESSOR MORRIS: I am going to move us in a slightly different direction. I certainly follow and I think I agree with what Professor Chemerinsky has to say here, but it seems to me what we are talking about at the moment is "law professors' federalism": the federalism that shows up in cases involving the Commerce Clause, Taxing and Spending Clauses, that which shows up in the case books. As I think of American federalism, a federal system was presumably intended to balance in such a way that neither the federal government nor the state governments would be

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<sup>42</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>43</sup> *See, e.g., Aetna Health, Inc. v. Davila*, 124 S. Ct. 2488, 2495 (2004); *Engine Mfr's. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1760 (2004).

oppressive, and in this way, the people would be protected.<sup>44</sup> Therefore, one could well argue that after the second period of federalist decisions up until 1990, the great concern should have been the potential growth of power in the federal government, and attempts to trim that power.

Now, if you prevent some state citizen from suing under the Americans with Disabilities Act, it may be a blow to civil liberties, but that is not a major constraint on the power of the federal government. But if you uphold the Racketeering Act (RICO),<sup>45</sup> if you uphold the power of the Executive Branch to ban snowmobiles in the forests of Minnesota,<sup>46</sup> if you uphold or accept the USA PATRIOT Act,<sup>47</sup> you do not have any kind of balance

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<sup>44</sup> See THE FEDERALIST NO. 51 (James Madison). Madison wrote:

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority, that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.

*Id.*

<sup>45</sup> 18 U.S.C. § 1961-68 (2004).

<sup>46</sup> *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981). The Boundary Waters Canoe Area Wilderness Act of 1964 provided an exemption from the generalized ban on snowmobile use in forest areas for Northern Minnesota. In 1976, the Department of Agriculture banned all snowmobiling within the area. The United States Court of Appeals rejected Minnesota's challenge to the regulation, holding that the Property Clause of the Constitution granted Congress power over public lands. *Id.* at 1251.

<sup>47</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001



between state and federal government. What you essentially have is the continued growth of the federal government. So, my own view is that these cases under discussion are not, on the whole, very important.

PROFESSOR SCHWARTZ: I think they are important cases. Take the Age Discrimination in Employment Act (ADEA) that Professor Chemerinsky mentioned.<sup>48</sup> Here is a case where the ADEA is made applicable to the states by Congress, but a state employee who claims to have been discriminated against on the basis of age and who sues the state in Federal Court is met with an Eleventh Amendment defense, even though Congress intended to override the Eleventh Amendment and to give the individual a remedy. That seems to me to be exceedingly important.

PROFESSOR CHEMERINSKY: If you are one of the millions of people who work for a state government and you cannot sue the state for age discrimination and cannot sue the state for disability discrimination in employment, then this is very important. Similarly, if you cannot sue a state government, you cannot enforce copyrights against a state government. Think of a hypothetical law professor who has written a few books that law students may buy. And imagine the state university copies those

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(authorizing the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings). 8 U.S.C. § 1226a(a)(6) (2004).

<sup>48</sup> 29 U.S.C. §§ 621-634 (2003).

books and sells them to students for a few dollars less than they cost. Imagine this hypothetical professor is saving the royalties for his hypothetical four children's college educations and he wants his royalties. He is out of luck. He cannot sue the state in federal court or state court.

And lest you think this is purely hypothetical, not long ago I was preparing a talk for judges in another state and was using some copyrighted material. I said I would obtain the copyright release from the author. A person working in the judicial education department said they do not ask for copyright releases anymore because they know they cannot be sued for copyright infringement.

Now law professors, contrary to what you might have thought as law students, do not get all that much in royalties from their books, but there are multimillion-dollar patent infringement suits against state universities that are getting dismissed because of this. And so, at least in that context, I think those cases are very important.

PROFESSOR SCHWARTZ: To get to what took place last term in the Supreme Court and even, say, the last two terms in the Supreme Court, the big federalism cases were decided in favor of congressional power; states' rights did not prevail.<sup>49</sup> Of those

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<sup>49</sup> See Lazarus, *supra* note 25, stating:

The decision, *Tennessee v. Lane*, redraws the boundaries between state sovereign immunity from private lawsuits under the eleventh amendment and Congressional authority to enforce the fourteenth amendment. In effect, the *Tennessee*

cases, the Tax Injunction Act is a federalism congressional policy;<sup>50</sup> the case dealing with enforcement of consent decrees against the states raised an Eleventh Amendment issue.<sup>51</sup> So during the last term, in all the federalism cases, the states' rights position did not prevail and the biggest of those was *Tennessee v. Lane*.<sup>52</sup> But the question then becomes whether this is just a type of happenstance or accident. This gets back to the point of looking at decisions over a broader period of time, that maybe ten years from now, these two years of decisions will be fairly minor in the whole scheme of things, or can we say that maybe the federalism revolution has ended?

If we are saying that, I wonder about two things. One, I wonder about the influence of September 11th<sup>53</sup> on some of the Justices' thinking; that maybe cutting back on congressional power is not a great idea in an age of terrorism where Congress has to have the power to further national security. The second thing I am wondering about is whether the Justices are reacting at all to the criticisms. We have a conservative Ninth Circuit judge, Judge Noonan, who wrote a book criticizing all of these federalism

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majority tempers the expansion of state sovereignty originated in *Seminole Tribe v. Florida* and the contraction of Congress' fourteenth amendment enforcement authority in *Boerne v. Flores*.

<sup>50</sup> *Hibbs v. Winn*, 124 S. Ct. 2276 (2004).

<sup>51</sup> *Frew v. Hawkins*, 540 U.S. 431 (2004).

<sup>52</sup> 124 S. Ct. 1978 (2004) (holding that the ADA was a valid exercise of congressional power under § 5 of the 14th Amendment).

<sup>53</sup> On September 11, 2001, nineteen hijackers took control of four domestic American flights and crashed them into the World Trade Center, the Pentagon, and a field in Pennsylvania; nearly 3,000 people died in the terrorist attack.

decisions.<sup>54</sup> He is not known as a liberal circuit judge by any means, and I just wonder if the Supreme Court has been responsive to the criticisms.

PROFESSOR CHEMERINSKY: There are three questions. First, in *Tennessee v. Lane*, Lane was a criminal defendant in a state court proceeding in Tennessee.<sup>55</sup> The courthouse was not equipped for people with disabilities and he climbed on his hands and knees to get to the second floor courtroom.<sup>56</sup> It was either that or be carried and he refused to do that, so he literally crawled on his hands and knees. He sued the state for violating Title II of the Americans with Disabilities Act (ADA).<sup>57</sup> This provision of the ADA says the state and local governments cannot discriminate against people with disabilities in governmental programs, services and activities.<sup>58</sup>

The issue was whether state governments could be sued under Title II of the ADA. The Supreme Court, five-to-four, held that state governments can be sued when the fundamental right of access to the courts is implicated.<sup>59</sup> Justice Stevens wrote the opinion for the court joined by Justices Souter, Ginsburg, Breyer

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<sup>54</sup> JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002).

<sup>55</sup> *Lane*, 124 S. Ct. at 1982.

<sup>56</sup> *Id.* at 1982-83.

<sup>57</sup> *Id.* at 1983.

<sup>58</sup> Title II of the Americans with Disabilities Act of 1990 (ADA) provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132 (2005).

<sup>59</sup> *Lane*, 124 S. Ct. at 1994.

and O'Connor. Justice Stevens' majority opinion said the Supreme Court found there was a fundamental right of access to the courts.<sup>60</sup>

Now when Congress is dealing with a fundamental right type of discrimination, Congress has more latitude to act. Therefore, Congress can authorize suits against state governments under these circumstances. The opinion is very narrow. It does say state governments can be sued under Title II when the fundamental right of access to courts is implicated. What about all the other things that state and local governments do? When else can state governments be sued under Title II? The Court does not say.

I think it is pretty clear that state governments can be sued if a fundamental right is implicated, like voting.<sup>61</sup> Imagine New York State is sued in the next three weeks for discriminating against people with disabilities because there is no access to the polls. What about the state being sued for discriminating against people with disabilities with regard to medical licenses or licenses of lawyers? There is no fundamental right there. By implication, can we say the state cannot be sued? How close does the connection have to be to fundamental rights? The Court does not say. Imagine a state is sued for discriminating against people in a public transportation system. Is that so closely related to the fundamental right to travel that the state can be sued?

I think this is an opening for discussing why the Supreme

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<sup>60</sup> *Id.* at 1994.

<sup>61</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-67 (1966).

Court decides narrowly in some cases, and I think there is an easy explanation: that is as far as Justice O'Connor was willing to go and she was the fifth vote.

PROFESSOR SCHWARTZ: That becomes hard to explain as a matter of doctrine. If you look at the other federalism decisions, they all deal with constitutionality of the statute on its face. Then, all of a sudden we have a decision on this specific as applied type of claim under the Americans with Disabilities Act. I would have to admit that I would not know what to say to a class of students, other than Professor Chemerinsky said it came out that way because that is how the majority was able to get Justice O'Connor's vote.

PROFESSOR CHEMERINSKY: There is a difference between saying why is it this way and what it means for you as lawyers. If you are practicing in this area, what it means is that sometimes you are going to be able to sue the states under Title II of the Americans with Disabilities Act, and sometimes you are not going to be able to sue the states under Title II of the Americans with Disabilities Act. More generally I think what the Supreme Court is saying is that a statute adopted by Congress, if it deals with a fundamental right, can be used to sue state government, but other statutes cannot.

PROFESSOR SCHWARTZ: Professor Chemerinsky, to be precise about it, to use the Americans with Disabilities Act, when there is a fundamental right or discrimination subject to strict scrutiny, and there has been a congressional record showing widespread violations of that right by the states, does Congress have to make a record of widespread violations by the states?

PROFESSOR CHEMERINSKY: No. If it is a fundamental right or a kind of discrimination subject to strict scrutiny, Congress does not need a record documenting pervasive discrimination. If a fundamental right or type of discrimination requiring strict scrutiny is not at issue, it will need a record, and I base that conclusion on a Supreme Court decision the year before last.<sup>62</sup>

PROFESSOR SCHWARTZ: In *Tennessee v. Lane*, there was such a record.

PROFESSOR CHEMERINSKY: There was such a record in *Lane* and there was also one in *Nevada Department of Human Resources v. Hibbs*.<sup>63</sup> This was a case that involved whether state governments could be sued under the family leave provision of the Family Medical Leave Act.<sup>64</sup> This statute requires employers to give employees unlimited leave time for family and medical purposes.

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<sup>62</sup> Nev. Dep't Human Res. v. Hibbs, 538 U.S. 721, 729 (2003).

<sup>63</sup> *Id.* at 735.

<sup>64</sup> 29 U.S.C. § 2612 (a)(1)(C) (2003).

The Supreme Court decided, six-to-three, that the state government could be sued.<sup>65</sup> The Supreme Court said Congress adopted the family leave provision because it was concerned about gender discrimination, and the Family Medical Leave Act is facially gender neutral.<sup>66</sup> Hibbs in that case was a male, but the Supreme Court said that Congress was concerned over societal roles that more likely put women, rather than men, in the position of caretaker.<sup>67</sup> Based on the congressional record, which documented continuing gender discrimination by the states, the Supreme Court Justices used heightened scrutiny.<sup>68</sup>

PROFESSOR SCHWARTZ: The Court was willing to come to the conclusion that this type of discrimination had been practiced by the states.<sup>69</sup> And I think the Court has to come to that conclusion because how else will it be able to determine whether the state remedy is congruent and proportionate to the problem that Congress is seeking to solve?

PROFESSOR CHEMERINSKY: Let me respond to your other two questions quickly. One was whether September 11th changed the Court's perspective about federalism. I think what explains, in part, the tremendous deference to the national government starting in the 1930's to the 1990's were three phenomenon: the

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<sup>65</sup> *Nev. Dep't Human Res.*, 538 U.S. at 740.

<sup>66</sup> *Id.* at 732.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 736.

<sup>69</sup> *Id.* at 735.



Depression, which created a perception of the need for strong national authority for the economy; World War II; and the Cold War, which also created a perception of the need for a national government with great power. I do not think that it is coincidental that you see states' rights positions emerging when these three forces are fading in the background. You asked whether since September 11th, the Court perceives a need for greater national power. I do not know and I do not think it is implied in any of the federalism states' rights cases that have been decided so far. Finally, you asked whether I think this Court is responding to the criticism of federalism: No.

PROFESSOR SCHWARTZ: Is the Court's Eleventh Amendment decision dealing with the discharge of student loans in bankruptcy an important federalism decision?<sup>70</sup>

PROFESSOR CHEMERINSKY: For people who practice in bankruptcy court, I think this is an important case. For students that have loans with a state, it is an important case. The case is *Tennessee Student Assistance Corp. v. Hood*, which involved a student in Tennessee who filed a Chapter 7 adversarial proceeding against the state that held the loan, in order to have it discharged.<sup>71</sup> If you practice in the field of bankruptcy, you will know student loans are not automatically dischargeable; they are dischargeable

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<sup>70</sup> *Tenn. Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004).

<sup>71</sup> *Id.* at 1908.

only if there is a showing of undue hardship.

The bankruptcy court in the United States Court of Appeals in the Sixth Circuit said that sovereign immunity does not apply in bankruptcy court.<sup>72</sup> The Sixth Circuit said Congress' power to create uniform rules for bankruptcy means that sovereign immunity does not apply there.<sup>73</sup> The Supreme Court, without reaching that issue, ruled seven-to-two in favor of the student against the state.<sup>74</sup> Chief Justice Rehnquist wrote for the Court; Justice Thomas wrote a dissent joined by Justice Scalia. Chief Justice Rehnquist said bankruptcy proceedings are in rem proceedings because they are dealing with the estate of the bankrupt.<sup>75</sup> Chief Justice Rehnquist said sovereign immunity and the Eleventh Amendment do not apply in bankruptcy discharge proceedings.<sup>76</sup>

Now, my problem with that is why it should matter if this is an in rem or in personam proceeding. While we should have first year law students learn the distinction between in rem and in personam, the effect on the state is exactly the same whether you call it in rem or in personam.<sup>77</sup> Bottom line though, with regard to discharge proceedings and bankruptcy, sovereign immunity does

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<sup>72</sup> *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003).

<sup>73</sup> *Id.* at 764.

<sup>74</sup> *Hood*, 124 S. Ct. at 1908.

<sup>75</sup> *Id.* at 1910.

<sup>76</sup> *Id.* at 1911.

<sup>77</sup> In rem jurisdiction is defined as a court's power to adjudicate the rights to a given piece of property, and in personam jurisdiction is defined as a court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights. BLACK'S LAW DICTIONARY 854 (6th ed. 1991).

not apply when, as the Court says, they are in rem and not in personam.<sup>78</sup>

PROFESSOR SCHWARTZ: I just want to mention a federalism case on the calendar this term that deals with the question of whether Congress has the power to prohibit individual possession of homegrown marijuana for medical use.<sup>79</sup> I think this is potentially a very important issue.

PROFESSOR CHEMERINSKY: Next, there were two important employment discrimination cases last year. If you practice in this area, both are likely to be significant for you.

The first of these cases was *General Dynamics Land System, Inc. v. Klein*.<sup>80</sup> The issue here is a straightforward one: can a reverse age discrimination claim be brought under the Federal Age Discrimination Employment Act?<sup>81</sup> What you have is a federal statute that prohibits discrimination on the basis of age and protects all who are over the age of forty from discrimination in employment based on age.<sup>82</sup>

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<sup>78</sup> *Hood*, 124 S. Ct. at 1910.

<sup>79</sup> *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004) (granting a preliminary injunction against enforcement of the federal Controlled Substances Act, 21 U.S.C. § 801 (2004), and finding a likelihood of success that the federal law would be found unconstitutional as applied to a state regulation permitting medical use of marijuana).

<sup>80</sup> 540 U.S. 581 (2004).

<sup>81</sup> *Id.* at 584.

<sup>82</sup> 29 U.S.C. § 631 (2003) ("Individuals at least 40 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.").

Here, a company decided to give benefits to those who were over the age of fifty, but those benefits were denied to those who were under the age of fifty.<sup>83</sup> So employees who were between ages forty and fifty — and thus protected under the Federal Age Discrimination Employment Act — brought a lawsuit claiming discrimination on account of age.<sup>84</sup> If you read the text of the Employment Discrimination Statute, it would seem that they have a valid claim. The Age Discrimination Employment Act says no one over the age of forty can be discriminated against based on age; these employees were between forty and fifty, and did not get the benefit solely because of their ages.<sup>85</sup>

The Supreme Court, in an opinion by Justice Souter, said the employees did not have a cause of action under the Federal Age Discrimination Employment Act.<sup>86</sup> Justice Souter's opinion said that the Age Discrimination Employment Act was meant to protect older workers from being discriminated against to the benefit of younger workers.<sup>87</sup> He said that here, older workers were benefiting by what the employers were doing, and younger workers were suffering by that choice. Justice Souter said this situation, however, was never contemplated to be within the purview of the Federal Age Discrimination Employment Act.<sup>88</sup>

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<sup>83</sup> *General Dynamics*, 540 U.S. at 584.

<sup>84</sup> *Id.* at 584-85.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 600.

<sup>87</sup> *Id.* at 590-91.

<sup>88</sup> *General Dynamics*, 540 U.S. at 596.

I think the Court was concerned with the fact that many employers offered benefits, such as incentives for early retirement, to older workers. They would not be able to do that if anything given to an older worker had to be given to younger workers between ages forty and fifty. So the Supreme Court clearly and emphatically held that there cannot be reverse discrimination claims under the Federal Age Discrimination Employment Act.<sup>89</sup>

The next case dealing with employment discrimination was *Pennsylvania State Police v. Suders*.<sup>90</sup> If you practice in the area of employment discrimination law, whether you represent plaintiffs or defendants, this is a very important case. It is a case with simple facts. A woman went to work for the Pennsylvania State Police, working in a division that had not previously had female employees.<sup>91</sup> She was the only woman in the workplace, and was repeatedly subjected to harassing speech and harassing behavior.<sup>92</sup> This was not a quid pro quo harassment case; this was not an employer/supervisor saying, "sleep with me or you are fired." Instead, it was a so-called hostile environment case, and she sued claiming that a hostile working environment existed which constituted employment discrimination in violation of Title VII of

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<sup>89</sup> *Id.* at 600.

<sup>90</sup> 124 S. Ct. 2342 (2004).

<sup>91</sup> *Id.* at 2347.

<sup>92</sup> *Id.* at 2347-48 (noting that "Easton would bring up [the subject of] people having sex with animals" when Suders entered his office; "Easton also would sit down near Suders, wearing spandex shorts, and spread his legs apart; Baker repeatedly made an obscene gesture in Suders' presence by grabbing his genitals and shouting out a vulgar comment inviting oral sex.").

the 1964 Civil Rights Act.<sup>93</sup> She actually quit her job because the hostile environment was so pervasive that, in essence, she was constructively discharged.<sup>94</sup>

There were two issues before the Supreme Court. First, is constructive discharge actionable under Title VII of the 1964 Civil Rights Act?<sup>95</sup> Now, you might have thought that this was long ago resolved. I certainly thought, until this case came up, that the Supreme Court had long ago decided that there can be claims of constructive discharge under Title VII. You will find if you research this that the Supreme Court has never directly faced that issue.<sup>96</sup> The Court had approved claims for constructive discharge under other federal civil rights laws. The Court had approved

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<sup>93</sup> *Id.* at 2347 (“To establish a hostile work environment, plaintiffs like Suders must show harassing behavior sufficiently severe or pervasive to alter the conditions of their employment.”) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

<sup>94</sup> *Id.* at 2348. The Court stated that “[a] plaintiff alleging constructive discharge in violation of Title VII must establish [that] he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign” and that the resignation “was reasonable given the totality of the circumstances.” *Id.* at 2350.

<sup>95</sup> 42 U.S.C. § 2000e-2(a)(1) (2005). Title VII of the Civil Rights Act provides in pertinent part:

It shall be an unlawful employment practice for an employer  
(1) to fail or refuse to hire or to discharge any individual, or  
otherwise to discriminate against any individual with respect  
to his compensation, terms, conditions or privileges of  
employment, because of such individual’s race, color, religion,  
sex, or national origin.

<sup>96</sup> See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Although “petitioner was the victim of sexual harassment violative of Title VII” the law at the time did not “authorize any recovery of damages even though she was injured.” *Id.* at 250. Provisions of the Civil Rights Act of 1991 creating a right to recover compensatory and punitive damages for certain violations of Title VII were not yet in effect. *Id.* at 249. The Court believed that “if the same conduct

claims for constructive discharge in the federal labor law statutes, but the Court had not dealt with it under Title VII.<sup>97</sup> In an eight-to-one decision, the Supreme Court said that if a person can show he or she was constructively discharged based on race, gender or religion, that person does have a cause of action under Title VII of the 1964 Civil Rights Act.<sup>98</sup>

Then the Court reached the second much more difficult and complicated issue. It concerned the type of affirmative defense available to an employer in a constructive discharge hostile environment case.<sup>99</sup> To have this make any sense, especially if you do not practice in this area, I need to tell you about two 1998 Supreme Court cases: *Faragher v. City of Boca Raton*<sup>100</sup> and *Burlington Industries, Inc. v. Ellerth*.<sup>101</sup> Both were, as the *Suders*

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were to occur today, petitioner would be entitled to a jury trial and that the jury might find that she was constructively discharged.” *Id.* at 250.

<sup>97</sup> See *Sure-Tan v. NLRB*, 467 U.S. 883 (1984) (affirming the Court of Appeals’ holding that two small leather processing firms committed an unfair labor practice under NLRA § 8(a)(3) by constructively discharging their undocumented alien employees by reporting them to the INS in retaliation for their participation in union activities).

<sup>98</sup> *Suders*, 124 S. Ct. at 2346.

<sup>99</sup> *Id.* at 2347. The Court stated:

An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.

<sup>100</sup> 524 U.S. 775 (1998).

<sup>101</sup> 524 U.S. 742 (1998).

case was, hostile environment sexual harassment cases. The Supreme Court in these two cases, *Faragher* and *Ellerth*, said if an employee can show an adverse employment action, then there is no affirmative defense available to the employer; it is strict liability.<sup>102</sup> So if the employee can show she was demoted, denied a promotion, or had her salary cut, then she proves a hostile environment and she prevails under strict liability.

But if there is no adverse employment action, then the Supreme Court said an affirmative defense is available to the defendant.<sup>103</sup> The affirmative defense is that the defendant can avoid liability by showing that the employer took reasonable steps to prevent harassment and that the employee failed to take advantage of the available mechanisms.<sup>104</sup>

The issue in *Pennsylvania State Police v. Suders* was: how does this framework apply to the constructive discharge situation?<sup>105</sup> The Supreme Court, in an opinion by Justice Ginsburg, said that the *Faragher/Ellerth* framework applies to the constructive discharge situation just like it applies in any other

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<sup>102</sup> *Id.* at 765 (“No affirmative defense is available . . . when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”); *Faragher*, 524 U.S. at 789-90.

<sup>103</sup> *Ellerth*, 524 U.S. at 765. The Court stated:

[A] defending employer may raise an affirmative defense to liability or damages . . . [comprised of] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

*Id.*

<sup>104</sup> *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

<sup>105</sup> *Suders*, 124 S. Ct. at 2346-47.



employment context. In other words, the Supreme Court said if the employee can prove that there was an adverse employment action taken against her that led to her constructive discharge, then there is strict liability for the employer.<sup>106</sup> If she can show that she was demoted, denied a raise, transferred in an adverse way, then together with proving a hostile environment constructive discharge, she wins and no affirmative defense applies.

On the other hand, if the employee cannot show an actual adverse employment decision against her, there is just a hostile environment leading to constructive discharge, then the employer has the same constructive defense that the Court outlined in *Faragher* and *Ellerth*.<sup>107</sup> If you practice in this area, the important part of Justice Ginsburg's opinion is in the end where she contrasts two cases. One is a First Circuit case where the employee was subjected to repeated harassing behavior, offensive language, offensive sexual touching and the like.<sup>108</sup> The Supreme Court said since there was no adverse employment action in the sense of a firing, a demotion, or a transfer, the employer may assert the affirmative defense.<sup>109</sup> The Court contrasted this with a Seventh

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<sup>106</sup> *Id.* at 2349 (following the holdings in *Faragher* and *Ellerth* that "an employer is strictly liable for supervisor harassment that 'culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment' ") (quoting *Ellerth*, 524 U.S. at 765; accord *Faragher*, 524 U.S. at 808).

<sup>107</sup> *Id.* at 2351.

<sup>108</sup> *Reed v. MBNA Mktg Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003). This case involved a seventeen year old female telemarketer whose supervisor made sexual comments to her, repeatedly placed green M&Ms on her desk which would "make [her] horny," and "pressed her to perform oral sex on him." *Id.* at 30-31.

<sup>109</sup> *Suders*, 124 S. Ct. at 2356.

Circuit case where an employee who claimed harassment was transferred.<sup>110</sup> In this case, the Supreme Court said strict liability; there was no affirmative defense.<sup>111</sup> So if you practice in the area, the bottom line is that the Supreme Court took the *Faragher/Ellerth* line of cases and applied it lock, stock and barrel to constructive discharge.

*Smith v. City of Jackson* involved an issue that has long split the circuits: Can there be a disparate impact claim brought under the Age Discrimination Employment Act?<sup>112</sup> You should know under Title VII, there can be claims of disparate impact; under the Constitution though, there needs to be proof of discriminatory purpose.<sup>113</sup>

Under the Age Discrimination Employment Act, can a claim be brought for disparate impact or does the claimant have to

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<sup>110</sup> *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). This case involved a female judicial secretary who was offered a transfer to another judge based upon her complaints of harassment; however, she declined the offer because she would be working in "hell." *Id.* at 324.

<sup>111</sup> *Suders*, 124 S. Ct. at 2356.

<sup>112</sup> 351 F.3d 183, 184 (5th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004). Subsequent to the conference, the Court affirmed the circuit court on other grounds. "[W]hile we do not agree with the Court of Appeal's holding that the disparate-impact theory of recovery is never available under the ADEA," petitioner has failed to allege a valid claim. 125 S. Ct. 1536, 1545, 1546 (2005).

<sup>113</sup> See Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 631 (1997) (stating "the disparate impact theory provides for broad enforcement of Title VII . . . [and] permits a victim of employment discrimination to attack covert discrimination that might otherwise go unchecked."); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976), and stating that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact"; rather, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

prove discriminatory purpose?<sup>114</sup> Now, the Age Discrimination Employment Act is modeled after Title VII, and uses much of the same language as Title VII, so one would think the disparate impact claim could be brought here as well. On the other hand, there is a strong argument some circuits have heard that you cannot bring a disparate impact claim; you have to prove discriminatory purpose.<sup>115</sup> We will have to wait and see how the Supreme Court resolves this issue.

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<sup>114</sup> Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1073 (1998) (stating that “courts uniformly had applied disparate impact analysis in ADEA cases”; however, since *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), several courts question “the application of this method of proof in age discrimination cases.”).

<sup>115</sup> *Ellis v. United Airlines*, 73 F.3d 999, 1009 (10th Cir. 1996) (holding that plaintiffs cannot bring a disparate impact claim under the ADEA); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-77 (7th Cir. 1994) (reasoning that claims based on disparate impact should not be brought under ADEA).