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The Federalism Cases

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THE FEDERALISM CASES

PROFESSOR LEON FRIEDMAN¹

The Constitution is an anachronism, 200 years out of date. Although the Bill of Rights is adequate, much of the Constitution relates to a world we no longer face. Certainly it is true that the whole fight in adopting and ratifying the Constitution was between the federalists and the antifederalists.² The antifederalists did not want a central government because a central government with a standing army could march on the States and use their weapons to impose all kinds of tyranny and deprive the States of their liberty.³ The whole push and pull of the Philadelphia Convention, the Constitution, and the ratifying conventions was to give the national government some power, but not enough to use that power to somehow overwhelm the States.⁴ In light of this, a national government of limited powers was created. Congress was given seventeen enumerated powers⁵ and the Necessary and Proper Clause.⁶ The States wanted to give the national government only those limited powers that a national government needs, such as, the

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² 10 ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES at 3 (1997).

³ See CHERMERINSKY, *supra* note 2.

⁴ See CHERMERINSKY, *supra* note 2.

⁵ U.S. CONST. art. I, § 8, cl. 1-17.

⁶ *Id.* at cl. 18. This provision states in pertinent part: "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

power to raise an army,⁷ control over foreign affairs,⁸ and the power to raise taxes;⁹ the states wanted to take care of the rest.

Then 200 years passed and all of a sudden the national government had control over many other things; it regulates the environment,¹⁰ it regulates economic activities,¹¹ and it criminalizes certain activities it feels strongly about. For instance, Congress opposes car jacking, thus, they enacted a federal law criminalizing the act.¹² Eventually, we got used to winking at the sections of the Constitution that purported to limit national power, particularly in the area of Congress's power to regulate. The Constitution explicitly states that Congress shall have the power to regulate commerce among the several States.¹³ Regulate, meaning to pass the rules by which commerce is to be governed. It has been interpreted very broadly indeed.¹⁴

In *Wickard v. Filburn*,¹⁵ an Ohio farmer grew more wheat than he was allotted by the government to feed his cows.¹⁶ He was

⁷ *Id.* at cl. 12, granting Congress the power "[t]o raise and support armies . . ."

Id.

⁸ U.S. CONST. art. II, § 2, cl. 2, providing in pertinent part that, "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls" *Id.* See U.S. CONST. art. I, § 8, cl. 11.

⁹ See U.S. CONST. art. I, § 8, cl. 1.

¹⁰ See The Clean Water Act, 33 U.S.C. § 1344 (2000).

¹¹ See *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹² 18 U.S.C. § 2119 (2000). Section 2119 states in pertinent part:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and (3) if death results, be fined under this title or imprisoned for any number or years up to life, or both, or sentenced to death.

Id.

¹³ U.S. CONST. art. I, § 8, cl. 3. This provision states in pertinent part: "[t]o regulate Commerce with foreign Nations, and among the several States . . ."

Id.

¹⁴ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 189-90 (1824).

¹⁵ 317 U.S. 111, 115.

financed by the government and had to pay for the excess acreage that he grew.¹⁷ However, if he grew only twenty bushels more in a year than he was allotted, he would feed the excess bushels to his own cows. How does that affect interstate commerce? According to the Supreme Court, we must aggregate the actions of the farmer.¹⁸ We cannot just look at poor little Filburn, we must look at all the farmers in his position. We must aggregate all of that activity and look at commerce as a continuous activity, the stream of commerce.¹⁹ By using those two tricks, stream of commerce and aggregating activity, there isn't anything Congress cannot do pursuant to its Commerce Clause power.

The Supreme Court tried to stop Congress from overstepping its Commerce Clause power in *Carter v. Carter Coal Company*.²⁰ The Court held that Congress exceeded its Commerce Clause power in regulating coal wages.²¹ The Court held that coal mining was a local activity with no effect on interstate commerce.²² However, two years later, *Carter* was implicitly overruled.²³ From 1936 to 1995, all Congressional enactments that

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms.

Id.

¹⁶ *Id.* at 114-15.

¹⁷ *Id.*

¹⁸ *Id.* at 128.

¹⁹ *Id.*

²⁰ 298 U.S. 238 (1936).

²¹ *Id.* at 304.

²² *Id.*

²³ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Court held that the National Labor Relations Act purported to "prevent any person from engaging in any unfair labor practice," including regulation of wages and hours, was constitutional. *Id.* at 30. The Court stated, "The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point." *Id.* at 43.

were challenged under its Commerce Clause power were held constitutional.²⁴ In light of this, Congress began enacting numerous statutes testing the scope of its Commerce Clause power. These were not very controversial laws. For instance, there was the Gun-Free School Zones Act of 1990 ("GFSZA").²⁵ The GFSZA made it a federal offense to knowingly possess a gun within one thousand feet of a school zone.²⁶ Who doesn't want gun-free schools? A school on Long Island in Suffolk County was just closed because a gun was found in the school.²⁷ In response to the public's demands, Congress enacted this statute. Members of Congress wanted to show their constituents that they were doing something about this problem by responding to the public's concerns.

However, the Supreme Court did review the constitutionality of the GFSZA in *U.S. v. Lopez*.²⁸ It is hard to fault the Court's analysis of the terms of the Constitution. The Court asked, how does carrying a gun within one thousand feet of a school zone affect Congress? How does this affect interstate commerce?²⁹ The Act contained no requirement that the gun possessed within the school zone ever have moved in interstate commerce.³⁰ Although many federal statutes require that the gun move through interstate commerce, in this case, if you did not cross state lines with the gun, you did not violate the statute. There was no jurisdictional hook, no requirement that the gun being possessed in the school zone have ever moved in interstate commerce, and the law was, therefore, declared unconstitutional.³¹

²⁴ CHEMERINSKY, *supra* note 2, at 185-86.

²⁵ 18 U.S.C. § 922 (1988). This statute forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," *Id.* §§ 922 (q)(1)(A). See *U.S. v. Lopez*, 514 U.S. 549 (1995) (amended by 18 U.S.C.A. § 922 (q)(1)(A) (2000)).

²⁶ *Id.*

²⁷ Michael Luo, *Experts: Gun in School Operable / Questions arise over discrepancies*, NEWSDAY, October 13, 2000, at A38.

²⁸ 514 U.S. 549 (1995).

²⁹ *Id.* at 561.

³⁰ *Id.* at 551. See *supra* note 25.

³¹ *Id.*

After the *Lopez* decision, Congress revised the Act. The GFSZA has been reenacted to include a jurisdictional element.³² Now if you go into a school zone with a gun, you will go to jail. Why? Because five words were added to that statute. The statute now reads that no person shall knowingly possess a gun that *has moved in interstate commerce* in a place where that person “knows, or has reasonable cause to believe, is a school zone.”³³ Although there originally was no interstate nexus, we now have one.

In *Lopez*, the Court held that Congress can regulate and legislate only if they are controlling one or more of the following three aspects of interstate commerce:³⁴ 1) the use of channels of interstate commerce,³⁵ 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce,³⁶ and 3) activities that substantially affects or relate to interstate commerce.³⁷ The Court also stated that with regard to the third aspect, the activity being regulated must be an economic activity substantially affecting interstate commerce.³⁸ The Court strongly encouraged Congress to produce factual findings to support its conclusion that the activity substantially affects interstate commerce.³⁹ The Court stated that it was no longer going to defer to Congress in the manner they had before.⁴⁰

Five years after the *Lopez* decision, the Court examined another law enacted by Congress, the Violence Against Women

³² 18 U.S.C. § 922(q)(2)(A) (amended by 18 U.S.C.A. § 922 (q)(1)(A) (2000)). This statute states in pertinent part: “It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” *Id.*

³³ 18 U.S.C. § 922(q)(2)(A).

³⁴ *Lopez*, 514 U.S. at 558.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 559.

³⁹ *Id.* at 562-63.

⁴⁰ *Lopez*, 514 U.S. at 567 (stating “some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further”).

Act ("VAWA"),⁴¹ which was attacked on the same basis as *Lopez*.⁴² The VAWA is a non-controversial law containing two parts. First, the Act contains a criminal provision which states that if you cross state lines and beat up your spouse, or you beat her up and then you cross state lines, or if you take her across state lines to beat her up, you have committed a federal criminal offense.⁴³ Second, there is also a civil provision providing the victim with damages if she is abused.⁴⁴ However, there was no requirement

⁴¹ 42 U.S.C. § 13981 (2000). Section 13981 states in pertinent part that, "[I]t is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." *Id.*

⁴² *Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F.3d 820, 826 (4th Cir. 1999).

⁴³ 18 U.S.C. § 2261(a)(1) (1994). The statute states in pertinent part:

A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

(b) Penalties.--A person who violates this section . . . shall be fined under this title, imprisoned--

- (1) for life or any term of years, if death of the victim results;
- (2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
- (3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
- (4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
- (5) for not more than 5 years, in any other case, or both fined and imprisoned.

Id.

⁴⁴ 42 U.S.C. § 13981(c) (1994). This statute states in pertinent part: "A person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." *Id.*

that anyone had to cross state lines for this civil penalty to be applicable.⁴⁵ There was no jurisdictional element.

After the Court's decision in *Lopez*, in which the Court stated that factual findings were strongly encouraged,⁴⁶ Congress made explicit findings that domestic violence costs the United States economy three billion dollars each year.⁴⁷ Moreover, Congress found that women who are beaten up miss work and lose wages⁴⁸ and have to go to hospitals.⁴⁹ All of these things cost money and are economic in nature, thus, Congress certainly made findings that violence against women was a serious problem. Congress also made a finding that the States were not doing their jobs by treating domestic violence as a less serious crime.⁵⁰ States allowed the violence to go virtually unpunished, which encouraged husbands or boyfriends to abuse further. In light of this, Congress felt they needed an effective federal weapon in order to stop violence against women.

Despite Congressional findings, when the Act was challenged in *U.S. v. Morrison*,⁵¹ the Supreme Court found the law to be unconstitutional.⁵² The Court stated in a very short opinion⁵³ that this case was governed by *Lopez*, and that Congress may not regulate non-economic violent criminal conduct based solely on

⁴⁵ See *id.* § 13981(b)-(c).

⁴⁶ *Lopez*, 514 U.S. at 563.

⁴⁷ *United States v. Morrison*, 120 S. Ct. 1740, 1761 (2000). See S. Rep. No. 101-545, at 33 (1990).

⁴⁸ *Id.* at 1763. Congress found that, "[c]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate [and] from engaging in employment in interstate business" H. R. Conf. Rep. No. 103-711, at 385 (1994).

⁴⁹ *Id.* at 1762. Congress found that, "[o]ver 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners." S. Rep. No. 101-545, at 37.

⁵⁰ *Id.* at 1762. Congress found that, "[a]rrest rates may be as low as 1 for every 100 domestic assaults." S. Rep. No. 101-545, at 38.

⁵¹ 120 S. Ct. 1740.

⁵² *Id.* at 1745.

⁵³ It was a very short opinion. I was in the Court the day it was announced, moving the admission of some of my former students. When Rehnquist started reading the opinion, I started shaking my head. He stared down at me as if I was somehow interrupting his flow; asking, in effect, why are you expressing a negative view towards this decision? Then I saw Souter and Ginsburg with their heads down while the decision was being read.

that conduct's aggregate effect on interstate commerce.⁵⁴ The Court stated that the Constitution requires a distinction between what activity is national and what is local, and that Congress' Commerce Clause power "[m]ay not be extended so as to embrace effects upon interstate commerce . . . [that] would effectually obliterate th[is] distinction."⁵⁵ With regard to the origins of the Constitution, "we preserve[d] one of the few principles that ha[ve] been consistent since the clause was adopted; that the regulation and punishment of intrastate violence" that is not directed at the instrumentalities or channels of goods involved in commerce has "always been the province of the States,"⁵⁶ or a traditional state function. Therefore, if there is no jurisdictional hook, and you are not controlling instrumentalities of interstate commerce, or a person or thing that moves in interstate commerce, and you are regulating a non-economic activity, you cannot aggregate the activity. The Court did not disapprove of *Wickard v. Filburn*.⁵⁷

What are the implications of these cases? One of the earlier cases we teach in law school is *United States v. Perez*.⁵⁸ This case involved extortionate loan transactions;⁵⁹ you lend someone money and charge an exorbitant amount of interest, and threaten the borrower with physical violence if the loan is not paid back.⁶⁰ The Supreme Court held that this was no problem, that loan sharks, indeed, affect interstate commerce.⁶¹ Oh, really? What are they regulating in that case? Congress is not regulating the loan, they are regulating the threat of violence if you do not repay the loan. Here is a very well established federal statute, but is it going to be challenged under *Lopez* and *Morrison*?

The Supreme Court has an important case this term, a case challenging the Clean Water Act ("CWA").⁶² The CWA regulates

⁵⁴ *Morrison*, 120 S. Ct. at 1751.

⁵⁵ *Id.* at 1749.

⁵⁶ *Id.* at 1754.

⁵⁷ *Id.* at 1768.

⁵⁸ 402 U.S. 146 (1971).

⁵⁹ *Id.* at 147.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 33 U.S.C. § 1344 (2000). Section 1344 states in pertinent part:

Discharge into navigable waters at specified disposal sites:
The Secretary may issue permits, after notice and opportunity

wetlands of intrastate waters.⁶³ The Army Corps of Engineers lay out all kinds of regulations stating that you cannot build or fill in wetlands without permits from them.⁶⁴ What is the substantial effect on interstate commerce of the CWA regulation of wetlands? The water did not move in interstate commerce. The Seventh Circuit held in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,⁶⁵ that the CWA substantially affects commerce because of migratory birds.⁶⁶ The Court stated that tourists go to see the migratory birds, and therefore, it affects interstate commerce.⁶⁷ Here is this wonderful wetland and I will go from Indiana to Illinois to see those wetlands, but if the wetlands are not filled I will not cross state lines; that is Congress's justification. Will this Act pass muster with this new tough analysis that the Supreme Court decided in *Morrison*?

Another Act that may be challenged under *Morrison* is the Endangered Species Act.⁶⁸ Under this Act, it is illegal to kill a red

for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Denial or restriction of use of defined areas as disposal sites: The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas

Id.

⁶³ *Id.*

⁶⁴ *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 848 (7th Cir. 1999). See 33 U.S.C. § 1344.

⁶⁵ 191 F.3d 845.

⁶⁶ *Id.* at 850.

⁶⁷ *Id.*

⁶⁸ 16 U.S.C. § 1531(b)-(c) (2000). Sections 1531(b) and (c) state in pertinent part:

wolf in North Carolina because they are protected.⁶⁹ Red wolves do not move in interstate commerce, they stay up in the Smoky Mountains; so how are they protected by Congress? Once again, tourists go to see red wolves.⁷⁰ If the red wolves are wiped out as a species, tourists will not go and see them.⁷¹ That, Congress says, is how red wolves affect interstate commerce. Will this pass muster under this new analysis? The Fourth Circuit in *Gibbs v. Babbitt*,⁷² actually upheld this law.⁷³

What about the Child Support Recovery Act?⁷⁴ This Act contains a criminal provision which states that after a couple

Purposes: The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Policy: (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter. (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

Id.

⁶⁹ *Gibbs v. Babbitt*, 214 F.3d 483, 488 (4th Cir. 2000).

⁷⁰ *Id.* at 492. The Court also reasoned that without red wolves there would be no scientific research or commercial trade in pelts. *Id.*

⁷¹ *Id.*

⁷² 214 F.3d 483.

⁷³ *Id.* at 506.

⁷⁴ 18 U.S.C. § 228 (1994) (amended by 18 U.S.C.A. § 228 (a)(2) (2000)).

Section 228 as enacted in 1994 stated in pertinent part:

Offense.—Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished as provided in subsection (b).

Restitution.—As used in this section—the term “past due support obligation” means any amount-determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living; and that

divorces and one parent moves to another state and fails to make child support payments, suit may be brought in federal court to enforce the support obligation.⁷⁵ In *United States v. Faasse*,⁷⁶ the Sixth Circuit found this Act unconstitutional pursuant to *Lopez* and *Morrison*.⁷⁷ Why? The Court said that you cannot base the decision on the basis that the parent fled the jurisdiction, because when he fled the jurisdiction he was not behind on his support obligation.⁷⁸ Thus, it is not enough to simply say that you are in another state, you cannot base the law merely on diversity jurisdiction; that is not enough.

How about the Clean Air Act's effect on commerce?⁷⁹ We had smokestacks, and you have to clean the smokestacks and not

has remained unpaid for a period longer than one year, or is greater than \$5,000

Id. This statute, as amended, "includes a provision criminalizing travel in interstate commerce with the intent to evade a support obligation." *U.S. v. Faasse*, 227 F.3d 660, 664 n.1 (6th Cir. 2000). See 18 U.S.C. § 228 (a)(2) (2000).

⁷⁵ 18 U.S.C. § 228(e). The statute states in pertinent part:

(e) Venue.--With respect to an offense under this section, an action may be inquired of and prosecuted in a district court of the United States for--

(1) the district in which the child who is the subject of the support obligation involved resided during a period during which a person described in subsection (a) (referred to in this subsection as an "obligor") failed to meet that support obligation;

(2) the district in which the obligor resided during a period described in paragraph (1); or any other district with jurisdiction otherwise provided for by law.

Id.

⁷⁶ 227 F.3d 660 (6th Cir. 2000).

⁷⁷ *Id.* at 663.

⁷⁸ *Id.* at 672.

⁷⁹ 42 U.S.C. §§ 7401-26. Section 7401 states in pertinent part:

b) Declaration. The purposes of this subchapter are--(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control

have carbon particles or sulfur particles.⁸⁰ Now what is the effect on commerce to say you've got to have one of these? But particles aren't moving in interstate commerce, they are not items of commerce.⁸¹ What is the economic effect? I think all of these environmental laws are maybe most susceptible to attack on this basis because our justification for upholding these environmental laws over a long period of time has been a very attenuated notion about effect on commerce.⁸² However, if Congress made findings that the Court found sufficient, we are not going to look any further. Now the Supreme Court says that if it is a non-economic activity you've got to look.⁸³ There must be a substantial effect on

programs; and (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

Pollution prevention. A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

Id. at § 7401.

⁸⁰ *Id.*

⁸¹ To establish jurisdiction, the statute, 42 U.S.C. 7401(a)(1), states, "The Congress finds (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States." *Id.*

⁸² In *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Supreme Court stated:

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 1752-53.

⁸³ In *Morrison*, the Supreme Court explained the rationale for creating a distinction between economic and noneconomic activities, "While we need not adopt a categorical rule against aggregating the effects of any noneconomic

a true commercial activity and we are not simply going to accept Congress's say-so with regard to this.⁸⁴

There are all kinds of criminal laws: car-jacking laws,⁸⁵ violent crime in aid of racketeering laws,⁸⁶ gun possession laws,⁸⁷ one law after another with a very attenuated interstate connection. Timothy McVeigh was prosecuted for possessing a weapon of mass destruction following the Oklahoma City bombing.⁸⁸ There was no requirement that the weapon move in interstate commerce, he merely had to possess a weapon of mass destruction.⁸⁹ Simple

activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.*

⁸⁴ The *Morrison* court explained this point further:

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Id. at 1764.

⁸⁵ Carjacking Correction Act of 1996, 18 U.S.C. § 2111 et seq. (1996).

⁸⁶ Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961 et seq. (1984).

⁸⁷ Gun Control Act of 1968, 26 U.S.C. § 5801 et. seq. (1968)

⁸⁸ *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). The statute under which McVeigh was convicted was the Defense Against Weapons of Mass Destruction Act of 1996. See 18 U.S.C. § 2332a. (2000).

⁸⁹ 18 U.S.C. § 2332a (a) states in pertinent part: "A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction" *Id.*

18 U.S.C. § 2332a (c) (2) states:

[T]he term "weapon of mass destruction" means-- (A) any destructive device as defined in section 921 of this title; (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; (C) any weapon involving a disease organism; or (D) any

possession of a weapon of mass destruction is a federal crime; there is no requirement that the assault weapon move in interstate commerce.⁹⁰ The argument would be that if an individual dynamites a building, or uses an assault weapon, that act is likely to have an effect on interstate commerce. However, the Supreme Court now says that you are required to justify each law by proving its effect on commerce in each case. Thus, fifty years of congressional enactments are based on Congressional findings that there is an effect on commerce, which up until now have not been challenged in the courts.⁹¹ Now we are going to have to take another look at these.

Secondly, last year the Eleventh Amendment was discussed.⁹² I give you statistics each year on how many laws have been declared unconstitutional. Since *Marbury v. Madison*,⁹³ over a 197 year span, 154 laws have been declared unconstitutional.⁹⁴ Yet, in the last five years the Supreme Court has declared twenty-five laws unconstitutional.⁹⁵ Thus, instead of an average of less than one a year they are now declaring four or five laws unconstitutional a year. Moreover, of the twenty-five laws that have been declared unconstitutional in the last five years, eleven of them are on federalism grounds and the biggest one being the Eleventh Amendment. The Eleventh Amendment states that federal judicial power shall not extend to suit by a citizen of a state against another state.⁹⁶ However, there is no mention about a citizen's suit against his own state.⁹⁷ *Hans v. Louisiana*, discussed

weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

Id.

⁹⁰ *Id.*

⁹¹ *N.L.R.B. v. Jones*, 301 U.S. 1 (1937), is considered the first case in a line of cases that upheld Congress's power under the Commerce Clause.

⁹² U.S. CONST. amend. XI. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

⁹³ 1 Cranch 137 (1803).

⁹⁴ Leon Friedman, *New York State Constitutional Laws: Trends and Developments*, 16 TOURO L. REV. 265 (2000).

⁹⁵ *Id.*, at 93.

⁹⁶ See *supra* note 92.

⁹⁷ See *supra* note 92.

the history regarding the adoption of the Eleventh Amendment.⁹⁸ There was a time about ten or fifteen years ago when Justices Brennan, Marshall, Stevens and Blackmun wanted to overrule *Hans v. Louisiana*; that time has passed. Instead of the Eleventh Amendment fading out of the picture, it has become very strong.

Briefly, the history is as follows: in a case called *Pennsylvania v. Union Gas*, the Supreme Court held that Congress can overrule the state's Eleventh Amendment immunity by use of its Commerce Clause power.⁹⁹ Then in 1996, in *Seminole Tribe v. Florida*,¹⁰⁰ the Supreme Court decided to overrule *Pennsylvania v. Union Gas*,¹⁰¹ holding that Congress may overrule a state's Eleventh Amendment immunity, but only if it is exercising its power relying on a later constitutional provision such as the

⁹⁸ 134 U.S. 1 (1890) (holding that a State cannot, without its consent, be sued in a Circuit Court of the United States by one of its own citizens, upon a suggestion that the case is one that arises under the Constitution and laws of the United States). In *Hans*, a brief history was given for the adoption of the Eleventh Amendment:

[U]nder the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.

Id. at 11.

⁹⁹ 491 U.S. 1 (1989). "We hold that CERCLA renders States liable in money damages in federal court, and that Congress has the authority to render them so liable when legislating pursuant to the Commerce Clause." *Id.* at 23.

¹⁰⁰ 517 U.S. 44 (1996).

¹⁰¹ 517 U.S. at 76:

The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court. The narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine cannot be used to enforce (the statute) because Congress enacted a remedial scheme . . . specifically designed for the enforcement of that right. The Eleventh Circuit's dismissal of petitioner's suit is hereby affirmed.

Id.

Fourteenth Amendment.¹⁰² Therefore, if Congress is relying on its powers flowing from Section 5 of the Fourteenth Amendment, Congress shall have the power to enforce these provisions by appropriate legislation.¹⁰³ The laws that Congress passes under Section 5 of the Fourteenth Amendment can overrule a state's Eleventh Amendment immunity.¹⁰⁴

¹⁰² *Id.* at 184-85. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). In this case, the Supreme Court most clearly enunciated this concept. When deciding whether or not Congress exceeded its Section 5 powers when enacting the Religious Freedom Restoration Act, the Supreme Court stated:

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation 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. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Id. at 519.

¹⁰³ *Id.*

¹⁰⁴ *Seminole*, 317 U.S. at 59. The Supreme Court in *Seminole* explained Congress's Section 5 powers:

Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and

Very early in the game, after Title VII was extended to state and local officers in 1972,¹⁰⁵ and state and local employees, the Supreme Court, in a case called *Fitzpatrick v. Bitzer*,¹⁰⁶ held that Title VII was a valid exercise of congressional power under the Fourteenth Amendment and therefore States can be sued for gender and race discrimination.¹⁰⁷ Then two years ago, the Supreme Court had a line of cases dealing with the Eleventh Amendment. There was a patent case,¹⁰⁸ a trademark case,¹⁰⁹ and a copyright case¹¹⁰ and they established a new rule which was to forget the Necessary and Proper Clause. If you overrule a state's Eleventh Amendment immunity or if you purport to overrule a state's Eleventh Amendment immunity, you must show that there is a problem. Furthermore, it must be a problem that the states are uniquely creating, it must be a pervasive problem, and it must be a problem that we have already recognized as constitutionally important and constitutionally protected.

therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Id.

¹⁰⁵ Civil Rights Acts of 1964, Title VII, 42 U.S.C. 2000e et. seq. (2000) (as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000(a)). The statute was amended in 1972 to include "governments, governmental agencies, and political subdivisions." *Id.*

¹⁰⁶ 427 U.S. 445 (1976). "As relevant here, the definition of 'person' . . . was amended by § 2 (1) of the Equal Employment Opportunity Act of 1972 . . . to include 'governments, governmental agencies, and political subdivisions.'" *Id.* at n.2.

¹⁰⁷ *Id.* at 457. The Court stated, "[g]iven the express congressional authority for such an award in a case brought under Title VII, it follows necessarily from our holding . . . that Congress' exercise of power in this respect is also not barred by the Eleventh Amendment. We therefore affirm the Court of Appeals' judgment . . . on this basis." *Id.*

¹⁰⁸ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding the Patent Remedy Act could not be sustained as a valid congressional abrogation of the states' Eleventh Amendment immunity under the Due Process Clause of the Fourteenth Amendment).

¹⁰⁹ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding the Patent Remedy Act could not be sustained as a valid congressional abrogation of the states' Eleventh Amendment immunity under the Due Process Clause of the Fourteenth Amendment).

¹¹⁰ *Chaves v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

Let me explain that. The Fourteenth Amendment states, "Nor shall any state deprive any person equal protection of the law."¹¹¹ The Supreme Court has declared that race and gender discrimination are constitutionally protected by the Equal Protection Clause.¹¹² In that case, Congress can afford a remedy, which is granted pursuant to its Section 5 power.¹¹³ In other words, the Supreme Court has to define the constitutional violation. Only after the constitutional violation has been defined can Congress pass a proportionate and congruent remedy.¹¹⁴ When Title VII came up before the Supreme Court we did not have this test.

Recently, commencing about two years ago, the Supreme Court began to examine various laws dealing with employment discrimination.¹¹⁵ Just last year, they dealt with age discrimination.¹¹⁶ Now, Congress extended the age discrimination law, the Age Discrimination in Employment Act, to the States very explicitly.¹¹⁷ In the same way they extended Title VII to the

¹¹¹ U.S. CONST. amend. XIV.

¹¹² See *Brown v. Board. of Educ.*, 347 U.S. 483 (1954) (holding that "segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment"). See also *Craig v. Boren* 429 U.S. 190 (1976) (holding that the "gender-based differential under state statutes prohibiting the sale of . . . beer to males under the age of 21 and to females under the age of 18 constitutes a denial to males 18-20 years of age of equal protection of the laws in violation of the Fourteenth Amendment").

¹¹³ U.S. CONST. amend. XIV § 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

¹¹⁴ *Boerne*, 521 U.S. 507 (1997) (holding that, "in determining whether, for purposes of Congress' enforcement power under § 5 of the Federal Constitution's Fourteenth Amendment, federal legislation is permissibly remedial or impermissibly substantive, there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

¹¹⁵ In addition to the Age Discrimination in Employment Act, it also reviewed the Americans with Disabilities Act ("ADA") in *University of Alabama at Birmingham v. Garrett*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000).

¹¹⁶ *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (determining that the ADEA contained clear statement of intent to abrogate States' sovereign immunity, but the ADEA's purported abrogation of immunity was invalid).

¹¹⁷ See 29 U.S.C. § 623(a)(1).

States, Congress has extended the age discrimination law. The problem with the age discrimination law was that the Supreme Court had never said that age was a violation of the Equal Protection Clause.¹¹⁸ Therefore, the question is, can Congress, through enforcement of the Fourteenth Amendment, protect an interest that the Supreme Court had not decided was constitutionally protected? In *Kimel v. Florida Board of Regents*, another five-to-four decision, the Supreme Court held that Congress may not do so.¹¹⁹ Justice O'Connor wrote the opinion, concluding that the ADEA was not appropriate legislation under Section 5 of the Fourteenth Amendment.¹²⁰ The age classification at issue did not violate the Equal Protection Clause, according to the *Kimel* court. The court opined that age classification cannot be characterized as irrelevant to the achievement of a state interest because older persons, unlike those who suffer discrimination on the basis of gender, have not been subject to a history of purposeful unequal treatment.¹²¹

How can the Court hold that "[o]ld age . . . does not define a discrete and insular minority"?¹²² "Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive objective that it cannot be understood as responsive to or designed to prevent unconstitutional behavior."¹²³ There is very offensive language in

¹¹⁸ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 470. Age is not a suspect classification under the Equal Protection Clause.

¹¹⁹ *Kimel*, 120 S. Ct. at 646:

States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision.

Id.

¹²⁰ *Id.* at 645.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Kimel*, 120 S. Ct. at 647 (citing *Boerne*, 521 U.S. at 532). 29 U.S.C. § 621 (b) states: "It is therefore the purpose of this Act . . . to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.*

the Supreme Court decision which states that Congress failed to identify a widespread pattern of age discrimination by the states.¹²⁴ It is not enough to say that there is age discrimination in employment generally, you must show that there is a particular problem in the states doing it. Moreover, it is not enough to say that in some states, it has to be a pervasive problem. Listen to what the Court is saying: since Congress failed to identify a widespread pattern of age discrimination by the states, the ADEA law is unconstitutional.¹²⁵

This year, the Supreme Court is going to look at the Americans with Disabilities Act ("ADA").¹²⁶ Employers certainly were discriminating in general against people with disabilities. However, were the states a particular source of the problem and was it widespread in the states? The case before the Supreme Court is *University of Alabama at Birmingham v. Garrett*.¹²⁷ The Eleventh Circuit upheld the ADA, finding sufficient findings that the states and governments were particularly unsympathetic to people with disabilities.¹²⁸ However, the Seventh Circuit found the ADA unconstitutional.¹²⁹ The Sixth Circuit also said it is unconstitutional, and the Eighth Circuit agreed.¹³⁰ This year we will see how the Supreme Court handles this issue.

¹²⁴ *Kimel*, 120 S. Ct. at 649.

¹²⁵ *Id.* at 649-50.

¹²⁶ 42 U.S.C. § 12101 et. seq. (2000).

¹²⁷ 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000).

¹²⁸ *Garrett*, 193 F.3d at 1218.

¹²⁹ *Stevens v. Illinois Dep't of Transp.*, 210 F.3d 732 (7th Cir. 2000) (holding that "Congress' abrogation of the States' Eleventh Amendment immunity in the ADA was without authority under the § 5 of the 14th Amendment because Congress made no findings of discriminatory conduct by the States that violated the 14th Amendment, which would authorize Congress under § 5 to remedy those violations").

¹³⁰ *Popovich v. Cuyahoga County Court of Common Pleas*, 227 F.3d 627 (6th Cir. 2000) (holding that Congress exceeded its enforcement authority under the 14th Amendment in applying Title II of the ADA to the states because Title II of the ADA's strict prohibition on discrimination, along with the accommodation requirement, regulated far more conduct than 14th Amendment § 1, the Equal Protection Clause, prohibited. Because evidence was scarce that the states unconstitutionally discriminated in the provision of public services to the disabled, Title II of the ADA was an unwarranted response to a perhaps inconsequential problem); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (holding that extension of the ADA to the states was not a proper exercise

How about the Family Medical Leave Act?¹³¹ This is a very important federal law that allows people, if there is a family member sick or someone is pregnant, to take leave from the workplace.¹³² It applies to the federal government, to local governments, and it applies to federal employees.¹³³ The question is, does it apply to the states? There are four million people working for the states. That is three percent of the entire work force, and they are probably not protected by the ADA, or the Family Medical Leave Act. Four million people without that kind of protection, and where does all this come from? It comes from exactly this kind of analysis: look at the Constitution closely, we

of Congress's power under § 5 of the 14th Amendment. Consequently, there was no valid abrogation of Arkansas's immunity from private suit under the 11th Amendment, and the trial court lacked subject matter jurisdiction over the ADA claim).

¹³¹ Family Medical Leave Act of 1993, 29 U.S.C §§ 2601–2654 (2000).

¹³² See *Id.* 29 U.S.C. §2601(b) states:

It is the purpose of this Act—

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment [USCS, Constitution, Amendment 14, § 1] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
- (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Id.

¹³³ 29 U.S.C. § 2611 (4) (a) (iii). This subsection states in pertinent part: "The term "employer" includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938." *Id.*

want a national government with limited powers.¹³⁴ The states retain these powers, and we cannot let the states be subject to suit.¹³⁵ Now, one way out of this is that the states are not acting as states, they are acting as employers and the governments are not exercising their governmental capacity. All of these laws pertain to their proprietary functions as employers. However, the Supreme Court has not made that distinction for a very long time.

Let me just add two things. There were three additional federalism laws last year before the Supreme Court. The Court actually rejected a Tenth Amendment federalism argument, in *Reno v. Condon*.¹³⁶ The case involved the Driver's Privacy Protection Act ("DPPA") in which Congress had passed a law prohibiting the states from selling motor vehicle information.¹³⁷ The facts are as follows: an individual in California who was stalking an actress wanted to find her address.¹³⁸ He went to a commercial outfit that put all this information on their websites.¹³⁹ There was motor vehicle information that the state of California

¹³⁴ See CHEMERINSKY, *supra* note 2.

¹³⁵ See U.S. CONST. amend. XI.

¹³⁶ 120 S. Ct. 666 (2000).

¹³⁷ Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (2000). 18 U.S.C. § 2721 (a) states in pertinent part: "Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." *Id.*

¹³⁸ Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment*, 53 U. MIAMI L. REV. 71, 88 (1998). In this article, the authors explained the genesis of the DPPA:

Congress enacted the DPPA primarily as an anti-stalking measure after the highly-publicized stalking death of actress Rebecca Schaeffer on July 18, 1989. Prosecutors successfully alleged that Robert John Bardo was an obsessed fan who had "stalked" and fatally shot Schaeffer after obtaining her address and other personal information from a private detective. The private detective agency reportedly obtained the information from Schaeffer's motor vehicle records.

Id.

¹³⁹ Odom & Feder, *supra* note 138.

had sold to this commercial outfit.¹⁴⁰ The stalker was able to find the actress's address, and he proceeded to stalk and kill her.¹⁴¹ Congress felt that something should be done about this, thus, they passed the DPPA.¹⁴² In the state of South Carolina, the Fourth Circuit found that it was a Tenth Amendment violation because Congress was making the states carry out a federal function.¹⁴³ The case goes to Supreme Court and it is a nine-nothing decision delivered by Rehnquist.¹⁴⁴ Rehnquist stated that Congress is not enlisting the states to carry out a federal policy, instead, it is prohibiting the states from carrying out a policy that it does not agree with.¹⁴⁵ Upon this distinction, the Supreme Court upheld the law.

Two other cases also challenged the federalism issue. One was *Jones v. United States*, which dealt with the Federal Arson Statute.¹⁴⁶ The Federal Arson Statute makes it a crime to burn down any building used in commerce.¹⁴⁷ However, what happens

¹⁴⁰ Odom & Feder, *supra* note 138.

¹⁴¹ Odom & Feder, *supra* note 138.

¹⁴² See *supra* note 137 and accompanying text; *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (affirming the district court ruling that held that the DPPA violated the Tenth Amendment and permanently enjoined its enforcement in the state of South Carolina).

¹⁴³ *Condon*, 155 F.3d at 463.

¹⁴⁴ *Condon*, 120 S. Ct. 666 (2000).

¹⁴⁵ *Id.* at 672:

[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations [as in *New York*], and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals [as in *Printz*]. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id.

¹⁴⁶ 120 S. Ct. 1904 (2000) (holding that the arson of owner-occupied residence not currently used for any commercial purpose held not to be subject to prosecution under the federal arson statute, 18 U.S.C. 844 (i), because residence was not "used" in commerce or commerce-affecting activity).

¹⁴⁷ 18 U.S.C. 844 (i) (2000). This statute states in pertinent part: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property

if you burn down a private dwelling? Is the private dwelling used in commerce? Well, the wood that made up the private dwelling was used in commerce, in fact, we know that all the building products were used in commerce. Thus, an argument was made based on *Lopez* and *Morrison*.¹⁴⁸ However, the Supreme Court stated they were going to narrowly interpret the law as not covering private residences, and therefore we do not have to pass on the constitutionality of the law.¹⁴⁹ If the Court had considered the constitutionality, it probably would have struck the law down because the activity regulated is the burning down of a building, which is a non-economic activity.

The last case which again raised a constitutional issue, but then escaped from it, is a qui tam case, *Vermont Agency of Natural Resources v. United States*,¹⁵⁰ in which a suit was brought under the False Claims Act. The False Claims Act states that anyone who brings an action against a person who engages in fraud, may do so in federal court.¹⁵¹ Additionally, the action is, theoretically, brought by the United States, but it is always on behalf of the

used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . fined . . . or both." *Id.*

¹⁴⁸ *Jones*, 120 S. Ct. at 1910:

The Government urges that the Fort Wayne, Indiana residence into which Jones tossed a Molotov cocktail was constantly "used" in at least three "activities affecting commerce." First, the homeowner "used" the dwelling as collateral to obtain and secure a mortgage from an Oklahoma lender; the lender, in turn, "used" the property as security for the home loan. Second, the homeowner "used" the residence to obtain a casualty insurance policy from a Wisconsin insurer. That policy, the Government points out, safeguarded the interests of the homeowner and the mortgagee. Third, the homeowner "used" the dwelling to receive natural gas from sources outside Indiana.

Id.

¹⁴⁹ *Id.*

¹⁵⁰ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 1858 (2000) (holding that although relator had standing to bring qui tam action against state agency under the False Claims Act, state agency was not subject to liability in the action).

¹⁵¹ 31 U.S.C. §§ 3729-3733.

person who blows the whistle against the defendant.¹⁵² Moreover, Vermont raised the Eleventh Amendment defense, stating that the state could not be sued.¹⁵³ In reality, it is not the United States who is the party whose standing is examined (in terms of who can sue the states), it is really a private individual because they are the ones who get the economic benefit.¹⁵⁴ However, the Supreme Court stated that in interpreting the qui tam statute, we look to the person, not a state.¹⁵⁵ The Court did not find the law unconstitutional, it simply interpreted the operative language in a way that states could not be sued.¹⁵⁶

There are two more cases this term where the Supreme Court will have to look at the ADA¹⁵⁷ and the Clean Water Act.¹⁵⁸ The federal courts are coming right up behind examining all of these issues. So this issue is not going away.

¹⁵² *Vermont Agency*, 120 S. Ct. at 1860. "As amended, the FCA imposes civil liability upon 'any person' who, *inter alia*, 'knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.'" *Id.*

¹⁵³ *Id.* at 1866.

¹⁵⁴ *Id.* at 1863:

We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

Id.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1871. "We hold that a private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act . . . but that the False Claims Act does not subject a State (or state agency) to liability in such actions." *Id.*

¹⁵⁷ *University of Alabama v. Garrett*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000).

¹⁵⁸ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 848 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).

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