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Appendix I

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Appendix I

Cover Page Footnote

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THE NEW FEDERALISM

A Report of the Committee on Federal Legislation
Association of the Bar of the City of New York

I. INTRODUCTION

Since the 1994-95 Supreme Court Term, the Court has held twenty separate federal laws unconstitutional. This rate is unprecedented in our history. The Supreme Court has nullified a total of 150 acts of Congress on constitutional grounds since *Marbury v. Madison*, 1 Cranch 137 (1803), an average of slightly less than one act per year. The recent trend of striking down an average of four statutes each year is exceptional and deserves the attention of the legal profession and other branches of government.

In annulling these federal laws, the Court has applied new standards for examining legislation passed by Congress. While it is not unusual for the Court to hold that a particular law violates the First Amendment or the equal protection or separation of powers doctrines, it was previously quite rare for the Court to hold that Congress exceeded its powers under the Commerce Clause, as the Court did in *United States v. Lopez*, 514 U.S. 549 (1995). Indeed, before *Lopez*, the Court had not struck down a federal law on that basis since 1936. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

In the Term after *Lopez*, 1995-96, the Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) that the Commerce Clause did not give Congress the power to override the State's Eleventh Amendment immunity. Congress, the Court said, could only overcome the Eleventh Amendment immunity of the States by exercising its power under the Fourteenth Amendment and only by expressing an unequivocal intent to do so.

More recently, the Court greatly expanded the Tenth Amendment in *Printz v. United States*, 117 S.Ct. 2365 (1997). In *Printz*, the

Court struck down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement officials to perform background checks on handgun purchasers for an interim period before a federal computer system could be established. The Court held that the federal government may not enlist state officials to carry out federal policies. *Printz* calls into question many federal laws that impose minimum burdens on state officials to supply information to, or cooperate with, the federal government.

After *Printz*, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that Congress could not, by exercising its powers under Section 5 of the 14th Amendment, expand individual rights beyond the limits established by the Supreme Court in interpreting that Amendment. That decision goes against a long line of decisions by the Court that had interpreted Section 5 as the equivalent of the "necessary and proper clause" in Article 1, Section 8. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966):

By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.

In its most recent Term, 1998-99, the Court expanded the federalist rulings noted above still further. In *Alden v. Maine*, 119 S.Ct. 2240 (1999), the Court held that those provisions of the Fair Labor Standards Act that expanded the protection of that law to state employees, 29 U.S.C. §216(b), and that required the States to pay overtime to their employees, could not be enforced in either state or federal court. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999), the Court struck down the Trademark Remedy Clarification Act, 15 U.S.C. §1122, which extended the protections of the federal Lanham Act to the States, holding that the Eleventh Amendment prohibited any such suit in federal court. And in the companion case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999) the Court came to a similar conclusion which respect to the Patent Remedy Act, 35 U.S.C. §271(h) and 296(a), which made the States amenable to suits for patent infringement in federal court.

These decisions have created considerable concern that the Court has imposed impractical and inappropriate limitations on the power

of Congress to legislate in the national interest. The theme of all of the decisions is a new view of federalism in which the power of the federal government vis-a-vis the States is constitutionally limited to a degree unprecedented in modern times. The Court explained the principle in *Printz*:

It is incontestible that the Constitution established a system of "dual sovereignty." . . . Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he 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.

117 S.Ct. at 2376-77.

The lower federal courts have recognized this trend, and some have stretched and expanded the concept of states' rights to an unprecedented degree. The discussion in some recent cases is reminiscent of the early debates between the Federalists and Anti-Federalists over ratification of the Constitution. The Fourth Circuit began its recent opinion invalidating the Violence against Women Act — a law protecting women from violence, sponsored in part by Senators Hatch and Dole and passed by large majorities in both Houses of Congress in 1994 — with the following exhortation:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). These simple truths of power bestowed and power withheld under

the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

Brzonkala v. Virginia, 169 F.3d 820, 825-26 (4th Cir. 1999)(en banc).

Similarly, lower federal courts have applied the new federalism to strike down numerous federal statutes, whose validity had never been questioned before. Besides the Violence Against Women Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Drivers Privacy Protection Act were held invalid as applied to the States. Justice Stevens, in his dissent in *Florida Prepaid*, identified a number of other laws that were vulnerable, based on the reasoning in that case -- including the Family and Medical Leave Act and the Individuals with Disabilities Education Act. *See* 119 S.Ct.at 2219 fn 18. (Stevens, J. dissenting).

The Committee on Federal Legislation is greatly concerned that the New Federalism developed by the Supreme Court and expanded by the lower federal courts is both inappropriate and dangerous.

First, the formalistic rules established by the Supreme Court are anti-majoritarian in the extreme. The decisions discussed in detail below make it more difficult for the national Congress -- surely expressing the desires and wishes of "We the People" -- to address problems of national dimension on a national basis. The New Federalism decisions focus primarily on those provisions of the Constitution intended to preserve the theoretical separation of the States in the constitutional scheme and protect them from encroachment by the central federal government. These concerns had some force at the founding of the republic, when a strong central government was viewed as a danger to liberty. We believe that the Court's resurrection of these doctrines at the threshold of the 21st Century is anachronistic at best.

Second, the States do not need the assistance of the United States Supreme Court to protect their independence. The Court's fear that the States' separateness will be overwhelmed or undermined by federal legislation and that they will become mere provinces in the European model subject to direct central control is unrealistic in the extreme. The Constitution affords the states ample power to protect their separateness in a number of ways: the Senate consists of two

senators from each state regardless of population. The Electoral College guarantees that any candidate for President must deal with the political power of each State separately. The States establish both the qualifications of voters and the electoral lines of legislative districts for the House of Representatives. We disagree with the view that the States need further protection from the United States Supreme Court, applying the vague phrases of the Tenth Amendment or some general idea of proper "structure" between the states and the federal government.

We believe that it is very undesirable to impose dramatic new restrictions on Congress' power to legislate in the national interest. The New Federalism adds to the already difficult process of marshalling political and legislative support for initiatives that must occur on a national level. We reject the notion that Congress, which represents the concerns of the entire nation, cannot ask for State cooperation on national policies, such as protecting the environment, and cannot make the States amenable to protective or anti-discriminatory legislation in dealing with its own employees. We are not dealing with theoretical problems of an Eighteenth Century rural society where the greatest danger to freedom seemed to be a national government with a standing army. We should not interpret the Constitution as if that were the chief threat facing our government today.

This report will examine each of the relevant recent Supreme Court decisions and suggest ways in which Congress, in passing future legislation, may satisfy the Supreme Court's concerns about federalism. We believe that Congress should make its purpose clear in passing protective federal legislation affecting state employees or requesting state aid in carrying out federal policies. In addition, in exercising its power of the purse, it may condition the grant of federal funds to the States upon their compliance with federal policies designed to resolve national problems on a national basis.

II. COMMERCE CLAUSE POWERS AFTER *LOPEZ*

Lopez appeared, initially, to impose the most severe restrictions on Congress. In practice, however, the lower federal courts have generally not expanded the ruling, which appears to present serious challenges to few federal laws, with one notable exception from the Fourth Circuit. Congress itself easily corrected the defect the Court identified in *Lopez*. The Court gave Congress considerable leeway in relying on the Commerce Clause, and the case no longer seems a serious barrier to legislation.

A. The holding in *Lopez*.

The Supreme Court in *Lopez* invalidated the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows ... is a school zone," 18 U.S.C. § 922(q)(2)(A). The Court held in a five-to-four decision that the law was explicitly based upon Congress' power under the Commerce Clause. The Court returned to what it called "first principles" of our Constitutional scheme, under which the police power of the States was virtually unlimited (unless specifically prohibited by some Constitutional limitation) while the powers of the federal government "are few and defined."

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."

Although the Court acknowledged that its modern precedents had significantly expanded Congress' power under the Commerce Clause to permit it to deal with national problems, there remained limitations on that power:

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin*

Steel, the Court warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.” 301 U.S., at 37, 57 S.Ct., at 624.

514 U.S. at 556-57.

To support a Congressional enactment under the clause, one of three conditions had to be met. The Court explained:

First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.

514 U.S. at 558-59.

Congress has broad power to regulate the “channels of interstate commerce,” (*e.g.*, railroads, wire communications, the mail) and to “protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” *e.g.*, guns or drugs that have moved in interstate commerce. But with respect to the last category, where an interstate facility is not involved and no “person or thing” has moved in interstate commerce, three requirements must be met: (1) the activity that is regulated must involve or affect commerce in the strictest sense, that is, “economic enterprise” or activity; (2) the activity regulated by the federal law must “substantially affect” interstate commerce; (3) the Court will not simply accept Congress’ say-so that the required effect exists.

We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no

such substantial effect was visible to the naked eye, they are lacking here.

514 U.S. at 562-63.

The Court rejected the government's argument that crime has an affect on interstate commerce and that guns in school zones will ultimately impact on the nation's economic activities, noting:

Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564.

The Court thereby redefined federalism, finding the general power to legislate for the public good should remain in the hands of the States, and that the Commerce Clause does not empower Congress to legislate in every area of national life.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, 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. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.

514 U.S. at 567-68.

B. Lower Court interpretation of *Lopez*.

The decision in *Lopez* precipitated challenges against dozens of federal laws. The constitutionality of the Violence against Women Act (VAWA) (42 U.S.C. § 13981 et seq.) under *Lopez* has been debated in many cases, see, e.g., *United States v. Page*, 136 F.3d

481 (6th Cir. 1998) and *United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998). The Fourth Circuit, however, is the only circuit to apply the reasoning of *Lopez* to invalidate the VAWA. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999)(en banc)(holding that criminal violence based on gender did not involve commercial activity and that ultimate impact of violence against women on the movement of goods and services across state lines did not create sufficient interstate nexus under *Lopez*). The validity of the Child Support Recovery Act (18 U.S.C. §228) was upheld in *United States v. Williams*, 121 F.3d 615 (11th Cir. 1997) and *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

Federal courts have also had to deal with *Lopez* challenges to the Hobbs Act (18 U.S.C. §1951), see *United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999); the Freedom of Access to Clinics Act (FACE), see *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997) and *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); the federal drug trafficking statute (21 U.S.C. §841(a)(1)), see *United States v. Patterson*, 140 F.3d 767 (8th Cir. 1998); the federal child pornography statute (18 U.S.C. §2252), see *United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998) and *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998); the federal arson statute (18 U.S.C. §844(i)), see *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998); the firearm possession law, (18 U.S.C. §922(g)(1)), see *United States v. Crawford*, 130 F.3d 1321 (8th Cir. 1997); the domestic violence gun possession law, (18 U.S.C. §922(g)(8)), see *United States v. Cunningham*, 161 F.3d 1343 (11th Cir. 1998); contraband cigarette trafficking law, (18 U.S.C. §2341-46), see *United States v. Abdullah*, 162 F.3d 897 (6th Cir. 1998); the federal car-jacking law (18 U.S.C. § 2119) and sentencing factors under the law, see *United States v. Rivera-Figueroa*, 149 F.3d 1 (1st Cir. 1998); *United States v. Cobb*, 144 F.3d 319 (4th Cir. 1998) and *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), *appeal after remand*, 116 F.3d 1487 (9th Cir. 1997).

The lower courts have had no difficulty in concluding that even without a specifically articulated interstate nexus, laws against arson, the possession of a machine gun, devices of mass destruction or possession of explosives has a "substantial effect" on interstate commerce. See generally *United States v. Latouf*, 132 F.3d 320 (6th Cir. 1997)(arson statute), *United States v. Franklyn*, 157 F.3d 90

(2d Cir. 1998)(machine gun possession), *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998)(possession of weapons of mass destruction), and *United States v. Dascenzo*, 152 F.3d 1300 (11th Cir. 1998)(possession of explosives).

Rarely has a lower federal court upheld a challenge under *Lopez* to a federal law. However, the Fourth Circuit held that regulations issued under the Clean Water Act, which extended federal legal protection to certain wetlands, exceeded Congressional power under the Commerce Clause, see *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). It has also recently held that the VAWA was unconstitutional since there was no showing that violence against women had a substantial effect on commercial activity between the states. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999)(en banc). Prompt review of that decision in the Supreme Court is being sought by the government.

In addition, one district court has held that the Child Support Recovery Act (18 U.S.C. §228), criminalizing a parent's failure to make child support payments when the parent and child live in different states, was unconstitutional, see *United States v. Schroeder*, 894 F.Supp 360 (D. Ariz. 1995), but that decision was reversed on appeal, *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

The overwhelming number of cases treat the limitations established by *Lopez* as a minor problem, easily correctable through the devices mentioned below. So long as Congress relies upon regulating the "channels" of interstate commerce or "persons or things" moving in interstate commerce as the basis for legislation, *Lopez* should not pose an impediment.

C. Congressional Response After *Lopez*.

Shortly after the decision in *Lopez*, Congress amended the Gun Free School Zones Act to correct the defect noted by the Supreme Court. In P.L. 104-294, Congress added the underlined twelve words to the law to create the missing interstate nexus: "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." 18 U.S.C. §922(q)(2)(A). Since the new law

specifically relies for federal jurisdiction upon a “thing” (the gun) that moved in interstate commerce, the deficiency noted in *Lopez* was corrected.

Thus, so long as Congress relies on the first two bases for its commerce clause legislation — regulating a “channel” of interstate commerce or regulating or protecting a “person or thing” that moved in interstate commerce, *Lopez* is not a problem.

Even if there is no explicit interstate nexus, Congress can make specific legislative fact-findings to demonstrate the “substantial effect” on economic activity required for the third prong of *Lopez*. In the future, the case should not create a serious bar to the exercise of Congressional power under the Commerce Clause.

III. STATE IMMUNITY FROM FEDERAL SUIT UNDER THE ELEVENTH AMENDMENT.

The most serious obstacle to the exercise of Congressional power is *Seminole Tribe*. The Supreme Court expanded the rationale of that decision in three cases decided in the 1998-99 Term, mentioned above, *Alden*, *Florida Prepaid*, and *College Savings Bank*. Lower federal courts found that Congress lacked the power after *Seminole Tribe* to expand federal court jurisdiction over the States in many separate instances, involving such important federal laws as the Age Discrimination in Employment Act and the Americans with Disabilities Act. As noted above, in his dissent in *Florida Prepaid*, Justice Stevens identified six separate federal laws that were also susceptible based on *Seminole Tribe*.

A. *Seminole Tribe*, *Alden* and *Florida Prepaid*.

The Supreme Court held in *Seminole Tribe* that Congress could not rely upon its commerce clause power to overcome a State’s Eleventh Amendment immunity, even if Congress made its intent and purpose unequivocally clear. In a five-to-four decision (involving the same majority as in *Lopez*), the Court struck down a provision of the Indian Gaming Regulatory Act (IGRA) that permitted a federal court action against a state to compel state officials to negotiate with an Indian tribe with respect to a gambling compact. The IGRA allows an Indian tribe to conduct certain gaming activities only in

conformance with a valid compact between the tribe and the State in which the gaming activities are located. 25 U.S.C. § 2710(d)(1)(C). Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710(d)(3)(A), and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710(d)(7). Florida refused to negotiate with the Seminole Tribe, and suit was then brought by the Seminoles in federal court to compel the State to engage in the required negotiations.

Striking down that provision of the IGRA that permitted a federal court action to compel the state to negotiate, the Court noted that there were two requirements for Congress to abrogate a State's Eleventh Amendment immunity: First, Congress must unequivocally express its intent to do so and second, it must act "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

In this instance, through the numerous references to the "State" in § 2710(d)(7)(B)'s text, Congress provided an "unmistakably clear" statement of its intent to abrogate.

With respect to the second condition, the Court had to decide whether the law was passed pursuant to a constitutional provision granting Congress such power. The Court had previously held that Congress could rely upon its power under Section 5 of the Fourteenth Amendment to overrule a State's Eleventh Amendment immunity, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In a later split decision, the Court held that Congress could also rely upon the Commerce Clause to overrule a State's Eleventh Amendment immunity, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The *Union Gas* plurality found that Congress' power to abrogate came from the States' cession of their sovereignty when they gave Congress plenary power to regulate commerce, and thus the States had "consented" to the waiver of their 11th Amendment immunity.

Seminole Tribe overruled *Union Gas* and held that Congress could not rely upon the Commerce Clause to make States amenable to federal court jurisdiction.

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of

Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

517 U.S. at 72-73.

The Supreme Court read even more federalism dictates into the Eleventh Amendment in *Alden v. Maine*. That case was originally brought by certain probation officers from the State of Maine, who sued for overtime pay under the Fair Labor Standards Act. After the *Seminole Tribe* decision, the First Circuit dismissed the case, holding that since the FLSA was passed pursuant to Congress' Commerce Clause power, the State could now raise an Eleventh Amendment defense. See *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997).

The plaintiff in *Mills* then moved his case for overtime pay to state court, relying on a long line of Supreme Court cases holding that the Eleventh Amendment was not a defense to a suit against a State brought in state court: "... the Eleventh Amendment does not apply in state courts," *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 63?64 (1989). Nevertheless, the Maine Supreme Court held that Congress could not require the states to entertain federal causes of action that could not be brought in federal court because of the Eleventh Amendment, see *Alden v. Maine*, 715 A.2d 172 (Me. 1998), *affirmed*, 119 S.Ct. 2240 (1999).

The Supreme Court, in yet another five-to-four decision written by Justice Kennedy, held that even though the Eleventh Amendment by its own terms prohibited suits against the States in *federal court*, the Amendment embodies a broader sovereign immunity doctrine which protects the States from federal suits in their own courts.

We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is

limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

119 S.Ct. at 2246.

Examining the history of the Court's Eleventh Amendment immunity cases, Justice Kennedy noted:

These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.

Id. at 2254.

The Court examined in great detail the historical background to State sovereign immunity, Congressional practice and court decisions interpreting the concept. Based on this broader interpretation of the meaning of the Eleventh Amendment, the Court held that Congress lacked the power to abrogate State sovereign immunity in its own courts.

In some ways, of course, a congressional power to authorize private suits against non consenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. . . . A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. . . Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

The Court concluded:

In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from

private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

In the two other five-to-four Eleventh Amendment decisions decided in the 1998-99 Term, *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board*, 119 S.Ct. 2219 (1999) and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999), the Court struck down the Trademark Remedy Clarification Act, 15 U.S.C. §1122, and the Patent Remedy Act, 35 U.S.C. §271(h) and 296(a), which made the States amenable to suit for trademark and patent infringement in federal court.

In the trademark case, the Court held that the State of Florida had not impliedly or constructively waived its Eleventh Amendment immunity by engaging in commercial activity that fell within the Trademark Remedy Act. The Court overruled the *Parden* doctrine (*Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)), under which a State may constructively waive its Eleventh Amendment immunity by engaging in activity that Congress warned could lead to a federal suit. *Parden* had held:

By enacting the [FELA] ... Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U. S., at 192.

In *Florida Prepaid*, the Court rejected the principle of “constructive waiver”:

We think that the constructive-waiver experiment of *Parden* was ill-conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, *Parden* broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, *Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law. Today, we

drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.

In the companion patent case, the Court examined the question whether Congress had properly exercised its power under section 5 of the Fourteenth Amendment in passing the Patent Remedy Act. That is, was Congress enforcing the due process clause by making the States amenable to suit in federal court for patent infringement? The Court concluded that a patent right was a property right. But it held that Congress exceeded its powers under the Fourteenth Amendment by passing the law in question, since it was not clearly established that patent infringement by the States was a pervasive problem that had to be solved by Congressional exercise of its Section 5 power. Relying on the narrowing interpretation of Congressional power under section 5 as described in *City of Boerne*, the Court held that Congress had to demonstrate that the law it passed could be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for victims of State actions.

The Court explained:

In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases, *see City of Boerne, supra*, at 525-27, Congress came up with little evidence of infringing conduct on the part of the States. The House Report acknowledged that "many states comply with patent law" and could provide only two examples of patent infringement suits against the States. See H. R. Rep., at 38. The Federal Circuit in its opinion identified only eight patent infringement suits prosecuted against the States in the 110 years between 1880 and 1990.

Even if a deprivation of property rights had occurred, the States did provide a remedy through their own courts.

Thus, under the plain terms of the Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to

injured patent owners for its infringement of their patent could a deprivation of property without due process result. Since a remedy (such as an eminent domain suit in state court) was possible, no deprivation could be shown.

B. Lower Court Expansion of Eleventh Amendment.

After 1989, Congress reacted to the *Union Gas* decision by passing a series of laws making the States amenable to federal court jurisdiction. As noted above, Congress amended the Copyright, Patent and Trademark Laws, specifically granting jurisdiction to federal courts to hear cases against the States involving infringement of rights in those areas. See e.g., 17 U.S.C. §511, 35 U.S.C. §271(h) and §296(a), and 15 U.S.C. §1125(a)(1) and (2). In addition, Congress had expanded federal anti-discrimination laws, particularly in the employment area, and made the States proper defendants in such suits, in view of the States' significant role as a major employer.¹

Soon after *Seminole Tribe*, the lower federal courts began to examine the question of whether the States may be sued in federal court for violating various anti-discrimination laws passed by Congress. As noted above, the Court had held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) that Congress had properly exercised its powers under Section 5 of the Fourteenth Amendment in making the states amendable to suit under Title VII for discrimination based on race, gender or national origin.

Lower federal courts applied the same reasoning to uphold the Equal Pay Act (29 U.S.C. §206) see *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998). For the most part, federal courts have upheld the validity of almost all of the important anti-discrimination laws such as Title VI, the ADEA and the ADA as applied to the States. See *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998)(ADEA); *Magneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998)(ADEA); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998)(ADEA);

¹ According to Justice Souter's dissent in *Alden*, the States collectively employed 4,732,608 workers in 1997, see fn. 40, approximately 3.5% of the total civilian work force in the United States.

Debs v. Northeastern Illinois University, 153 F.3d 390 (7th Cir. 1998)(ADEA); and *Goshtasby v. Board of Trustees of the University of Illinois*, 123 F.3d 427 (7th Cir. 1997)(upholding validity of ADEA as applied to the States); *Autio v. AFSCME*, 140 F.3d 802 (8th Cir. 1998)(ADA as applied to states was valid exercise of Congressional power under Section of 14th Amendment); *Alsbrook v. City of Maumelle*, 156 F.3d 825 (8th Cir. 1998)(ADA); *Lesage v. State of Texas*, 158 F.3d 213 (5th Cir. 1998)(Congress had authority to abrogate States' Eleventh Amendment immunity under Title VI); *Anderson v. State University of New York*, 169 F.3d 117 (2d Cir. 1999)(Congress had authority to overrule state's 11th Amendment immunity in Equal Pay Act); *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998)(Equal Pay Act).

But some lower federal courts have come to opposite conclusions. Thus the Eighth Circuit and the Eleventh Circuit have held that the ADEA was not properly passed pursuant to Section 5 of the Fourteenth Amendment, and States may assert their Eleventh Amendment immunity to private suits brought against the states to enforce that law. See *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822 (8th Cir. 1998) and *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1997) *cert. granted*, 119 S.Ct. (January 25, 1999). The Americans with Disabilities Act was recently declared invalid insofar as it authorized suits against the states, see *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999)(holding that ADA regulations prohibiting states from charging handicapped people for special parking places were unconstitutional) and *Kilcullen v. New York State Department of Transportation*, 33 F.Supp.2d 133 (N.D. N.Y. 1999)(ADA requirement of "reasonable accommodation" placed upon States and permitting suits against States, invalid under Eleventh Amendment).

The 1998-99 cases read even more force into the Eleventh Amendment, thus encouraging the States to raise even more objections to federal law.

C. Legislative Abrogation of Eleventh Amendment Immunity

As noted, Congress may abrogate the States' Eleventh Amendment immunity if it makes its intention to do so clear, and if

it acts pursuant to a valid exercise of Constitutional power, such as section 5 of the Fourteenth Amendment. Thus, for example, to the extent that Congress' intention to overrule a State's Eleventh Amendment immunity was held to be unclear under the ADEA or the ADA, Congress could rectify the problem by doing what it tried to do in the Patent Remedy Act — specifically naming the States as proper defendants under these Acts.

The Eighth Circuit held in *Humenansky* that Congress did not make its intent to overrule a state's Eleventh Amendment immunity "unmistakably clear," as required by *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989). Although the 1974 amendments to the ADEA specifically broadened the definition of an "employer" to include a "State or a political subdivision of a State," see 29 U.S.C. §630(b), the Eighth Circuit found that Congress' failure to specifically mention its intent to overrule a State's Eleventh Amendment immunity or to amend the jurisdictional section of the law (specifically allowing suits in federal court) did not satisfy the strict requirements of *Seminole Tribe*, 517 U.S. at 54, n. 6. See 152 F.3d at 825.

In the Eleventh Circuit decision in *Kimel*, also invalidating the ADEA's application to the States, one judge (Edmondson) came to the same conclusion. (A concurring Judge found that age was not a protected status under the equal protection clause of the Fourteenth Amendment and thus the law was invalid on that ground since Congress could enforce the equal protection provisions of Section 1 only with respect to classes found subject to heightened scrutiny. This was also an alternative holding of the Eighth Circuit in *Humenansky*.)

The solution is for Congress to specifically express its intention not only to make States amenable to suit, but also to express its desire to overrule the States' Eleventh Amendment immunity. For example, 42 U.S.C. §2000d-7 (a)(1) reads as follows: "A State shall not be immune under the Eleventh Amendment of the Constitution . . . from suit in Federal court for a violation of Section 504 of the Rehabilitation Act, . . . title IX of the Education Amendments . . . Title VI of the Civil Rights Act of 1964 or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." This type of provision

would certainly seem to satisfy the “unmistakably clear” requirement mentioned above.

In addition, if Congress is relying upon Section 5 of the Fourteenth Amendment as the basis for overruling a States’ Eleventh Amendment immunity, it should say so. The Fifth Circuit panel decision in *Chavez* holding that the Copyright Remedy Act was unconstitutional relied in part on the fact that Congress did not explicitly cite Section 5 of the 14th Amendment when it passed that law: “The Copyright Remedy Clarification Act does not expressly rely on section 5 of the Fourteenth Amendment . . . It may be too much of a leap to infer Congress’ reliance on the Fourteenth Amendment in the copyright amendments when it did not expressly state its intent to legislate on that basis.” 157 F.3d at 288, n. 8.

Once again, the solution is to cite specifically Section 5 if Congress wishes to make the States amenable to suit in federal court. As noted below, *City of Boerne* also places an additional burden on Congress to show that its reliance on Section 5 was remedial and proportionate. In addition, Congress is now required to make findings that the State action it is remedying involved a “pattern” of unconstitutional action. *See Florida Prepaid*: “In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. . . . Congress came up with little evidence of infringing conduct on the part of the States.”

Another possible solution, as previously suggested by the Civil Rights Committee of this Association, was for Congress to condition federal financial assistance upon a State’s waiver of its Eleventh Amendment immunity. Under the Supreme Court decision in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)(a seven-to-two decision written by Chief Justice Rehnquist, in which Justice Scalia joined), Congress may impose conditions on the States pursuant to its exercise of its Spending Power. Thus Congress could require the States to surrender their immunity under the Eleventh Amendment in order to obtain highway funds, crime control expenditures, medicaid or medicare funds, education funds or even funds under the Social Security Act. If the States wish to obtain federal funds under various social welfare provisions, they must accede to the anti-discrimination laws mentioned above, such as the ADEA and

ADA, and waive their immunity for suit in federal court. See discussion below at pp. 25-26.

IV. THE *PRINTZ* DECISION AND TENTH AMENDMENT IMMUNITY

In yet another five-to-four decision involving the same voting majority as in *Lopez* and *Seminole Tribe*, the Court in *Printz* held that the federal government may not enlist state officials to carry out federal policies. Thus as minor a burden as requiring local sheriffs to conduct background checks on potential purchasers of handguns (until a national computer system could be established) violated States' rights under the Tenth Amendment.²

A. The *Printz* Decision

The 1993 amendments to the federal Gun Control Act (the Brady Bill) required the "chief law enforcement officer" in local jurisdictions to make background checks on potential purchaser of handguns, to insure that they did not fall within certain prohibited categories, such as convicted felons, aliens, dishonorably discharged veterans or persons adjudicated as mentally defective or committed to mental institutions. The Act required the Attorney General to establish a national instant background check system by November 30, 1998, at which time the state officers' obligation to perform background checks would end.

The interim background check requirement was challenged by various sheriffs, who claimed that the Tenth Amendment forbade Congress from enlisting them to carry out the federal policy. The Supreme Court agreed.

In the majority opinion, Justice Scalia examined various early federal laws which generally placed certain reporting requirements on state officials to supply information to the federal government and distinguished them from the requirements of the Brady Bill.

² The Association had filed a brief as *Amicus curiae* in *Printz* urging that the background check provision be upheld. See "The Brady Bill and the Tenth Amendment," 52 *The Record* (March, 1997).

He then examined the “structure” of the Constitution, which unequivocally showed that:

using the States as the instruments of federal governance was both ineffectual and provocative of federal/state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and “[t]he practicality of making laws, with coercive sanctions, for the States as political bodies” having been, in Madison’s words, “exploded on all hands,” 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed.1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people ?? who were, in Hamilton’s words, “the only proper objects of government,” The Federalist No. 15, at 109.

117 S.Ct. at 2376.

According to Justice Scalia’s analysis, “The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.” *Id.* This structure, the Court reasoned, was crucial to protect the people’s freedom:

This separation of the two spheres is one of the Constitution’s structural protections of liberty. “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

Id. citing Gregory, 111 S.Ct.; at 2400.

Finally, the Court found that the requirements of the Brady Bill violated the “political accountability” requirements of *New York v. United States*, 505 U.S. 144 (1992):

The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of New York because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take

credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. 117 S.Ct. at 2382.

B. Application of the *Printz* Decision

Other courts have applied *Printz* to cast doubt on the constitutionality of the Fair Labor Standards Act as it applies to state and local government employees. See *West v. Anne Arundel County Maryland*, 137 F.3d 752 (4th Cir. 1998).

The Fourth Circuit held that the Driver’s Privacy Protection Act (18 U.S.C. §2721-2725), which broadly prohibited States from selling motor vehicle records for commercial purposes, was unconstitutional under *Printz*, see *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, 119 S.Ct. since Congress was requiring state officials to carry out a federal policy.

The First Circuit had to deal with the question of whether, after *Printz*, an injunction would be issued under the Endangered Species Act against state officials issuing permits for lobster pot fishing. See *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). Although the Court ultimately upheld the injunction against state officials issuing gillnet permits and lobster pot fishing permits, the Court acknowledged that *Printz* had raised serious barriers to federal environmental requirements against state officials. The Ninth Circuit found the Forest Resources Conservation and Shortage Relief Act (16 U.S.C. § 620-620j) invalid, *Board of National Resources v. Brown*, 993 F.2d 937, 947 (9th Cir 1993), because of the burden placed on state officials to carry out a federal environmental policy.

Many other requirements of the federal environmental laws, which require state coordination and reporting, may be questionable after *Printz*. Among the questionable laws are the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2645, 2647, requiring governors to develop management plans for dealing with asbestos in school buildings, and the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §11001, requiring states to create emergency response commissions. See generally Jonathan Adler, “The Green Aspects of *Printz*: The Revival of Federalism and Its Implications for Environmental Law,” 6 Geo. MASON L. REV. 573 (1998). See also Vicki C. Jackson,

"Federalism and the Uses and Limits of Law," 111 HARV. L. REV. 2181, 2205 (1998).

C. Legislative Solution to *Printz*

The *Printz* restriction on Congressional power under the Tenth Amendment cannot be evaded simply by Congressional expression of its intent to overturn a State's immunity. *Printz* and *New York* both provide that a State cannot involuntarily be required to carry out any federal policy.

However, in the same way that Section 5 of the Fourteenth Amendment can be utilized to overrule States' immunity under the Eleventh Amendment, we think it can also be relied upon to serve as a basis for federal action to prevail against a Tenth Amendment challenge. See Evan H. Caminker, "*Printz*, State Sovereignty, and the Limits of Federalism," 1997 Sup. Ct. Rev. 199, 238 (1997). Thus so long a Congress has made the proper legislative findings and has expressed its clear intent to rely on Section 5, the analysis is the same as with the Eleventh Amendment above.

For example, the States can be obliged to follow the requirements of the Voting Rights Act and carry out federal policy to insure the elimination of barriers to voting. Since the Voting Rights Law was clearly based on the Fourteenth Amendment, *Printz* does not bar its enforcement.

Another solution to the problems caused by the Court's reliance on the Tenth Amendment doctrine may lie in the Spending Power. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that Congress may condition receipt of federal funds upon state compliance with federal requirements if three conditions are met: (1) the condition must relate "to the federal interest in particular national projects or programs," 483 U.S. at 210; (2) there is no other constitutional prohibition that independently bars the conditional grant of funds (such as the "unconstitutional condition" doctrine), 483 U.S. at 207; (3) the financial inducement must not be "coercive," 483 U.S. at 211.

States receive a wide variety of federal funds for highway construction, crime control, medicaid, medicare, education, social security and other programs. Congress could condition the States' receipt of such funds upon the States' agreement to carry out certain

federal policies in the areas for which funds are made available to the States, such as the Brady gun control act (crime control funds) or the Driver's Privacy Protection Act (highway funds), the subject of cases described above. Surely if Congress could require the states to raise the drinking age to 21 or lose millions of dollars in highway funds, Congress could also require the States to protect the privacy of motor vehicle records or lose such funds.

Congressional conditional grant of funds in these areas would appear to meet the three conditions noted above.³

V. CONGRESSIONAL POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Another important federalism decision was *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down a very popular Congressional enactment, the Religious Freedom Restoration Act. In *Morgan v. Katzenbach*, 384 U.S. 641, 650 (1966) the Court had held that Congress could, through specific legislation, enlarge the scope of Fourteenth Amendment rights as previously defined by the Supreme Court. Now the Supreme Court in *City of Boerne* has cast doubt on that principle.

A. The Decision in *City of Boerne*.

In *City of Boerne*, the Court analyzed the extent of Congressional power under Section 5 of the Fourteenth Amendment. The Court examined Congress' power to alter the extent of protection of religious rights through the Religious Freedom Restoration Act. In a previous decision, the Court had held in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) that any law of general applicability that impacted on free exercise rights would be measured under a more lenient standard than a "compelling state interest" test.

Congress was dissatisfied with such a moderate and easily met test. It quickly passed the RFRA, which required that whenever

³ This is the conclusion reached by most commentators on the issue. See Jesse H. Choper, "On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term," 19 CARDOZO L. REV. 2259, 2271 (1998).

government action substantially burdens religious free exercise rights, the government action can be upheld only by the demonstration of a compelling state interest. And this test would have to be applied to laws or actions that directly focused on religious rights or to laws of general applicability that impacted substantially on such rights. It was that law, explicitly passed pursuant to Congressional power under Section 5, which *City of Boerne* examined.

In previous cases, the Court had held that Section 5 must be interpreted as broadly as the Necessary and Proper clause.

By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.

Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

The Court had noted that Congress may deem it necessary to add specific statutory guarantees to the broad language of the rights contained in Section 1 of the Amendment:

[i]t is the power of Congress which has been enlarged [by §5]. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. *Id.* at 648.

To eliminate any lingering doubt over the true intent of Section 5, Justice Brennan, writing for the Court and citing the legislative history of the Amendment, reasoned in *Morgan*:

[e]arlier drafts of the proposed Amendment employed the “necessary and proper” terminology to describe the scope of congressional power under the Amendment . . . The substitution of the “appropriate legislation” formula was never thought to have the effect of diminishing the scope of this congressional power. *Id.*, fn. 9.

But as broad as this power may be, Congress cannot create new constitutional rights in the guise of enforcing the Fourteenth Amendment. The Court explained in *Boerne*:

Congress’ power under § 5, however, extends only to “enforc[ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial,” *South Carolina v. Katzenbach*, *supra*, at 326, 86 S.Ct., at 817-18. 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.

117 S.Ct. 2164.

The Court concluded that any remedy that Congress establishes to enforce the substantive provisions of the Fourteenth Amendment must be "proportionate" to the evil sought to be corrected:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment. *Id.*

In *Florida Prepaid*, the Court added another prerequisite to exercise of Congress' power under Section 5. Chief Justice Rehnquist noted that:

Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any §5 legislation 'must be judged with reference to the historical experience ... it reflects.'" With respect to the problem of state infringement of patents, the Court noted that: "In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.

B. Effect of *City of Boerne* and *Florida Prepaid*

The key issue under *City of Boerne* is whether Congress is simply providing a proportionate remedy to the violation of a Constitutional right already recognized by the Supreme Court or whether Congress is attempting to “decree the substance of the Fourteenth Amendment’s restrictions on the States.” In addition, there must be a showing that Congress was attempting to deal with a “pattern” of unconstitutional action by the States, as required by *Florida Prepaid*.

The issue has arisen in a scattering of cases in the lower federal courts. The Fourth Circuit has rejected the purported exercise of Congressional power under Section 5 in two recent cases, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (holding that federal regulations under the ADA prohibiting states from charging for handicapped parking privileges were unconstitutional and not a proper exercise of Congressional power under Section 5) and *Brozankala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999) (holding that the Violence against Women Act was not validly enacted pursuant to Congress’ Section 5 power).

In *Brown*, the Court found that the regulations under the ADA which barred the requirement of payment for handicapped parking was too much of an intrusion into the States’ traditional power. The Court noted:

Nor do the safeguards of federalism wither in the face of an overzealous bureaucracy intent upon imposing its will on the states. Regulations that unjustifiably intrude “into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens,” *Boerne*, 117 S.Ct. at 2171, are invalid exercises of power. Just as the Eleventh Amendment does not leave states without a shield when they confront congressional acts, states are not rendered defenseless in their duels with government by bureaucracy. 166 F.3d at 704.

The Court noted:

Here, we hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a

constitutionally valid exercise of power, and the effort to abrogate must fail. *Id.* at 705.

Similarly, in the *Brzonkala* decision, the Court relied upon generalized notions of federalism, noting “‘the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.’” 169 F.3d at 851.

In both cases, the Fourth Circuit found that Congress’ power to legislate under Section 5 is disproportionate and a violation of the *Boerne* restriction if it violates the States’ traditional prerogatives and general authority “to regulate for the health and welfare of their citizens.”

Most other Circuits have rejected the Fourth Circuit’s approach. Thus the Second Circuit recently upheld the validity of the Equal Pay Act as a proper exercise of Congress’ Section 5 power.

Finally, the EPA’s provisions are not out of proportion to the harms that Congress intended to remedy and deter. . . . Since the EPA provides an employer with four affirmative defenses, including the ability to prove that the wage differential [is] based on any other factor other than sex, 29 U.S.C. § 206(d)(1)(iv), the EPA reaches only those wage disparities for which the employee’s sex provides the sole explanation. . . . Thus, the statute is remedial legislation reasonably tailored to remedy intentional gender-based wage discrimination and is sufficiently limited in scope to satisfy the City of Boerne test.

Anderson v. State University of New York, 169 F.3d 117, 121 (2d Cir. 1999).

C. Congressional Response to City of Boerne.

Congress has limited options to meet the requirements of *City of Boerne*. Once again, it can attempt to justify any remedial legislation by making a careful legislative record of the problem which the legislation is attempting to meet and why its legislation is “proportionate” to the problem. While Congressional findings are not conclusive on the federal courts, *see Lopez*, the normal deference that federal courts afford to Congressional conclusions on the need for legislation should go a long way to satisfying the rule.

VI. CONCLUSION

The States' concern about restrictions being placed on them by Congressional legislation can better be determined in the political arena, where the States have ample power to express and defend their positions, rather than by federal court decision. The New Federalism presents an unnecessary barrier to the already difficult process of enacting legislation on a national scale.

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[1] According to Justice Souter's dissent in *Alden*, the States collectively employed 4,732,608 workers in 1997, see fn. 40, approximately 3.5% of the total civilian work force in the United States.

[2] [Get citation of Civil Right Committee report]

[3] The Association had filed a brief as *Amicus curiae* in *Printz* urging that the background check provision be upheld. See "The Brady Bill and the Tenth Amendment," 52 *The Record* (March, 1997).

[4] This is the conclusion reached by most commentators on the issue. See Jesse H. Choper, "On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term," 19 *Cardozo L. Rev.* 2259, 2271 (1998).

