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FEDERALISM: THE NEXT GENERATION

*Richard E. Levy**

It's the sequel. The United States Supreme Court is once again in the business of enforcing federalism-based limits on congressional power, reinvigorating, and at times reinventing, a constitutional doctrine that has lain dormant since the trilogy of post-New Deal decisions repudiating the Court's *Lochner*[1] era jurisprudence of reserved state powers. With each new decision invalidating a federal statute because it exceeds federal authority[2] or violates state sovereignty,[3]

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1. Lochner v. New York, 198 U.S. 45 (1905). See *infra* Part I for a history of federalism.

2. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act as beyond the scope of congressional authority under the Commerce Clause); *see also* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act (RFRA) as beyond the scope of congressional power to enforce the Fourteenth Amendment, but in the context of a perceived attack on judicial power). For further discussion of these cases and their implications, see *infra* notes 43-53, 80-85, and accompanying text.

3. This aspect of the new federalism includes the "no commandeering" rule and the reinvigoration of state sovereign immunity. The no commandeering rule originated in *New York v. United States*, 505 U.S. 144, 188 (1992) (invalidating the "take title" provisions of the Federal Low Level Radioactive Waste Policy Amendments Act on the ground that they coerced states to legislate in accordance with federal policy), and was extended in *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act on the ground that they compelled state officials to execute federal law). *But see* Reno v. Condon, 120 S. Ct. 666, 671-72 (2000) (distinguishing *New York* and upholding a law prohibiting states from selling driver's license information). The reinvigoration of sovereign immunity began with *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress may not abrogate Eleventh Amendment immunity pursuant to the commerce power and overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)), and was extended in last Term's trilogy of state sovereign immunity

the Court's commitment—or at least that of a majority of Justices—to the enterprise of reestablishing judicially enforced limits on the scope of federal power becomes increasingly apparent.[4] But the long term practical impact of the recent decisions remains unclear, even if the basic contours of the new doctrine are fairly discernable. Indeed, the new federalism raises more questions than it answers, and its final frontiers will depend on how the Supreme Court resolves this next generation of federalism questions.[5]

This Essay focuses on one subset of questions raised by the recent federalism decisions: their implications for the scope of "other" federal powers, particularly the power to enforce the Reconstruction Amendments and the spending power.[6] Until recently, the

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cases. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); Alden v. Maine, 119 S. Ct. 2140 (1999); *see also* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (holding that the abrogation of state sovereign immunity under the Age Discrimination in Employment Act cannot be sustained by relying on Section 5 power). For further discussion of the state sovereignty cases, see *infra* notes 54-70 and accompanying text.

4. This year has already seen two important federalism decisions: *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), and *Reno v. Condon*, 120 S. Ct. 666 (2000), and a third is pending. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 889 (4th Cir. 1999) (en banc) (invalidating the Violence Against Women Act as exceeding the scope of federal power under either the Commerce Clause or Section 5 of the Fourteenth Amendment), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999). The Court also granted certiorari in a pair of cases to consider abrogation of state sovereign immunity under the Americans with Disabilities Act, but these cases were recently settled, and the Court dismissed the writs of certiori. *See infra* note 98. Given the division on the issue in the lower courts, this issue is likely to come before the Court again in the near future.

5. My apologies.

6. U.S. CONST. amends. XIII, XIV, XV. I shall use the term Reconstruction Amendments to refer collectively to these amendments, whose distinctive feature for the purpose of federalism is that they were adopted during the Reconstruction Era and after the Tenth and Eleventh Amendments. Under the principle of later in time, subsequent amendments impliedly repeal earlier ones, and the Reconstruction Amendments would be controlling over the Tenth and Eleventh Amendments to the extent that there is any inconsistency. The same principle would also apply to other subsequent amendments that include enforcement powers, such as the Nineteenth Amendment, the Twenty-Fourth Amendment, and the Twenty-Sixth Amendment. As a practical matter, the most important of these subsequent amendments for federalism purposes is the

commerce power has been the dominant focus of cases concerning the scope of federal authority, and the Supreme Court has paid relatively less attention to the scope of other federal powers. But most of the new federalism limits are specific to the commerce power and do not appear to apply to other federal powers.[7] Particularly with respect to state sovereignty, the power to enforce the Reconstruction Amendments and the spending power are especially attractive and potentially expansive alternative bases of authority for federal action, and it is to be expected that the courts will increasingly be confronted with questions concerning the scope of these other federal powers. How the courts resolve these questions will go a long way toward determining whether the new federalism effects a significant practical shift in the balance of federal and state authority. Beyond its practical significance, the resolution of these issues is of immense doctrinal interest because the courts are engaged in their first extended analysis of the scope of congressional power to enforce the Reconstruction Amendments since the nineteenth century, and may soon address the spending power in much the same way.

I. THE EARLY EPISODES: A BRIEF HISTORY OF THE "OLD" FEDERALISM

Before examining the Court's recent federalism decisions and their implications, let me provide some historical context, focusing on the scope of the commerce power and its relation to other enumerated federal powers. As a practical matter, the commerce power has been the focal point of federalism analysis because most major federal regulation has been justified in terms of that power.[8] When

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Fourteenth Amendment.

7. *See infra* Part II.

8. The Court's first major federalism decision was *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which addressed the scope of implied powers and the Necessary and Proper Clause in connection with the creation of a national bank under the taxing and spending powers. Most of the subsequent cases have focused on the commerce power, beginning with *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), in which the Court gave Congress a relatively broad authority to regulate interstate commerce. During much of the nineteenth century, however, the commerce power lay dormant, and the main issue was the extent to which the commerce power preempted state regulation of its own force. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). The preemptive effect of the commerce power in its dormant state is

the Court aggressively limited the scope of federal legislative authority during the *Lochner* era,[9] the leading cases were commerce power cases, and the Court's construction of other federal powers was driven by its desire to preserve limits it had placed on the commerce power. When the Court began to read the commerce power expansively, limits on other federal powers essentially became moot and were seldom addressed because virtually any federal legislation could be justified in commerce power terms.

As Congress became more active after the Civil War, the Court began to enforce limits on the scope of federal legislative authority.[10] The Court's narrow construction of federal power in general, and the commerce power in particular, reached its peak during the so-called *Lochner* era and was part of a broader opposition to government regulation of private economic activity.[11] Beginning in 1895 with *United States v. E. C. Knight Co.*[12] and culminating in 1936 with

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beyond the scope of this Essay.

9. In contrast, the Court did not during this period limit the scope of federal *judicial* authority, but rather asserted constitutional requirements of substantive economic due process over many of the same activities, such as labor relations that were deemed beyond the scope of federal *legislative* power. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 483-91 (1997) (arguing that, contrary to the conventional wisdom, the judicial shift of 1937 did more to free states from federal judicial control than to expand federal power vis-a-vis the states).

10. Many of these decisions concerned the scope of congressional authority under the Reconstruction Amendments and invalidated or narrowed a number of statutes regulating private conduct or other activity that the Court held was not within the scope of the amendments. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 25-26 (1883) (invalidating civil rights legislation as beyond the scope of the power to enforce the Fourteenth Amendment); United States v. Harris, 106 U.S. 629, 639-40 (1882) (same); United States v. Cruikshank, 92 U.S. 542, 567-69 (1875) (same); United States v. Reese, 92 U.S. 214, 221-22 (1875) (invalidating civil rights legislation as beyond the scope of the power to enforce the Fifteenth Amendment). There were, however, some relatively early decisions invalidating legislation as beyond the scope of the commerce power. *See, e.g.*, The Trade-Mark Cases, 100 U.S. 82, 99 (1879) (invalidating trademark legislation as beyond the scope of the commerce power); United States v. DeWitt, 76 U.S. (9 Wall.) 41, 44-45 (1870) (invalidating federal legislation regulating sale of oils for illumination as beyond the scope of the commerce power).

11. *See generally* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 342-44 (1995) [hereinafter Levy, *Economic Rights*].

12. 156 U.S. 1, 17-18 (1895) (narrowly construing the Sherman Antitrust

Carter v. Carter Coal Co.,[13] the Court employed a narrow construction of the commerce power to obstruct a variety of federal regulatory efforts on federalism grounds.[14] A central feature of the Court's federalism jurisprudence during this period was the reserved powers doctrine, under which the Tenth Amendment was interpreted as reserving the "police power" to the states and federal legislation that usurped that power was invalid.[15] This doctrine assumed that federal and state authority occupied mutually exclusive spheres and that legislation within the sphere of state power was by definition beyond the scope of federal power.

The reserved powers doctrine tended to conflate the diverse enumerated powers of the federal government. Because the commerce power analysis focused on whether federal action interfered with state police power, the limits articulated in commerce power cases arguably applied to federal legislation regardless of the power on which it was based. The Court's decisions concerning the scope of the taxing and spending powers, in particular, were driven by its commerce power decisions. Consider, for example, the federal effort to stem child labor. In *Hammer v. Dagenhart (The Child Labor Case)*,[16] the Court held that a law prohibiting the interstate shipment of goods manufactured with child labor exceeded the scope of the

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Act as inapplicable to a sugar refining monopoly on the ground that refining was not commerce and a refining monopoly therefore did not directly affect interstate commerce).

13. 298 U.S. 238, 315-17 (1936) (invalidating provisions of the Bituminous Coal Conservation Act on the ground that Congress's regulation of labor was beyond their authority).

14. The frequency and consistency of such decisions, however, should not be overstated. According to Professor Tribe, the Court "in fact . . . held on only eight occasions prior to 1937 . . . that Congress had exceeded the substantive limits of its commerce power." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 810 n.8 (3d ed. 2000). This count, however, does not include cases such as *E. C. Knight*, in which the Court narrowly construed statutes in light of the limits of the commerce power. Even so, there are notable exceptions to the Court's narrow reading of the commerce power, such as *The Shreveport Rate Case*, 234 U.S. 342, 360 (1914) (upholding federal authority to regulate intrastate railroad rates because of their impact on interstate rail traffic).

15. *See* Richard E. Levy, New York v. United States*: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493, 495 (1993).

16. 247 U.S. 251(1918).

commerce power.[17] Because the law directly regulated the interstate movement of goods in commerce, it would appear to fall easily within the scope of the commerce power under cases such as *Champion v. Ames (The Lottery Case)*.[18] But the Court in *The Child Labor Case* distinguished *Champion* and invalidated the law in question because it was an effort to regulate the production of goods, which fell within the state police power and was therefore beyond the scope of federal power.[19] Subsequently, in *Bailey v. Drexel Furniture Co. (The Child Labor Tax Case)*,[20] the Court invalidated a tax on the interstate movement of goods manufactured with child labor, reasoning that the purpose of the tax was to accomplish a forbidden regulatory objective.[21]

In a similar vein, even before the *Lochner* era, the preservation of states' police powers had figured prominently in the Supreme Court's narrow reading of congressional power to enforce the Reconstruction Amendments.[22] Although these Amendments came after the Tenth Amendment and therefore would not be controlled directly by the reserved powers doctrine,[23] the Court often supported its decisions by emphasizing that a contrary reading would give Congress broad authority to regulate in areas traditionally reserved for the states and that such a result was not intended by the

17. *See id.* at 276-77.

18. 188 U.S. 321, 363-64 (1903) (upholding a federal law prohibiting the interstate transport of lottery tickets).

19. *See Hammer*, 247 U.S. at 271-72 (concluding that the Act "does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States," and, thus, that the Act violated the principle that "the production of articles, intended for interstate commerce, is a matter of local regulation").

20. 259 U.S. 20 (1922).

21. *See id.* at 37 (concluding that the tax's "prohibitory and regulatory effect and purpose are palpable"). Other cases similarly construed the taxing and spending powers narrowly to preserve limits on federal authority articulated under the commerce power. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); United States v. Constantine, 296 U.S. 287 (1935); Hill v. Wallace, 259 U.S. 44 (1922).

22. *See supra* note 10.

23. This is the same reasoning that justifies abrogation of Eleventh Amendment immunity under the Reconstruction Amendments and would similarly imply that the no-commandeering rule is inapplicable under those Amendments. *See infra* notes 56-57, 93 and accompanying text.

Amendments. In the *Civil Rights Cases* of 1883, for example, the Court held that Congress had no power under the Fourteenth Amendment to regulate private conduct, reasoning in part that

> [s]uch legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them.[24]

Ironically, while the Court soon rejected its narrow reading of the substantive rights protected by the Fourteenth Amendment so as to accommodate substantive economic due process,[25] this expansion did not provide an attractive basis for congressional legislation, and the Court did not address the scope of federal power under the Reconstruction Amendments during the *Lochner* era.[26]

Overall, the principal focus of the Court's federalism decisions during the *Lochner* era was the commerce power. The Court's treatment of other powers was driven by the reserved powers doctrine that was articulated and developed primarily in the commerce power area, and the scope of other federal powers thus tended to

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24. The Civil Rights Cases, 109 U.S. 3, 13 (1883); *see also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77-78 (1872) (refusing to read the scope of substantive rights under the Fourteenth Amendment broadly because such a reading would effectively transfer to Congress power over "the entire domain of civil rights heretofore belonging exclusively to the States").

25. The *Slaughter-House Cases* had rejected the argument that the Privileges and Immunities, Due Process, or Equal Protection Clauses protected economic interests—except in the context of racial discrimination. But substantive economic due process jurisprudence crafted broad protections against state interference with contract and property rights. Insofar as this doctrine thus amounted to a judicially enforced federal laissez-faire regulatory regime, the *Lochner* era's express concern for preserving state authority in areas of manufacture and production rings hollow.

26. First, under the *Civil Rights Cases*, the power did not extend to private conduct, and thus Congress was unable to regulate private economic or social relationships. Second, the Court presumably would have concluded that regulation of private economic activity exceeded congressional authority because Congress was not acting to prevent or remedy state interference with contract and property rights recognized under substantive economic due process.

mirror the scope of the commerce power.[27] In much the same way, but for different reasons, the Court's subsequent treatment of the scope of federal power has also been dominated by the commerce power.

After a series of high-profile decisions rejecting important New Deal legislation in 1935 and 1936, the Court's commitment to the restrictive doctrines of the *Lochner* era ended abruptly with the "switch in time that saved nine" in 1937.[28] In three major federalism decisions, *NLRB v. Jones & Laughlin Steel Corp.*,[29] *United States v. Darby*,[30] and *Wickard v. Filburn*,[31] the Court first distinguished and then overruled its earlier commerce power precedent, adopting an expansive view of the commerce power. The Court replaced the restrictive "direct effects" test for assessing commerce power legislation with the more lenient "substantial relation" test, under which Congress may regulate an activity if it has a rational basis for concluding that the activity has a substantial relation to, or substantial effect on, interstate commerce.[32] The Court also explicitly rejected

27. One interesting exception to this phenomenon was in the area of foreign affairs. In *Missouri v. Holland*, 252 U.S. 416 (1920), the Court held that the Tenth Amendment did not apply to the treaty power because the Supremacy Clause did not require treaties to be made "in pursuance" of the Constitution. *See id.* at 432. This exception reflected a general reluctance on the part of the Court during the *Lochner* era to apply its restrictive doctrines in the field of foreign affairs. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317-22 (1936) (holding that the nondelegation doctrine did not apply with equal force to delegations of foreign affairs authority to the President). However, the reasoning of *Holland* managed to permit broad federal authority in foreign affairs while preserving the reserved powers doctrine in other areas.

28. Justice Roberts, who had previously joined the conservative majority, changed his position on the constitutionality of state and federal regulation and helped to form a new majority that was receptive to New Deal Liberalism. *See* Levy, *Economic Rights*, *supra* note 11, at 344 & n.66.

29. 301 U.S. 1, 41, 43 (1937) (distinguishing *Carter Coal* and upholding federal labor regulation).

30. 312 U.S. 100, 116-17, 123-24 (1941) (overruling *Carter Coal* and the *Child Labor Case* and declaring that the Tenth Amendment is "but a truism").

31. 317 U.S. 111, 128-29 (1942) (upholding federal regulation of grain production for consumption on the premises because the cumulative impact of such activity could have a substantial effect on interstate commerce).

32. *See Jones & Laughlin Steel*, 301 U.S. at 37 (stating that Congress may regulate intrastate activity that bears a "close and substantial relation" to interstate commerce).

the reserved power doctrine, declaring that the Tenth Amendment is but a "truism" that restates the principle of enumerated federal powers and does not impose any independent limits on the scope of federal powers.[33] *Wickard* in particular tended to suggest that there were no longer any limits on the scope of the commerce power, because the Court upheld federal authority to regulate the production of grain by a farmer for purposes of feeding his own livestock on the theory that the cumulative effects of his production along with similar activity by other farmers bore a substantial relation to interstate commerce. Whatever the merits of this logic, if a farmer's production on his own land of grain that would never enter the market could be regulated under the commerce power, it was hard to conceive of any activity whose regulation could not be justified by similar logic, and subsequent decisions only seemed to confirm the breadth of the commerce power.[34]

With the Court's expansive reading of the commerce power, the scope of other federal powers essentially became a non-issue. If the commerce power is virtually unlimited, for example, it is unnecessary to inquire whether a particular exercise of the taxing or spending power is designed to evade limits on the commerce power. Thus, in 1937, the Court upheld the unemployment insurance and old age benefit provisions of the Social Security Act as valid uses of the taxing and spending powers.[35] In subsequent cases, the Court was

33. *See Darby*, 312 U.S. at 123-24. While *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the direct regulation of states might interfere with state sovereignty so as to violate federalism principles embodied in the Tenth Amendment, that decision was repeatedly narrowed and finally overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which even went so far as to imply that the scope of federal power might be a political question largely beyond the purview of the courts. *See id.* at 551-52, 556-57.

34. *See* Perez v. United States, 402 U.S. 146 (1971) (upholding Congress's authority under the Commerce Clause to regulate loan-sharking because of the effect organized crime has on interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Congress's authority under the Commerce Clause to prohibit discrimination in restaurants because restaurant supplies travel in interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Congress's authority under the Commerce Clause to prohibit discrimination in hotels because limited hotel rooms affect interstate commerce).

35. *See* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (unemployment

disinclined to inquire into the underlying purposes of taxing or spending measures, notwithstanding their regulatory effects.[36] Likewise, while the Court did address the scope of the power to enforce the Reconstruction Amendments in some important decisions,[37] the cases were generally narrowly decided and did not address the fundamental question of the extent of congressional authority to regulate private conduct under the Reconstruction Amendments. Indeed, when presented with the opportunity in *Heart of Atlanta Motel, Inc. v. United States*[38] and *Katzenbach v. McClung*,[39] the Court expressly avoided reconsidering *The Civil Rights Cases* and relied instead on the commerce power to support congressional authority for The Civil Rights Act's prohibition on discrimination in public accommodations.[40] Although some cases suggest that Congress has at least some power to regulate private conduct under the Fourteenth and Fifteenth Amendments,[41] it was generally easier for Congress and the Court to rely on the commerce power for most federal legislation.[42]

II. THE NEXT GENERATION OF FEDERALISM?

Against the background described above, it should come as no surprise that the recent resurgence of federalism-based limits on federal power would concentrate initially on the commerce power, or

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compensation); Helvering v. Davis, 301 U.S. 619 (1937) (old age benefits).

36. *See* 1 TRIBE, *supra* note 14, at 846 & n.19 (taxing power); *id.* at 836 & n. 14 (spending power).

37. *See* City of Rome v. United States, 446 U.S. 156 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

38. 379 U.S. 241 (1964).

39. 379 U.S. 294 (1964).

40. *See Heart of Atlanta Motel*, 379 U.S. at 249-58; *McClung*, 379 U.S. at 299-304.

41. *See* District of Columbia v. Carter, 409 U.S. 418, 423-24 (1973) (indicating in dicta that the state action requirement does not mean Congress lacks power to regulate purely private conduct under Section 5 of the Fourteenth Amendment); United States v. Guest, 383 U.S. 745, 762, 782-84 (1966) (Clark & Brennan, JJ., concurring) (concurring opinions joined by a majority of Justices).

42. *See* EEOC v. Wyoming, 460 U.S. 226, 243-44 & n.18 (1983) (relying on the commerce power to sustain the extension of the Age Discrimination in Employment Act to state government while implying that the extension could also be sustained under the Fourteenth Amendment).

that decisions restricting the commerce power in the name of federalism would garner significant attention. These new federalism decisions establish limits on both the substantive scope of federal authority under the commerce power and the means that can be used to implement regulatory decisions within the scope of that authority.[43] Because these decisions are primarily limited to the commerce power, however, they invite the exploration of other federal powers as potential bases for regulation that cannot be accomplished using the commerce power. As a result, it seems likely that the Court will be forced to address, in a more sustained and independent fashion than ever before, the scope of federal authority under the power to enforce the Reconstruction Amendments and the taxing and spending powers, a process that has already begun.

The most high-profile of the recent federalism decisions is *United States v. Lopez*,[44] in which the Court invalidated the Federal Gun-Free School Zones Act as beyond the scope of the commerce power. As the first decision since 1937 to declare that regulation of a particular activity was beyond the scope of the commerce power,[45] *Lopez* was a particularly dramatic signal of the Court's rededication to federalism-based limits on federal power, even if its precise import for the scope of the commerce power remains unclear.[46] *Lopez*

43. While one might consider *City of Boerne v. Flores*, 521 U.S. 507 (1997) (overturning the Religious Freedom Restoration Act as beyond the scope of congressional power to enforce the Fourteenth Amendment), to represent a similar movement towards limiting the power to enforce the Fourteenth Amendment, for reasons that will be discussed below, I do not think *City of Boerne* itself, as opposed to what subsequent cases make of it, is very significant as a federalism case. *See infra* notes 79-85 and accompanying text.

44. 514 U.S. 549 (1995).

45. At least two cases had invalidated federal legislation on state sovereignty grounds, however. First, the Court held in 1976 that the application of the Fair Labor Standards Act to state employees violated the Tenth Amendment because the direct regulation of states as states in this manner impaired the operation of state government in areas of traditional state sovereignty. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). *Usery* was at first distinguished, *see EEOC*, 460 U.S. at 239-42, and then overruled, *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *New York v. United States*, 505 U.S. 144 (1992), the first no-commandeering case, also predates *Lopez*.

46. The Court identified four factors that justified invalidation of the law: (1) the inapplicability of *Wickard*'s cumulative effects principle because the underlying activity regulated—gun possession—was not economic in charac-

did not purport to alter the law concerning the scope of the commerce power, but rather to restate it.[47] Nonetheless, the Court made clear that the relationship between a regulated activity and interstate commerce must be *substantial*,[48] and, more important for present purposes, narrowed the scope of *Wickard* by concluding that the "cumulative effects" principle is available to sustain legislative action under the commerce power only when the underlying activity being regulated is commercial or economic in character.[49] In the absence of the cumulative effects principle, it appears from *Lopez* that Congress may regulate noncommercial activity only if each instance of that activity substantially affects interstate commerce, that is,

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ter; (2) the absence of a jurisdictional requirement that connected individual instances of gun possession with interstate commerce; (3) the lack of congressional findings to support the claimed substantial effect on interstate commerce; and (4) the concern that a contrary ruling would permit unlimited federal authority to regulate criminal law and education, two areas traditionally within the state police powers. The opinion leaves unclear how these factors are related to each other and which, if any, of them are predominant.

47. *See Lopez*, 514 U.S. at 556-61. The Court retained the rational basis test, *see id.* at 557, but then categorized the Court's precedents as establishing three categories of permissible congressional action:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . 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' [sic] 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 . . . .

Id. at 558-59 (citations omitted). The Court's analysis of the statute focused on the third category.

48. *Id.* at 559 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

49. *See id.* at 607. In this regard, the Court distinguished farming, which is an economic activity, from gun possession, which is not. *See id.* at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."). It is unclear why the Court chose gun possession as the underlying activity, rather than education, which might easily be characterized as economic in character.

when the statute imposes a jurisdictional requirement,[50] or perhaps if sufficient evidence and findings support the congressional conclusion that a particular noncommercial activity affects interstate commerce.[51] Nonetheless, the vast majority of lower court decisions since *Lopez* have distinguished the case and upheld federal statutes,[52] although there are also some notable decisions following *Lopez* and indicating that some subjects are beyond the scope of the commerce power.[53]

While the enforcement of substantive limits on the commerce power in *Lopez* is striking, the more sustained and developed strand of the new federalism decisions are means-based: they prevent Congress from implementing its commerce power objectives through means that interfere with state sovereignty rather than limit the subjects that may be addressed under the commerce power. First, in

50. *Lopez* indicated that the absence of a jurisdictional nexus requirement in the statute was a factor that weighed against its constitutionality and suggested that such requirements confine federal legislation to its proper sphere. *See id.* at 561 (noting that "[section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). Countless lower court decisions since *Lopez* have relied on jurisdictional requirements in statutes to distinguish *Lopez* and uphold federal criminal statutes on that basis.

51. This possibility derives from the Court's finding, which weighed against the constitutionality of the law, that there was an absence of any connection between gun possession in schools and interstate commerce. *See id.* at 562-63 (discussing the role of findings and concluding "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").

52. *See, e.g.*, 1 TRIBE, *supra* note 14, at 820 n.50 (citing cases).

53. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc) (invalidating the Violence Against Women Act as exceeding the scope of federal power under either the Commerce Clause or Section 5 of the Fourteenth Amendment), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999); United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (narrowly construing agency authority to regulate isolated wetlands under the Clean Water Act to avoid constitutional difficulties); United States v. Denalli, 73 F.3d 328, 329 (11th Cir. 1996) (same); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999) (following *Brzonkala* and invalidating Violence Against Woment Act); *see also* United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (construing jurisdictional requirement in federal arson statute to require showing of substantial effects in individual cases).

New York v. United States[54] and *Printz v. United States*,[55] the Court held that Congress may not "commandeer" state governments by compelling them to either legislate in accordance with federal mandates, as in *New York*, or execute federal statutes, as in *Printz*. Second, the Court in *Seminole Tribe v. Florida*[56] overruled a prior decision to hold that Congress could not, pursuant to the commerce power, abrogate a state's Eleventh Amendment immunity from suit in federal court.[57] In last year's trilogy of decisions, the Court extended *Seminole Tribe* to prevent abrogation of a state's sovereign immunity in state court on the theory that the Eleventh Amendment reflected a background constitutional understanding that states would retain their sovereign immunity. Both lines of cases recognized that Congress could regulate the underlying activity at issue, such as the disposal of low level radioactive waste in *New York* or gaming on tribal lands in *Seminole Tribe*, but invalidated legislative means that interfered with state sovereignty.

These substantive and means-based limits on the commerce power, however, do not necessarily apply in the context of other federal powers, particularly the power to enforce the Reconstruction Amendments and the spending power. This point is self-evident as to *Lopez*, since the requirement of a substantial effect on interstate commerce is tailored to language of the Commerce Clause and cases interpreting its scope. Unless the Court reestablishes the reserved powers doctrine, the fact that an intrastate activity is beyond the scope of the commerce power would not mean that it is beyond the scope of other powers.[58] Thus, for example, Congress might

54. 505 U.S. 144 (1992) (invalidating the "take title" provisions of the Federal Low Level Radioactive Waste Policy Amendments Act on the ground that they coerced states to legislate in accordance with federal policy). The Court quite recently distinguished *New York v. United States* and upheld a law prohibiting states from selling driver's license information in *Reno v. Condon*, 120 S. Ct. 666 (2000).

55. 521 U.S. 898 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act on the ground that they compelled state officials to execute federal law).

56. 517 U.S. 44 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

57. *See id.* at 72.

58. Thus, for example, the Court has expressly acknowledged that the scope of the spending power is not limited by the scope of the other enumerated

conceivably attempt to adopt the equivalent of the Federal Gun-Free School Zones Act by finding that the failure of the states to ban—or to adequately enforce a ban on—the possession of weapons in schools violated the Due Process or Equal Protection Clauses.[59] Similarly, Congress might condition the availability of federal funds for education or crime control on the states adopting and enforcing laws that ban possession of weapons in schools.[60]

In the same vein, sovereignty-based limits on federal power do not appear to prevent Congress from using similar means under the spending power or the power to enforce the Reconstruction Amendments. *New York v. United States* expressly indicated that while Congress could not "compel" states to legislatively implement a federal mandate, Congress could require states to legislate as a condition of receiving federal funds.[61] A similar result would presumably obtain under *Printz*.[62] And while the Court has not expressly addressed the issue, the Reconstruction Amendments would appear to authorize Congress to compel states to legislate or execute laws because their

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powers. *See infra* note 107 and accompanying text. To the extent that *Lopez* relies on the fact that the Gun-Free School Zones Act interferes with traditional areas of state regulatory authority, it is reminiscent of the reserved powers doctrine. Similar arguments might be used to justify limits on other powers. *See infra* note 136 and accompanying text (discussing the possibility of the Court's developing a modern equivalent of the reserved powers doctrine).

59. The argument would be that the state's inaction deprives some students of life, or a liberty interest in bodily integrity, without due process, or because the activity reflects discrimination in some way.

60. These laws would not be the precise equivalent of federal legislation since they would depend on states for enforcement, but they would ensure a uniform national policy.

61. *See* New York v. United States, 505 U.S. 144, 167 (1992).

62. Although the majority opinion in *Printz* expressly declined to address the conditional funding question, *see* Printz v. United States, 521 U.S. 898, 917-18 (1997), Justice O'Connor's concurrence indicated that "Congress is also free to amend the . . . program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of federal programs." *Id.* at 936 (O'Connor, J., concurring) (citing conditional spending statutes). Justice O'Connor is probably right, but the majority may have reserved the question because it relied in part on a separation of powers rationale not present in *New York*—the commandeering of state officers to administer federal programs interferes with presidential oversight of federal executive action. *See id.* at 932-33. The states' voluntary choice to implement federal programs might resolve the federalism issues, but state consent could not legitimize interference with federal executive authority.

substantive provisions are explicitly directed at state action and Congress is empowered to enforce the prohibitions on state action by appropriate legislation.[63] Similarly, in the sovereign immunity cases the Court has expressly indicated that Congress may both condition federal funding on a waiver of sovereign immunity[64] and that it may abrogate the states' sovereign immunity pursuant to the Reconstruction Amendments,[65] although both options require a clear statement of the intent to do so in the relevant statute. As was the case with the new substantive limits of *Lopez*, then, Congress might seek to invoke other federal powers to support regulation that would interfere with state sovereignty in impermissible ways under the commerce power.

To the extent that Congress or litigants begin to rely on other federal powers to regulate or defend legislation, respectively, the Court is likely to be called upon to define the parameters of those other federal powers in a manner that has heretofore been unnecessary. Indeed, this process has already begun, particularly with respect to the power to enforce the Reconstruction Amendments. In two of last year's sovereign immunity cases[66] and again this year,[67] the Court rejected arguments that Congress could abrogate state sovereign immunity because the laws in question were within the scope of congressional power under Section 5 of the Fourteenth Amendment.[68] In a pending case, the Court will consider whether the federal Violence Against Women Act can be sustained under either the

63. For example, the Voting Rights Act compels states to legislate and to administer their election laws in accord with federal mandates, and yet its constitutionality appears to be clear. This conclusion draws force from the Court's treatment of the analogous state sovereign immunity as well. *See infra* note 65 and accompanying text.

64. *See* Alden v. Maine, 119 S. Ct. 2240, 2267 (1999); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against *unconsenting* States.") (emphasis added).

65. *See Alden*, 119 S. Ct. at 2267; *Seminole Tribe*, 517 U.S. at 59.

66. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199 (1999).

67. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

68. *See Kimel*, 120 S. Ct. at 634; *College Sav. Bank*, 119 S. Ct. at 2224; *Florida Prepaid*, 119 S. Ct. at 2205-07.

commerce or Section 5 power.[69] Lower courts have also considered spending power arguments based on a coercion theory.[70] Thus, as the process of articulating the new federalism continues, the Court is likely to confront a number of important questions concerning the scope of these other federal powers.

III. WHERE NO ONE HAS GONE BEFORE: EXPLORING THE UNEXPLORED POWERS

What makes these questions particularly fascinating is that, as described above, the Court's federalism jurisprudence has historically been so "commerce-power-centric" that we actually know very little about the scope of the other powers. Consider, for example, the scope of federal authority to regulate private conduct under Section 5 of the Fourteenth Amendment. In 1883, the *Civil Rights Cases* determined that the Fourteenth Amendment's substantive provisions apply only to state action and that Congress was therefore without power under Section 5 to regulate private conduct.[71] Since that decision, the first wave of federalism has flourished and died, the commerce power has been extended virtually without limit, and a new wave of federalism has begun. It is striking that while numerous federalism doctrines have come and gone and many cases have been overruled in the commerce power arena, the Court has not directly revisited the issue in the *Civil Rights Cases* or provided any significant further guidance on the scope of congressional power to regulate private conduct.[72] As in the example of this issue, which may be

69. Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 889 (4th Cir. 1999) (en banc) (invalidating the Violence Against Women Act as exceeding the scope of federal power under either the Commerce Clause or Section 5 of the Fourteenth Amendment), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

70. *See* Litman v. George Mason Univ., 186 F.3d 544, 553 (4th Cir. 1999); Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 560-61 (4th Cir. 1997) (en banc); Kansas v. United States, 24 F. Supp. 2d 1192, 1197 (D. Kan. 1998).

71. *See supra* notes 24-26 and accompanying text.

72. Although the Court addressed the scope of the Reconstruction Amendments in cases challenging the Voting Rights Act and civil rights legislation during the 1960s and 1970s, as well as in a few cases between that period and the late 1990s, it did not directly consider the scope of federal power to address private conduct. *See supra* notes 37-40.

addressed as early as this Term,[73] reliance on other federal powers to support legislation is likely to require the Court to explore new worlds of constitutional jurisprudence. In this part of the Essay, I will briefly discuss some of the important questions that may arise concerning the scope of two other federal powers: the power to enforce the Reconstruction Amendments and the spending power.

A. The Reconstruction Amendments

I will begin with the Reconstruction Amendments because several cases have already made their way to the Court in this area. Indeed, while *Lopez* has received most of the press coverage, the Court has been far more active in recent years concerning the substantive scope of the power to enforce the Reconstruction Amendments, particularly the Fourteenth Amendment, than it has with respect to the substantive scope of (as opposed to sovereignty based limitations on) the commerce power.[74] The overarching question concerning federal authority under the Reconstruction Amendments is the relationship between the regulated conduct and the violation of a substantive right protected by the Amendments that is necessary to provide a basis for federal legislation.[75] The seminal decision on this question during

73. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999). In *Brzonkala*, the Fourth Circuit read *Lopez* as preventing the regulation of noncommerical intrastate activity under the commerce power in the absence of a statutory jurisdictional nexus requirement and relied on the *Civil Rights Cases* to conclude that the Act could not be sustained under the Section 5 power because it regulated private conduct. *See id.* at 830-32, 869.

74. The Court has addressed the scope of congressional authority to enforce the Reconstruction Amendments in at least five cases since 1997. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); Lopez v. Monterey County, 525 U.S. 266 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

75. The *Civil Rights Cases* of 1883 established the link between Section 5 and the substantive provisions of the Fourteenth Amendment by holding that the Privileges and Immunities, Due Process, and Equal Protection Clauses protect only against state action and that Congress's power to enforce those rights therefore did not include the power to regulate private conduct. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

the modern era is *Katzenbach v. Morgan*,[76] which concluded that Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce the Amendment's substantive protections by "appropriate" legislation, was intended to incorporate the *McCulloch v. Maryland* test for the exercise of federal power.[77] Applying this test, the Court rejected the argument that Congress was limited to remedying violations of the Amendments as judicially defined, held that Congress could act based upon either its determination that regulating conduct may prevent future violations or on factual determinations that would establish a violation of substantive rights as defined by the Court, and even implied that Congress might by statute broaden the scope of substantive rights protected by the Fourteenth Amendment.[78] Notwithstanding the potential scope of *Morgan*, however, the Reconstruction Amendments did not emerge as a major source of federal legislation.[79]

In its most recent decisions, the Court seems to be moving toward a narrow reading of congressional authority to enforce the Reconstruction Amendments, as we might expect. This trend began with *City of Boerne v. Flores*,[80] which was more of a separation of powers case than a federalism case,[81] but which nonetheless laid the

76. 384 U.S. 641 (1966).

77. *See id.* at 650-51. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), established the parameters for Congress's broad powers under the Necessary and Proper Clause. *See id.*. at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

78. *See Morgan*, 384 U.S. at 648-58.

79. Between *Morgan* and *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court decided several cases addressing the scope of congressional authority under the Reconstruction Amendments. In these cases the Court was often badly fragmented, and the decisions did little to clarify the issues. *See generally* Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 U. KAN. L. REV. 61 (1995) [hereinafter Levy, *Unwelcome Stranger*].

80. 521 U.S. 507 (1997).

81. The Court in *City of Boerne* invalidated the Religious Freedom Restoration Act, Congress's attempt to effectively overrule *Department of Human Resources v. Smith*, 494 U.S. 872 (1990), which held that in Free Exercise Clause challenges, strict scrutiny does not apply to neutral laws that only incidentally burden religious practices. *See id.* at 886 & n.3. The critical issue in the case was the respective roles of the Court and Congress in determining the

foundation for the most recent decisions. *City of Boerne* definitively rejected any suggestion in *Morgan* to the effect that Congress might define and expand the scope of substantive constitutional rights, thus requiring legislation under the Reconstruction Amendments to be tied to a violation of the Fourteenth Amendment as defined by the Court.[82] In discussing *Morgan*, however, the Court in *City of Boerne* reconfirmed congressional authority to enact prophylactic measures that prevent violations and to make factual determinations necessary to establish violations.[83] Even after *City of Boerne*, then, Congress could still rely on prophylactic and fact-finding theories to support regulation of state action that would not necessarily be found by a court to violate the Fourteenth Amendment.[84] Nonetheless the Court indicated a willingness to scrutinize the basis for congressional action with some care, holding that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[85] This congruence and

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substantive scope of constitutional rights, not the respective regulatory spheres of the state and federal governments.

82. *See City of Boerne*, 521 U.S. at 519-24. Notwithstanding some suggestions to the contrary, *see, e.g.*, 1 TRIBE, *supra* note 14, at 954, this result was hardly surprising, since the suggestion of a broad congressional power to redefine the scope of the Fourteenth Amendment in *Morgan* was oblique to begin with, and the Court had been moving away from it in subsequent decisions. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 204-05 (1970).

83. *See City of Boerne*, 521 U.S. at 518.

84. Thus, for example, Congress might prohibit state action that would be evaluated under the rational basis test by finding that there was animus against a class under *Romer v. Evans*, 517 U.S. 620 (1996), or that the prohibition would prevent state action based on animus. In a similar vein, Congress might reach private acts of discrimination on the theory that the states' failure to act more aggressively to prevent such discrimination was itself based on discriminatory motives. *See generally* Levy, *Unwelcome Stranger*, *supra* note 79, at 84-85, 88 (discussing potentially broad reading of Fourteenth Amendment power based on fact-finding and prophylactic rationales).

85. *City of Boerne*, 521 U.S. at 520. In *Boerne*, the Court found that the Religious Freedom Restoration Act was so out of proportion to any constitutional violations as to justify the conclusion that it was intended to effect a substantive change in free exercise rights. *See id.* at 532 ("Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.").

proportionality test appears to be something more than rational basis scrutiny, and the critical question is just how strictly the Court will apply the test.

Indications from the recent sovereign immunity cases are that the Court will apply the congruence and proportionality test fairly strictly, according little deference to congressional determinations regarding the appropriateness of legislation to enforce the Reconstruction Amendments. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[86] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[87] the Court rejected arguments that trademark and patent laws could be sustained as an exercise of the power to enforce the Due Process Clause.[88] These cases standing alone may not tell us much because the Fourteenth Amendment arguments in them were relatively weak.[89] When they are taken together with this year's decision in *Kimel v. Florida Board of Regents*,[90] however, it becomes apparent that the Court is unwilling to allow the Fourteenth Amendment to be used as a means of evading the state sovereign immunity principles proclaimed in *Seminole Tribe v. Florida*[91] and *Alden v. Maine*.[92] *Kimel* is particularly instructive and bears further discussion.

In *Kimel*, the Court held that the abrogation of state sovereign immunity under the Age Discrimination in Employment Act (ADEA) cannot be sustained by relying on the Section 5 power,[93]

86. 119 S. Ct. 2199 (1999).

87. 119 S. Ct. 2219 (1999).

88. *See College Sav. Bank*, 119 S. Ct. at 2223-24; *Florida Prepaid*, 119 S. Ct. at 2210-11.

89. The cases involved patent and trademark laws, and it is fairly obvious that the plaintiffs in those cases invoked the Section 5 power simply as a post hoc rationale to support abrogation of sovereign immunity. Indeed, in *College Savings Bank*, the Court did not even apply the congruence and proportionality test because there was no property at stake under the applicable trademark law. *See College Sav. Bank*, 119 S. Ct. at 2225. These cases thus offer little insight into how the Court would treat legislation in which Congress explicitly relies on its power to enforce the Reconstruction Amendments and carefully articulates and documents a rationale that links the abrogation of sovereign immunity to the enforcement of constitutional rights recognized by the courts.

90. 120 S. Ct. 631 (2000).

91. 517 U.S. 44 (1996).

92. 119 S. Ct. 2140 (1999).

93. *See Kimel*, 120 S. Ct. at 645. The substantive provisions of the Act, and

that is, "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[94] The Court reasoned that because age is not a suspect classification, it may be used "as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests" without violating the Equal Protection Clause.[95] As such, the ADEA prohibits "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[96] While the Court acknowledged that this overbreadth is not necessarily fatal because Congress may enact prophylactic remedies, the Court's examination of the legislative record found insufficient evidence to support such a rationale for the law.[97] *Kimel* would seem to suggest that Congress must carefully create a record to support its reliance on the Reconstruction Amendments

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its remedies against private parties, were not at issue in the case and are constitutional under the commerce power, even though this power could not be used to support the abrogation of sovereign immunity under *Seminole Tribe* and *Alden*. *See id.* at 639. The lower court decision in *Kimel* held that the ADEA was not within the scope of the Section 5 power, but concluded that the Americans with Disabilities Act (ADA), also at issue in the case, was. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998). The Supreme Court decision in *Kimel* did not address the ADA issue, which has been the subject of much recent litigation and uncertainty. *See infra* note 98 and accompanying text.

94. *Kimel*, 120 S. Ct. at 645. Although the Court had held in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-15 (1976), that age is not a suspect classification, irrational age classifications or classifications based on animus would nonetheless violate the Equal Protection Clause. *See id.* at 314. Congress might find that employment decisions based on age are, more likely than not, based on irrational stereotypes about the performance of the elderly, that such generalizations would not be tolerated but for a certain animus against the elderly, or that a broad prohibition is necessary to prevent such arbitrary and discriminatory decisions from being made by the states. Any one of these determinations would link the regulated conduct to a violation of the Fourteenth Amendment as defined by the Court, and thus satisfy the general rule of *City of Boerne*.

95. *Kimel*, 120 S. Ct. at 646.

96. *Id.* at 647. The Court rejected the plaintiff's argument that the statutory exceptions for bona fide occupational qualifications (BFOQ) meant that it prohibited only arbitrary decisions—that would violate even the rational basis test—because the BFOQ exception is much narrower than constitutional requirements. *See id.*

97. *See id.* at 648-50.

when it attempts to regulate conduct that is not an obvious violation of a substantive constitutional right as defined by the Court. It also suggests that the Reconstruction Amendments will not be an effective alternative basis for legislation that was adopted before the advent of the new federalism because Congress did not generally consider it necessary to develop such a record.[98]

98. A statute that presents very similar issues to the ADEA and that has produced considerable litigation is the Americans with Disabilities Act (ADA), whose abrogation of state sovereign immunity, like that of the ADEA, can no longer be sustained under the commerce power. One of the cases consolidated by the court of appeals in *Kimel* raised the issue of whether the ADA is within the scope of the Section 5 power. *See Kimel*, 139 F.3d at 1428-29 & n.2. The court of appeals held that it is. *See id.* at 1433. The Supreme Court, however, only considered the ADEA issue. *See Kimel*, 120 S. Ct. at 636-37. The Court has since granted certiorari on the court of appeal's ADA holding in *Kimel*, as well as in another decision arising out of the Eighth Circuit, only to dismiss certiorari in both cases because the parties settled. *See* Florida Dep't of Corrections v. Dickson, 139 F.3d 1426 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 976 (2000), *and cert. dismissed*, 120 S. Ct. 1236 (2000); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted sub nom.* Alsbrook v. Arkansas, 120 S. Ct. 1003 (2000), *and cert. dismissed*, 120 S. Ct. 1265 (2000).

In the meantime, the circuits remain split over the issue. *Compare* Dare v. California, 191 F.3d 1167, 1173 (9th Cir. 1999) (upholding ADA as a proper exercise of the Section 5 power), *petition for cert. filed*, 68 U.S.L.W. 3566 (U.S. Feb. 2, 2000) (No. 99-1417), *and* Martin v. Kansas, 190 F.3d 1120, 1125-29 (10th Cir. 1999) (same), *and* Muller v. Costello, 187 F.3d 298, 309-10 (2d Cir. 1999) (same), *and* Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998) (same), *cert. denied*, 119 S. Ct. 58 (1998), *and* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (same), *with Alsbrook*, 184 F.3d at 1010 (concluding that ADA was not a valid exercise of the Section 5 power), *and* Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 707 (4th Cir. 1999) (same); *see also* Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 4-5 (1st Cir. 1999) (declining to reach the issue and noting precedent upholding Congress's exercise of its Fourteenth Amendment powers in enacting the ADA); Nelson v. Miller, 170 F.3d 641, 648 & n.7 (6th Cir. 1999) (same). The Fourth Circuit has been somewhat inconsistent in this area. Although it held that one provision of the ADA exceeded the scope of the Section 5 power in *Brown*, it upheld a different provision in *Amos v. Maryland Department of Public Safety and Correctional Services*, 178 F.3d 212, 216-23 (4th Cir. 1999). However, shortly after the court vacated the *Amos* decision and granted rehearing en banc, the parties to the case reached a settlement and the case was dismissed. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., No. 96-7091, 2000 U.S. App. LEXIS 3391 (4th Cir. Mar. 6, 2000). Given the Fourth Circuit's record of aggressive application of the new federalism decisions, it is likely to extend *Brown* in future cases. Presumably, the Supreme Court will have to address this issue fairly soon, and the petition

In another case to be decided this Term, the Court may give further guidance as to the kind of record necessary to support the exercise of the power to enforce the Fourteenth Amendment.[99] In *Brzonkala v. Virginia Polytechnic Institute*,[100] the Fourth Circuit sitting en banc invalidated the federal Violence Against Women Act, holding that the Act not only exceeds the scope of the commerce power under *Lopez* because it regulates noncommercial intrastate activity but also exceeds the scope of Section 5 of the Fourteenth Amendment because it regulates private conduct.[101] The *Brzonkala* court relied on the *Civil Rights Cases* to hold that regulation of private acts is beyond the scope of congressional authority under Section 5,[102] notwithstanding congressional statements that the failure to enforce state domestic violence laws is the product of gender bias.[103] Thus, the Supreme Court may have the opportunity both to address the vitality of the *Civil Rights Cases*, which was reaffirmed by the Fourth Circuit notwithstanding important intervening precedent,[104] and to consider a legislative record that, at least to some extent, provides support for reliance on the Fourteenth Amendment as a basis for federal action. On the other hand, if the Supreme Court were to conclude that the Act is within the scope of the commerce power, as did the dissenters in *Brzonkala* and a number of district courts that have considered the issue,[105] then it will be unnecessary for the Court

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for writ of certiorari in *Dare* may present an opportunity to do so, as would another recent decision in the Eleventh Circuit. *See* Garrett v. University of Alabama Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3564 (U.S. Mar. 1, 2000) (No. 99-1240).

99. *See* United States v. Morrison, 120 S. Ct. 11 (1999) (granting cert. in *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999) (en banc)).

100. 169 F.3d 820 (4th Cir. 1999).

101. *See id.* at 826.

102. *See id.* at 873-75.

103. *See id.* at 883-86 (discussing the legislative record and concluding that it did not support the statute as directed towards unconstitutional state action).

104. For discussion of some of those intervening precedents, see *supra* notes 10-13 and accompanying text.

105. *See Brzonkala*, 169 F.3d at 911 n.1 (Motz, J., joined by Murnaghan, Ervin & Michael, JJ., dissenting); Doe v. Mercer, 37 F. Supp. 2d 64, 68-69 (D. Mass. 1999); Liu v. Striuli, 36 F. Supp. 2d 452, 477-78 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601, 609-10 (E.D. Wash. 1998); C.R.K. v. Martin, Civ. No. 96-1431, 1998 U.S. Dist. LEXIS 22305, at *6-10 (D. Kan. July 10, 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385, 396-97

to address either aspect of the power to enforce the Fourteenth Amendment. Whatever the outcome, the Supreme Court's decision will tell us a great deal about the ultimate significance of *Lopez*, as well as the importance of the Fourteenth Amendment as an alternative basis for legislation addressing private noncommercial activity.[106]

B. The Spending Power

Like the power to enforce the Reconstruction Amendments, the spending power presents an alternative source of authority that might be used to avoid the new limits on the commerce power because Congress can influence conduct by conditioning the receipt of federal monies on compliance with federal requirements. Attaching conditions to federal funding to states is a particularly attractive means of avoiding sovereignty-based limitations on the commerce power[107] and will be the focus of this discussion, although conditional spending to private persons may also influence conduct and might be used to reach intrastate noncommercial activity notwithstanding *Lopez*.[108] While there are some indications of increased

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(S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531, 540 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188, 1190 n.1, 1195 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375, 1423 (N.D. Iowa 1997); Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996); *see also* Timm v. Delong, 59 F. Supp. 2d 944, 950-62 (D. Neb. 1998) (upholding the Act under both the Commerce Clause and the Fourteenth Amendment).

106. If the Court relies on the commerce power, that would suggest that *Lopez* poses little danger to federal legislation so long as Congress articulates and supports a commerce power justification for legislation. If the Court concludes that the Act exceeds the scope of the commerce power, that would suggest that *Lopez* has some teeth and perhaps that the Court intends to develop the *Lopez* principle further. If *Lopez* indeed represents the beginning of a major tightening of the commerce power, the scope of the Fourteenth Amendment power may become increasingly important, particularly the question of congressional authority to regulate private conduct.

107. *See supra* note 64 and accompanying text (discussing the Court's explicit recognition that conditional spending may be used to induce states to implement federal mandates notwithstanding the no commandeering rule or to waive their sovereign immunity).

108. Conditional spending for private parties presents a host of additional issues unrelated to federalism and cannot be covered in any comprehensive fashion in the context of this Essay. For more information on this issue, see generally RICHARD EPSTEIN, BARGAINING WITH THE STATE (1993).

judicial activity concerning the spending power, and the courts have applied a "clear statement" rule requiring conditions on federal monies to be explicitly stated in the pertinent statutes, none of the cases invalidate such conditions as beyond the scope of the spending power.[109]

The controlling test for conditions on federal funding for the states is *South Dakota v. Dole*,[110] which predated the new federalism. Under *Dole*, (1) the federal spending must further the general welfare; (2) the attached condition must be unambiguous; (3) the condition must be related to the purposes of the spending; and (4) the condition may not violate other constitutional provisions that act as independent limits.[111] In addition, the Court indicated that conditions may be unconstitutional if they are so "coercive" as to pass the point at which "'pressure turns to compulsion.'"[112] *Dole* treated the statute generously under the then prevailing attitude in which virtually any federal law was within the scope of congressional authority, and it is to that extent out of step with the new federalism, particularly as to the protection of state sovereignty.[113] Thus, it is entirely

109. An Eighth Circuit decision, *Bradley v. Arkansas Department of Education*, 189 F.3d 745 (8th Cir. 1999), concluded that section 504 of the ADA was not a valid exercise of the spending power. *See id.* at 757-58. However, the court granted the federal government's petition for rehearing en banc—on the spending clause issue—and vacated those portions of the panel decision. Jim C. v. Arkansas Dep't of Educ., 197 F.3d 958 (8th Cir. 1999). This is hardly surprising since the panel reached this startling result without even citing *South Dakota v. Dole*, 483 U.S. 203 (1987). *See Bradley*, 189 F.3d at 757-58.

110. 483 U.S. 203 (1987) (upholding the conditioning of federal highway money on a state's increasing its drinking age to twenty-one).

111. *See id.* at 207-08. As a practical matter, parts (1) and (4) of this test are unimportant. The "general welfare" is defined very broadly and is not limited by the scope of other federal powers. *See id.* at 206-07. The requirement that the law not violate independent constitutional limits applies to any legislation under any power and does not add anything to the spending power analysis.

112. *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

113. A number of commentators have advocated a more aggressive application of *Dole* so as to restrict the spending power and thereby preserve the new federalism limits. *See, e.g.*, Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115 (1998); Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11 (1998); Angel D.

possible that the Court might seek to add more teeth to the *Dole* test so as to prevent evasion of the new limits on federal power. In this regard, the key constitutional questions are how close the relationship between the purposes of the expenditure and the condition must be and when, if ever, conditions may be unduly coercive. At a practical level, it appears that the key question may be how clearly Congress must express the condition in order for the courts to recognize it.

Conditional spending for states, particularly in the context of the no commandeering and sovereign immunity cases, is a species of the "unconstitutional conditions" problem.[114] An unconstitutional conditions issue arises when the government offers a benefit that it is not constitutionally required to provide in exchange for something the government could not compel, such as the relinquishment of a constitutional right.[115] Although the denial of a benefit normally receives the most deferential scrutiny, at times the Court has expressed concern over the coercive character of the arrangement and invalidated the condition using some form of heightened scrutiny.[116] In the federalism context, when Congress conditions the receipt of federal funds (which Congress has no obligation to provide) on the states' implementation of federal programs or waiver of sovereign

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Mitchell, Comment, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161 (1999); Ryan C. Squire, Note, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869 (1998). Thus far the courts do not appear to have taken up the call, with a possible exception in the aggressive application of the clear statement requirement for federal conditions. *See infra* notes 121-22 and accompanying text.

114. For general discussion of the unconstitutional conditions doctrine, see EPSTEIN, *supra* note 108; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

115. *See* Sunstein, *supra* note 114, at 593 n.2.

116. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (applying heightened scrutiny under the Takings Clause to exaction of easement as a condition for a rebuilding permit); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that state could not condition receipt of unemployment benefits on willingness to accept employment that would violate religious beliefs); Speiser v. Randall, 357 U.S. 513 (1958) (holding that state could not condition receipt of a property tax exemption on taking a loyalty oath).

immunity (which Congress could not directly compel) a potential unconstitutional conditions issue arises. Although *Dole* itself was very deferential regarding conditional federal funding, its analysis incorporates the two factors that figure into the Court's notoriously inconsistent and confusing case law on unconstitutional conditions:[117] (1) whether the condition is coercive and (2) whether the condition is sufficiently related to the purposes of the expenditure. With the recognition of spheres of state sovereignty into which the federal government may not intrude, these aspects of *Dole* may take on a new significance.[118]

To date, however, there is little indication that the courts will craft new limits on the spending power. Spending power challenges have been raised in a number of lower court cases and have been uniformly rejected—even by the Fourth Circuit.[119] These cases typically reason that the particular loss of federal funds is not unduly

117. For every case, such as those in the preceding footnote, invalidating a condition, one can cite to a similar and contemporary case in which the Court exhibited no concern for the possibility that benefit conditions might violate constitutional rights. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (upholding denial of federal funding to family planning clinics that also provided abortion counseling and services); Harris v. McRae, 448 U.S. 297 (1980) (upholding denial of Medicaid coverage for abortions).

118. That a spending measure is coercive or attempts to achieve a regulatory objective is significant only if that which is being coerced is impermissible or the regulatory objective exceeds federal power. Thus, these issues tended to be mooted by the expansive interpretation of the commerce power that prevailed prior to the new federalism. *See supra* notes 35-36 and accompanying text.

119. *See, e.g.*, United States v. Dierckman, 201 F.3d 915, 922-23 (7th Cir. 2000) (rejecting spending power challenge to Food Security Act); Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999) (holding that acceptance of Title IX funding was conditioned on a waiver of Eleventh Amendment immunity and that such a condition was permissible under the spending power); California v. United States, 104 F.3d 1086 (9th Cir. 1997) (holding that the federal government did not commandeer states by conditioning receipt of Medicaid funds on the states' provision of emergency medical services for illegal aliens); Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996) (holding that loss of highway funding for failure to propose adequate state implementation plan under the Clean Air Act did not improperly coerce states); Kansas v. United States, 24 F. Supp. 2d 1192 (D. Kan. 1998) (holding that loss of federal welfare funds for failure to meet deadlines for establishing child support enforcement database did not infringe upon state sovereignty). The only exception to this consistent pattern is the Eighth Circuit panel decision in *Bradley*, which was promptly taken en banc and vacated. *See supra* note 109.

coercive, or they find sufficient connection between the condition and the purposes of the federal expenditure. They often emphasize that Congress may "encourage" activity through the spending power that it could not compel pursuant to its other powers. A few cases, however, have pointed to potential constitutional difficulties to support a narrow construction of conditional spending statutes.[120] Nonetheless, unless there is a more dramatic signal from the Supreme Court, it seems unlikely that lower courts will aggressively narrow the scope of the spending power and that it will remain a viable alternative to the commerce power as a means of avoiding the constraints of both *Lopez* and the state sovereignty cases.

This is not to say that federalism will be irrelevant in conditional spending cases, but rather that it will likely be expressed through means other than the invalidation of conditional spending statutes. In this regard, the key seems to be *Dole*'s requirement that conditions be expressed unambiguously so that a state has sufficient notice of the conditions, which has as its corollary the "clear statement" rules for conditional waiver of sovereign immunity. In last year's decision in *Davis v. Monroe County Board of Education*,[121] for example, the Supreme Court held that Title IX required a funding recipient to waive immunity with sufficient clarity to satisfy the notice requirement.[122] Of the five pro-federalism Justices, only Justice O'Connor was in the majority in *Davis*, and the remaining four dissented, emphasizing that the notice requirement served as a "vital safeguard" against the danger that the

> Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by

120. *See* United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999) (narrowly construing provision criminalizing theft or bribery in programs receiving federal funds to require proof in individual cases that a federal interest has been implicated so as to avoid constitutional concerns under *Dole*); Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 569-72 (4th Cir. 1997) (en banc decision adopting dissenting opinion in panel decision) (reasoning that a broad interpretation of the Individuals with Disabilities Education Act would impose such onerous obligations on states as a condition of federal funding as to violate the Tenth Amendment).

121. 119 S. Ct. 1661 (1999).

122. *See id.* at 1669-74.

> permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.[123]

This kind of reasoning has also been relied upon by the Fourth Circuit to support narrow constructions of state obligations under conditional spending statutes.[124]

IV. CONCLUSION: THE FEDERALISM VOYAGER

The story of the new federalism is still unfolding at warp speed (for courts anyway) and those of us who write on the subject run the risk of being overtaken by events.[125] Thus, it is difficult to predict the Court's final destination, which will ultimately depend on the resolution of the next generation of federalism questions. Nonetheless, we may draw some tentative conclusions and identify some of the key challenges that lie ahead. This final section of the Essay considers the new federalism from a broader perspective, assessing how far the Court has come and where it may be going on its new federalism voyage.

As an initial matter, it is useful to compare and contrast the tests used by the Court to evaluate the substantive scope of federal authority. In all three areas, the Court employs an ends-means scrutiny that reflects the approach to implied powers enunciated by Chief Justice Marshall in *McCulloch v. Maryland*.[126] First, legislation must be linked to an end (i.e., a purpose or authority) that is within the scope of the pertinent enumerated power. Second, the means (i.e., the legislative program) must be related to or "fit" this end. Ends-means scrutiny can be more or less deferential, as the Court's

123. *Id.* at 1677 (Kennedy, J., joined by Rehnquist, C.J.; Scalia & Thomas, JJ., dissenting).

124. *See Riley*, 106 F.3d at 566-68 (reasoning that a broad interpretation of the IDEA would impose liability on states without sufficient notice); *see also* Sellers v. School Bd., 141 F.3d 524, 531-32 (4th Cir. 1998) (employing similar reasoning with respect to a different IDEA provision).

125. The paradoxes of time travel are, however, beyond the scope of this Essay.

126. 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

treatment of the commerce, Section 5, and spending powers indicate. With respect to ends, the Court can define the range of legitimate purposes more or less broadly and can require Congress to be more or less explicit about its purposes or to provide more or less evidence to support a given purpose. Likewise, the Court can impose looser or tighter fit requirements, depending on the context. In terms of the traditional understanding, the pre-*Lopez* rational basis test was the epitome of deference; it accepted any plausible commerce-related purpose and very loose connections between means and ends.[127] *Lopez* does seem to require a stronger factual justification for commerce-related purposes and makes the relationship to commerce somewhat more difficult to establish without the cumulative effects principle, but on the whole it does not substantially restrict the scope of substantive fields that Congress may regulate. By comparison, the Section 5 cases apply a more aggressive form of scrutiny, narrowly defining the range of permissible purposes, requiring a factual basis to support them, and imposing a "congruence and proportionality" test for remedial and prophylactic means.[128] Thus, Congress's power to enforce the Reconstruction Amendments does not provide an attractive basis for federal legislation that is not clearly linked to the violation of some constitutional right.[129] On the other hand, the test

127. It is possible that the Court's pending decision in *Brzonkala v. Virgina Polytechnic Institute & State University*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999), might further heighten the scrutiny of legislation under the commerce power. In particular, while there were no formal findings of a substantial effect on commerce in *Lopez*, Congress made explicit findings in *Brzonkala*. *See id.* at 844-52 (reading *Lopez* as turning on the nature of the connection between an activity and interstate commerce rather than the evidence or findings to support it and concluding that the congressional findings in support of the Violence Against Women Act did not alter the tenuous and insubstantial nature of the Act's connection to interstate commerce). Thus, the Court will likely give further guidance on the role of evidence and findings in deciding the case.

128. This relatively higher level of scrutiny appears to stem from separation-of-powers concerns that congressional construction of constitutional rights might intrude upon the courts' responsibility to "say what the law is." I have argued elsewhere that congressional action under the power to enforce the Reconstruction Amendments should not be more carefully scrutinized than action under other federal powers. *See* Levy, *Unwelcome Stranger*, *supra* note 79, at 87-98.

129. Thus, for example, if remedying age discrimination could not be sustained as appropriate legislation to enforce the Equal Protection Clause in

for conditions attached to the spending power is very generous,[130] insofar as the "general welfare" accommodates an exceptionally broad range of purposes, there is no hint of any requirement of findings or evidence, and the fit needed to satisfy *South Dakota v. Dole* is especially relaxed.[131] Overall, then, the relative levels of scrutiny under the three powers can be summarized as follows:

Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), and the Americans with Disabilities Act is problematic as well, *see supra* note 98, it is hard to see how Congress could justify Fair Labor Standards Act remedies against states under the Section 5 power.

130. This relatively lower level of scrutiny appears to stem from the distinction between "denying a benefit" and imposing a command, in the sense that conditional spending is not coercive and states voluntarily choose to implement federal programs or waive sovereign immunity when they accept federal funding.

131. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court articulated the fit requirement as follows: "[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Later in the opinion, the Court declined to further specify the meaning of the "germaneness" or "relatedness" requirement. *See Dole*, 483 U.S. at 208 n.3.

Table: Levels of Scrutiny and the Enumerated Powers

Power	Commerce	Section 5 of the 14th Amendment	Spending
Level	Rational basis but not absolute deference after *Lopez*	More rigorous than rational basis test	Less rigorous than rational basis test
Purpose	Linked to commerce, but need not be actual or stated purpose	Limited to enforcing rights as defined by court	General welfare not limited to enumerated powers
Evidence	Evidence and findings help independent judicial determination	Necessary to establish remedial or prophylactic purposes absent clear violation of right	No need for evidence or findings
Fit	Substantial relation does not require proportionality, but cumulative effects test is limited	Congruence and proportionality test	Very deferential relationship inquiry

This pattern has important implications for the state sovereignty component of the new federalism. While *Lopez* may not significantly restrict the substantive scope of the commerce power, the no-commandeering and state sovereign immunity cases do impose significant restrictions on the means that Congress may use to implement federal regulatory objectives under the commerce power. To the extent that Congress wishes to have state legislatures or executive officials implement federal legislation or seeks to create legal remedies against the states, Congress must rely on the Section 5 and spending powers. Thus, for example, the spate of recent decisions involving the Section 5 power has been fueled by the state sovereign

immunity cases, which forced parties to defend statutes abrogating sovereign immunity on the basis of the Section 5, rather than commerce, power.[132] In view of the respective tests that apply, it is apparent that the spending power would be the more attractive vehicle for pursuing such objectives, at least from the constitutional perspective.[133] This is particularly true insofar as courts have repeatedly acknowledged that "Congress' power 'to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the constitution,'" and that "Congress can use its Spending Clause power to pursue objectives outside of 'Article I's enumerated legislative fields' by attaching conditions to the grant of federal funds."[134] Since conditions attached to federal spending need only be loosely connected to the purposes of the expenditure, we might expect Congress to increasingly rely on conditional spending legislation to require states to implement federal programs or waive sovereign immunity. This kind of development might eventually force the pro-federalism majority on the Court to rework its spending power jurisprudence or even reconsider *Dole*, although there are few indications of such a development at the present time.[135]

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132. Although *City of Boerne v. Flores*, 561 U.S. 507 (1997), was not a state sovereign immunity case, the subsequent decisions, including *Alden v. Maine*, 119 S. Ct. 2240 (1999), its companions, and *Kimel*, all involved statutes plainly within the scope of the commerce power—or other enumerated powers—but whose abrogations of sovereign immunity were unconstitutional unless they could be justified under the Section 5 power. Likewise, we may expect the ADA version of this problem to be before the Court again soon. *See supra* note 98.

133. To the extent that the use of the spending power requires new spending (i.e., costs money) it may impose economic and political costs that would discourage Congress. *See infra* note 138 and accompanying text. But federal money to the states is already ubiquitous and Congress could simply attach new conditions to existing programs, as it has done, for example, in the case of welfare reform legislation. *See* Kansas v. United States, 24 F. Supp. 2d 1192 (D. Kan. 1998) (upholding new statutory requirement that states develop database for tracking child support as a condition of receiving federal welfare funding). Nonetheless, this approach would require program-specific provisions with clear language to be adopted.

134. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., dissenting) (quoting Butler v. United States, 297 U.S. 1, 65 (1936)).

135. *See supra* note 118 and accompanying text. Indeed, since eight of the

Overall, it would seem that there is very little that Congress could do before the new federalism that it cannot do after the new federalism, and the Court is at a critical juncture. If the pro-federalism majority wishes to substantially restrict the scope of federal authority under the enumerated powers, it will have to work a more fundamental change in the Court's federalism jurisprudence. One path that it might take would be to reinvigorate the concept of reserved state powers. Although the strict version of the reserved powers doctrine was rejected with the demise of the *Lochner* era and is unlikely to return,[136] the notion that the Constitution prevents federal intrusion into some matters that are traditionally reserved to the states remains a powerful one. Thus, for example, interference with traditional areas of state power was one factor the Court emphasized in *Lopez*.[137] The pending decision in *Brzonkala/Morrison* presents the Court with an opportunity to further elaborate on this idea, insofar as the Fourth Circuit seemed to invoke that kind of reasoning in its rejection of the Violence Against Women Act:

> [Congress] has sought to reach conduct quintessentially within the exclusive purview of the States through legislation that neither conditions the federal intervention upon proof of a misconduct imputable to a State or upon a nexus to interstate commerce, nor is it tailored so as to address activity closely connected with constitutional failures of the States or with interstate commerce. This the Congress may not do, even in pursuit of the most noble of causes, lest be ceded to the Legislature a plenary power over every aspect of human affairs—no matter how private, no matter how local, no matter how remote from commerce.[138]

This rationale resonates with the state sovereignty line of cases insofar as both emphasize the need to preserve the constitutional

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nine Justices supported the outcome in *Dole* and the majority opinion was written by (then) Justice Rehnquist, who is one of the new federalism majority, it may be especially difficult to overturn. Subsequent cases might distinguish *Dole*, although the precise basis for doing so remains unclear.

136. *See supra* notes 15-34 and accompanying text (discussing the reserved power doctrine during the *Lochner* era and its subsequent rejection).

137. *See supra* note 46.

138. Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 889 (4th Cir. 1999).

balance of federal and state power by protecting states against the inexorable expansion of federal authority. These themes could easily be developed into a jurisprudence under which congressional action that is far removed from the core of an enumerated federal power and/or interferes with traditional areas of state autonomy and authority requires an especially strong justification, especially in terms of evidence and findings in the legislative record to support the connection between the activity regulated and an enumerated federal power. The Court's opinion in *Brzonkala/Morrison* may go a long way toward telling us whether such a development is in the offing.

Even if the Court does not further develop and strengthen the new federalism, and there are few subjects that Congress may not reach or means that it may not employ, the Court has already effected a significant change in the political dynamics of federalism. Congress must now exercise greater care in its choice of federal powers, develop the necessary record to support its judgments, and express its conditions and requirements clearly and explicitly. Moreover, insofar as Congress must appropriate funds to rely on the spending power, the costs of using states to implement federal programs and of creating remedies against states have been increased, and the political stakes have been raised.[139] The need to exercise care and consider political consequences—to think about and justify federal action that is not clearly within the core of the enumerated federal powers—is a significant change from the "anything goes" attitude that prevailed less than ten years ago. To that extent, the new federalism arguably reinforces the political safeguards of federalism and helps to ensure that adequate attention will be paid to federalism concerns. Although there is much disagreement about the scope of federal authority and the courts' proper role in policing constitutional limits on federal power, perhaps there can be greater consensus that a legislative process sensitive to federalism concerns would be a constructive development.

139. Indeed, *New York v. United States*, 505 U.S. 144 (1991), adverted to this rationale insofar as the Court reasoned that by "commandeering" states to implement federal programs, Congress avoided political accountability for its policies, which presumably would include the need to finance federal programs. *See id.* at 168-69.