



Winter 2001

Suits against the States: The Changing Law of Immunities

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Recommended Citation

Michael B. Browde, Erwin Chemerinsky & Ruth Kovnat, *Suits against the States: The Changing Law of Immunities*, 31 N.M. L. Rev. 149 (2001).

Available at: <https://digitalrepository.unm.edu/nmlr/vol31/iss1/11>

SUITS AGAINST THE STATES: THE CHANGING LAW OF IMMUNITIES

PANEL

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PROFESSOR BROWDE: My name is Michael Browde. I am on the faculty at the University of New Mexico School of Law. We are also joined by Ruth Kohnat, a colleague of mine at the New Mexico School of Law. You all know Erwin Chemerinsky, a professor at the University of Southern California. The primary focus of what we are trying to do this afternoon is engage in a discussion about some state immunity issues. With that in mind, Ruth, do you want to make a few comments about Erwin's presentation on immunities?¹

PROFESSOR KOVNAT: It is shocking in a way to be living and thinking about state immunity issues at a time of a true revolution. I would not be the first to talk about immunity as a debate between the judicial power and the power of the political branches. To some extent, the Supreme Court is reemphasizing that it is the primary province of the judicial branch to police the Constitution, and that includes policing the boundaries of federal and state power, which are not explicitly set out in the federal Constitution. To the extent that the Supreme Court enforces these structural limitations on national power and expansions of state power, there is an increase in judicial power at the expense of Congress.

BROWDE: I just finished a Continuing Legal Education presentation for the State Bar of New Mexico, which was billed as a review of civil procedure. I reviewed the Supreme Court procedural cases and my colleague, Ted Occhialino, did the New Mexico cases. This year, I threw all the procedural cases out, and said to my friends in the bar, "Something is happening that affects every one of you." I spent time on this historic, revolutionary change in federalism because I think that virtually every federal statute is now up for grabs. Anybody who has a claim under a federal statute ought to think, "Wait a minute, is this statute going to be subject to attack?" Anybody who is defending a claim brought against a federal statute ought to think in terms of its validity, which most of us just ran by in previous years. I think the three of us panelists share a view of the difficulties, and perhaps the criticisms, of what the Supreme Court has done. With that in mind, if people have questions, let's have them.

KRISTIN MORGAN-TRACY:² I am trying to work out in my mind what is left. In discrimination statutes, whom can you sue, whom can't you sue, and where can you sue them? What is left, particularly with age discrimination?

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1. Prof. Chemerinsky made his comments during this conference in a keynote presentation, *The Federalism Revolution*, reprinted in this volume.

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BROWDE: Recently, I have found it interesting to talk to practicing lawyers who are either bringing claims against states or defending suits on behalf of states. They get involved with the Eleventh Amendment³ and, lo and behold, the resolution of the Eleventh Amendment question has nothing to do with the Eleventh Amendment. It has to do with whether the particular federal statute that seems to allow a claim against a state is valid, not under the Eleventh Amendment, but under the Fourteenth Amendment.⁴ Section Five of the Fourteenth Amendment, the last section, says, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."⁵ So what is appropriate legislation? There are a series of cases from the 1970s in which the Court upheld portions of the Voting Rights Act.⁶ Although there was some debate in those cases, there was a good deal of deference to what Congress did. There was recognition that Congress has some authority to go beyond the scope of the substantive provisions of the Fourteenth Amendment.⁷ Then comes the line of cases starting with the Religious Freedom Restoration Act⁸ case⁹ to the recent cases that have narrowed the scope of Congress's power.¹⁰

It is clear now, as perhaps it was not then, that Congress has a limited power. It has a power to remedy and to perhaps prevent constitutional violations. There is no question that Congress's intent must be clear.¹¹ What Congress may not do is declare new constitutional rights.¹² In terms of keeping Congress within the limited, remedial, preventive mechanism the Court has articulated, there must be congruence and proportionality between the constitutional violations that Congress is supposedly taking care of and the means that they have chosen to do so.¹³

We cannot forget that the Fourteenth Amendment only limits governmental actions, and therefore, it is not an appropriate use of the Section Five power to go beyond state action.¹⁴ So what do we know? We know the discrimination in the Age Discrimination in Employment Act¹⁵ is not a valid abrogation because distinctions based on age are subject to rational basis scrutiny.¹⁶ In essence, Congress imposed heightened scrutiny.¹⁷ Now before the Court is the Americans with Disabilities

3. U.S. CONST. amend. XI.

4. U.S. CONST. amend. XIV.

5. *Id.* at § 5.

6. Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974e (1994).

7. U.S. CONST. amend. XIV.

8. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (1994 & Supp. II 1996).

9. *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997) (holding the Religious Freedom Restoration Act unconstitutional as an impermissible expansion of rights).

10. *See United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding the Violence Against Women Act unconstitutional as exceeding the scope of Congress's Commerce Clause power); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding the Federal Gun-Free School Zones Act unconstitutional as exceeding the scope of Congress's Commerce Clause power).

11. *See Maine v. Taylor*, 477 U.S. 131, 139 (1986).

12. *See Flores*, 521 U.S. at 519 (holding that Congress may not expand the scope of rights or create new rights).

13. *Id.* at 520.

14. *Id.* at 519.

15. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1994 & Supp. IV 1998).

16. *Kimel v. Fla. Bd.*, 528 U.S. 62, 83 (2000) ("The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision.").

17. *See id.* at 88 (finding that the Act's substantive requirements "remain at a level akin to the Court's heightened scrutiny cases under the Equal Protection Clause").

Act,¹⁸ which is very much a struggle of analysis about the legislative history and what Congress was trying to do and how it sought to do it.¹⁹ The last point I would like to make is the one Erwin also made, and that is, this is just life in the real world. All of these standards are being applied to statutes that were enacted long before these were the rules of the game. So, in that regard it is tough.

PROFESSOR CHEMERINSKY: I agree with everything Michael said. It seems to me there are two questions that I would ask in answering your question about whom you can and cannot sue. One is, who is the defendant in the particular case? The second is, what is the particular law? Let me just say a word about why I think those are the relevant questions.

In terms of who is the defendant, there are three possible kinds of defendants. One is a private entity. We need to remember that Congress can only regulate private entities if Congress is acting under some authority other than Section Five of the Fourteenth Amendment.²⁰ In other words, Congress would have to be acting under the commerce power or under Section Two of the Thirteenth Amendment,²¹ because the Supreme Court has overruled that part of *The Civil Rights Cases*.²² The Court has said, in cases like *Jones v. Alfred H. Mayer Co.*²³ and *Runyon v. McCrary*,²⁴ that Congress can prevent private race discrimination under Section Two of the Thirteenth Amendment.²⁵ The second possible defendant is a city or county government where the government is not part of the state and not immune under the Eleventh Amendment.²⁶ Then, Congress can act under either the commerce power or under Section Five of the Fourteenth Amendment.

The third kind of defendant is the state government where Congress can only authorize suits if it is acting under Section Five of the Fourteenth Amendment.²⁷ The Age Discrimination Employment Act was not a valid exercise of Congress's Section Five power, but it was a valid exercise of the commerce power.²⁸ So to answer your specific question, private entities and cities can still be sued for age discrimination because they are not given Eleventh Amendment protection. State governments, however, cannot. As Michael points out, the Americans With Disabilities Act issue is now before the Supreme Court.²⁹ There is no doubt that private entities and local governments will be able to be sued. Whether state governments can be sued depends on whether there is a valid exercise of Section Five.

18. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

19. See *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

20. U.S. CONST. amend. XIV, § 5; See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

21. U.S. CONST. amend. XIII, § 2.

22. *United States v. Stanley* ("Civil Rights Cases"), 109 U.S. 3 (1883).

23. 392 U.S. 409, 438 (1968) (Congress's Thirteenth Amendment power includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.") (citing *Civil Rights Cases*, 109 U.S. 3, 23 (1883)).

24. 427 U.S. 160, 179 (1976).

25. U.S. CONST. amend. XIII, § 2.

26. See, e.g., *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 430 (1978) (Stewart, J., dissenting) (noting that "municipalities cannot claim the State's sovereign immunity under the Eleventh Amendment").

27. See *Martin v. Kan.*, 190 F.3d 1120, 1126 (10th Cir. 1999).

28. *E.E.O.C. v. Wyo.*, 460 U.S. 226, 243 (1983).

29. *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

The same week that the Supreme Court decided *Kimel v. Florida Board*,³⁰ the Court granted certiorari, reversed, and remanded two Equal Pay Act³¹ cases that said state governments could be sued for violating the Equal Pay Act.³² Now, Justice O'Connor in *Kimel* said that age is different from gender and race because gender and race get heightened scrutiny.³³ The Equal Pay Act is about gender.

I thought that the Supreme Court would simply deny review or maybe even affirm, but the Supreme Court granted certiorari, reversed, and remanded, and I am not sure what to make of that. We could go on with a long list, for example, Title VII of the Civil Right Act of 1964.³⁴ There is no doubt Title VII is constitutional with regard to private employers, because it is a valid exercise of a commerce power.³⁵ What about the states where it expands rights like in allowing the disparate impact theory?³⁶ Is that unconstitutional? That seems to be the place where we do not know the answer to your question.

KOVNAT: I agree with Michael and Erwin, and I would add only one thing with respect to Title VII. *Fitzpatrick v. Bitzer*,³⁷ the Supreme Court opinion that gave birth to the abrogation doctrine itself, was a Title VII case. So, I remain optimistic that those kinds of statutes will still be upheld even though they are based on disparate impact.

BROWDE: But the issue is Section Five. If a statute survived a Section Five challenge, then you have got a suit against the state.

CHEMERINSKY: I think it is very hard to think of why a disparate impact theory under Title VII could be brought against state governments. Isn't it analogous to the Religious Freedom Restoration Act?³⁸ The Supreme Court says you have to prove discriminatory intent.³⁹ Congress says discriminatory impact is sufficient.⁴⁰ Isn't that Congress expanding the scope of rights? I will give you another example that is outside the employment context. I find it hard to see how the Court, under its current jurisprudence, can uphold the Voting Rights Act Amendments of 1982.⁴¹

I think of the analogy between that statute and the Religious Freedom Restoration Act. The Supreme Court in *Mobile v. Bolden*⁴² said that proof of discriminatory impact is not enough. Rather, to challenge an election system, like an at-large voting

30. 528 U.S. 62 (2000).

31. Equal Pay Act of 1963, 29 U.S.C. 201 (1994 & Supp. IV. 1998).

32. *Varner v. Ill. State Univ.*, 150 F.3d 706 (1998), *rev'd & remanded by*, *Ill. State Univ. v. Varner*, 528 U.S. 1110 (2000); *Anderson v. State Univ. of N.Y.*, 169 F.3d 117, 121 (1999), *rev'd & remanded by*, *State Univ. of N.Y. v. Anderson*, 528 U.S. 1111 (2000).

33. *Kimel v. Fla. Bd.*, 528 U.S. 62, 83-84 (2000).

34. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

35. *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 n.6 ("Title VII...was enacted pursuant to the commerce power to regulate purely private decisionmaking....").

36. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

37. 427 U.S. 445, 452-56 (1976).

38. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb(4) (1994 & Supp. II 1996).

39. *Employment Div. v. Smith*, 494 U.S. 872, 878-89 (1990).

40. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393, n.1 (9th Cir. 1994) (noting that 42 U.S.C. § 2000bb(b)(1) restored the compelling interest test recognized under *Sherbert v. Verner*, 374 U.S. 398 (1963), which allows for a cause of action when the burden on the exercise of religion is indirect).

41. 42 U.S.C. §§ 1973aa-6 (1994).

42. 446 U.S. 55 (1980).

scheme, you have to prove discriminatory purpose.⁴³ Congress came along in the Voting Rights Act Amendments of 1982 and said, "We are going to amend this to say that it is a statutory violation if you can prove disparate impact in an election scheme."⁴⁴ In *Thornburg v. Gingles*⁴⁵ there is a disparate impact standard. Isn't that Congress expanding the scope of rights to overturn a Supreme Court case just like the Religious Freedom Restoration Act was doing relative to *Employment Division v. Smith*?⁴⁶

BROWDE: That seems to bring you back to the Section Five cases. Some of the language in the new cases, though very limited, indicates that Congress has the power to both remedy and prevent.⁴⁷ In *Mobile*, Justice Marshall, in his dissent, said that the discriminatory intent was there, but it was just too hard to prove and there was enough evidence of the fact that the discrimination existed. He reasoned that the severity of the standard prevented the proof; therefore, disparate impact equaled a violation.⁴⁸

PAUL FRYE:⁴⁹ Are you saying that the way to get around the problem was the Voting Rights Act? That Congress was merely adjusting standards of proof and the constitutional violations in the Acts are the same? That Congress is merely implying a different standard of proof than the Court suggests was necessary?

CHEMERINSKY: I am personally skeptical of that argument because whether or not there is a violation depends on the standard of proof. Under *Mobile* the Los Angeles City Council's districting would not have been a violation.⁵⁰ Under the 1982 Voting Rights Act, the action would have been a violation. Isn't that the clearest indication of an expansion of rights? For that matter, wasn't the Religious Freedom Restoration Act⁵¹ just about the standard of proof? It changed the standard of proof back to strict scrutiny. Yet the Court said that is an expansion of rights and that is not allowed.⁵²

BROWDE: It is an uphill, tough row to hoe. But at least in the legislation back then, we found evidence of constitutional violations and they were categorized as burden of proof problems. If we do not allow Congress to make those types of determinations, then Congress cannot prevent constitutional violations. The whole notion is that there is some give in Congress's ability. After all, Congress can make legislative judgments that we cannot make. At least in the earlier cases there was

43. *Id.* at 62.

44. 42 U.S.C. § 1973 (1994).

45. 478 U.S. 30, 44 (1986).

46. 494 U.S. 872, 878 (1990) (holding that laws that unintentionally and incidentally burden religion do not offend the First Amendment).

47. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.").

48. *City of Mobile v. Bolden*, 446 U.S. 55, 137 (1980).

49. Attorney at Law, Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Enfield, Albuquerque, New Mexico.

50. According to Chemerinsky, roughly ten years ago the Los Angeles City Council's districting was challenged for having a racially discriminatory impact. With impact as a basis for liability under the 1982 Voting Rights Act Amendments, the city ultimately settled the suit. Telephone Interview with Erwin Chemerinsky, Professor, University of Southern California (February 8, 2001).

51. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (1994 & Supp. II 1996).

52. *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

much language about needing to leave Congress with some flexibility to make those legislative judgments.

KOVNAT: There is some lip service paid to that idea.

FRYE: When I was taking Constitutional Law about twenty-three years ago with Professor Tribe,⁵³ he was talking about a constitutional dialogue that would be between Congress and the courts. There is no dialogue here. It seems like there is an ossification, at least from Congress's point of view, and the Court is free to do what it wants.

KOVNAT: Welcome to the revolution. Let me be a slight skeptic. The Court does say in cases like *Florida Prepaid Postsecondary Education Expense Board v. College Saving*⁵⁴ and *Kimel* that there were not adequate legislative findings to show the law was congruent or proportionate.⁵⁵ I think the question is, How sincere is the Court in that?

If the Court is sincere in saying that if there were the appropriate findings, then the law would be allowed, then maybe there is something of a dialogue. Congress could come back and prove that there is an extensive pattern of state violations of intellectual property and reenact the law authorizing suits against states. If the Court allowed it, that would be a form of dialogue.

I think the Americans With Disabilities Act is important because now we have a Section Five case where there is the legislative record of state violations. The question is, Do findings matter? That is why *United States v. Morrison*⁵⁶ is important, in the Commerce Clause context, for those who believed that this debate is really about the need for findings by Congress. The Violence Against Women Act had findings, but they did not matter in *Morrison*.

BROWDE: Not only that, but there is an express statement by the Court in *Morrison*. The Court says there are findings, but these are ultimately judicial judgments that must be made here.⁵⁷ That is put as starkly as it could be in terms of separation of powers. That is what I found eye opening about it. My dear friend Ruth Kovnat said, "You just missed the boat. It was there in *Lopez*⁵⁸ and you just did not want to see it."

CHEMERINSKY: *Lopez* was just a nice signal to Congress, "Mind your p's and q's and you can still do what you have been doing." It all comes down to what appeals to a particular Justice. If one of the five in the majority, say hypothetically O'Connor, had found that the legislative findings for the Violence Against Women Act⁵⁹ were sufficient, we would be having a very different discussion now. The same thing applies with ADA.

53. Laurence H. Tribe, Harvard Law School.

54. 527 U.S. 627 (1999).

55. *Kimel v. Fla. Bd.*, 528 U.S. 62, 83 (2000) (finding the ADEA requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act").

56. *United States v. Morrison*, 529 U.S. 598 (2000) (noting that the statute in question was supported by numerous congressional findings).

57. *Id.*

58. *United States v. Lopez*, 514 U.S. 549, 562 (1995) (stating that the Court *considers* legislative findings in making its *independent* evaluation) (emphasis added).

59. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994).

BROWDE: Much harder to ignore is the true clash between the Court and Congress in the face of those findings. It is hard to ignore the lack of judicial restraint that would emerge if the findings were ignored.

JAMES WEGER:⁶⁰ Given that most of these decisions are five to four, very close votes, do you think that a change in the makeup of the Court would cause an about-face on these decisions? Or is the Supreme Court still wrestling with decisions, like *Roe v. Wade*,⁶¹ that a lot of the Justices do not agree with today, but refuse to overturn?

CHEMERINSKY: In *Kimel*, Stevens wrote a dissent saying, I believe that *Seminole Tribe* was wrong.⁶² I think it is quite likely that if the vacancy in the Court was in the five in the majority and it was selected by, say, Gore, and was of a like mind to Stevens, I think it would be overruled. When *Garcia*⁶³ overruled *National League*,⁶⁴ Rehnquist wrote this very short dissent in which he said, "They got the votes today, we are going to get them in the future because a little bit more needs to be said."⁶⁵ I thought Stevens' dissent in *Kimel*, in January, was the same thing. On the other hand, if the next president is Bush and he's sincere about appointing more Scalias and Thomases, then we are talking about doctrines that will not only continue, but be expanded through the rest of our careers.

KOVNAT: Other thoughts and questions about any of this?

INGA MUNSINGER:⁶⁶ I am concerned about the implications. The Tenth Circuit seems to be going out on a limb in recognizing a waiver of sovereign immunity by removing cases to federal court. I was wondering if you thought other circuits would follow what the Tenth is doing, or if the Tenth Circuit may get slapped down for it.

KOVNAT: I think Erwin mentioned that the Tenth Circuit appears to be following Justice Kennedy's concurrence in *Wisconsin Dep't of Corrections v. Schact*.⁶⁷ It is not so odd a notion that when you invoke the federal forum you have consented to be sued in the federal forum. That is a traditional notion of consent. So, although the Tenth Circuit has gone far, I do not personally think that it is such a peculiar notion.

CHEMERINSKY: I have two thoughts. One is, I think the underlying question is, Who in the state can waive the state's sovereign immunity? If you believe that the state's attorney general's office can waive the sovereign immunity, then you are absolutely right, that removal waives sovereign immunity. However, if you say that only the state legislature can waive a state's sovereign immunity, then there is a strong argument that removal by a state attorney general cannot be a waiver.

60. Attorney at Law, Jones, Givens, Gotcher & Bogan, Tulsa, Oklahoma.

61. 410 U.S. 113, 154 (1973) (holding that the constitutional right to privacy encompasses a woman's decision to terminate her pregnancy).

62. *Kimel v. Fla. Bd.*, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting) (referring to *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996)).

63. *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528 (1985).

64. *Nat'l League v. Usery*, 426 U.S. 833 (1976).

65. *Garcia*, 469 U.S. at 579-80.

66. Law Clerk for the Honorable Robert Baldock, District Judge, United States District Court, District of New Mexico.

67. 524 U.S. 381, 393-98 (1998) (advocating "a rule of waiver in every case where the State, through its attorneys, consents to removal").

The Supreme Court has said that in the context of federal sovereign immunity, only Congress can waive the U.S. sovereign immunity.⁶⁸ The Court has analogized the U.S. sovereign immunity to a state's sovereign immunity, so it becomes a little more questionable. The Tenth Circuit is not alone in this regard. Generally, the circuits are much more willing to limit the scope of the Eleventh Amendment or broaden the waiver. *Hill v. Blind Industries & Services*⁶⁹ is a Ninth Circuit case from last June. It involved a diversity suit for breach of contract in federal court.⁷⁰ There were extensive pretrial proceedings, a pretrial conference, and pretrial discovery.⁷¹ On the day of the trial, the defendant says to the Court, "We forgot to tell you that we are really an agency of the State of Maryland, so we are protected by the Eleventh Amendment. You have to throw this out based on the Eleventh Amendment."⁷²

The Ninth Circuit held that the state, by choosing to participate in pretrial proceedings, had waived its Eleventh Amendment immunity.⁷³ Now, the usual notion is that you cannot waive subject matter jurisdiction just by participating in proceedings.⁷⁴ You can raise it any time.⁷⁵ But the Eleventh Amendment is different because it can be waived.⁷⁶ The Ninth Circuit said that participation in pretrial proceedings was a waiver.⁷⁷ Can the state, through its attorney general waive sovereign immunity, or does it take something from the legislature? That seems to be the underlying question with regard to *Hill*.

MUNSINGER: It seems unfair to the parties, such as in the *Hill* case, to get surprised on the day of trial with removal. But, there is a lot of subject matter, which seems very strange and unfair, yet is strictly enforced.

KOVNAT: The question really is whether Eleventh Amendment or sovereign immunity is subject matter jurisdiction or just akin to subject matter jurisdiction as the Supreme Court characterized it in *Edelman v. Jordan*,⁷⁸ because the doctrine of sovereign immunity itself contains the limitation except by consent.⁷⁹ The focus is on determining what conduct constitutes consent. It is fair to say that it is completely cloudy, but also there is room for making arguments. Litigation activity, if engaged in by an authorized state officer, can constitute consent.

CHEMERINSKY: I agree. The only thing is that in *Edelman* it was not raised until the court of appeals level.⁸⁰ The Supreme Court said that it was fine because

68. *Alden v. Maine*, 527 U.S. 706, 787 (1999) (citing Justice Blair's *seriatim* opinion in *Chisholm v. Ga.*, 2 U.S. (2 Dall.) 419, 449 (1793)).

69. 179 F.3d 754 (9th Cir. 1999).

70. *Id.* at 756.

71. *Id.*

72. *Id.*

73. *Id.* at 763.

74. *Id.* at 756.

75. *Id.*

76. *College Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) ("[A] State may waive its sovereign immunity by consenting to suit.").

77. *Hill*, 179 F.3d at 763.

78. 415 U.S. 661, 662-63 (1974), *reh'g denied*, 416 U.S. 1000 (1974).

79. *Id.* at 662-63 ("[T]his Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.").

80. *Id.* at 678 ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.").

it was akin to subject matter jurisdiction.⁸¹ I think that is inconsistent with the *Hill* case.

CARL SHEWMAKER:⁸² What are the problems in suing states?

KOVNAT: You can think of it as a pendulum. There was a period in American constitutional history that looked quite a bit like the direction that this is going. When the real world need for national legislation, that is the depression, occurred, a more realistic rather than formalistic interpretation of the Constitution came about.

CHEMERINSKY: I think that the Court is saying that this should be done at the state rather than the federal level. It is significant that in most of these cases the Court was invalidating federal laws in areas that traditionally have been regulated by the states.

Forty-one states, according to the Rehnquist opinion, already have laws that prevent guns in your schools.⁸³ Violence against women is traditionally a matter of state domestic violence law or civil suits. That explains those cases. I don't think it explains all of the cases. Regulating nuclear waste seems to be inherently more a federal interest.⁸⁴ I think these Supreme Court decisions are going to shift the focus from the federal to the state level.

KOVNAT: In the early days when the major federal environmental laws were enacted, the architect of both the Clean Air Act⁸⁵ and the Clean Water Act⁸⁶ was Senator Muskie. I attended conferences where Senator Muskie's chief drafters would stand up and say, "Do you want to know what the scope of the Environmental Protection Agency's power is over water? You see the water in this glass as it moves from the table to my lips? That water, and that water alone, is excluded from the reach of the EPA under the commerce power." There was no question that there was recognition in Congress for the need of national legislation. Interestingly, federal environmental laws that are most vulnerable are the provisions of the Clean Water Act that regulate isolated wetlands.⁸⁷ These are the areas that are just not connected hydrologically to any other water. Endangered Species Act regulations, fish and wildlife regulations (particularly to the extent that they regulate the taking of species on private land) post-*Lopez* and *Morrison*, those regulations are vulnerable. The Court has granted certiorari on the U.S. Army Corps of Engineers' power to regulate waste fill in an isolated wetland where there are findings that it is used as a habitat for migratory birds. So, I hope we will get a little guidance on that.

BROWDE: Your question and the other comments on this subject cause me to think about not the Court, but Congress itself. That leads me back to the points that Erwin made earlier about ways in which Congress can act under the Commerce Clause. It can regulate the channels of interstate commerce and the instrumentalities

81. *Id.*

82. Attorney at Law, Eureka, Kansas.

83. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (noting that over forty states have "criminal laws outlawing the possession of firearms on or near school grounds").

84. *New York v. United States*, 505 U.S. 144, 159-60 (1992) (recognizing that Congress has the power to regulate the disposal of low level radioactive waste under the Commerce Clause).

85. Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994).

86. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994).

87. *Id.* at §1344(t).

and things in interstate commerce only if those things have a substantial effect.⁸⁸ I wonder if Congress, at least on the commerce side of this revolution, might focus on instrumentalities and things. One theme that runs through these cases is providing jurisdictional hooks or jurisdictional requirements of proof that require a case-by-case determination. In order to enforce criminal law or the regulatory scheme, the prosecutor is going to have to prove, as an element of the case, a particular connectedness or use of a channel.

The dicta in *Lopez* suggest that there was no jurisdictional hook because there was no evidence that the gun had traveled in interstate commerce.⁸⁹ I think Congress will be forced to do more of that, which will make statutes more convoluted, their enforcement more difficult, and the prosecution of cases more difficult. I think that is one of the realities, not just in terms of the judicial gain, but on the legislative side as well. We will see very crazy statutes.

CHEMERINSKY: There is language in both *Lopez*⁹⁰ and in *Morrison*⁹¹ about these being areas traditionally left to the states. If I was litigating one of these cases, I might emphasize that in areas that have not been traditionally regulated by the states, as long as there had been regulation in areas of special federal concern, the Court should take a different approach, or apply the three-part test more broadly. If arguing to the Court, I would try to make a lot out of the language in Rehnquist's opinion, that these are traditional areas for the states. I would distinguish areas that have not been traditional for the states.

KOVNAT: The flip side is legislation like the Hate Crimes bill.⁹² It is hard to see what the constitutional power is to support that legislation under this regime. I do not know if you have given some thought to that?

CHEMERINSKY: No, I think it is very difficult. Once Congress cannot regulate private behavior under Section Five of the Fourteenth Amendment, we are left with just the Commerce Clause.

KOVNAT: Right. Certainly these crimes are traditionally under state law, perhaps not the enhancement part. I do not see how it survives.

FRYE: Does section 1985 indicate that at least some private conduct ought to be within the purview of this Section Five power?

KOVNAT: You would think that the Supreme Court thinks so emphatically. The majority in *Morrison* emphatically reaffirmed the old civil rights cases that insisted on state action.⁹³

CHEMERINSKY: What is interesting about the Thirteenth Amendment is that *The Civil Rights Cases*⁹⁴ said that Congress could only regulate government behavior under the Thirteenth Amendment.⁹⁵ Then, in 1968 *Jones v. Alfred H. Mayer Co.* overruled that, saying that Congress has the authority under the

88. *Lopez*, 514 U.S. at 558-59.

89. *Id.* at 567 (reasoning that the respondent had not "recently moved in interstate commerce, and [that there was] no requirement that his possession of the firearm have any concrete tie to interstate commerce").

90. *Id.* at 609.

91. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

92. Hate Crimes Prevention Act of 2001, H.R. 74, 107th Cong. (2001).

93. *Morrison*, 529 U.S. at 624.

94. *United States v. Stanley* ("Civil Rights Cases"), 109 U.S. 3 (1883).

95. *Id.* at 20.

Thirteenth Amendment to eliminate private race discrimination.⁹⁶ Then *Patterson v. McLean Credit Union*⁹⁷ comes to the Supreme Court addressing the meaning of section 1981⁹⁸ in private discrimination based on race in contracting, which was adopted under Section Two of the Thirteenth Amendment. The specific issue that comes to the Supreme Court is a seemingly narrow one. Is racial harassment formed after the contract prohibited by section 1981? The Supreme Court had oral argument and briefing and then granted certiorari on the question of whether *Jones and Runyon*⁹⁹ should be overruled in allowing Congress to regulate private behavior. The Supreme Court then, after hearing oral argument, held nine to zero that Congress, under Section Two of the Thirteenth Amendment,¹⁰⁰ can regulate private behavior, but held five to four that racial harassment after the contract does not violate section 1981.¹⁰¹ Now, that was a nine-to-zero decision and it was a 1989 case. So, it was eleven years ago, but that is before all of these federalism developments. It is hard to know why you draw a distinction between the cases, other than that the Thirteenth Amendment relates to private conduct.

BROWDE: Perhaps what this indicates in terms of congressional power is that Congress will dust off the Thirteenth Amendment.

KOVNAT: Only as to race.

BROWDE: It does limit us to race, but at least it takes a fresh look at that. I feel for the people in Congress these days because we all know that Congresspersons are going to say, "I want to do this, you figure out a way to do it."

MUNSINGER: Does section 1985 apply to federalism?

CHEMERINSKY: Anybody who is involved in a conspiracy to violate somebody's civil rights could be sued under section 1985.¹⁰² Section 1985 is not limited to conspiracies that interfere with civil rights that are racial in nature. Any conspiracy to interfere with people's civil rights is actionable under section 1985.¹⁰³ I would like to say constitutional, but I do not know how it is going to be in a non-race context after *Morrison*,¹⁰⁴ because it applies to private interference with rights.

CHEMERINSKY: It's been a long day. Thank you.

96. 392 U.S. 409, 439 (1968).

97. 491 U.S. 164 (1989).

98. 42 U.S.C. § 1981.

99. *Runyon v. McCrary*, 427 U.S. 160 (1976).

100. *Patterson*, 491 U.S. at 172.

101. *Id.* at 213-18.

102. 42 U.S.C. § 1985 (1994).

103. *Id.*

104. *United States v. Morrison*, 529 U.S. 598 (2000).