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The Dark Side of Federalism in the Ninties: Restricting Rights of Religious Minorities

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FIRST MONDAY — THE DARK SIDE OF FEDERALISM IN THE NINETIES: RESTRICTING RIGHTS OF RELIGIOUS MINORITIES*

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The most dominant theme of the Rehnquist Court's jurisprudence is federalism. Although this term refers to maintaining a proper balance between state and federal power, to the Rehnquist Court it has meant restoring power to the states. It has invoked federalism to limit congressional power to enact laws on behalf of the people, even when such laws expand individual liberty. Further, it has invoked federalism as a basis for denying a broad interpretation of constitutional guarantees. This essay will explore generally the growth of federalism as an obstacle to enforcing federal rights and then more specifically the Court's use of federalism to deny the rights of religious minorities.

I. THE EXPANDED USE OF FEDERALISM BY THE REHNQUIST COURT

The Framers of the Constitution struggled with the question of how best to distribute power between the states and the federal government. The Constitution which emerged mandates that Congress may enact legislation only pursuant to powers specifically enumerated in that document. Among those powers, the Commerce Clause has probably been the one most utilized. Over the years Congress has invoked and perhaps stretched its stated power to regulate commerce among the states to pass literally hundreds of laws, including significant civil rights laws in the 1960's and 1970's, based on a theory that discrimination affects interstate commerce. It has passed environmental laws, labor laws, and criminal laws, and the Supreme Court has acquiesced and has in fact given its stamp of approval to such enactments. It is this line of decisions that is one of the primary targets of the Rehnquist Court.

In *Printz v. United States*,[1] the Court held that Congress exceeded its power in passing the Brady Handgun Act, which commanded the state's Chief Law Enforcement Officers to search records to ascertain whether a person could lawfully purchase a handgun. Despite its previously broadly construed Commerce Clause source, the Court reasoned that the history and structure of the Constitution prohibits Congress from

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[1] 521 U.S. 98 (1997).

conscripting state executive officers to enforce a federal regulatory program. Earlier, in *New York v. United States*,[2] the Court invalidated an environmental law, the Low-Level Radioactive Waste Disposal Act, that required states to either enact measures to deal with the problem of low radioactive waste generated within their borders by 1996 or else to take title to the waste. The Court ruled that Congress may not "commandeer" state officials to exercise legislative power to assist the federal government. This was only the second time since 1936 that a federal law was invalidated on Tenth Amendment grounds, as the other decision had been overturned in 1985.[3]

Finally, in *United States v. Lopez*,[4] the Court ruled that Congress exceeded its Commerce Clause power in passing a federal criminal statute, the Gun-Free School Zone Act, which prohibited the possession of a firearm within 1000 feet of a school. Congress failed to demonstrate that the regulated activity substantially affected interstate commerce. Further, the criminal statute had nothing to do with commerce, nor was possession of firearms in any way connected with a commercial transaction. The Court invoked federalism, stressing that the statute governed areas historically left to states, namely criminal law enforcement and education.[5]

The Rehnquist Court's concern for states' rights is also apparent in a series of recent decisions that protect state agencies and state officials from suit in federal court. The Eleventh Amendment to the Constitution was enacted to restore state sovereignty by protecting states from suit in a federal forum. However, the Supreme Court long ago recognized two principles that restrict this immunity. First, the states, through their representatives in Congress, may waive state immunity from suit. Second, the Eleventh Amendment does not preclude a federal court from enjoining a state official where there is an ongoing violation of federal law, even though the state itself may be immune.[6]

In a landmark ruling, the Court in *Seminole Tribe of Florida v. Florida*[7] attacked both of these well-established limitations on the Eleventh

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[2] 505 U.S. 144 (1992).

[3] *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) was expressly overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

[4] 514 U.S. 549 (1995).

[5] This was the first time since 1936 that a federal law not directly aimed at states was declared unconstitutional simply because it exceeded the scope of Congress' Commerce Clause authority.

[6] *Ex parte* Young, 209 U.S. 123 (1908).

[7] 517 U.S. 44 (1996).

Amendment. The Court held that Congress lacks the power to abrogate the Eleventh Amendment when it acts under the Commerce Clause, or any Article I power; thus, the State of Florida could not be subjected to suit in federal court. The Court further held that even suits seeking injunctive relief against state officials, rather than the state itself, are barred when Congress has prescribed a detailed remedial scheme for enforcing a statutorily created right against a state. As to the first holding, the *Seminole* case places in jeopardy numerous federal statutes such as environmental laws, labor laws, and even some civil rights laws that expressly authorize suit in federal court against state government, but that were enacted under the Commerce Clause.[8] As to the second ruling, it represents the first time in almost 100 years that the Supreme Court has disallowed suit against a state official in federal court. It seriously threatens the well-established principle that state government action that violates federal rights may be enjoined by naming the responsible officials as defendants in the federal court action.

One year later, in *Idaho v. Coeur d'Alene Tribe of Idaho*,[9] the Court again held that a federal court may not hear an action against state officers for injunctive and declaratory relief. The Court reasoned that the Indian tribe in essence sought adjudication of Idaho's title to land, and that an injunction against the governor would deprive the state of all practical benefits of ownership of the disputed waters and submerged lands. This was too direct an affront to state sovereignty, even if the state itself was not named as a defendant. Four Justices, dissenting in both *Seminole* and *Coeur d'Alene*, argued that there was nothing unique in either of these cases to abandon the "general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began."[10]

These recent decisions expand state immunity, and the price is loss of state accountability for federal law violations. Our lectures this afternoon will focus more specifically on the use of federalism to justify the Court's refusal to recognize and protect individual rights from

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[8] For example, the First, Fourth, Sixth, Seventh, and Eighth Circuits have recently held that the Eleventh Amendment bars suit against a state in federal court under the Fair Labor Standards Act, which was enacted under Congress' power to regulate interstate commerce. *See, e.g.*, Mueller v. Thompson, 133 F.3d 1063 (7th Cir. 1998) (listing cases). The Eighth and Eleventh Circuits have held that the Age Discrimination in Employment Act did not abrogate the states' Eleventh Amendment immunity, although the First, Second, Third, Fifth, Sixth, Seventh, Ninth and Tenth Circuits have disagreed. *See* 67 U.S.L.W. 2160 (9-22-98).

[9] 521 U.S. 261 (1997).

[10] *Seminole Tribe*, 517 U.S. at 177 (Souter, J., dissenting).

government tyranny. Although the Framers did express concern that a national system not invade and swallow up state sovereignty, they also envisioned a system whereby individual rights would enjoy double protection—under state and federal constitutions and in state and federal courts. James Madison wrote that federal courts were necessary to ensure the protection of individual liberties, and Justice Marshall in the 1803 *Marbury v. Madison* decision established the important principle of constitutional judicial review. As the Supreme Court wrote in *Cooper v. Aaron*:[11] "[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle ever since has been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

The Rehnquist Court has turned federalism on its head by abdicating its role as guardian of the rights of the people. It has narrowed federal court jurisdiction based on its express declaration that state courts are equally trustworthy in deciding constitutional claims, and that federal courts should thus take a "passive" role in enforcing constitutional values.[12] Professor Burt Neuborne has explained that this concept of parity may be a "pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine."[13] Professor Neuborne's cynicism may be well-founded. An overview of recent decisions suggests that while abdicating its duty to protect the rights of the politically powerless in our society, the Court has in actuality not relinquished its role as final arbiter of the meaning of the Constitution and indeed has taken an "activist" stance when this would advance a political agenda that favors the interests of the majority.

For example, the Supreme Court has interpreted the First Amendment Free Speech Clause to prohibit state and local government from enacting hate speech statutes. As Justice White wrote in *RAV v. City of St. Paul, Minnesota*[14] "the majority legitimates hate speech as a form of public discourse." The Court has also invoked the free speech

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[11] 358 U.S. 1, 18 (1958).

[12] *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. at 2037 ("neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts . . . . For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court.").

[13] Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105-1106 (1977).

[14] 505 U.S. 377, 402 (1992).

guarantee to expand the rights of big business by affording significant protection for commercial speech, holding, for example, that big business should be able to advertise its wares free from state interference.[15]

Another example is provided by the Court's decisions interpreting the Due Process Clause. The Supreme Court has held that the due process clause protects against abuses of government power, but only where such instances are sufficiently egregious so as to "shock the judicial conscience." Last summer the Court ruled that it does not shock the judicial conscience for a police officer to conduct a high speed chase of up to 100 miles per hour (mph) through a residential area to pursue a juvenile on a motorcycle whose only crime was refusing another officer's command to stop.[16] The chase ended seventy-five seconds after it began when the motorcycle overturned, and the deputy skidded into and killed the sixteen-year old. Nonetheless, the Court ruled its conscience would not be shocked unless the evidence showed the deputy acted "with intent to harm"—a police officer does not violate substantive due process merely by causing death through deliberate or reckless indifference to life. On the other hand, this same Court has ruled that its judicial conscience *is* shocked by juries that impose excessive punitive damage awards on major companies like BMW, and it has invoked substantive due process to overturn such awards.[17]

Further, the Rehnquist Court has "actively" invoked the Equal Protection Clause to invalidate state and municipal affirmative action plans based on the disingenuous rationale that racism and sexism no longer warrant any type of preferential treatment.[18] My colleagues will elaborate on these cases and provide other examples of this form of judicial activism. My focus will be on the rights of religious minorities.

II. RESTRICTING RIGHTS OF RELIGIOUS MINORITIES IN THE NAME OF FEDERALISM

The Rehnquist Court's approach to the First Amendment religion clauses clearly demonstrates both its willingness to protect majority interests and its unjustified use of federalism to invalidate laws that would protect the rights of those who lack political power. There are

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[15] 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (statute which bans advertisement of retail liquor prices except at the place of sale violates the First Amendment).

[16] County of Sacramento v. Lewis, 118 S.Ct. 1708 (1998).

[17] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[18] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

two clauses in the First Amendment—one prohibits government from establishing religion and the other guarantees the free exercise of religion. As to the Establishment Clause, the Court has clearly moved from a strict wall of separation between church and state to an approach which seeks to accommodate religion. At least three members of the Court, namely, Chief Justice Rehnquist and Justices Scalia and Thomas, would permit virtually all forms of government assistance to religion provided there is no coercion involved and the government is not favoring any particular faith. Justice Kennedy would vote with these accommodationists against a separatist approach, unless he perceives some form of actual or subtle coercion. Justice O'Connor would provide a fifth vote to sustain government involvement with religion provided such appears neutral and arises out of a general scheme that only incidentally benefits religion.

At first blush this may be seen as a movement towards greater protection of religious liberty. Indeed, Justice Douglas, a jurist whose philosophy was more "liberal" than that espoused by any currently sitting Justice, wrote in 1952 that "When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[19] However, the wall of separation erected by the Warren Court is viewed by members of religious minorities as a safeguard against practices which tend to favor those majority religious faiths that have the political power to enact laws for their own benefit. When government officials decide to display religious symbols, to offer prayers at public functions, or to institutionalize prayer in public schools, one can be assured that neither Buddhism nor Islamic prayers or symbols will be selected. Yet the Court has rejected Establishment Clause challenges and has upheld public displays of religious symbols provided they are sanitized by a secular context, such as a creche surrounded by reindeer and a Santa.[20]

Let me point out that I am not necessarily opposed to the Court's movement towards a more accommodationist approach. Indeed I agree with its most recent accommodationist decision, *Agostini v. Felton*.[21] In this decision, the Court overturned a 1985 Supreme Court ruling, *Aguilar v. Felton*,[22] which had denied Title I funds for remedial educational and

[19] Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
[20] County of Allegheny v. ACLU, 492 U.S. 573 (1989).
[21] 521 U.S. 203 (1997).
[22] 473 U.S. 402 (1985).

counseling services for needy children on parochial school grounds. The Court in *Aguilar* assumed that having public salaried teachers set foot on parochial school premises would end up impermissibly advancing religion and causing excessive entanglement between church and state, so the program violated the Establishment Clause. However, because the Court did allow such services to be provided *off* parochial school property, i.e., at neutral sites and in mobile instructional units parked outside the parochial schools, *Aguilar* in essence meant that millions of dollars had to be spent on leases and transportation rather than for remedial education. At the time of the decision some 183,000 students nationwide benefited from the program. The Court's ruling meant that thirty-five percent fewer students would be served. The New York School Board alone reported that as a result of the 1985 ruling it spent $100 million to lease off-site instructional units and transport parochial students to those sites.

It should be noted that the Title I program, enacted as part of the 1965 Elementary and Secondary Education Act, specifically mandated that parochial school classrooms used by public teachers to provide remedial services were to be expunged of all religious paraphernalia. In addition, only preapproved secular materials could be used, and remedial instructors were cautioned not to inculcate religion into their instruction. Thus, the only notable difference between on-campus and off-campus instruction was the fact that the former took place on the property of the parochial school, whereas the latter was administered in mobile units that were often parked on the curb of the parochial school campus! Although some have heralded *Agostini* as portending a significant and welcome shift in Establishment Clause jurisprudence, perhaps foreshadowing a further crumbling of the wall of separation, I applaud the decision on much more narrow grounds—namely, it means that the special education needs of the impoverished of our society will be better served, regardless of whether those children happen to attend public or parochial school.

On one level, *Agostini* might be interpreted as a decision providing greater protection for religious liberty, since it recognizes the right of parents to select religious over public education. However, since the vast majority of parochial schools are operated by mainstream religions, *i.e.*, over eighty percent are affiliated with the Catholic Church, the Court's willingness to allow aid to parochial schools does not really reflect a concern for minority religious interests. Indeed the Court's willingness to accommodate religion under the Establishment Clause stands in sharp contrast to its jurisprudence under the Free Exercise

guarantee—a clause clearly intended to protect minority religious interests from the will of the majority. Here the Court has really subjected minority rights to a double whammo—both narrowly construing the Free Exercise Clause and then vitiating Congress' attempt to broaden religious rights by legislation. Ironically, many of the Justices who have argued for an accommodationist approach under the Establishment Clause have flatly rejected the need to accommodate the religious practices of minority faiths under the Free Exercise Clause.[23]

In 1990, in *Employment Division v. Smith*,[24] the Court held that the Free Exercise Clause grants no special exemption from generally applicable laws that appear neutral and that do not single out religious groups for adverse treatment. No matter how much such laws burden religious practices, they will be upheld provided they are rational. In *Smith*, the Court rejected a claim by members of the Native American Church that their free exercise right was unconstitutionally burdened by an Oregon statute that criminalized the use of the drug peyote. Black and Smith were terminated from their jobs and then denied unemployment compensation by the state for engaging in their religious practice of ingesting peyote sacramentally.

Prior to *Smith*, laws which substantially burdened religious freedom were subject to a much stricter analysis: states had to show an overriding interest that would be significantly impaired by granting a religious exemption. In other words, states would have to **accommodate** religion by granting an exemption unless this strict standard could be met. Now, under *Smith*, a law will be sustained so long as it does not single out religious behavior for punishment. Because Oregon's drug law applied equally to all and it was rational, Smith and Black could lose their claim to unemployment compensation and even be imprisoned, despite the fact that ingesting peyote was central to their religious beliefs. Native American Indians have been using peyote in their ceremonies for centuries without causing societal problems.

Justice Scalia acknowledged in *Smith* that his rational basis test would place religious minorities at the mercy of the political process, but he blithely concluded that discriminatory treatment was an "unavoidable consequence of democratic government."[25] The problem is that

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[23] An exception is Justice O'Connor who has maintained that, like the Establishment Clause, the Free Exercise Clause requires, where possible, accommodation of religious practice. City of Boerne v. Flores, 521 U.S. 507 (1997) (O'Connor, J., dissenting).
[24] 494 U.S. 872 (1990).
[25] *Id.* at 890.

democratic government generally will be sensitive to the religious needs of the majority—*i.e.*, during Prohibition an exemption was made for the use of wine during Holy Communion—but it is apt, as was the case in Oregon, to ignore the concerns of religious minorities. Since the whole purpose of the Bill of Rights was to withdraw certain subjects, such as religious liberty, from the will of the majority—to establish certain fundamental values that the courts are to protect—Justice Scalia's comments are deeply troublesome. Indeed, *Smith* triggered an immediate reaction nationwide and a massive coalition of mainstream and minority religious leaders turned to Congress for help, and Congress listened.

To restore greater protection for religious liberty, Congress, by an overwhelming majority,[26] enacted the Religious Freedom Restoration Act (RFRA). This law prohibits government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden furthers a compelling interest and is the least restrictive means of furthering that interest.[27] The victory for religious liberty was unfortunately short-lived. The Supreme Court in *City of Boerne v. Flores*,[28] ruled that RFRA was an unconstitutional exercise of congressional power, even though its source was the Fourteenth Amendment, which guarantees against state deprivation of our liberty.

The Court in *Flores* acknowledged that section 5 of the Fourteenth Amendment gives Congress the power "to enforce by appropriate legislation, the provisions of this Article," including the free exercise guarantee. It concluded nonetheless that this enactment "alters the meaning of the Free Exercise Clause" and "cannot be said to be enforcing the Clause."[29] The Court drew a distinction between Congress' legitimate power to enforce constitutional rights, *i.e.*, to act in a remedial fashion, and the illegitimate use of power to determine what constitutes a constitutional violation. It determined that RFRA was not a proper exercise of Congress' remedial or preventive power, despite 800 pages in the Congressional Record setting forth the difficulty that minority religions have had in getting exemption from facially neutral laws.[30] The

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[26] The House voted unanimously and all but three senators endorsed this Act. 139 CONG. REC. S. 14461-01 (daily ed. Oct. 27, 1993).

[27] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C.A. §§ 2000b, et seq., (1993).

[28] 521 U.S. 507 (1997).

[29] *Flores*, 117 S.Ct. at 2164.

[30] Such examples were cited both by the majority, *see id.* at 2169, and by the dissent, *see id.* at

Court stated that RFRA was so out of proportion to a supposed remedial or preventive objective that it could not be understood as merely responsive to any unconstitutional behavior. RFRA required state and local legislation that substantially burdens religious liberty to meet a compelling interest/least restrictive means test. Justice Kennedy, writing for the majority, determined that this violated federalism principles because Congress intruded "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[31]

The Court's conclusion that RFRA was an unwarranted expansion of Congress' power because it attempted to make a substantive change in constitutional protections and thus intruded on the Court's bailiwick appears misdirected. Congress was not declaring that an individual has a constitutional right of free exercise greater than that announced in *Smith*, but was merely adding a *federal legislative right*, one that on its face is not inconsistent with or prohibited by *Smith*. RFRA addressed the concern that the rights of religious minorities cannot be protected in the majoritarian legislatures and that even where laws are facially neutral, by reason of indifference, if not hostility, religious minorities may find themselves at a disadvantage.

At the beginning of my remarks I addressed the Court's recent decisions restricting Congress' power under the Commerce Clause on the theory that such laws intruded on state sovereignty. The *Printz* case, invalidating aspects of the Brady Act, was indeed handed down two days after *Flores*. The difference, however, is that RFRA was passed not under the Commerce Clause, but under section 5 of the Fourteenth Amendment. The Supreme Court ruled in the 1960's that section 5 is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[32] Indeed, Chief Justice Rehnquist himself wrote in a 1976 decision that the principle of state sovereignty is

> necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment . . . . When Congress acts pursuant to section 5, not only is it exercising legislative authority that is plenary within the

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2177.

[31] *Id.* at 2171.

[32] Cutsinbuck v. Morgan, 384 U.S. 641, 651 (1966).

> terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.[33]

Justice Rehnquist cited the Fourteenth Amendment and observed that it "quite clearly contemplates limitations on [state] authority"[34] and represents a "shift in the federal-state balance."[35]

On several occasions in the past, the Supreme Court has given a fairly narrow construction to a constitutional right, and Congress has then passed a law under section 5 of the Fourteenth Amendment creating a more expansive federal statutory right. For example, the Supreme Court ruled that Congress acted well within its authority under section 5 of the Fourteenth Amendment in concluding that the needs of the Puerto Rican minority warranted federal intrusion upon any state interests served by English literacy requirements because such requirements impaired the ability of this group to vote. Even though the Supreme Court had earlier sustained the use of literacy tests by states against a constitutional challenge, Congress was free to reevaluate the situation and determine that in certain contexts a federal statutory right to be free of restrictive literacy tests was warranted.[36]

Similarly, after an all-male Supreme Court held that discrimination based on pregnancy was not necessarily sex discrimination, Congress passed the Pregnancy Discrimination Amendment, which defines discrimination based on pregnancy as a form of gender discrimination. Congress created a federal statutory right on behalf of women employees to be free from discrimination based on pregnancy even where that discrimination would not be deemed to violate the equal protection guarantee of the Fourteenth Amendment.[37] More analogous are the congressional enactments of the 1960's, such as Title VII and the Voting Rights Act, which dispense with proof of overt discrimination and allow a remedy for conduct that has a discriminatory impact even though the Equal Protection Clause itself has been interpreted by the Court as

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[33] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
[34] *Id.* at 453.
[35] *Id.* at 455.
[36] Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966).
[37] The Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974) reasoned that pregnancy discrimination is not necessarily gender discrimination and Congress promptly responded with the Pregnancy Discrimination Act, 42 U.S.C. § 2000(e)(k) (1994) (redefining sex discrimination to include pregnancy discrimination).

reaching only intentionally discriminatory conduct.[38] In short, it is well established that Congress, as well as state government, may confer *more* rights than the Court finds in the Constitution.

In finding that RFRA cannot be viewed as necessary remedial legislation, the Court has subjected this act of Congress to an even more stringent test than that imposed with regard to laws passed under the Commerce Clause. This again turns federalism on its head. The Fourteenth Amendment was specifically aimed at states and designed to limit their power following the Civil War. Historically, it makes no sense to interpret section 5 as imposing more rigorous federalism constraints on Congress than those imposed by the Commerce Clause. The latter arguably was limited by the subsequently enacted Tenth Amendment that carved out a sphere of power reserved exclusively to the states, and the Eleventh Amendment that was adopted to protect states from federal court judges.

Flores is troublesome not only because it leaves religious liberty without effective federal protection, but also because it casts doubt on Congress' power to address other pressing national problems under section 5 of the Fourteenth Amendment. The Court's new proportionality requirement—that congressional enactments be reasonably well-suited to their end—is vague. As Douglas Laycock, the attorney who argued and lost the RFRA battle before the Supreme Court, opined, "*Flores* significantly limits Congress' independent power to protect the civil liberties of the American people. How significantly remains to be seen, because the opinion announced a vague standard of uncertain scope."[39]

It is difficult to understand how federalism mandates this result. The purpose of federalism is to ensure against federal tyranny by dividing power between state and federal governments. However, if Congress is expanding rights, there is no reason to fear tyranny. Further, federalism is promoted because it purportedly infuses power into state and local government which is closer to the people and thus more likely

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[38] The Court in *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) held that only overt discrimination in employment is prohibited by the Equal Protection guarantee, but Title VII requires employers to justify practices that have a disparate impact on protected groups by showing job-relatedness or business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Further, the Voting Rights Act imposes a "results" test despite the Supreme Court's holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) that ruled that the Fourteenth Amendment itself forbade only purposeful vote dilution.

[39] Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 745 (1998).

to be responsive to their needs and concerns. The whole point of RFRA, however, is to acknowledge that the majoritarian processes, whether at a state, local, or federal level, often ignore the needs of minority faiths. The Court's reliance on federalism in this context thus appears suspect.

The most obvious effect of *Flores* is to reduce protection of free exercise of religion by returning the law to the test articulated in *Smith*, *i.e.*, that a neutral law of general applicability will never be found to violate the Free Exercise Clause provided government can muster any rational basis for its enactment. *Flores* means that people in the United States, primarily those who lack political power, will have far less protection for their religious practices. It certainly means that many claims of free exercise of religion that previously would have prevailed under RFRA now certainly will lose. Thus, in less than a decade the Rehnquist Court has restricted one of the most revered principles in the Bill of Rights by invoking judicial passivism to deny any meaningful protection to religious liberty under the Constitution and then by offering a novel, unprincipled and certainly "judicially active" interpretation of federalism to vitiate Congress' attempt to correct the Court's error.