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WILL THE NEW FEDERALISM BE THE LEGACY OF THE REHNQUIST COURT?

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Although we focus this afternoon on the Rehnquist Court, many have suggested that the real legacy of the Rehnquist Court is "O'Connorism." Justice O'Connor's approach has dominated because she is the one who set forth the constitutional standards to govern future cases. Her "undue burden" test now governs abortion,[1] her "endorsement test," which acknowledges that government-sponsored religion may threaten religious liberty, governs the Establishment Clause;[2] and her position that affirmative action should be subject to a test that is strict in theory, but not fatal in fact, led a majority of the Court to sustain Michigan Law School's diversity program as a necessary, narrowly-tailored racial preference.[3] These are all rulings from which Justice Rehnquist dissented. He did not succeed in overruling *Roe v. Wade*,[4] eliminating affirmative action,[5] or in getting prayer back into schools, graduation ceremonies, or football games.[6] Indeed, during his last terms, the liberal faction prevailed in several key cases—abolishing the death penalty for juvenile offenders[7] and striking down state sodomy laws[8] as well as some government displays of the Ten Commandments.[9]

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* This speech was given on October 19, 2005, as part of a panel discussion on "The Legacy of the Rehnquist Court" held at Valparaiso University School of Law. Many of the views expressed by fellow panelist, Notre Dame Law Professor Richard W. Garnett, who clerked for Justice Rehnquist during the 1995–1996 Term, are presented in his 2003 article entitled *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003).

1 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

2 County of Allegheny v. ACLU, 492 U.S. 573 (1989) (adopting Justice O'Connor's "no endorsement" analysis as a general guide in Establishment Clause cases).

3 Grutter v. Bollinger, 539 U.S. 306 (2003).

4 In *Casey*, 505 U.S. 833, the majority refused to overrule *Roe v. Wade*, 410 U.S. 113 (1973). Subsequently, in *Stenberg v. Carhart*, 530 U.S. 914, 930–31 (2000), it invalidated a state's ban on partial birth abortions.

5 In *Grutter*, 536 U.S. 306, O'Connor delivered the opinion holding that race may be used as a factor in the student admissions program at the University of Michigan Law School because such was narrowly tailored to serve the school's compelling interest in having a diverse student body.

6 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that the school's football prayer policy was invalid); Lee v. Weisman, 505 U.S. 577 (1992) (holding that the inclusion of clerical members who offered prayers as part of an official school graduation ceremony was inconsistent with the religion clauses of the First Amendment).

7 Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the execution of juveniles).

8 Lawrence v. Texas, 539 U.S. 558 (2003) (overturning a criminal sodomy statute as infringing fundamental privacy rights).

On the other hand, it cannot be denied that Justice Rehnquist presided over a major shift in U.S. law from the liberal Warren Court, and much of the conservative agenda was accomplished in the name of one overriding doctrine—federalism. It is fair to say that the Rehnquist Court's most contentious legacy is a series of decisions handed down in the name of federalism.[10] Although the term refers to maintaining a proper balance between state and federal power, to the Rehnquist Court it has meant reigning in Congress and restoring power to the states. As explained by Justice O'Connor, one of its key proponents, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front . . . . In the tension between federal and state power lies the promise of liberty."[11] Arguably, fulfilling the promise of liberty could describe the legacy of the Warren Court, but the Rehnquist Court decisions demonstrate that the "New Federalism" has not furthered this liberty-enhancing goal. To the contrary, federalism has been invoked to narrowly construe constitutional rights and to limit Congress' power to enact laws that protect individual rights.

First, it is noteworthy that the Rehnquist Court "overturned more acts of Congress than all previous Supreme Courts combined."[12] This has been an extremely judicially active Court, and a recurring theme has been the need to curb Congress' lawmaking authority. In 1993, Justice Scalia taught a course on Separation of Powers, where he expressed this same disdain for the "800 pound gorilla," as he not–so-affectionately

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[9] McCreary County, Ky. v. ACLU of Ky., 25 S. Ct. 2722 (2005) (holding that the display of large, framed copies of the Ten Commandments on the walls of the courthouse for an ostensibly religious purpose violated the Establishment Clause); *cf.* Van Orden v. Perry, 125 S. Ct. 2854 (2005) (holding that the display of the Ten Commandments on the Texas State Capitol grounds together with seventeen other monuments and twenty-one historical markers did not violate the Establishment Clause).

[10] *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (describing the Rehnquist Court's federalism revolution); Larry D. Kramer, *The Supreme Court 2000 Term: Forward: We the Court*, 115 HARV. L. REV. 4, 129 (2001) (discussing the "revolution" in federalism doctrine).

[11] Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991). In 1971, Justice Black referred to "Our Federalism" as the belief that the "National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" and the federal government should conduct itself in a manner that will not "unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. 37, 44 (1971).

[12] Martha Neil, *Cases & Controversies*, 91 A.B.A. J. 38, 41 (2005) (quoting legal historian Joel Grossman); *see also* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005 (noting that between 1995 and 2003 the Rehnquist Court struck down thirty-three federal laws on constitutional grounds, doing so at a higher annual rate than any court in American history).

referred to Congress.[13] During the Roberts confirmation hearings, a sharp exchange ensued between Senator Arlen Specter and nominee Roberts in which Senator Specter asserted that he and other members of Congress took umbrage at the Court's recent treatment of congressional legislation. Specter accused the Court of failing to give appropriate deference to congressional findings and its determinations as to what was in the best interests of the country. Specter asked Justice Roberts if he would continue this malevolent trend. As with so many questions, the nominee deftly skirted the issue.[14]

The Rehnquist Court's federalism has been invoked to restrict congressional authority to enact laws under two constitutional provisions: the Commerce Clause and the Fourteenth Amendment. I will briefly discuss each in turn. In 1995, in *United States v. Lopez*,[15] the Supreme Court, for the first time in decades, struck down an act of Congress as falling outside of its Commerce Clause authority. Prior to *Lopez*, the Court had explicitly stated that it had gotten out of the federalism business. In the 1985 decision of *Garcia v. San Antonio Metro Transit Authority*,[16] the majority ruled that if there was any limitation on congressional power under the Commerce Clause, it would stem from the political process, rather than judicial review of the result of the process.[17] States were sufficiently represented in Congress, and thus the Court would not override its legislation in the name of state sovereignty. Justice Rehnquist dissented from this opinion, boldly asserting his confident belief that the principle of state sovereignty would "in time again command the support of a majority of this Court."[18] His prediction became reality with the appointments of Justice Antonin Scalia and later Justice Clarence Thomas.[19]

The 1995 landmark *Lopez* case involved the validity of an act of Congress that prohibited possession of a gun within 1,000 feet of a school. The Supreme Court, perhaps understandably, found no link between the possession of guns near schools and interstate commerce

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13 Justice Scalia made these remarks in a course on Separation of Powers that he taught in Cambridge, England, in the summer of 1993.

14 *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the Senate Comm. on the Judiciary*, 109th Cong. 299–302 (2005).

15 514 U.S. 549 (1995).

16 469 U.S. 528 (1985).

17 *Id.* at 556.

18 *Id.* at 580. (Rehnquist, J., dissenting).

19 Justice Antonin Scalia was appointed to the Supreme Court in 1986, the same year Justice Rehnquist became Chief Justice. Justice Clarence Thomas ascended to the Court in 1991.

and thus ruled the act unconstitutional, arguing that criminal law should be a subject for state, not federal, control.[20] This decision did not really implicate individual liberty—by prohibiting dual layers of criminal sanctions, the Court did not adversely affect anyone's individual liberty. *Lopez*, however, was alarming because many civil rights laws, including some criminal provisions, were enacted under the theory that Congress' Commerce Clause power was plenary. Laws prohibiting race discrimination in public accommodations, restaurants, and hotels,[21] as well as laws prohibiting race, gender, and religious discrimination by private employers[22] were enacted under the theory that discrimination adversely affects interstate commerce and thus may be proscribed. The fear that *Lopez* heralded a new, narrower interpretation of Commerce Clause power was realized in a 2000 decision, *United States v. Morrison*.[23] The Court invalidated significant portions of the Violence Against Women Act, reasoning that Congress failed to demonstrate a sufficient link between domestic and other forms of violence against women and interstate commerce.[24] Despite volumes of congressional findings demonstrating that violence against women may substantially deter women from engaging in activities that affect interstate commerce, that sexual assault was costing our economy billions of dollars in terms of lost productivity, and that states were not taking crimes against women, especially domestic violence, seriously, the Court found that Congress had no authority to enact this law.[25]

The greatest challenge to individual liberty, however, came from the Rehnquist Court's decisions invalidating civil rights laws enacted not under the Commerce Clause, but under the Fourteenth Amendment, which guarantees equality and due process. The fact that Congress would use the Commerce Clause to enact civil rights legislation, rather than the arguably more appropriate and logical Equal Protection Clause of the Fourteenth Amendment, is a historical anomaly. A nineteenth century Supreme Court decision interpreted the Enforcement Clause, i.e., Section 5 of the Fourteenth Amendment, to permit Congress to reach only discrimination by government and not private individuals.[26] Thus, Congress in the 1960s turned instead to the broadly and expansively interpreted Commerce Clause provision. However, when Congress

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20 United States v. Lopez, 514 U.S. 549, 561 (1995).
21 Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).
22 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).
23 529 U.S. 598 (2000).
24 *Id*. at 618.
25 *Id*. at 615.
26 Civil Rights Cases, 109 U.S. 3 (1883).

seeks to hold government responsible for its own discrimination, it has traditionally enjoyed broad power under the Fourteenth Amendment. Indeed, Justice Rehnquist himself proclaimed in a 1976 decision that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the 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."[27] He observed that the Fourteenth Amendment "quite clearly contemplates limitations on [state] authority"[28] and represents a "shift in the federal-state balance . . . ."[29] In short, principles of federalism or state sovereignty that might otherwise be an obstacle to congressional authority evaporate when Congress seeks to enforce the Civil War Amendments because these amendments were specifically designed to expand federal power and intrude upon state sovereignty.

This was the understanding until 1997. In that year, in *City of Boerne v. Flores*,[30] the Court ruled that Congress exceeded its power under the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993.[31] In this Act, Congress sought, by an overwhelming majority, to restore religious liberty by overturning a Supreme Court decision that significantly restricted the rights of religious minorities.[32] The Supreme Court had held in a 1990 ruling that the Free Exercise Clause guarantees no protection from "neutral" laws; no matter how much a state law burdened religious practices, it would be upheld provided it was simply rational.[33] Congress sought to restore the strict scrutiny test previously used for laws that substantially burdened free exercise rights. Despite 800 pages in the Congressional Record documenting the difficulty minority faiths have had in securing exemption from facially neutral laws, the Court ruled that Congress exceeded its Section 5 power.[34] The Act was neither "congruent" nor

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27 Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

28 *Id*. at 453.

29 *Id*. at 455.

30 521 U.S. 507 (1997).

31 42 U.S.C. § 2000bb (1994), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

32 The House voted unanimously, and all but three senators endorsed this Act. 139 CONG. REC. S14461–01 (dailey ed., Oct. 27, 1993).

33 Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990). Justice Scalia acknowledged 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." *Id*. at 890.

34 *Boerne*, 521 U.S. at 530–32 (discussing the extensive Congressional Record in support of RFRA as compared to the truncated record of the Voting Rights Act).

"proportionate" to the supposed remedial objective, and thus it intruded "into the States' traditional prerogatives" to regulate.[35]

The Religious Freedom Restoration Act, as the title implies, was a direct slam on the Supreme Court's interpretation of the Free Exercise Clause of the Constitution—the majority in *Boerne* called it an affront to *Marbury v. Madison*[36] itself.[37] As so understood, *Boerne* could have been a constitutional blip, a warning to Congress that it should not pass in-your-face restoration laws.[38] However, the principle that acts of Congress must pass a rigid "congruent and proportionality" test threatened other civil rights provisions enacted under the Fourteenth Amendment to expand individual liberty. Indeed, in 2000, the Supreme Court, for the first time in fifty years, invalidated portions of a major federal civil rights statute, the Age Discrimination in Employment Act ("ADEA"). It ruled that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in subjecting state employers to money damages for making age-biased employment decisions.[39] One year later, Justice Rehnquist authored an opinion holding that state employees could not recover money damages for violation of the Americans with Disabilities Act ("ADA") because Congress had failed to sufficiently document a pattern of disability discrimination by the states so as to warrant this intrusion on state sovereignty.[40] In enacting the ADA, Congress made detailed findings of pervasive discrimination against the disabled in both the private and public sectors, but the Court nonetheless held that the Act failed the congruent and proportionality test.[41] Similarly, the Court ruled that, to the extent the Violence Against Women Act had as its source not just the Commerce Clause, but Section 5 of the Fourteenth Amendment, it lacked the required congruence and proportionality, and thus it was invalid.[42]

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35 *Id*. at 533–34.

36 5 U.S. 137 (1803).

37 *Boerne*, 521 U.S. at 536. The Senate Report that accompanied RFRA strongly criticized *Smith*, contending that the framers of the Constitution recognized free exercise of religion as an inalienable right and that "[b]y lowering the level of constitutional protection for religious practices, the decision has created a climate in which the free exercise of religion is jeopardized." S. Rep. No. 103-111, at 8 (1993). Further, the statute listed as its purpose: "[T]o restore the compelling interest test as set forth" in earlier decisions. § 2000bb(b)(1).

38 Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Anti-Discrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 461 (2000) (asserting that the Supreme Court was clearly provoked by the temerity of Congress in enacting RFRA).

39 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000).

40 Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

41 *Id*. at 374.

42 United States v. Morrison, 529 U.S. 598, 626–27 (2000).

The whole purpose of federalism, as Justice O'Connor explained,[43] is to ensure against federal tyranny by dividing power between state and federal governments. However, if Congress is expanding individual rights, is there any 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 to be responsive to their needs. Yet, in enacting the Religious Freedom Restoration Act, the Violence Against Women Act, the ADEA, and the ADA, Congress was acknowledging that the majoritarian processes on the state and local level had failed to be responsive to the needs of the aged, the disabled, religious minorities, and battered women. The Court's reliance on federalism thus appears suspect.[44] Rather than being liberty enhancing, the decisions appear to simply promote a conservative agenda—the same agenda reflected in a series of decisions narrowly interpreting other key civil rights provisions. Congress' response was to enact the Civil Rights Act of 1991, the goal of which was to overturn some seven or eight Rehnquist Court rulings that had reduced individual protection from discrimination by narrowly construing civil rights laws.[45] During this same time frame, the Court limited free speech rights of students, lessened the protection of criminal defendants, abdicated its role in ensuring school desegregation and prison improvements, increased restrictions on affirmative action programs, and decreased protection for minority religious beliefs.[46]

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43 *See supra* note 11 and accompanying text.

44 Professor Erwin Chemerinsky has observed that the Court's purported concern for states' rights is ignored when businesses challenge state regulation on preemption grounds: "States' rights challenges to federal civil rights laws win; businesses' challenges to state business regulations win. Civil rights plaintiffs lose and business plaintiffs win. Is that really a federalism principle or is that just a description of a greatly conservative Court?" Erwin Chemerinsky et al., *Discussion: A Focus on Federalism*, 20 TOURO L. REV. 909, 922 (2005).

45 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Congress listed among its purposes for the Act, "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id*. at 1071.

46 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that strict scrutiny, rather than the previously followed intermediate scrutiny, was the required standard of review for congressionally-mandated affirmative action programs); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that educators may exercise broad editorial control over the contents of a high school newspaper and may freely censor student articles based on a finding of legitimate pedagogical objectives); *see also* Rosalie B. Levinson, *The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47 (1998) (arguing that federalism has been used to restrict the rights of religious minorities).

There was only one ruling in which the Court ignored federalism, purportedly in favor of individual rights. The Rehnquist Court did step in to stop Florida from performing a recount of presidential ballots, thereby handing George Bush the White House.[47] As the dissent opined in *Bush v. Gore*,[48] "[w]ere the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."[49] They would have followed the core federalism principle that mandates deference to state courts on matters of state law. Georgetown University Law Professor Mark Tushnet has commented: "From the public point of view and from the historian's point of view, it's almost certain that *Bush v. Gore* will be the case of the Rehnquist court."[50] If the partisan split in *Gore* is the legacy of the Rehnquist Court, it is a legacy that has likely contributed to what has been described as a crisis in the judiciary. Recently released public polls show that the majority of Americans lack confidence in the integrity and independence of the Court.[51] Proposals have circulated that would eliminate life tenure in favor of fixed terms for federal judges, including Supreme Court Justices, because they have blithely ignored their own precedents and principles.[52] But I will leave this discussion for another day.

So is the New Federalism the legacy of the Rehnquist Court? Two years ago I would have ended my remarks on federalism at this point. However, as my students know, interpretation of the Constitution is an evolving process, and a few recent decisions suggest that the New Federalism may already be waning, both as a restriction on Congress' power under the Fourteenth Amendment and under the Commerce Clause. In a 2003 decision, Justice Rehnquist himself rejected the federalism argument and ruled that Congress acted within its authority under Section 5 of the Fourteenth Amendment in subjecting state

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47 Bush v. Gore, 531 U.S. 98 (2000).

48 *Id.*

49 *Id.* at 142–43 (Ginsburg, J., dissenting).

50 Joan Biskupic, *Rehnquist Left Supreme Court with Conservative Legacy*, USA TODAY, Sept. 9, 2005, *available at* http://www.usatoday.com/news/washington/judicial/supremecourt justices/2005-09-04-rehnquist_legacy_x.htm (quoting Professor Mark Tushnet).

51 Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis*," A.B.A. J. EREPORT, Sept. 30, 2005, http://www.abanet.org/journal/ereport/s30survey.html. The survey reported that a majority agreed with the statement that "'judicial activism' ha[d] reached the crisis stage, and that judges who ignore voters' values should be impeached." Further, nearly one-half agreed with a congressman who said judges are "arrogant, out-of-control and unaccountable."

52 *See* Benjamin Wittes, *Without Precedent*, THE ATLANTIC MONTHLY, Sept. 1, 2005, at 39.

employers to damage actions under the Family Medical Leave Act.[53] Justice Rehnquist viewed this as a valid prophylactic measure intended to eliminate gender-based discrimination in the workplace, and he ruled that the Act met the stringent congruence and proportionality test.

Federalism was rejected in two other decisions, although both were over Justice Rehnquist's dissent. One case again involved the ADA. As I noted, the Supreme Court ruled that state employers could not be sued for violating the ADA. Nonetheless, in *Tennessee v. Lane*,[54] it held that the ADA was a valid exercise of Congress' power as applied to cases implicating the fundamental right of access to the courts. Thus, a paraplegic who was denied wheelchair access to a second story courtroom in a Tennessee building that lacked an elevator could sue the state for damages. The ADA trumped state sovereignty because court access is a fundamental right.[55]

In a second case rejecting federalism, the Court ruled that Congress had authority under the Commerce Clause to criminalize the possession of marijuana even when grown within a state for personal, in-state medicinal use.[56] The federal criminal drug law came into direct conflict with California's medical marijuana statute. Despite arguments that imposition of the federal drug laws in this context invaded states' rights and that any link to interstate commerce was too attenuated, the majority turned to the more traditional understanding of the Commerce Clause to sustain the law. It reasoned that Commerce Clause authority included the power to prohibit the local cultivation and use of marijuana, even as applied to the troubling facts of this case where seriously ill patients would suffer significant harm.[57] In a bizarre twist, the dissenting conservatives lamented the betrayal of federalism—they would not have allowed federal agents to raid the homes of sick people and seize their homegrown marijuana.[58] Obviously, the liberal Justices felt that sustaining Congress' power under the Commerce Clause was paramount, despite this compelling picture of government invading individual liberty.

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53 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

54 541 U.S. 509 (2004).

55 *Id*. at 532–34.

56 Gonzales v. Raich, 125 S. Ct. 2195 (2005).

57 *Id*. at 2209.

58 Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, dissented. *Id*. at 2220–39.

Notwithstanding these new cases, I believe the reports of the demise of the New Federalism are a bit premature. The 800 pound gorilla will not roam freely, nor will Congress have unbridled authority. Difficult questions regarding federalism and the proper role of Congress in enacting laws under the Commerce Clause and under Section 5 of the Fourteenth Amendment remain—indeed the Roberts Court faces some of these questions this term.[59] I have no doubt that the Rehnquist Court's federalism legacy will continue to influence the debate on these pending cases and on future cases for years to come.

[59] In *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir.), *cert. granted*, 125 S. Ct. 1299 (2005), the Court will determine whether the Attorney General permissibly construed the Controlled Substances Act to prohibit distribution of federally controlled substances for purposes of facilitating an individual's suicide, despite state law purporting to authorize such distribution. [Subsequent to the date of this lecture, the Court found that the Attorney General lacked authority under the Controlled Substances Act. 126 S. Ct. 904 (2006).] In *Goodman v. Georgia*, 120 Fed. App'x 785 (11th Cir.), *cert. granted*, 125 S. Ct. 2266 (2005), the Court will decide whether the ADA was a proper exercise of Congress' power as applied to the administration of state prison systems, such that inmates with disabilities may sue for damages to rectify discrimination by state-operated prisons.