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THE GANG OF FIVE & THE SECOND COMING OF AN ANTI-RECONSTRUCTION SUPREME COURT

John E. Nowak*

I. WARNING: 1990s "FEDERALISTS" MAY CONSIDER THIS ESSAY DANGEROUS TO YOUR MENTAL HEALTH

Because I am a great admirer of the late Professor Fred Rodell, this Essay will be just that: an essay, not a law review article. If you want a traditional law review treatment of the June 23, 1999 decisions of the Supreme Court, you will need to look elsewhere. You will not find detailed analysis of judicial opinions or a politically neutral view of the Rehnquist Court in this Essay.

I should tell you up front that my view of the "Gang of Five" (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) that has controlled Supreme Court decisions in the 1990s mirrors Fred Rodell's view of the late nineteenth-century Supreme Court. To quote the late Professor:

The Justices had been busily perverting the plain intent of the Fourteenth Amendment—and the Fifteenth Amendment too . . . . Through the 1860's and 1870's, Congress had passed a series of laws designed to put teeth into the otherwise empty words of the post-war Amendments . . . . [T]he Court imperiously and impatiently swept aside almost all of these so-called Civil Rights Acts, either by flatly branding them—unconstitutional—no matter that the Constitution had been amended precisely to achieve what these laws were aimed to achieve—or by using legalistic chop-logic to "interpret" them out of effective existence.¹

* David C. Baum Professor of Law, University of Illinois. I would like to thank Professor Janis Johnson, Director of the University of Illinois Law Library, and Mr. Hal Southern of our law library staff for their help in securing many of the materials cited in this Essay. I also want to thank Professor Alfred L. Brophy, Oklahoma City University School of Law, for providing me with the information concerning the killing of minority race persons in Oklahoma and Florida that appears infra note 59. Special thanks goes to my secretary, Mrs. S. Cook, for her assistance to an old professor who has not adapted to the computer/word-processing era.

¹ Fred Rodell, Nine Men 165–66 (1955). My views, as expressed in this Essay, are similar to the views of two of my favorite legal realists: the late Professor Fred
II. WHO CARES ABOUT THE JUNE 23 CASES?

I must admit that I do not have much interest in the Eleventh Amendment anymore. When I last wrote about the Eleventh Amendment a quarter-century ago, I was young enough to be writing traditional law review articles. I was naïve enough that I thought that the Court would return to the original intent of the framers and ratifiers of the Eleventh and Fourteenth Amendments to recognize Congress's authority to create a variety of causes of action against state governments.

A lot of trees have been killed in the intervening quarter-century to publish articles and books by scholars examining both historical and functional approaches to interpreting the Eleventh Amendment.

Rodell and the late Judge Jerome Frank. See generally Jerome Frank, Law and the Modern Mind (1930). Professor Rodell and Judge Frank held different “realist views” about the nature of judicial rulings. See generally Robert J. Glennon, The Iconoclast as Reformer: Jerome Frank's Impact on American Law (1985). For an overview of the development of legal realism and a sampling of writings from legal realist scholars, see American Legal Realism (William W. Fisher et al. eds., 1993). In other speeches and essays, I have attempted to resurrect Professor Rodell's brand of legal realism in analyzing constitutional issues. See John E. Nowak, Foreword: Evaluating the Work of the New Libertarian Supreme Court, 7 Hastings Const. L.Q. 263 (1980); John E. Nowak, Professor Rodell, the Burger Court, and Public Opinion, 1 Const. Commentary 107 (1983).

Although one would never guess it by the number of footnotes in this Essay, I really hate footnotes. I made that point in John E. Nowak, Woe Unto You, Law Reviews!, 27 Ariz. L. Rev. 317 (1985). I swiped that title from one of my heroes, the late Professor Fred Rodell. Unlike Professor Rodell, I do not have the courage of my convictions, and I will give citations to what I believe are relevant authorities throughout this Essay. The reader need not read any of the notes to evaluate the substantive arguments presented in this Essay. I take some solace in the fact that Judge Abner Mikva, a former student of Professor Rodell, as well as a noted scholar and jurist, has also made some accommodation to the need to use notes to support statements in law reviews today. Because Judge Mikva is a person of more character than myself, he has made less of a departure from Professor Rodell's approach to legal writing than I have. Compare Abner J. Mikva, Goodbye to Footnotes, 56 U. Colo. L. Rev. 647 (1985) (arguing against the importance of footnotes in legal writing), with Abner J. Mikva & Jeff Bleich, When Congress Overrules the Court, 79 Cal. L. Rev. 729 (1991) (recognizing the usefulness of footnotes only as means of citation).


Most, though not all, scholars have found reasons why Congress should have the power to create private courses of action against state governments. Nevertheless, if we set the academic debate aside, there is not much reason to be concerned about the Eleventh Amendment. As Professor Jeffries, in an excellent examination of the relationship of the Eleventh Amendment to basic civil rights legislation, has concluded, "[F]or all its virtues, Eleventh Amendment scholarship neglects a crucial fact: the Eleventh Amendment almost never matters."4

On June 23, 1999, a five Justice majority in *Alden v. Maine*5 created an Eleventh Amendment-like immunity for state governments from suits that are based on federal legislation. Indeed, the reasoning in *Alden*, such as it is, mirrors the reasoning used by the Gang of Five in two Eleventh Amendment decisions announced on the same day as *Alden* and in their earlier decision in *Seminole Tribe v. Florida*.6

The "bottom line" of the June 23 decisions7 is (1) state governments, but not local governments, are protected from suits for monetary damages or other forms of retroactive relief brought by private persons (rather than the federal government or another state); (2) private persons, as well as government entities, may bring suits for various forms of prospective relief to require state officers to conform the practices of state governments with federal law; (3) private parties may maintain suits for money damages against state officers or state employees who violate federal law, although such suits may be difficult to maintain if the state is seen as the real party in interest; and (4) Congress may create private causes of action against state governments (to be heard in federal or state courts) if Congress clearly states its intention to do so and if the legislation comes within Congress's authority to enforce the Fourteenth Amendment.

If the results of the cases can be so easily summarized, and if the Court only slightly expanded the immunity it had created for states in prior cases, why write about the cases? Despite their narrow holdings, the cases are important because the opinions in these cases reflect Anti-Reconstruction, and to some extent Anti-Federalist, "philosophy" that has been adopted and imposed on our country by the Gang of Five.

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4 Jeffries, *supra* note 3, at 49.
7 The two June 23 decisions concerning the Eleventh Amendment are *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999).
In the June 23 decisions of the Supreme Court we can hear the voice of the Court that decided *Hans v. Louisiana*. In *Hans*, the Court extended the Eleventh Amendment to suits brought against a state by one of its own citizens. The majority opinion, by Justice Bradley, was based entirely on an Anti-Reconstruction, Anti-Federalist vision, rather than an honest assessment of the history of Article III and the Eleventh Amendment. The result in *Hans* was predictable because that case was decided by a Court that had already struck down Reconstruction legislation to protect "states' sovereignty" and brought harm to minority race persons. For the same reasons, the results in the June 23, 1999 cases were predictable. These cases, like *Hans*, are merely echoes of the Anti-Reconstruction sentiments prevalent on the Court. Ah, you say, the June 23 cases concerning federal court jurisdiction and the sovereign immunity of states did not involve cases having to do with racial discrimination. Neither did *Hans*.

Justice Kennedy's majority opinion in *Alden v. Maine* states that the ruling is not based on the Eleventh Amendment. Nevertheless, Justice Kennedy places more reliance on *Hans v. Louisiana* than on the historical data regarding Article I or the Tenth Amendment. Like Justice Bradley in *Hans*, Kennedy cites *Federalist No. 81*, but not *Federalist No. 80*, when talking about the views of Hamilton. Kennedy selectively quotes Madison and Marshall in precisely the same ways as Justice Bradley used their views in *Hans*. Ultimately, Justice Kennedy's opinion is based on nothing but the Gang of Five's view of how the federal system should work. Justice Souter's dissent is clearly correct, despite Kennedy's protestations to the contrary, when he describes the majority opinion as being based on philosophy that has no clear basis in the text of the Constitution or documented intentions of the framers and ratifiers of the Constitution or the amendments thereto.

If Justice Souter were less kind, he would have called Kennedy's opinion tautology. Kennedy, like Bradley before him, finds that Congress was not given the power to make states subject to suit because states could not be subject to suit. Circular reasoning? You bet. But it's good enough for government work, if five Justices agree.

The two cases concerning the dispute between the Florida Prepaid Postsecondary Education Expense Board and the College Savings Bank demonstrate the current majority's view of the power given to Congress by the Fourteenth Amendment. Justice Scalia, in *College Savings Bank*, and Chief Justice Rehnquist, in *Florida Prepaid Postsecondary Education Expense Board v. Florida Prepaid Postsecondary Education Expense Board*, joined by Justice Kennedy, in *Alden v. Maine*, and by Justice Souter, in *Hans v. Louisiana*, dissented.

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8 134 U.S. 1 (1890).

9 See *Alden*, 119 S. Ct. at 2269 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).
Education Expense Board, used the Court's 1997 decision in Boerne v. Flores\(^\text{10}\) as the justification for the Court narrowly defining the scope of power granted to Congress by Section 5 of the Fourteenth Amendment. No analysis of the framing of the Fourteenth Amendment was needed according to Rehnquist and Scalia; Scalia did not have to go on one of his searches for original intent. Boerne settled all that, we are told.

The fact that Congress concluded that it was protecting civil liberties under its Fourteenth Amendment power carries little weight with the Gang of Five. Fourteenth Amendment legislation, according to the majority opinions in College Savings Bank and Florida Prepaid Postsecondary Education Expense Board, will be upheld only if the federal government can prove to the satisfaction of the Gang of Five (1) that there has been a constitutional violation, as defined by the Court rather than Congress, and (2) that the legislation are narrowly tailored to remedy the violation or to prevent future similar constitutional violations.

In the two College Savings cases, the majority opinions, by Chief Justice Rehnquist and Justice Scalia respectively, did not explore the historical basis for finding that the Court should place narrow limits on the power granted to Congress by the Fourteenth Amendment. Rather, they simply relied upon the analysis of history and the Court's ruling in Boerne v. Flores. Both the Scalia and Rehnquist opinions find that the judiciary must independently determine the existence of a constitutional violation and whether the means chosen by Congress to remedy or correct the violation are narrowly tailored to that goal. Justice Scalia's opinion ruled that there was no deprivation of property in the actions of Florida when it violated federal law in a way that harmed the business prospects of the College Savings Bank.\(^\text{11}\) Chief Justice Rehnquist's opinion ruled that, even if the Court were to assume that patent infringement constituted the taking of property, Congress had failed to provide a legislative record showing that the property was taken in violation of Just Compensation Clause principles or that the congressional creation of a cause of action against state governments for patent infringement was narrowly tailored to correct unconstitutional takings of property.\(^\text{12}\) These two majority opinions take Boerne to its logical, if unfortunate for the country, conclusion. Congress is to be given no deference in defining the types of civil liberties that it will protect under the Fourteenth Amendment;

\(^{10}\) 521 U.S. 507 (1997).


\(^{12}\) See Florida Prepaid, 119 S. Ct. at 2205–11.
Congress will be given no deference when the Court looks at legislation that is designed to prevent specific constitutional violations.

Justice Stevens's dissent in *Florida Prepaid Postsecondary Expense Board* notes that the Court's reading of *Boerne* "threatens to read Congress's power to pass prophylactic legislation out of Section 5 altogether." While joining Justice Breyer's dissent in *College Savings Bank*, Stevens again emphasized his view that the Court was unduly restricting the Section 5 powers of Congress. Justice Breyer's dissent for four Justices in *College Savings Bank* asserted that Congress had the power under the Commerce Clause to remove state immunity from federal court actions. Justice Breyer attacked the majority's rigid view of our federal system.

The views of the Rehnquist Court majority concerning the scope of Congress's powers under the Fourteenth Amendment should be considered shocking, though not surprising. These opinions were foreshadowed by a decade of rulings adverse to the interests of racial minorities. Perhaps we should not even be shocked by a Supreme Court that wants to cut down congressional protection for civil rights because we have seen a Court like this before, in the late nineteenth century.

In this Essay, I would like to compare some of the rulings of the Supreme Court in the late nineteenth century with the rulings of the Court since the appointment of Justice Kennedy to show that we are witnessing the return of an Anti-Reconstruction Supreme Court. Before getting to a comparison of the Court in the 1990s and the Court in the late nineteenth century, I need to digress into commentary on the labels that describe the players in today's federalism game and the history that today's "Federalist" Justices don't like to talk about.

III. You Can't Tell the Players Without a Scorecard: Federalist, Anti-Federalist, or Plain Old "States' Rights" Justices?

To understand the current dispute, you need to go back not one, but two centuries. In the 1780s and 1790s, everyone knew who the Federalists and the Anti-Federalists were. During the debates concerning the ratification of the proposed Constitution, a Federalist was someone who favored adoption of the Constitution; an Anti-Federalist

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13 Id. at 2217 (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting).
14 See *College Sav. Bank*, 119 S. Ct. at 2234 (Stevens, J., dissenting).
15 See id. at 2234 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting).
was someone who opposed ratification.\textsuperscript{16} After the Constitution was ratified, however, a person was not a Federalist because he agreed with, or even wrote some of, the \textit{Federalist Papers}. A Federalist was a member of the Federalist political party, whose leaders included John Adams, Alexander Hamilton, and John Marshall. Members of the Federalist Party believed in a strong national government; they were not champions of "states' rights."

The Federalists were opposed by a political party known as the Democratic-Republicans (which was also called the Democrats, the Republicans, or the Anti-Federalists in various portions of the country). The Anti-Federalists, who had opposed the Constitution, were a dying political group. The Democratic-Republicans espoused a modified version of the Anti-Federalist philosophy; they mirrored the Anti-Federalists in their opposition to the Federalists' political philosophy.\textsuperscript{17} The Democratic-Republicans, including Thomas Jefferson and James Madison, favored a system in which state governments had more power than the federal government. The Anti-Federalists, Democratic-Republicans, and Federalists disagreed over foreign as well as domestic matters. The Federalists, for a time, supported the British in their conflicts with the French. The Democratic-Republicans supported the French Revolution and opposed many policies of the British government.

The clear differences between the two dominant political groups in the late nineteenth century made it easy to identify the politics of newspapers of the time. Thus, \textit{The Gazette of the United States} was considered the "mouthpiece of the Federalist Party," while \textit{The National Gazette} and \textit{The Philadelphia General Advertiser} were seen as newspapers supporting Anti-Federalist views.\textsuperscript{18}

Why do people call themselves Federalists today when they are in fact espousing views of the Democratic-Republicans and Anti-Federalists? Perhaps they do not want to be seen as rejecting the views of Chief Justice Marshall. Perhaps these persons do not want to be given the label of "states' rights" advocates; they want to separate themselves from the states' rights positions taken by southern politicians from the

\textsuperscript{16} Everyone knows about the Federalists. If you don't, you should check the footnotes in Nowak, \textit{supra} note 2. For information about the Anti-Federalists and their opposition to the Constitution, see generally \textit{The Anti-Federalists} (Cecilia M. Kenyon ed., 1966), and \textit{The Complete Anti-Federalist} (Herbert Strong ed., 1981).

\textsuperscript{17} Regarding the disputes between these groups, see Nowak, \textit{supra} note 2. \textit{See generally} Joseph M. Lynch, \textit{Negotiating the Constitution: The Earliest Debates Over Original Intent} (1999).

Civil War era to the 1960s. All of today’s Justices, and most law professors, are well aware that the campaign for states’ rights was a campaign of Southern state and local governments for the powers to disregard federal law and Supreme Court rulings concerning racial discrimination. One assumes that Southern politicians in the 1950s and 1960s longed to have a Supreme Court like the one that existed in the late nineteenth and early twentieth centuries. Their ideal Court would restrict federal power to protect civil rights and do nothing on its own to help minority race persons. Today’s Federalists pretend that those Southern politicians have not had their wish fulfilled.

Chief Justice Marshall, a real Federalist, rejected the argument that the states, rather than the people themselves, created the federal government. He saw the Constitution as being based on the will of the people as a whole. Our federal system, without the intervention of the judiciary, works in a way that is consistent with the views of Chief Justice Marshall. As Herbert Wechsler and Jesse Choper have so ably shown, federal legislation will virtually never cause significant harm to a majority of state governments for the simple reason that such harmful legislation could not be passed by Congress.\(^ {19} \) Regardless of which political party has a majority in the House or Senate, and regardless of the political affiliation of the President, governors and other representatives of state governments will have their voices heard in the federal legislative process. The same people who elect members of the House and Senate also elect governors and state legislators. Congresspersons who “beat up” state and local governments, in contravention of the will of the people, are not headed for long careers in Congress.

Though they may claim theoretical kinship with the Federalists, the Gang of Five cannot disguise the fact that they have nothing but disdain for the federal system that our country adopted both in 1787 and following the Civil War. These states’ rights Justices want to give a state that disagrees with a federal law, passed with the approval of a majority of people in the country, the ability to disregard that federal law. Given that the Supremacy Clause of Article VI requires states to follow federal law, that is not an easy position to justify. The only “re-

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A number of professors have disputed Professor Wechsler’s and Professor Choper’s view of the federal system. Since these scholars are wrong, I am not going to cite them. I’ll bet that you can find citations to those persons in other papers in this Symposium.
spectable" way to be a champion of an Anti-Reconstruction states' rights position (in the 1950s sense) and an Anti-Federalist position (rejecting everything that John Marshall stood for) is to find that Congress was never given the authority to govern state activities in a variety of areas. Of course, to fully carry out the Anti-Reconstruction, Anti-Federalist "vision," a court would have to restrict the scope of the federal commerce power, give a narrow interpretation to the enforcement clauses of the Civil War amendments, interpret federal civil rights legislation in the narrowest possible manner, restrict both state and federal legislation that helped racial minorities, restrict the power of federal courts to cure racial segregation in schools, and, oh yes, grant state governments immunity from lawsuits based on federal statutes.

IV. Forget History—the Supreme Court Has!

A. Article III & the Eleventh Amendment

In Seminole Tribe v. Florida, the Supreme Court majority refers to the history of Article III and the Eleventh Amendment in a way that makes it appear that the drafters and ratifiers of that Article and Amendment clearly meant to prohibit congressional power to create causes of action against state governments when it used its Article I powers. That conclusion provides much of the basis for the majority opinion in Alden. Nevertheless, that conclusion is, at best, highly debatable if one looks at more history than is supplied by the Gang of Five’s opinions.

There is no clear documentary authority for the proposition that Article III was intended, by drafters or ratifiers, to preclude congressional creation of federal causes of action against state governments. The records of the Constitutional Convention contain no clear references to the Committee of Detail’s proposal for establishing federal judicial jurisdiction over cases “between a State and Citizens of another State.” The ratification debates are ambiguous, at best. For example, in the Virginia ratification debates, Edmund Randolph and James Wilson (both of whom were members of the Committee of Detail) indicated that the proposed Constitution would allow federal lawsuits against state governments. Opponents of the Constitution in

21 See Nowak, supra note 2, at 1423–25, for reference to the records of the Convention and the notes of the Committee of Detail.
22 One author, at the start of the 20th century, asserted that James Wilson drafted the Article III language concerning jurisdiction over suits against states. See Allen Caperton Braxton, The Eleventh Amendment, Address Before The Virginia State Bar
Virginia understood Article III to allow such suits and made that point in opposition to ratification. Madison and Marshall asserted that Article III did not create federal court jurisdiction for suits against states, but they were silent on the point of whether Congress would be able to create federal causes of action against state governments.\(^2\)

The *Hans* and *Alden* majority opinions refer to *Federalist No. 81*, in which Alexander Hamilton states,

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan [the Constitution], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.\(^2\)

However, in *Federalist No. 81*, Hamilton made no reference to whether Congress could create federal court jurisdiction to allow suits against state governments. All of the reasons he expresses in *Federalist No. 81* for arguing against inherent jurisdiction over debt cases against state governments would not apply to the issue of whether Congress could create a regulation enforceable against state governments through court actions. Unfortunately, in the Supreme Court's majority opinions, there is no analysis of *Federalist No. 80*, in which Hamilton suggested that states could be sued by citizens of other states. *Federalist Nos. 80 and 81* would be entirely consistent if Hamilton meant to say that federal courts could not assume jurisdiction over state governments unless Congress (with presidential approval or by overriding a presidential veto) regulated states pursuant to one of its Article I powers and then gave citizens a right to enforce those regulations through court actions. Indeed, in closing his argument concerning the national judicial power, Hamilton noted that congressional control of jurisdiction would prevent problems because Congress would be responsive to the will of a majority of states.

The *Seminole Tribe* and *Alden* majority opinions take the position that the Eleventh Amendment was designed to reverse *Chisholm v. Georgia*\(^2\) in a way that meant that Congress could not create federal causes of action for money damages against state governments. The analysis of *Chisholm*, in these opinions, consists of assertions rather

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23 *See* Nowak, *supra* note 2, at 1426–27.


25 2 U.S. (2 Dall.) 419 (1793).
than historical data. These opinions provide no insight into the disputes between the Federalists and the Democratic-Republicans (and Anti-Federalists) that were part of the history of the Eleventh Amendment.

*Chisholm* was decided by Federalist Justices, one of whom was James Wilson. In that case, the Supreme Court entertained an action to enforce a debt of a state government without any specific federal legislation creating such federal court jurisdiction. The states felt threatened by the opinion, as a number of states had incurred significant debts during the Revolutionary War. Many of the creditors with claims against state governments were Tories. Not surprisingly, immediate reaction to *Chisholm* ran along party lines. Many Federalists and Federalist newspapers indicated agreement with the Court's position; the Democratic-Republicans (the Anti-Federalists) attacked the case immediately.

Federalists soon came to oppose *Chisholm* for reasons that are debated among scholars. Professor Jacobs believed that the Federalists supported the Eleventh Amendment for theoretical reasons after they considered the scope of power it would give to the federal judiciary. On the other hand, I concluded that the switch in position by the Federalist members of Congress related to more mundane political concerns. At the same time that the Eleventh Amendment was being considered, there was a real possibility of war with Great Britain. The Senate vote for the Amendment occurred shortly after the Portuguese-Algerian Pirate Truce, induced and coordinated by Britain, which seemed to threaten our naval interests. The House of Representatives vote on the Eleventh Amendment took place only a week after it was announced in Philadelphia that the British were seizing American ships in the West Indies. A vote against the Eleventh Amendment would have been viewed by the public as a vote for the rights of Tory creditors. A vote for the Eleventh Amendment, on the other hand, coincided with the Federalist Party's strategy of proving that they were as anti-British as the Democratic-Republicans.

The true intent of the Eleventh Amendment framers may be lost to history, for, among other reasons, there were a number of members of each house of Congress who did not have any affiliation with either the Federalists or Democratic-Republicans. However, the views of the Federalists who voted for the Eleventh Amendment seem to be clear. They were voting only to stop the federal courts from assuming


27 *See Nowak, supra* note 2, at 1437-41.
jurisdiction over debt actions without congressional authorization. There is no reason to believe that the Federalists sought to restrict the scope of federal legislative authority. Most, though not all, of the scholars who have looked at the Eleventh Amendment history in the past quarter-century have, for a variety of reasons, concluded that the Amendment left Congress with a great scope of power to create causes of actions against state governments in the federal courts. All of that history was disregarded by the Gang of Five’s majority opinions in Seminole Tribe and Alden.

B. The Fourteenth Amendment

Recognition of the complete disagreement between President Johnson and members of Congress (who impeached Johnson and almost removed him from office) concerning the scope of congressional power and the relationship of the federal government to the states is essential to understanding the Fourteenth Amendment. After the Thirteenth Amendment had been ratified, Congress passed a Civil Rights Act over the veto of President Johnson, who did not believe that the Thirteenth Amendment Enabling Clause gave Congress the power to protect civil rights. The Congress also passed, again over President Johnson’s veto, the Second Freedman’s Bureau Law to protect persons who were deprived of civil rights in the Southern states.


29 Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. This law was passed by overriding Johnson’s veto. See Cong. Globe, 39th Cong., 1st Sess. 1809, 1861 (1866) (Senate and House).

30 Act of July 16, 1866, ch. 200, 14 Stat. 173. There was an earlier bill to continue the Freedmen Bureau which was passed by Congress but vetoed by President Johnson. The attempt to override the veto in the Senate failed at that time. See Cong. Globe, 39th Cong., 1st Sess. 943 (1866). However, a second bill was reintroduced on this subject which also included a section establishing jurisdiction in military courts to protect the rights of freedmen in the South. This bill was passed over the veto of
In *Boerne v. Flores*, Justice Kennedy, found that Section 5 of the Fourteenth Amendment did not give Congress the power to expand the scope of civil liberties that the Court defined under Section 1 of the Fourteenth Amendment. In section III.A.1 of his opinion in *Boerne* (which was joined by an uncertain number of Justices), Justice Kennedy found that the opposition to Representative John Bingham's initial proposal for an amendment framed only in terms of congressional power, and the tabling of that proposal, proved that the majority of Congress that ultimately voted for the proposed Amendment denied Congress the power to expand civil liberties.

The attacks on Bingham's first proposal were framed in terms of congressional power because the proposal was framed in terms of congressional power. After the Joint Committee returned its draft (which, after some compromise between the House and Senate, became the proposed and ratified Fourteenth Amendment), opponents of the proposed Amendment attacked the entire Amendment on the basis that it supplanted state and local law. Indeed, comments were made in opposition to the proposed Fourteenth Amendment because it "constitutionalized" Congress's passage of the Civil Rights Bill.33

There can be no honest doubt that the Thirty-Ninth Congress proposed an Amendment that would have constitutionalized the Civil

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President Johnson. *See id.* at 3842. The provision for military jurisdiction was contained in section 14 of that bill.

Justice Scalia voted for the Court's interpretation of the 14th Amendment but he would not sign-on to Kennedy's description of the original intent of the framers and ratifiers of the 14th Amendment. *See id.* at 507 (Scalia, J., concurring). Justice Stevens concurred in *Boerne* because he thought the Religious Freedom Restoration Act violated the religion clauses of the First Amendment. His position concerning the scope of congressional power under the 14th Amendment was unclear. *See id.* at 536–37 (Stevens, J., concurring). Justice Souter believed that the *Boerne* case should have been dismissed without a ruling on the merits of the case. *See id.* at 565 (Souter, J., dissenting). Justice Breyer, in *Boerne*, did not wish to address the question of whether the 14th Amendment justified the legislation. *See id.* at 544 (Breyer, J., dissenting).


For the comments of those who were in opposition to the Amendment because it "constitutionalized" the Civil Rights Bill, see, for example, Cong. *Globe*, 39th Cong., 1st Sess. 2461 (1866) (statement of Rep. Finck), *id.* at 2506 (statement of Rep. Eldridge), *id.* at 2538 (statement of Rep. Rogers), and *id.* at 2512–13 (exchange between Reps. Raymond and Wilson).
Rights Act and displaced a great amount of state authority that existed prior to the Fourteenth Amendment. Persons attacking the proposed Fourteenth Amendment, after it came out of Congress, focused on the scope of congressional power as well as judicial power to displace federal laws. The Johnson Administration did not sit on the sideline during the ratification process. Secretary of the Interior Browning wrote a lengthy letter to newspapers that probably had been approved by President Johnson. In that letter, Browning attacked the power given to each branch of the federal government to displace independence of the states. However, a number of newspaper articles in the North endorsed the creation of a federal legislative power to protect certain natural law rights. Browning's argument was rejected in some of the leading northern newspapers. As the New York Herald stated,

[T]he great fear of Mr. Browning is that this Amendment in its operation will do away with state sovereignty, legislative and judicial, and will put legislatures and courts of several states under Congress and the federal courts. . . . We hold that this old Southern theory of our government was demolished at Petersburg and surrendered at Appomattox Court House with Lee’s army; and so we dismiss this branch of the argument.

Following the ratification of the Fourteenth Amendment, Congress passed sweeping legislation displacing state authority. The Boerne majority opinion cites Representative Garfield as arguing during the debate on the Ku Klux Klan Act that there were limits on congressional power over the states. Justice Kennedy's opinion does not focus on the fact that the Ku Klux Klan Act was passed despite dissenter's concerns about the scope of federal power. Indeed, supporters of the Civil Rights Bill of 1871 saw it as only the first step in

38 The statute included authority for the federal government to use force to enforce the civil rights protected by the statute and, under certain circumstances, to suspend the writ of habeas corpus. See Act of Apr. 20, 1871, ch. 22, §§ 2-6, 217 Stat. 13.
enforcement of Fourteenth Amendment principles. For example, Representative Coburn stated his belief that Congress had the power under the Fourteenth Amendment to literally set aside state governments and take over the functions of the state. 39 It would be surprising if a majority of the Republicans who ratified the Fourteenth Amendment, many of whom could be described as Abolitionists or Radical Republicans, did not see themselves as having such power.

When Section 2 of the Fourteenth Amendment failed to spur Southern states to grant black persons the right to vote, there was enough Reconstruction sentiment left in the North for ratification of the Fifteenth Amendment, guaranteeing a right to vote for all persons (at least men) regardless of race and granting Congress the power to take steps to enforce that right in states that were failing to allow minority race persons to vote.

Unfortunately, the Reconstruction spirit of the North did not last. By the end of the century, the Congress would repeal some of the civil rights legislation that had been passed in the Reconstruction era. 40 The Anti-Reconstruction Supreme Court of the late nineteenth century had already overturned some of the Reconstruction era civil rights legislation and had so narrowly interpreted other civil rights statutes that they were made meaningless.

V. THE FIRST ANTI-RECONSTRUCTION COURT

Every law student knows that the Supreme Court in the late nineteenth and early twentieth centuries invalidated the most blatant forms of racial classifications that harmed minority race persons. Law professors are "judge lovers"; they like to portray the Supreme Court Justices as the good guys. It is a rare class in which the students learn enough of the Court's history to realize that the question of whether Marbury v. Madison 41 has helped or hurt racial minorities is impossible to answer with certainty.

In every constitutional law course, students learn that the Court invalidated a state statute that openly excluded black persons from juries. 42 How many courses, I wonder, examine the Court's refusal, in Virginia v. Rives, 43 to invalidate the conviction of a black defendant who had been tried before an all white jury? How many students real-

40 See, e.g., Act of Feb. 8, 1894, ch. 25, 28 Stat. 36.
41 5 U.S. (1 Cranch) 137 (1809).
42 See Strauder v. West Virginia, 100 U.S. 303 (1879).
43 100 U.S. 313 (1879); see also Benno Schmidt, Juries, Jurisdiction and Race Discrimination: The Last Promise of Strauder v. West Virginia, 61 Tex. L. Rev. 1401 (1983).
ize the similarity of then-Justice Rehnquist's dissent in *Batson v. Kentucky* to the Court's ruling in *Rives*?

Every student knows that the Court in *Yick Wo v. Hopkins* ruled that a city ordinance regulating laundries violated the Equal Protection Clause insofar as it was used in a selective manner to exclude Asian-American persons from owning laundries. Judging by casebooks, most students do not get to study the Court rulings from this era finding that states had a special public interest in limiting land ownership and certain businesses to U.S. citizens, which allowed the West Coast states to effectively create racial barriers against Asian-Americans owning property or engaging in certain types of businesses.

All but the most blatant forms of open discrimination by law were upheld by the Supreme Court in the late nineteenth and early twentieth centuries. The Court struck down a law prohibiting minority race persons from owning housing in a certain area of town, though the basis for that ruling was unclear. But the Court upheld statutes punishing sexual activity between members of different races. While pretending to create a separate but equal doctrine, the Court upheld the provision of education to white students only when a local school board claimed that it could not afford to operate a high school for black students as well as white students. And the Court upheld fines imposed on a private college for teaching black and white students together.

Perhaps one could not have expected a court to try to lead the country in a move for racial equality or integration in the late nineteenth and early twentieth centuries. But we might have expected a court that would not prevent congressional protection of minority race persons. However, our expectations would not have been met. The Court interpreted the scope of power given to Congress by the Civil War Amendments so as to prevent Congress from preventing violence against, and exploitation of, African-Americans.

The Court would recognize a limited power of the federal government to protect minority race persons when they were actually in the

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45 118 U.S. 356 (1886).
47 See Buchanan v. Warley, 245 U.S. 60 (1917).
50 See Berea College v. Kentucky, 211 U.S. 45 (1908).
custody of a United States Marshall. However, the Court held in United States v. Cruikshank that Congress had no constitutional authority given to it by the Thirteenth or Fourteenth Amendments to punish assault or murder of minority race persons by private individuals. It made this ruling even though more than one hundred African-Americans had been murdered in a public place.

Although the Court ruled that Congress had the power to protect individuals from being harmed when they were actually voting in federal elections, the Court ruled that Congress had no authority under the Thirteenth, Fourteenth, or Fifteenth Amendments to punish persons who engage in a conspiracy to prevent minority race persons from voting. The Court found that the Civil War Amendments did not give the federal government the ability to punish conspiracies that were designed to prevent the government from providing protection to racial minority persons.

Some of the Court's best known rulings restricting the authority of the federal government in the late nineteenth century read like bad philosophy papers rather than court rulings based on history or legal precedent. In the Civil Rights Cases, the Supreme Court held that Congress could not outlaw any form of race discrimination or any deprivation of civil liberties under its Thirteenth and Fourteenth Amendment powers that would not have been invalidated by Section 1 of these Amendments. The Supreme Court, in the Civil Rights Cases, found that Congress had no power to act against private persons who sought to deprive minority race individuals of equal access to public facilities. The Court said that the interpretation of the Fourteenth Amendment requested by the executive branch could not be allowed because giving that interpretation to the Fourteenth Amendment would conflict with the structure of the federal system that was embodied in the Tenth Amendment. The Court did not exactly invalidate the Fourteenth Amendment legislation on the basis of the Tenth Amendment, but it came pretty close. It used the Tenth Amendment to interpret both the applicability of Section 1 of the Fourteenth

51 See Logan v. United States, 144 U.S. 263 (1892).
52 92 U.S. 542 (1876).
53 For an account of the violence that was the background for this litigation, see Brooks D. Simpson, This Bloody and Monstrous Crime, Const., Fall 1992, at 38.
54 See Ex parte Yarbrough, 110 U.S. 651 (1884).
55 See United States v. Reese, 92 U.S. 214 (1876).
56 See United States v. Harris, 106 U.S. 629 (1883).
57 109 U.S. 3 (1883).
58 See id. at 15.
Amendment to private action and the scope of power given to Congress by Section 5 of the Amendment.

I could not demonstrate that these Supreme Court rulings directly contributed to the killing of thousands of black persons. Nevertheless, the rulings of the Court prevented the federal government, if federal administrators had been so inclined, from attempting to stop the killing of minority race persons throughout this country. There were thousands of lynchings of minority persons that might have been prevented by the federal government. There was no federal protection for the black persons who were killed and who had their neighborhood destroyed in Tulsa, Oklahoma or for the black persons who were killed when Rosewood, Florida was destroyed by a white mob. The Supreme Court bears some responsibility for those murders because it blocked congressional and executive branch actions designed to protect racial minorities.

_Hans v. Louisiana_ reads much like the _Civil Rights Cases_. According to _Hans_, Article I and the Eleventh Amendment did not give power to Congress to create private courses of action against states because such an interpretation of the Constitution would conflict with the Justices' views of a federal system. Knowing how the cases had to come out, the Court found it easy to analyze the issue in _Hans_ in a way that would restrict federal power. Justice Bradley's majority opinion in _Hans_ reflected the views of the Anti-Federalists, rather than the views of John Marshall. Bradley cited statements of John Marshall that might support the view that states could not be defendants in a federal court action. But Bradley dismissed language in Chief Justice Mar-

59 There appear to have been, by a conservative estimate, almost 5000 lynchings of racial minorities. The state-by-state lynching estimates contained in the Tuskegee University Lynching Reports are quoted in Mark Mayfield & Tom Watson, _Guilt, Innocence Blur with Passage of Time_, USA Today, Sept. 25, 1992, at 2A. For an account of the number of persons lynched, by race, from 1882 to 1970, see also U.S. Bureau of the Census, _The Statistical History of the United States: From Colonial Times to the Present_ 422 (1976).

60 Information concerning the Tulsa race riot of 1921 was provided by Professor Alfred L. Brophy, who has given the author of this Essay a draft of his article, based on a report he wrote for the Oklahoma Legislature's Commission on the Tulsa Race Riot, that is tentatively titled _Reconstructing the Dreamland: Contemplating Civil Rights Actions and Reparations for the Tulsa Riot of 1921_ (1999) (on file with the author & the Notre Dame Law Review). See also Jim Yardley, _Panel Recommends Reparations in Long-Ignored Tulsa Race Riot_, N.Y. Times, Feb. 5, 2000, at 1.

The State of Florida has taken action to compensate the remaining survivors and descendants of persons murdered in the 1923 "Rosewood Massacre." _See_ Rosewood Massacre-Investigation Compensation, 1994 Fla. Laws ch. 94-359.
shall's opinion in *Cohens v. Virginia* indicating that both Article III and the Eleventh Amendment only precluded suits against state governments by a citizen of another state and did not preclude suits by citizens of the state. Justice Bradley found that Chief Justice Marshall's statement was "unnecessary to the decision, and in that sense extra-judicial, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion [than Chief Justice Marshall's view of the structure of the federal system and the Eleventh Amendment]." In the next decade, the Court in *Ex parte Young* would provide an avenue by which citizens could force state officers to conform state actions to federal law. However, since the Court was controlling the scope of permissible congressional action, it was protecting states from federal authority except in a few narrow areas.

VI. THE ARRIVAL OF ANTHONY KENNEDY & THE SECOND ANTI-RECONSTRUCTION COURT

Early in the Burger Court era, it appeared that all of the Anti-Reconstruction views of the earlier Courts had been repudiated. The Court was giving great deference to congressional determinations concerning the scope of the Commerce Clause so that Congress could use that clause to protect the interest of minority race persons if it so chose. The Court overruled the earlier cases limiting the scope of Congress's Thirteenth Amendment power. In 1968 and 1976, the Court restored the original understanding of some Reconstruction era civil rights laws. The Court ruled that Congress had the power

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61 19 U.S. (1 Wheat.) 264 (1821).
62 Hans v. Louisiana, 134 U.S. 1, 20 (1890).
63 209 U.S. 123 (1908).
to enact legislation penalizing private persons, as well as government actors, for preventing persons from exercising basic civil rights, such as the right to travel. The Burger Court, though without a majority opinion, upheld federal preference for the awarding of public works contracts to businesses owned by minority race persons.

The Court did not approve congressional action lowering the voting age for state or local elections to eighteen without a constitutional amendment. But the Court granted great deference to Congress in controlling actions of state governments and private persons related to racial discrimination in voting. The Court allowed the prohibition of literacy tests by Congress even though the Court had found that such tests did not violate the Fourteenth or Fifteenth Amendments. It upheld the requirement that states that had a low percentage of registered voters among their racial minority populations could not change any voting laws without the approval of the Justice Department or the District Court in the District of Columbia. The Court, without a majority opinion, allowed jurisdictions covered by section 5 of the Voting Rights Act to employ race conscious districting in order to protect the voting strength of minority racial groups.

The Justices also used the Equal Protection Clause of the Fourteenth Amendment and the implied equal protection of the Fifth Amendment to protect racial minorities. The Warren Court repudiated the separate but equal doctrine. The early years of the Burger Court saw the Justices endorsing a wide power of federal courts to fashion remedies that would undo the effects of past racial segregation in school systems.

The Court’s position on most of these issues began to change slowly between the late 1970s and 1989. Nevertheless, we can point to one event that marks the end of an era in which the Supreme Court was interested in the protection of racial minorities and the start of an era in which the Supreme Court would consistently rule against the interests of minority race persons. That event was the appointment of

74 For an analysis of the shift in the Court’s rulings, see John E. Nowak, The Rise and Fall of Supreme Court Concern for Racial Minorities, 36 WM. & MARY L. REV. 345 (1995).
Anthony Kennedy to the Supreme Court. With the exception of one case concerning federal racial "affirmative action" programs, which would be reversed a few years later, and some very limited rulings concerning the technical application of the Voting Rights Act, since Anthony Kennedy joined the Court, a majority of Justices have voted against the interests of racial minorities in every case. Justice Kennedy would join Chief Justice Rehnquist and Justices O'Connor, Scalia, and White (and later, Justice Thomas) to form a Gang of Five that would consistently vote against the interests of racial minorities.

We could have anticipated the Court's actions during the past ten years by looking at the Spring of 1989. Justice Kennedy was appointed to the Court in February of 1988; his first full term on the Court was the October 1988 Term. In the Spring of 1989, Justice Kennedy voted: to use strict scrutiny to eliminate virtually all forms of state or local affirmative action for racial minorities;\(^7\) to make it difficult for minority workers in low-paying jobs to show that the predominance of white workers in higher-paid positions violated federal law;\(^7\) to increase the ability of white persons to challenge private sector affirmative action programs;\(^7\) for an interpretation of Title VII that made it difficult for women workers to challenge a seniority system that was alleged to have a discriminatory purpose;\(^7\) and for the position that cities could not be held liable for employee violations of 42 U.S.C. § 1981 under a respondeat superior theory.\(^7\) He wrote a majority opinion drastically restricting the scope of a Thirteenth Amendment Reconstruction era civil rights statute.\(^8\) The Civil Rights Act of 1991\(^9\)
was adopted in part to reverse, insofar as possible, some of these Spring, 1989 decisions.

Perhaps because of Justice Kennedy's votes in cases involving minority race persons, David Souter was questioned closely regarding protection of racial minorities in his confirmation hearing. Although then-Judge Souter would not answer specific questions as to his position on constitutional issues, he gave answers to Senators' questions indicating that he supported the goals of the Voting Rights Act and that he believed that Congress had the power to use benign racial classifications to remedy harms caused to racial minorities by societal discrimination.82 Justice Souter's voting pattern has demonstrated that he did not mislead the Senators.

As late as 1990, there was a majority of Justices on the Supreme Court who believed that Congress could authorize racial affirmative action programs if those programs were truly benign in character and were tailored to promote important interests. In Metro Broadcasting v. F.C.C.,83 Justice Stevens and Justice White took the position that Congress had the authority to use racial classifications in a benign manner, even though they believed that Section 1 of the Fourteenth Amendment prevented state and local governments from engaging in a similar use of racial classifications.84

After Justice White left the Court, Justice Thomas joined the four dissenting Justices from Metro Broadcasting to overrule that decision. In Adarand Constructors, Inc. v. Pena,85 Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas ruled that Congress had no greater authority to use benign racial classifications than did state or local governments. The Gang of Five effectively ended the authority of the federal government to help racial minorities. The Justices had already ruled in 1989 that state and local governments could only employ a racial classification to help minority race persons if the racial classification was narrowly tailored to correct identified illegal or unconstitutional discrimination.86

84 See id. at 601 (Stevens, J., concurring).
The Burger Court had not been sympathetic to claims of minority race persons who alleged that legislative districts had been established for the purpose of reducing their ability to elect representatives to a legislative body. According to the Burger Court, mere dilution of the voting power of racial minorities would not be enough to establish a racial classification. In 1982, Congress amended the Voting Rights Act to provide greater protection for minority race voters. In 1986, the Court interpreted the 1982 Act in a way that only slightly eased the burden of plaintiffs who challenged a voting law on the basis that the law diluted the voting strength of minority race voters. To win a case under the amended section 2 of the Voting Rights Act, minority race plaintiffs would have to show that the minority race group was large and geographically compact, so that the group would have constituted a majority in a district drawn with no racially discriminatory purpose; that minority race voters were so politically cohesive that they would have control of an election in fairly drawn districts; and that white voters were likely to engage in block voting. In 1993, the Supreme Court ruled that minority race voters who allege that they were packed into a single district so as to prevent them from influencing the vote in more than one legislative district would have to meet all of those conditions in order to show racial discrimination that would violate section 2 of the Voting Rights Act. When white voters, during the 1990s, complained about the use of racial considerations to draw legislative district lines, they would not have to overcome similar hurdles.

The Court's rulings on the scope of Congress's Fourteenth and Fifteenth Amendment power to protect the interests of minority race voters provide clear evidence of a desire on the part of five Justices to return to a late nineteenth-century approach toward interpretation of the Civil War Amendments. Section 5 of the Voting Rights Act requires jurisdictions with a history of low registration of racial minority voters to have changes in their voting systems approved by the Attorney General. The Gang of Five, in the 1990s, issued a series of rulings that made it impossible for the Attorney General to order or even encourage a state or local legislature to create legislative district lines in a way that would strengthen minority race voting power.

In *Shaw v. Reno*, the Court, by a five to four vote (surprise!), held that North Carolina's creation of a legislative district with a majority of minority race voters constituted a racial classification that had to be subject to the strict scrutiny test. When the case returned to the Supreme Court, five Justices ruled that if the lines were drawn to alleviate the effect of societal discrimination in North Carolina, the creation of a minority race district would be invalid because it would not be narrowly tailored to promote a compelling interest of the state.

As Justice Souter pointed out, the most amazing aspect of the *Shaw* ruling is the fact that, even with the additional legislative district in which minority race persons would be a majority of voters, minority race persons would continue to be statistically under-represented in the North Carolina congressional delegation. White voters did not have to prove vote dilution or racial block voting to have legislative districts invalidated by the Gang of Five.

In *Miller v. Johnson*, the Court ruled that the Voting Rights Act would not be interpreted to give the Justice Department the right to require states to create legislative districts to maximize the voting power of minority race persons, at least so long as the Justice Department could not show that such a district was absolutely necessary to remedy identified unconstitutional discriminatory acts designed to suppress minority race voting power. Justice Kennedy's majority opinion stated that an interpretation of the Voting Rights Act that would allow the federal government to maximize voting power of minority race persons would create "constitutional problems."

The *Miller* decision involved the plan adopted by the Georgia Legislature for the election of representatives to the United States...
House of Representatives. The original districting map drawn by the Georgia legislature included two congressional districts that were likely to be controlled by, and that would therefore likely elect, minority race persons. The United States Attorney General refused to approve the plan under section 5 of the Voting Rights Act. Instead of challenging the Attorney General's decision, the Georgia legislature adopted a plan with three congressional districts that would be controlled by minority race voters. White voters challenged the plan, and the Supreme Court, in *Miller*, ruled that the final Georgia districting plan, with three minority-race-controlled districts, violated the Equal Protection Clause.

After remand in *Miller*, the district court adopted a congressional district map for Georgia in which there was only one congressional district wherein a majority of the voters would be minority race persons.95 The plan adopted by the district court gave less voting power to minority race persons than the plan that had been originally adopted by the Georgia legislature (prior to any action by the Attorney General). In *Abrams v. Johnson*,96 the Gang of Five upheld the district court and ruled that the Georgia congressional district map should have only one district in which minority race voters could control an election. Justice Kennedy's majority opinion in *Abrams* held that the action of the Georgia legislature in adopting its original district map did not reflect the true intent of that legislative body. According to Justice Kennedy, the Georgia legislature would have created a congressional district map where minority race persons would be likely to control the election of only one congressional representative, were it not for fear of submitting the plan to the Department of Justice for approval under the Voting Rights Act.97

The Gang of Five may have a falling out regarding the Voting Rights Act. In 1996, in *Bush v. Vera*,98 Justice O'Connor wrote an opinion that was, in part, a majority opinion and, in part, a plurality opinion. She wrote for five Justices in finding that a legislative district designed to improve the voting power of minority race persons had to be subject to strict judicial scrutiny. However, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas would not join a concurring opinion by Justice O'Connor in which she stated that a state or

97 The dissenters pointed out, once again, that minority race persons would have been under-represented even if the majority had allowed the Georgia legislature to create three districts with a minority race voter majority. See id. at 103 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting).
local government’s need to comply with section 2 of the Voting Rights Act, which prohibits the dilution of minority race voting power, would constitute a compelling interest that could justify a legislative district design to enhance the voting power of racial minorities.99

The Rehnquist Court has made rulings designed to insulate local governments from judicial, as well as congressional, control. During the 1990s, the Supreme Court restricted the power of the federal courts to create effective remedies for school segregation. In 1990, the Court in Spallone v. United States100 ruled that federal courts could not impose contempt of court sanctions against members of the city council who refused to pass legislation to implement a consent decree for the integration of schools. Justice Brennan, one of the four dissenters, gave the majority members the benefit of the doubt concerning that intention, but he explained that the “unintended effect” of the majority opinion would be to embolden “recalcitrant officials continually to test the ultimate reach of remedial authority of the federal courts.”101

In 1991, the Court ruled that a lower federal court should dissolve its desegregation order in stages as soon as each part of a school system’s operation could be formally considered to have been integrated.102 Justice Souter, who had recently been appointed to the Court, did not participate in the case. Three Justices, in dissent, found that the majority was only giving lip service to the principle that school desegregation decrees should be continued until the effects of legal segregation had been eliminated.103 In 1995, Justice Souter would be one of four dissenters when the Supreme Court held that a district court exceeded its authority by ordering salary increases for school district employees and the funding of educational programs as a means of making city schools more likely to attract white students from private schools or from other school districts.104

VII. WHAT NOW?

The current Supreme Court majority has taken a states’ rights position in cases that have not involved racial discrimination. In Boerne, whose slanted view of Fourteenth Amendment history I have

99 See id. at 990 (O’Connor, J., concurring).
101 Id. at 306 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting).
103 See id. at 256–57 (Marshall, J., joined by Blackmun & Stevens, JJ., dissenting).
104 See Missouri v. Jenkins, 515 U.S. 70 (1995); 3 ROTUNDA & NOWAK, supra note 46, § 18.9 (regarding school desegregation cases).
discussed previously, the Court struck down a congressional attempt to grant persons an exemption from state or local laws with which they disagreed for religious reasons. The Court has invalidated federal laws when a majority of Rehnquist Court Justices could characterize the law as an order to local governments to take legislative or executive actions. The Gang of Five restricted the scope of the commerce power of Congress when they struck down a federal law that made it a crime to carry a gun near schools. These Commerce Clause decisions may be used to narrow or overturn civil rights legislation in the future.

In the 1999–2000 Term, will the Rehnquist Court allow the federal government to create causes of action against their attackers for women who have been subjected to violence? One can only hope that the Gang of Five will not vote as a block in that case.

At the time that this Essay was written, the Court had heard, for the second time, arguments in *Reno v. Bossier Parish School Board*. In 1997, the Supreme Court ruled that the Attorney General could not refuse to clear a change in the voting standards of the Bossier Parish School Board (a government entity covered by section 5 of the Voting Rights Act) solely on the basis that the new voting standard would dilute minority race voting strength in a manner that might violate section 2 of the Voting Rights Act. The Court’s opinion in *Bossier Parish School Board* left open the question of the types of evidence that might show that a voting change had been undertaken for the purpose of harming racial minorities. Following the remand of *Bossier Parish School Board*, a three judge district court, by a two to one vote, found that there was insufficient proof to establish discriminatory purpose. The Court is now considering the question of whether the school board’s change in voting standards was enacted with the purpose of denying or abridging the right to vote on account of race, so as to justify the refusal of the Attorney General to approve the voting change.


In 1999, Justice O’Connor wrote the majority opinion in *Lopez v. Monterrey County*,\(^{111}\) in which the Court ruled that a county that was covered by section 5 of the Voting Rights Act had to have changes in its voting procedures approved by the Attorney General, even though those changes were required by state law and the state was not itself subject to section 5 of the Voting Rights Act. Justice O’Connor wrote for six Justices in finding that this application of section 5 of the Voting Rights Act was within the authority granted to Congress under the Fifteenth Amendment and, therefore, that it did not unconstitutionally infringe on state sovereignty. Justice O’Connor’s opinion recognizing Congress’s Fifteenth Amendment power to prohibit changes in state or local voting regulations that did not have a discriminatory purpose, but only a discriminatory effect, was joined without further comment by Justice Scalia. Justice Thomas, in a dissent joined by no one else, found that this application of section 5 was “constitutionally doubtful.” He found that the Fourteenth and Fifteenth Amendment enforcement powers of Congress should be seen as “co-extensive,” and that the application of the Voting Rights Act in the manner favored by the majority “raises to new levels the federalism cost that the statute imposes.”\(^{112}\) Justice Kennedy and the Chief Justice found that the Voting Rights Act should be interpreted in a narrow manner. They believed that the local jurisdiction in *Lopez* had to have its voting practices reviewed by the Attorney General because of the specific circumstances in the case. However, they would have interpreted the statute to avoid requiring all voting changes of a local government subject to section 5 of the Voting Rights Act to be cleared by the Attorney General. They stated that their position concerning statutory interpretation was made “in light of the constitutional concerns identified by Justice Thomas.”\(^{113}\)

The difficulty in predicting the outcome of the *Bossier Parish* cases currently before the Supreme Court arises from the difficulty of predicting how Justices O’Connor and Scalia will vote.\(^{114}\)

\(^{112}\) Id. at 709 (Thomas, J., dissenting).
\(^{113}\) Id. at 705 (Kennedy, J., joined by Rehnquist, C.J., concurring).
\(^{114}\) After this Essay was written, the Supreme Court interpreted the Voting Rights Act so as to prohibit the Department of Justice from denying “preclearance” to changes in voting laws that were adopted with the intent to discriminate against minority race voters if the changes did not, in fact, reduce the voting power of racial minorities. *See* Reno v. Bossier Parish, 120 S. Ct. 866 (2000). The case was decided by a five to four vote of the Justices. Not surprisingly, the five Justices in the *Bossier Parish* majority were the same five Justices who had found that white voters could have a legislative district drawn to protect minority race voting power even though white voters were over-represented in a legislative delegation after the creation of the dis-
The division of the Justices and the intensity of the language in the majority and dissenting opinions in the June 23 cases reflect a division on the Court concerning things that are important, even if the Eleventh Amendment is not. Will the Court go all the way back to a view of the federal system that will make it impossible for Congress to effectively protect civil liberties? Only time will tell. But the voice of the Gang of Five that rang out on June 23, 1999 does not strike a hopeful note for anyone interested in the protection of minority interests in our society.

strict that was designed to protect minority race voters. The Court in *Bossier Parish* did not rule on the scope of Congress's power to enact legislation under the 15th Amendment.

115 After this Essay was written, the Supreme Court, by a predictable five to four vote, ruled that private persons who were employed by state governments could not sue their state employer for money damages based on the state's violation of the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1994 & Supp. III 1997). See *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000). With the increasing number of Gang of Five decisions, the 11th Amendment may have practical importance after all.