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2001]

WHY FEDERALISM MUST BE ENFORCED: A RESPONSE TO PROFESSOR KRAMER

MARCI A. HAMILTON*

The United States Supreme Court has issued a series of opinions that turn on the Constitution's inherent principles of federalism, decisions that have alarmed many a legal scholar. Some scholars have attacked the Court for overstepping its bounds, and others have criticized the Court on the ground that the federal/state balance should be maintained through the political process rather than judicial review. The most recent advocate of this position, Professor Larry Kramer, recently argued in the *Columbia Law Review* that the political party structure ensures that state interests are taken into account at the federal level, and therefore the Supreme Court need not and should not enforce federalism guarantees. This criticism of the judicial enforcement of federalism fails as a matter of constitutional history and on empirical grounds. The Supreme Court in this era deserves praise, not criticism, for its recent federalism jurisprudence.

I. INTRODUCTION

WITH his opinion rejecting a judicial role in policing the boundaries of federalism in *Garcia v. San Antonio Metropolitan Transit Authority, Inc.*,¹ which reversed *National League of Cities v. Usery*,² Justice Harry Blackmun set the stage for the Supreme Court's current federalism jurisprudence. *Garcia* is the strongest statement to date of the theory that judicial review of federalism is contrary to the constitutional design. The opinion charged that the Court's federalism doctrine was "unworkable," "inconsistent" and, most important for purposes of this Article, unnecessary.³ Justice Blackmun declared that the structure of the Constitution was sufficient to prevent the federal government from impinging on the states,

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1. 469 U.S. 528 (1985).

2. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

3. *See Garcia*, 469 U.S. at 531 (overruling *National League of Cities* (citations omitted)).

reasoning “that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”⁴

The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. . . . [T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.⁵

He continued, “State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”⁶

Justice Blackmun relied on the work of Professors Herbert Wechsler and Jesse Choper to reach his conclusion.⁷ Wechsler was the first to articulate this theory of the “political safeguards of federalism” in a brief essay in 1954.⁸ Choper later endorsed the political safeguards theory,⁹ and more recently, Professor Larry Kramer supported Wechsler’s conclusion, even if he takes issue with some of Wechsler’s theses.¹⁰ Wechsler’s and Kramer’s theories boil down to the principle that the courts need not police the boundary between the federal and state governments because that

4. See *id.* (discussing structure of federalism). In overruling *National League of Cities*, the Court stated:

Our examination of this “function” standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of “traditional governmental function” is not only unworkable but is also inconsistent with established principles . . . on which *National Leagues of Cities* purported to rest. That case, accordingly, is overruled.

Id.

5. *Id.* at 551-52 (finding Framers relied on structure of federal government to protect states’ interests).

6. *Id.* at 552.

7. See *id.* at 551 n.11 (citing works of other authors to support proposition that federal government was designed to protect states from congressional overreaching).

8. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954) (discussing distribution of authority between nation and states to serve ends of federalism).

9. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 193 (1980) (stating that judgment of political branches must preserve federalism).

10. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000) (stating “Wechsler’s central insight remains valid”).

boundary is sufficiently secured by the political structure¹¹ or the political parties.¹²

For procedural safeguard theorists, the boundaries of federalism are nonjusticiable. Judicial review of the boundaries of federalism is overkill and an invitation to judicial policymaking.¹³ As stated in *Garcia*, such review “invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”¹⁴ With the so-called safeguard of politics in place, these theorists have argued that the states’ interests are adequately secured.¹⁵ This trust in the invisible hand of politics, however, is misplaced.

Two errors sit at the base of the procedural safeguards thesis. First, it is wrong as a matter of constitutional history. Second, it is untrue as an empirical matter.

II. THE UNPREDICTABLE EXERCISE OF POWER AND THE FLEXIBLE CONSTITUTIONAL STRUCTURE

The Constitution is built on a tandem belief in the fallibility of humans, including the Framers, and the malleability of power. The argument that courts need not “interfere” with the federal/state balance inadequately takes into account the Framers’ most fundamental insight: the exercise of power is not static, but rather unpredictable.¹⁶ The Constitution divides, disperses and assigns powers, and most importantly, it rests on the assumption that every individual holding power will likely abuse it. There can be no static safeguards, but rather a set of structural mechanisms that will permit the various power centers to continually adjust to the others.¹⁷ The safeguards theorists would deprive the judiciary of its

11. See Wechsler, *supra* note 8, at 558-59 (“For the containment of the national authority Madison did not emphasize the function of the Court; he pointed to the composition of the Congress and to the political process.”).

12. See Kramer, *supra* note 10, at 233-78 (discussing political safeguards of federalism).

13. See Wechsler, *supra* note 8, at 559 (“The prime function envisaged for judicial review—in relation to federalism—was the maintenance of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their counsels.”).

14. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

15. See CHOPER, *supra* note 9, at 175-84 (noting that many aspects of political system serve states’ rights); Kramer, *supra* note 10, at 219 (arguing that structure of American politics does offer states protection from federal overreaching); Wechsler, *supra* note 8, at 558 (stating that political process in United States is well-adapted to federalism).

16. See Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 5-6 (1997) (“The Framers believed that the distribution of power was the best insurance against tyranny because power by its very nature is propulsive.”).

17. See *id.* at 4 (analogizing federal government to clock and solar system). “The discrete elements of a clock or a solar system, however, are not individual islands. . . . [Rather,] each element’s function is inter-linked . . . [like] the work of the federal government” *Id.*

only weapon—judicial review—to check congressional self-aggrandizement, a phenomena the Framers clearly expected.

By the time the Constitutional Convention was called, the colonies and then the states had witnessed abuses of power by the King, by the Parliament, by the state legislatures and by the people.¹⁸ They placed no great faith in any entity, including the people.¹⁹ This sentiment of distrust suffused the Convention, where Madison succinctly remarked that “[t]he truth was that all men having power ought to be distrusted to a certain degree.”²⁰ In particular, centralized power should be distrusted because, in Justice Harlan’s words, our ancestors “were suspicious of every form of all-powerful central authority.”²¹

The crux of the procedural safeguards theory—that the framing generation did not “fear that the Congress might pose a serious threat”—is simply wrong.²² The Framers, as well as Anti-Federalists and Federalists, during the ratification debates, deeply feared the abuses of power that would flow from a federal legislature.²³

The Framers believed that Congress would be the most dangerous branch of the federal government.²⁴ Therefore, they consciously crafted Congress against the backdrop of the degradation of state legislatures under the Articles of Confederation, analyzing governmental structures *qua* structures and seeing in the federal legislature the potential for cabal, corruption and intrigue exhibited by the state legislatures.²⁵ In Madison’s words:

Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other will be inevitable.²⁶

18. *See id.* (noting Framers’ belief that tyranny was ever-present threat to democracy).

19. *See id.* at 3-10 (discussing Framers’ rejection of direct democracy in favor of representative democracy).

20. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 1 (1911); *see also* Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael McConnell ed., forthcoming 2001).

21. John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 944 (1963).

22. *See* Kramer, *supra* note 10, at 246 (finding judicial review to be trivial aspect of Framers’ thinking).

23. For a further discussion, *see infra* notes 26-28 and accompanying text.

24. *See* FARRAND, *supra* note 20, at 52 (surmising that legislature would become too involved without check of executive).

25. *See id.* at 35 (discussing Madison’s apprehension about introduction of monarchy).

26. *Id.*

And in Morris' words: "The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose."²⁷

The Federalists, whether at the debates or during the ratification stage, did not believe that Congress could be trusted, and that the structure they had crafted—including judicial review—should restrain Congress.²⁸ For example, when some complained that the Constitution had no bill of rights, leading Federalists James Wilson, James Madison and Alexander Hamilton heatedly responded that a bill of rights was unnecessary because the Constitution limited and enumerated the powers of Congress.²⁹ Hamilton further justified the absence of a bill of rights with the fact of judicial review of federalism.³⁰ Wilson, the most far-sighted Framers on the structure of the Constitution, explained the necessity of judicial review of legislative action during the Pennsylvania Convention to ratify the Constitution:

[T]he legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . I had occasion, on a former day, to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.³¹

Nor did the Anti-Federalists trust Congress. To the contrary, they loudly objected that the Constitution was a charter for a dictatorial federal government with unlimited powers.³² Some Anti-Federalists voted against

27. *Id.* at 52.

28. See Kramer, *supra* note 10, at 221 ("According to Weschler, the Framers designed the federal government's political departments to give states a say in national politics and to ensure that national lawmakers would be responsive to 'local sensitivity to central intervention.'").

29. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 540 (1998) (quoting Hamilton and Madison).

30. See *THE FEDERALIST* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

31. James Wilson, Speech at the Pennsylvania Convention (Dec. 1, 1787), in 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 550-51 (John P. Kaminski & Gaspare J. Saladino eds., 1998).

32. See WOOD, *supra* note 29, at 513-14 ("In state after state, the anti federalists reduced the issue to those social terms predetermined by the Federalists themselves: the Constitution was a plan intended to 'raise the fortunes and respectabil-

the Constitution out of a fear of the Congress; others voted in favor only on the condition that a bill of rights would be added.³³ Anti-Federalists, under the pseudonym Brutus, argued that Congress would be overly powerful and that the Supreme Court would not be able to halt Congress' abuse of its powers, indicating that judicial review was not only within their ken but apparently taken for granted.

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. . . . The people will be told, that their state officers, and state legislatures are a burden and expense without affording any solid advantage, for that all the laws passed by them, might be equally well made by the general legislature.³⁴

In other words, the Anti-Federalists expected judicial review of legislative power, but expected the judiciary to be ineffective. The judiciary thus was expected to police the Congress' boundaries of power. None of the procedural safeguards theorists has rejected review under separation of powers or between church and state. The burden of persuasion thus falls on procedural safeguards theorists to show that judicial review, while appropriate in the separation of powers and church/state spheres, is inappropriate in the federalism arena. The distinction cannot be supported. The federal/state balance is as crucial to liberty as the other two means of separating power. In Justice Kennedy's words:

[O]f the four structural elements in the Constitution [separation of powers, checks and balances, judicial review and federalism], federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.³⁵

In short, keeping the federal and state governments distinct is a means of preserving liberty. While there is no debate that the courts appropriately draw the boundary lines of power between the federal

ity of the *well-born few*, and oppress the plebeians' [resulting in] an aristocratic[] government [that would] establish tyranny over us."); see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 67 (1992) (discussing early colonists' view of constitutional concepts).

33. See generally Wood, *supra* note 29, at 540-47 (discussing Anti-Federalist opposition to Constitution).

34. Brutus, XV, in 16 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 434 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

35. *United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring).

branches and between church and state, Professors Wechsler, Choper and now Kramer, have argued that the federal/state balance should be nonjusticiable.³⁶ Yet, the nature of the constitutional division between federal and state power is no different than the divisions among the federal branches or between church and state. All three arenas demand a neutral body, shielded from political influence, to read the Constitution and to impose its divisions on entities that are tempted to exercise power for self-aggrandizement in unanticipated ways.³⁷ If there is a cardinal failure among the procedural safeguards theorists, it is this failure to explain the difference in the division of power between the federal and state governments and that among the federal branches and between church and state.

The importance of judicial review of federalism was demonstrated by Chief Justice Marshall in *Marbury v. Madison*³⁸ and *McCulloch v. Maryland*.³⁹ Even if one reads these two decisions as highly deferential to the Congress, their very existence dispels the procedural safeguards theorists' claim that the balance of power between the federal and state government was intended to be nonjusticiable.⁴⁰ To the contrary, in *Marbury*, the Court stated the following:

The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide the operation of each. . . . [The Constitution] is superior to any ordinary act of the legislature.⁴¹

Under the procedural safeguards thesis, the Court should not have considered the question presented in the landmark case of *McCulloch*. *McCulloch* addressed whether federal bank legislation chartering the Second Bank of the United States displaced Maryland state legislation taxing

36. For a further discussion, see *supra* notes 10-14 and accompanying text.

37. See *United States v. Morrison*, 529 U.S. 598, 617 (2000) (rejecting extension of Congress' power to regulate "noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *Alden v. Maine*, 527 U.S. 706, 714 (1999) (discussing two ways in which federal system established by Constitution preserves sovereign status of states).

38. 5 U.S. (1 Cranch) 137 (1803).

39. 17 U.S. (4 Wheat.) 316 (1819).

40. For a further discussion, see *infra* notes 42-50 and accompanying text.

41. *Marbury*, 5 U.S. (1 Cranch) at 176-78.

branches within its state boundaries.⁴² The opinion is awash in discussion of the relevant sovereignty of the state and federal governments, saying “that the powers of the [federal] government are limited, and that its limits are not to be transcended” and that the “sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.”⁴³ To determine whether the Congress exceeded its power, the *McCulloch* Court established the test that continues to be in force in today’s federalism decisions: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁴⁴

Neither of these early landmark cases contain any indication that the division of power between state and federal government was intended to be a question beyond the courts’ purview.⁴⁵ To the contrary, rather, they reflect the spirit of Justice Kennedy’s concurrence in *Lopez*: “[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”⁴⁶

The recent Congress’ repeated assaults on state power invite judicial intervention as one of several means (one obvious other being congressional self-regulation) to secure a more appropriate role for Congress in the constitutional matrix.⁴⁷ While the constitutional order is not sacrificed by a single instance of aggrandizement by one branch, and therefore letting one instance of abuse pass unreviewed does not dictate the fall of the regime, persistent abuses of power tilt the scheme in a way that is dangerous to liberty. The “Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”⁴⁸ In this era, Congress is not infringing states’ rights on an annual basis through one item, but rather threatening liberty on a daily basis through one agenda after another. To a large extent, this last point is empirical.

42. See *McCulloch*, 17 U.S. (4 Wheat.) at 317-22 (noting facts and presenting issue).

43. *Id.* at 429.

44. *Id.* at 421.

45. See *id.* at 326 (“The second question is, whether, if the bank be constitutionally created, the states governments have power to tax it?”).

46. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

47. One proposal was the Congressional Responsibility Act of 1999, which would require congressional review of agency decisions before they become law. See H.R. 2301, 106th Cong. (1999) (discussing one method of congressional self-regulation); S. 1348, 106th Cong. (1999) (same).

48. *United States v. New York*, 505 U.S. 144, 181 (1992).

III. THE FAILURE OF POLITICAL SAFEGUARDS AS AN EMPIRICAL MATTER

The crux of the political safeguards theory is empirical. This is a factual question: Are states being overrun by the federal government or being subject to federal law without adequate recourse? Kramer rests his defense of the political safeguards theory on the broad statement that states continue to make a great deal of law; therefore, they must be winning the war against federal takeover, and the constitutional balance has been maintained.⁴⁹

Yet, the fact that the states make law, even a great deal of law, misses the point. There is no question that Congress frequently legislates despite willful ignorance of state interests. It is an incontrovertible fact that Congress has never been more activist than it has been in recent decades, spinning out laws that touch on every conceivable topic from school safety⁵⁰ to violence against women⁵¹ and gun registration.⁵² In addition, Congress has vehemently criticized the Supreme Court when the Court has suggested that Congress does have limits.⁵³

49. See Kramer, *supra* note 10, at 220, 227 ("First, we have the incontrovertible fact that the states have been and continue to be powerful and important components of American governance.").

50. See *Lopez*, 514 U.S. at 559 (finding Gun-Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority).

51. See *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding Violence Against Women Act exceeded Congress' Commerce Clause authority).

52. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding obligation to conduct background checks on prospective gun purchasers imposed unconstitutional obligation on state officers to execute federal law).

53. See generally *State Sovereign Immunity and Protection of Intellectual Prop.: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 1-4 (July 27, 2000) (statement of Rep. Howard Coble) (noting that although "it was universally understood that [intellectual property] laws applied to the states," Supreme Court held Congress could not use its Article I powers to abrogate state sovereign immunity based, in part, on legislative history); *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 1-2 (Feb. 26, 1998) (statement of Rev. Patrick J. Wilson, III, Minister of Community Development, Congress of Black Churches, Inc.) (examining need for reinstatement of legal standards to protect religious freedoms which were invalidated by *Flores* in which certain Religious Freedom Restoration Act of 1993 provisions restricting state and local government infringement on exercise of religion were ruled unconstitutional); *Protecting Religious Freedom After City of Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (July 14, 1997) (examining proposals to respond to invalidation of Religious Freedom Restoration Act of 1993, which provided that no federal, state or local government shall substantially burden one's exercise of religion unless burden is least restrictive means of furthering compelling governmental interest); *Guns in Schools: A Federal Role?: Hearing on S. 890 Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary*, 104th Cong. 1-3 (July 18, 1995) (statement of David A. Strauss, Professor, Univ. of Chi.) (discussing Gun-Free School Zones Act of 1990 and *United States v. Lopez* decision that decided that Act was not consistent with Commerce Clause because activity in question did not have substantial effect on interstate commerce); *State Sovereignty, and the Role of the Federal Government: Hearing Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the S. Comm. on the Judici-*

With each federal law, Congress holds the trump card of preemption,⁵⁴ a larger purse⁵⁵ and ready access to the national media. These tools have been exploited by Congress to the detriment of state autonomy, as Congress has now seen fit to regulate local land use issues, which might have been the last bastion of local authority seemingly secure against federal intervention, as they relate to churches.⁵⁶ As an empirical matter, the relative power relation between the federal government and the states has tipped to the federal side.

According to Kramer, "the unique American system of decentralized national political parties . . . linked the fortunes of federal officeholders to state politicians and parties and in this way assured respect for state sovereignty."⁵⁷ He has made, however, a critical mistake by conflating the interests of state politicians with the interests of the states. While one man may be a politician and a representative, each role places distinct (and often conflicting) demands on him. Because of the Constitution's structure and purpose, the interests of politicians are not the same as the interests of the states. The political parties channel the ambitions of politicians; they do not necessarily seek the common good of the inhabitants of the states.

The argument that states' rights are protected through the political party structure reduces the role of the representative to the day of election, melting down all of the politician's decisions and intentions into a single, particular moment.⁵⁸ The politician is, in effect, those he serves. This is a fascinating mistake because it partakes, even if unintentionally, of the common error of treating legislators as ciphers for those they re-

ary, 104th Cong. 1-4 (July 11, 1995) (statement of Governor E. Benjamin Nelson) ("For too long, Congress and executive branch officials have assumed that they can do to state and local governments whatever they wish . . . , as if the Constitution wasn't relevant. Unfortunately, the Supreme Court has said that it is the job of Congress, not the Court to interpret the commerce clause, regardless of the 10th amendment.").

54. See U.S. CONST. art. VI, cl. 2 (providing that Supremacy Clause makes clear that valid federal regulatory scheme will prevail).

55. For example, California's \$85.6 billion budget in 1999 was dwarfed by federal expenditures of \$1.7 trillion in 1999. Compare California Department of Finance, *California Budget* (providing information of California's 1999 budget), available at <http://www.dof.ca.gov/html/Budgt00-01/Schedules.pdf> (last visited Oct. 4, 2000), with Congressional Budget Office, *Historical Budget Data* (providing total outlays by federal government in 1999 fiscal year), available at <http://www.cbo.gov/showdoc.cfm?index=1821&sequence=0&from=7#t8> (last visited Oct. 4, 2000).

56. See Religious Land Use and Institutionalized Persons Act of 2000, H.R. 4862, 106th Cong. § 2(a)(1) (2000) (enacted) (discussing how bill prohibits forms of religious discrimination); Religious Land Use and Institutionalized Persons Act of 2000, S. 2869, 106th Cong. § 2(a)(1) (2000) (enacted) (discussing concurrent resolutions of both houses of Congress to restrict governmental regulations on land use that impose substantial burden on exercise of religion).

57. Kramer, *supra* note 10, at 276.

58. For a further discussion, see *infra* notes 61-62 and accompanying text.

present,⁵⁹ while turning that characterization from a criticism into a virtue. On this score, Kramer appears to have been influenced by those public choice theorists who assume that a representative acts as the aggregation of constituent preferences.⁶⁰ Although this is not an unusual mistake, it is an oversimplified understanding of the actual part the representative plays in the constitutional scheme.

The Constitution extends the representative's role well beyond Election Day into those days between elections when he is delegated authority to exercise independent judgment as a trustee on behalf of his constituents.⁶¹ He exercises this authority on behalf of them, not *as* them, which is a weighty difference. As an intellectual and as a constitutional matter, the role of the representative is quite different from the role of the politician.

The Constitution institutes a republican form of government to direct representatives' views away from mere preference aggregation, away from the raw will of the people and toward the common good.⁶² State representatives are placed in a position to have their attention trained on the state's interests while federal representatives are intended to take in a national horizon.⁶³ There is an instinct in the legislative institution that drives attention below the larger horizon to the particular, a phenomenon that became quite vivid in the state legislatures where representatives enacted laws for an individual or a town until the state constitutions were amended to prohibit such special legislation.⁶⁴ But that instinct is a defect in the process, not a necessity. When they live up to the high standards demanded of elected representatives by the United States' version of a republican government, their political ambitions should take a second seat to their responsibility to fulfill their constitutional duty to serve the common good, as the following examples suggest.

Justice Breyer has defended the procedural safeguards thesis, declaring that "Congress is institutionally motivated to [defend state inter-

59. See Marci A. Hamilton, *Discussions and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 479 (1994) (arguing that scholarly attempts to reconcile self-rule with representative democracy is misguided).

60. See *id.* at 504 (focusing on Professor Ely's representation-reinforcement scheme).

61. See *id.* at 530 (discussing legislative authority and its delegation from constituents).

62. See Marci A. Hamilton, *The Reformed Constitution: Representation, Calvinism, and Congressional Responsibility* (Oct. 1, 2001) (unpublished manuscript, on file with author).

63. See Kramer, *supra* note 10, at 222 n.27 (noting that state and local interests are secondary to federalism's goal of protecting decision-making authority of local government).

64. ROBERT E. WOODSIDE, *PENNSYLVANIA CONSTITUTIONAL LAW* 295 (1985) (noting how Constitution of 1874 changed local aspect of legislative content).

ests]."⁶⁵ According to Breyer, its members represent state and local district interests, and they consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place.⁶⁶ Neither his nor Kramer's empirical assumptions are borne out by recent legislative practice at the federal level.

There are undeniable connections between state and federal officials, but those connections do not accrue to the benefit of *states'* rights for two reasons. Kramer argues that national politicians are beholden to state political structures and therefore make laws with the interests of the states in mind, but he fails to take into account that many state politicians have national aspirations.⁶⁷ First, state politicians kowtow to the federal politicians because they want to be their colleagues. The most powerful political players in the states, the ones who would be most capable of standing up to federal officials—the Governors—have become the crop from which the United States harvests likely presidential and senatorial candidates.⁶⁸ If a governor aspires to national politics, it is not in his political interest to alienate national politicians or interest groups on behalf of his state, even if there is much at stake for his state. In this era, a state official is not nearly as invested in making a success of his state institutions, which Madison thought would motivate him in Federalist No. 51, as he is in currying favor in the national spotlight.⁶⁹ State officials today may rail against Washington or national politicians, but that railing is calculated to appeal to a broad (translate "national") audience, not to further state interest. As the following examples show, state officials have sacrificed state interest for personal political gain.

Second, the same lobbies that hound the federal government hound the states. State legislators and officials are as fearful of offending national lobbies, as are federal legislators and officials.⁷⁰ There has been a virtual avalanche of what I call "feel-good, look-good" legislation that is irrational for the states to support, but that has been politically impossible for state politicians to criticize. State attorneys general and governors have disappointed the aspirations of the Constitution in this era by letting their political ambitions take precedence over their representative roles.

65. See *United States v. Morrison*, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting) (noting that Congress may represent local interests).

66. See *id.* at 660-61 (Breyer, J., dissenting) (noting framers "structural design" of legislative process to protect states from infringement).

67. See Kramer, *supra* note 10, at 253-54 (noting that with federalism, national politicians are not deemed to worry only about national issues).

68. See *id.* at 267 (noting that getting elected to federal office is impossible without state and local party officials).

69. See generally THE FEDERALIST NO. 51 (James Madison) (discussing checks and balances and necessary means for branches to resist motives of encroachment).

70. See Kramer, *supra* note 10, at 267, 279-86 (noting that modern national politics are managed through network of lobbies).

For example, the Religious Freedom Restoration Act of 1993 (RFRA)⁷¹ imposed strict scrutiny on *every* generally applicable state law that substantially burdened any religious entity or individual, an obvious and expensive burden on the states. If Kramer's theory were correct, RFRA never would have been enacted because the federal politicians dependent on the state politicians would not have imposed this outrageous burden on the states. But, one must separate politics from state interest, the crucial move Kramer fails to take.

If the political safeguards of federalism worked, then the states would have been able to fight this heavy yoke before it descended. In the end, the political parties' agendas prevailed, which is to say that the interest of politicians predominated as the states' interests were kept under wraps. The typical failure of state entities to halt legislation against their interest was compounded in this era because the interest of politicians lies in looking strong and positive on religion. Many jurisdictions forbade their lawyers from challenging RFRA because it would look politically unattractive to be challenging a benefit for religion; others began strong against RFRA by filing suits against RFRA, but then toned down their criticisms in the face of attacks on their devotion to religion, and ultimately failed to take a position when the issue reached a national forum, the Supreme Court.

When RFRA arrived at the Supreme Court, the states should have been the most likely *amici* in support of the petitioners, the City of Boerne, Texas, whom I represented. While some states supported the petitioners and argued against RFRA,⁷² a number of states filed briefs praising RFRA and arguing irrationally that its provisions should be applied to state law.⁷³ It was the Supreme Court that invalidated RFRA,⁷⁴ and not state pressure or any allegiance to the states that prevented it.

When Congress moved to enact the Religious Liberty Protection Act (RLPA) to replace RFRA after it was invalidated, members of Congress

71. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1988) (codified at 42 U.S.C. § 2000bb (2001)).

72. See generally Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, and the Territories of American Samoa, Guam, and the Virgin Islands in Support of Petitioners, *Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (noting position that RFRA is unconstitutional and in violation of legislative process).

73. See Brief of the States of Maryland, Connecticut, Massachusetts, and New York as Amici Curiae in Support of Respondent, *Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (finding act constitutional); Brief Amici Curiae of Members of the Virginia House of Delegates and the Virginia Senate in Support of Respondents, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (stating RFRA presents religious freedom without constraining state legislative process).

74. See *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding Congress exceeded its enforcement powers).

were loathe to appear against it, even if they thought it foolhardy.⁷⁵ Indeed, the common wisdom was that most members of Congress were praying that RLPA would just fade away.

RLPA did not simply fade away; instead, it was sliced. A portion of it recently became law, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),⁷⁶ which would apply strict scrutiny to local land use laws and to state and local institutions, like prisons. Kramer's thesis that federal politicians are so reliant on the states that they defer to their requests or needs was disproved in this instance.⁷⁷ Ten years after RFRA was first introduced, the National League of Cities, the National Conference of State Legislators, and the National Association of Mayors (and especially Mayor Rudolph Giuliani of New York City) publicly opposed RLUIPA, or parts of it, in strong terms.⁷⁸ Entities with strong ties to local government and politicians, especially landmark and historical preservation organizations, also heavily criticized the bill to every member of Congress that would listen.⁷⁹ It made no difference. Nor did the Unfunded Mandates Reform Act, on which Justice Breyer relied in his *Morrison* dissent to defend the procedural safeguards hypothesis, because it does not place any meaningful limitations on congressional action, but rather only on executive action.⁸⁰ When congressional members were told that RLUIPA would, for the first time, bring local land use disputes into the federal courts—a federalism problem if there ever were one—their response was that they simply could not vote against the bill, regardless of the states' needs or interests.⁸¹ The bill was passed by unanimous consent in both houses within half an hour of each other, to the shock of municipalities, cities and states coast-to-coast.⁸² It took the Supreme Court to

75. See Kristian D. Whilten, *A Second Try at Religious Freedom Act: Congress' Most Recent Attempt to Shield Religious Groups with the Commerce Clause Is Still Flawed*, TEX. LAW., Aug. 2, 1999, at 26 (discussing senators' concerns over pending bill).

76. Pub. L. No. 106-274, § 2(a)(1), 114 Stat. 803, 803 (to be codified at 42 U.S.C. § 2000(c)).

77. See Kramer, *supra* note 10, at 280 (arguing that without state and local party support it is impossible to get elected).

78. See Juan Otero, *Congress Moves to Federalize Local Land Use Control; Measure Passes Under Guise of "Religious Liberty"*, NATION'S CITIES WKLY., Aug. 7, 2000, at 1, 8 (noting connection between land use and protection of religious liberties); David W. Dunlap, *God, Caesar and Zoning*, N.Y. TIMES, Aug. 27, 2000, § 11, at 1 (same); Editorial, *Religion and Its Landmarks*, N.Y. TIMES, July 27, 2000, at A24 (noting that Congress intended to prevent zoning board interference with practice of religion).

79. See Dunlap, *supra* note 78 (discussing alarm among preservationists).

80. Unfunded Mandate Reform Act of 1995, Pub. L. No. 104-4, § 2(1), 109 Stat. 48, 48 (1995) (revealing unfettered regression of congressional power to legislate at expense of states).

81. See Editorial, *Undermining Local Government*, N.Y. TIMES, Oct. 22, 1997, at A26 (noting how Republicans are still dealing with their failure to enact more sweeping legislation in last Congress).

82. See Dunlap, *supra* note 78 (noting how act passed House in sixteen minutes).

invalidate RFRA on federalism grounds, and it will take the Court to strike RLUIPA's usurpation of state and local power as well.

The same story can be told about the Americans with Disabilities Act of 1990 (ADA).⁸³ At least as interpreted by the Department of Justice, the ADA is an unreasonable mandatory accommodation statute that places extreme burdens on state and local government.⁸⁴ The states have borne its expensive and intrusive burdens, especially the Departments of Corrections, with a great deal of unhappiness. Yet, they have had great difficulty finding means of removing its yoke because of the political ambitions of state officials. In the course of recent constitutional challenges to the ADA before the Supreme Court, twenty-two states originally agreed to sign an amicus brief in opposition to the ADA. Once the disabilities lobby was through, that number was down to seven.⁸⁵ The first two cases the Court took to address the ADA's constitutionality following the Court's recent spate of federalism decisions worried the American Civil Liberties Union so much that they settled them, and the states' amicus brief became irrelevant. The Court then took another ADA challenge, *University of Alabama at Birmingham Board of Trustees v. Garrett*.⁸⁶ By the time the briefs were filed in *Garrett*, seven states still opposed the law on federalism grounds, but fourteen now sang its praises.⁸⁷ The threat of making the politicians in those states appear as though they were opposed to the disabled was sufficient to move those politicians from a position of principle on behalf of their states to a period of silence.

These examples are typical. Environmental laws regularly follow the same pattern.⁸⁸ It is common knowledge on Capitol Hill that federalism or states' rights are nonstarters as objections to legislation. Members spout federalism rhetoric to block legislation they oppose for other reasons, but it is never a dispositive consideration.

As a matter of politics, these stories make perfect sense. These stories also prove that political parties and structure have not held the line on federal overreaching into the states' business. No less than the politicians they foster, the political parties are captives of powerful national interests.

83. 42 U.S.C. §§ 12101-12213 (1994).

84. See Linda Greenhouse, *In Year of Florida Vote, Supreme Court Did Much Other Work*, WASH. POST, July 2, 2001, at A12 (noting that Congress cannot place burdens on states that exceed Constitution).

85. See Brief for Amici States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee in Support of Petitioners, *Univ. of Alabama Bd. of Trs. v. Garrett*, 120 S. Ct. 1669 (2000) (No. 99-1240) (insisting Congress violated balance of power between states and national government).

86. See 120 S. Ct. 1669, 1672 (2000) (holding state not immune from suit under ADA, which was enacted as valid exercise of congressional power).

87. See Phillip O'Connor, *People with Disabilities March Here, Target High Court Case in Alabama; Challenging '90 Law; Marchers Want to Affirm Americans with Disabilities Act*, ST. LOUIS POST DISPATCH, Oct. 4, 2000, at B1 (arguing states must be prevented from being free not to comply with ADA).

88. See ROSS SANDLER AND DAVID SCHOENBROD, *DEMOCRACY BY DECREE* (forthcoming 2002).

Their attention is trained on re-election, polls, money and little else. That is not necessarily a criticism of them, but it should make clear that they are not operating as the Constitution intended the people's representatives to operate, and that is with the common good as the highest priority.

The Congress has taken a mile from the inch they seized during the New Deal, and it needs to be brought back to constitutional proportion. The Court, seeing a congressional aggrandizement of power that is fundamentally at odds with the constitutional design, has stepped in to set the balance right by instituting effective mechanisms of limitation at a time when other safeguards for federalism are elusive. *It is the hero, not the cabal, of this era.*

IV. A RETURN TO THE FRAMERS' FRAME OF REFERENCE

The greatest objection to the Court's recent federalism cases appears to be a visceral response to the notion that Congress ought to be distrusted, but that is in fact their greatest virtue. Justice Sandra Day O'Connor's dissent in *Garcia* is one of the most forceful defenses of judicial review of federalism, and an invaluable introduction to the Court's now-developing federalism jurisprudence. She wrote:

[F]ederalism cannot be reduced to the weak 'essence' distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution." The central issue of federalism, of course, is whether any realm *is* left open to the states by the Constitution—whether any areas remain in which a State may act free of federal interference. . . . Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. . . . It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups, become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of the States as states. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic. . . . With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.⁸⁹

This last note, an unmistakable return to the Framers' distrust of government entities, including Congress, is the key to understanding the Court's

89. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580-88 (1985) (O'Connor, J., dissenting).

emerging federalism doctrines. Distrust has led the Court, quite reasonably, to call on Congress to act responsibly and to place reasonable limits on the reach of Congress' power when it exercises its power under section 5 of the Fourteenth Amendment to regulate the states directly.⁹⁰

A. *The Call to Congressional Responsibility*

With its recent federalism cases, the Court has called for congressional responsibility, issuing a reminder to Congress to pay attention to the constitutional base of its actions.⁹¹ The post-New Deal Congress was treated by the Supreme Court as though it had plenary power to enact any law. Lax standards yield lax practices, and the Congress came to consider itself as capable of legislating in any field without regard to which enumerated power might support its legislation. The procedural safeguards thesis gave them constitutional theory cover for almost fifty years. In that context, the Supreme Court's decision in *United States v. Lopez*, invalidating the Gun-Free School Zones Act, came as a shock.⁹² In the context of the larger picture of the Framers' project of placing meaningful limits on every government power, including Congress, *Lopez* was belated.

Although it has been little noticed, the Court, with its federalism decisions, has been explicit in explaining to Congress that it ought to engage in self-policing under the Constitution.⁹³ The Court is not claiming undeserved turf, but rather pointing to the constitutional requirements Congress can and should impose on itself.⁹⁴ In *Lopez*, for example, the Court stated that in determining Congress' power under the Commerce Clause it would "consider legislative findings, and indeed even congressional committee findings [and that] Congress normally is not required to make formal findings [justifying the enumerated power on which it relies]."⁹⁵ In other words, the Court held out an invitation to Congress to explain the constitutional basis of its actions. In that case, the Court was unwilling to uphold a law the constitutional basis of which was not "visible to the naked eye."⁹⁶ The message to Congress? It had slid past the most important threshold question: On what enumerated power does the exercise of power rest?

90. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding Congress' discretion to be limited).

91. See *id.* at 517-18 (discussing Congress' constitutional powers when adopting legislation).

92. See generally *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress' commerce power does not extend to regulation of guns in school).

93. See *Flores*, 521 U.S. at 531 (noting Court's threat to no longer give Congress deference).

94. See *id.* at 536 (noting necessity for Congress, to maintain federal balance under Fourteenth Amendment).

95. See *Lopez*, 514 U.S. at 562 (noting in this case lack of congressional findings and potential use if findings existed).

96. See *id.* at 563 (noting government's concession that there are no findings to support this outcome).

Two years later, in *Flores*, the Court reminded the Congress that it has a "duty" to examine the constitutional bases of its actions.⁹⁷ Then it implicitly warned Congress that if it did not start examining which constitutional power undergirded its enactment, the Court would cease deferring to Congress on the constitutionality of its actions.⁹⁸ The Court's language is well worth quoting on this score:

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.⁹⁹

That well-deserved warning fell on deaf ears as the House Committee on the Judiciary called hearings on the *Flores* decision a month after it was decided for the purpose of lambasting the Court for setting limits on Congress' power.¹⁰⁰ Failing to appreciate the irony of such a hearing, the members of Congress forged ahead to reinstate a slightly revised RFRA, even though they had been told it was unconstitutional in *Flores* on numer-

97. See *Flores*, 521 U.S. at 535 (noting Court's threat to no longer give Congress deference when it exceeds its powers).

98. See *id.* at 535-36 (noting respect each branch of government is to give Constitution).

99. *Id.* at 535 (citing 1 ANNALS OF CONG. 500 (Joseph Gales ed., 1789)).

100. See *Protecting Religious Freedom After City of Boerne v. Flores: Hearing Before the House Comm. on the Judiciary Subcomm. on the Constitution*, 105th Cong. (July 14, 1997) (statement of Reverend Oliver S. Thomas, Special Counsel, National Council of the Churches of Christ in the U.S.A.) (criticizing Supreme Court holding but warning Congress not to take radical action towards constitutional amendment).

ous grounds.¹⁰¹ Quite reasonably, Justice Scalia recently called for an end to the presumption of constitutionality.¹⁰²

Last Term, in *United States v. Morrison*, the Court further underscored this principle, rejecting copious fact findings in Congress on the tangential effects on interstate commerce of violent rapes to explain that the subject regulated must itself affect interstate commerce; it must be economic in nature.¹⁰³ The Court explained, as it had explained in *Lopez*, that the activity itself being regulated was not economic by nature.¹⁰⁴ In other words, Congress' fact-findings should have focused on the constitutional question of its power, and not solely on the policy concerns that would speak to any legislature, state or federal. The Court refused to genuflect in the face of fact-findings *per se*.¹⁰⁵ In effect, the Court refused to be diverted from its singular role—the determination of congressional power to legislate—by a voluminous record addressed to policy. The *Morrison* decision echoed Justice Marshall's concern in *McCulloch* that Congress should not be permitted to exercise federal authority as a pretext for expanding its powers under the Constitution.¹⁰⁶ This is the very sort of thoroughgoing distrust of federal power the Framers would have applauded and is the primary jurisprudential ingredient discarded by the New Deal Commerce Clause jurisprudence.¹⁰⁷ It is hardheaded, pragmatic and necessary to check a willful Congress.

101. See generally *Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 72-101 (Sept. 9, 1999) (statement of Douglas Laycock, Professor, Univ. of Tex. Law School) (noting Congress has power to protect religious beliefs); *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the House Comm. on the Judiciary*, 106th Cong. (May 12, 1999) (noting testimony for support of Act); *Religious Liberty Protection Act of 1999, Hearing on H.R. 1691 Before the S. Comm. on the Judiciary*, 106th Cong. (May 12, 1999) (noting conflicting views on constitutionality of Act under Establishment Clause); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. (June 23, 1998) (same); *Hearing on H.R. 4019, Religious Liberty Protection Act of 1998: Before the House Comm. on the Judiciary*, 105th Cong. (June 16, 1998) (discussing Congress' use of its commerce power to pass Act).

102. See Editorial, *A Shot From Justice Scalia*, WASH. POST, May 2, 2000, at A22 (criticizing Congress' practice of designing special procedures for laws it knows will be challenged).

103. *United States v. Morrison*, 529 U.S. 598, 610-11 (2000) (noting that activity that substantially affects interstate commerce will be viewed as economic in nature).

104. See *id.* (explaining that regulation of areas of traditional state concern would blur boundaries of federalism if no economic nexus existed).

105. See *id.* at 611 (noting that factual findings are weakened if they do not maintain separation of powers).

106. See *id.* (noting potential for Congress to obliterate federalism through use of Commerce Clause).

107. See, e.g., *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 255 (1964) (extending Commerce Clause to totally intrastate activity because of its aggregate effect on interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (discussing Commerce Clause powers); *Darby v. United States*, 312 U.S. 100, 118 (1941) (same); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31

B. *The Introduction of Proportionality When Congress Directly Regulates the States Pursuant to Section 5 of the Fourteenth Amendment*

In the recent cases interpreting section 5 of the Fourteenth Amendment, the Court has reiterated a sound rule from the law of remedies: the remedies for constitutional violations authorized by section 5 must be congruent and proportional to the harm they are intended to redress.¹⁰⁸ This is a principle that has run through the section 5 cases beginning with the first, the *Civil Rights Cases*.¹⁰⁹ The reasoning is the following: Congress was granted power under section 5 of the Fourteenth Amendment in response to the recalcitrance of the states and the courts to follow the Constitution's requirements.¹¹⁰ It is a power that interjects the federal government into a role it does not usually hold, and only holds in this instance because the pre-existing set of power relationships failed. This was the very sort of piecemeal innovation the Framers anticipated. Even though section 5 empowered Congress over and against the states in particular circumstances, it was not intended to wholly eviscerate federalism as it neither explicitly disavowed states' rights nor repealed the Tenth Amendment.

The Court's section 5 jurisprudence requires two inquiries that are intended to smoke out congressional self-aggrandizement: (1) a threshold inquiry into the existence of state wrongdoing¹¹¹ and (2) an analysis of how well the remedy meets the wrongdoing.¹¹²

In 1966, with *Katzenbach v. Morgan*,¹¹³ the Court moved away from this means of keeping Congress to the limits of its section 5 powers, as the Court implied that federal legislation need not remedy any existing state

(1937) (holding acts that burden interstate commerce are within reach of congressional power).

108. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 68 (2000) (holding that there must be congruency and proportionality between injury prevented and means to that end); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (same); *City of Boerne v. Flores*, 521 U.S. 507, 516-17 (1997) (explaining Congress' powers); see also Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 472 (1999) (discussing Court's proportionality test).

109. See 109 U.S. 3, 13 (1883) (finding legislation should be adapted to wrong that Fourteenth Amendment was intended to provide against).

110. See *id.* (noting that Congress has power to pass legislation to remedy in response to "some obnoxious state law passed," which constitutionally violates rights under Fourteenth Amendment).

111. See *Fla. Prepaid*, 527 U.S. at 640 (noting court must first identify Fourteenth Amendment evil or wrong that Congress intended to remedy); *Flores*, 521 U.S. at 531 (holding Fourteenth Amendment evil determines remedial measure).

112. See *Kimel*, 528 U.S. at 645 (applying proportionality and congruence test and determining that it is not appropriate legislation under Fourteenth Amendment); *Flores*, 521 U.S. at 532 (arguing RFRA is so out of proportion that it changes constitutional protections).

113. 384 U.S. 641 (1966).

violations, but rather could create new, substantive rights.¹¹⁴ A deeply fractured Court in *Oregon v. Mitchell*,¹¹⁵ a decision that requires a scorecard to determine the holding, cast into doubt this expansive view of congressional power,¹¹⁶ but clarification was needed. The Court's decision in *Flores* did just that, making clear that Congress misses the mark when it attempts to create new, substantive rights.¹¹⁷ The *Morgan* Court's decision impliedly approved the very sort of boundary-crossing move made by the post-New Deal Congress with respect to its commerce power: a masterful assumption of the power to engage in constitutional self-definition. *Flores* brought the Court back within constitutional boundaries:

The Court's recent section 5 cases, which have employed the proportionality doctrine,¹¹⁸ recall Congress to the fact of limits on its power, even when lawmaking power is affirmatively granted. The federalism cases, and especially the section 5 jurisprudence, set the case law on constitutional bedrock by instituting a healthy distrust of the congressional exercise of power. As long as it is the exercise of power that is distrusted by the Court—and not the policy judgments reached—this tool holds the most promise for reinforcing the Constitution's structural strengths.

V. CONCLUSION

The procedural safeguard theorists, including the most recent attempt by Professor Larry Kramer, have failed to carry the burden of proving the Constitution would deprive the courts of the power to check congressional overreaching. Could the Court transform its current federalism jurisprudence into a means of its own self-aggrandizement, as the procedural safeguard theorists fear? The Framers rightly would have assumed as much. When that time comes, it will be time to unearth the means of bringing the Court back into line. For the time being, however, it is the Court that is most true to the Constitution's ambitions.

114. See *Flores*, 521 U.S. at 536 (discussing Congress' vote to protect existing guarantees of Fourteenth Amendment).

115. 400 U.S. 112 (1970).

116. See *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (noting that both Congress and courts are limited by Constitution from setting policy).

117. See *Flores*, 521 U.S. at 519-20 (noting Congress has power to enforce section 5 but not to decree its substance).

118. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 68 (2000) (noting requirement of congruence of injury prevented and means to that end); *Fla. Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (same); *Flores*, 521 U.S. at 519-20 (noting Congress has power to enforce section 5 but not to decree its substance).