An Unwelcome Stranger: Congressional Individual Rights Power and Federalism

Richard E. Levy

The United States Supreme Court’s two recent decisions concerning the availability of federal remedies against private organizations that obstruct access to abortion clinics present a striking paradox. In *Bray v. Alexandria Women’s Health Clinic*, the Court held that 42 U.S.C. § 1985(3), which provides a civil remedy for conspiracies to deprive individuals of their constitutional rights because of their membership in a protected class, did not reach abortion blockades. Conversely, the Court held in *NOW v. Scheidler* that the Racketeer Influenced and Corrupt Organizations Act (RICO) applied to abortion blockades, notwithstanding the lack of an economic motive for an organization’s alleged pattern of illegal activity. The paradox is this: an individual rights statute does not apply to what is clearly an individual rights issue, while a statute whose purpose is to address illegal economic activity does. To be sure, the decisions rest on the Court’s interpretation of specific statutes, each with a language and history of its own. But

---

* Professor of Law, University of Kansas. I would like to thank Chris Drahozal, Stefan Hammer, Steve McAllister, Peter Schanck, and Sidney Shapiro for helpful comments on an earlier draft, and Elizabeth Cateforis, Class of 1994, for valuable research assistance. This work was funded in part by a grant from the University of Kansas General Research Fund.

1. 113 S. Ct. 753 (1993).
2. 42 U.S.C. § 1985(3) (1988). This provision was originally adopted as the Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871), also known as the Ku Klux Klan Act.
3. 113 S. Ct. at 759.
7. A similar paradox is reflected in *Katzenbach v. McClung*, 379 U.S. 294, 299-304 (1964), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249-58 (1964), where the Court sought to avoid the difficult question whether the 1964 Civil Rights Act could be enacted pursuant to Congress’s power under § 5 of the Fourteenth Amendment by resorting to an expansive and (particularly in *McClung*) questionable application of the commerce power. See *infra* notes 129-31 and accompanying text.
8. The relevant provision in *Bray*, 42 U.S.C. § 1985(3), provides a cause of action to redress any injury caused by a conspiracy “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.” The provision in *NOW*, 18 U.S.C. § 1962(c), makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” Racketeering activity is defined elsewhere in the statute. See *infra* note 39 and
interpretation is not an exact science, and the Justices' reading of a statute inevitably reflects their underlying views about the legal environment in which it was enacted.\(^9\)

Thus, the paradox of the Bray and NOW decisions illuminates the Court's understanding of the nature and scope of federal power to protect individual rights.\(^10\) The narrow view of federal power that prevailed regarding most areas of federal substantive authority until the 1930s was abandoned in the wake of the New Deal, and modern constitutional jurisprudence places virtually no federalism-based limits on most forms of federal authority.\(^11\) The individual rights power,

---

9. Thus, many critics of the Bray decision have suggested that the outcome was driven by the majority's opposition to abortion. See, e.g., Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 236 ("Only strong hostility to the right to abortion could blind the Court to the difference between everyday tort victims and women seeking to exercise their fundamental right to choose abortion."); see also Lisa J. Banks, Comment, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449, 451 (1993) (arguing that Bray is inconsistent with the legislative intent, history, and plain meaning of § 1985(3)); Dianne O. Fischer, Comment, Bray v. Alexandria Women's Health Clinic: *Women Under Siege*, 47 U. MIAMI L. REV. 1415, 1447 (1993) (arguing that Bray represents a significant setback for women's rights); Sherri S. Haring, Note, Bray v. Alexandria Women's Health Clinic: "Rational Objects of Disfavor" as a New Weapon in Modern Civil Rights Litigation, 72 N.C. L. REV. 764, 766 (1994) (criticizing Bray because it permits subjective prejudices to be masked behind a purportedly rational explanation); Marjorie Richter, Comment, *Blinking at Reality: An Examination of Bray v. Alexandria*, 20 HASTINGS CONST. L.Q. 905, 908 (1993) (arguing that the results and reasoning of Bray were flawed and that the decision's repercussions for abortion and other individual rights go beyond the specifics of the holding). The result in Bray cannot be attributed solely to anti-abortion sentiments on the Court, however, in light of the Court's refusal to adopt a narrowing construction in NOW that would have prevented applying RICO to antiabortion activity.

10. In particular, the result in Bray was the product of two narrowing constructions placed on the otherwise broad language of § 1985(3). In contrast, the NOW Court refused to impose analogous restrictions on RICO. The difference in the Court's receptiveness to narrowing constructions not apparent from the text of the statute reflects differing assumptions about Congress's power in the individual rights and interstate commerce fields. See infra note 72 and accompanying text.

11. See Laurence H. Tribe, *American Constitutional Law* § 5-1, at 297 (2d ed. 1988). This is not to say that federalism plays no role in modern constitutional jurisprudence. For example, federalism concerns are sometimes invoked to justify a presumption against federal preemption of state law, although this presumption is not employed consistently. See Richard E. Levy & Robert L. Glickman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 396-404 (1989). Of course, the conventional wisdom that the federal commerce power is essentially unlimited has been drawn into question by the Supreme Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), which invalidated the Gun Free School Zones Act as beyond the scope of congressional authority under the commerce power. Id. at 1634. The implications of Lopez, decided while this essay was in the editorial process, are discussed in the Author's Postscript, infra notes 186-202 and accompanying text.
however, is subject to narrowing constructions that suggest the Court views it as somehow different from other areas of federal authority. In short, the Court tends to construe the federal individual rights power narrowly based on the unspoken assumption that the power is somehow incompatible with the basic premises of federalism: it was a necessary encroachment on state power in the wake of the Civil War, but ought not to be exercised unless absolutely essential and then only to the narrowest possible extent. This suggestion may seem strange, given the phenomenal expansion of federal constitutional rights that peaked under the Warren Court, but the assumption that individual rights are an inappropriate area for the exercise of federal power does influence the Court's jurisprudence in significant, albeit subtle, ways. And although the assumption colors the Court's analysis in various areas, it has seldom been expressly articulated, much less subjected to critical examination. This failure is unfortunate because the assumption is, quite simply, wrong.

The Bray/NOW paradox presents an excellent occasion to examine the nature of congressional individual rights power more closely in order to understand its role in a federal system. I undertake such an examination in this essay, which argues that the exercise of federal authority in the field of individual rights is no less legitimate than in other areas of federal power, including interstate commerce. In Part I of the essay, I engage in a detailed analysis of Bray and NOW, demonstrating that a comparatively narrow view of federal individual rights authority colors the Court's resolution of the federalism issues presented in those cases. I then discuss the influence of the assumption in some other doctrinal areas. Part II of the essay considers whether the assumption that federal individual rights authority is inconsistent with basic principles of federalism is justified as a matter of constitutional principle. It concludes (1) that the assumption is not warranted by the language or history of the Reconstruction Amendments; (2) that federal individual rights power is not fundamentally incompatible with the conception of federalism embodied in the original Constitution so as to justify reading the Reconstruction Amendments narrowly; and (3) that functional considerations relating to the successful operation of a federal system justify federal individual rights authority.

12. See infra notes 15-111 and accompanying text.

13. Although the Court expressly relied on federalism concerns to justify its narrow reading of the Reconstruction Amendments in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), and to a lesser degree in The Civil Rights Cases, 109 U.S. 3 (1883), this discussion reflected a conception of federalism that has since been abandoned in other contexts. See infra notes 113-14 and accompanying text.
I. Bray and NOW Compared

An analysis of the Bray and NOW opinions confirms that divergent assumptions about the implications of federalism colored the Court’s interpretations of the statutes at issue. Most obviously, while the Court expressly invoked federalism concerns in several portions of its Bray opinion to justify a narrow construction of section 1985(3), the NOW opinion never mentions federalism in the course of rejecting a narrowing construction of RICO. This difference is particularly telling in light of the parallel federalism issues raised by the statutory questions in each case. First, the Bray Court’s application of a “class-based animus” requirement under section 1985(3) reflects a concern for the federalization of state law that might also justify an “economic motive” requirement under RICO, which was rejected in NOW.14 Second, the application of a state action requirement under section 1985(3) in Bray reflects a limitation on congressional authority for which there is no counterpart in NOW’s construction of congressional ability to reach intrastate activity affecting interstate commerce under RICO.

A. The Federalization of Traditional Areas of State Law

Consider first the “class-based animus” requirement in Bray. The requirement originated in Griffin v. Breckenridge,15 which expanded the scope of section 1985(3) by extending it to private conspiracies.16 Although the Griffin Court held that Congress could reach private conspiracies, it expressed concern over “[t]he constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law.”17 These concerns justified the conclusion that “[t]he language [of section 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”18

Although the Griffin Court suggested that the statutory references to “equal” protection and “equal” privileges and immunities supported its narrowing construction, the “class-based animus” requirement actually runs counter to the statutory language, which applies to any conspiracy

---

15. 403 U.S. 88, 102 (1971).
16. The Court overturned Collins v. Hardyman, 341 U.S. 651 (1951), on the grounds that the federalism-based constitutional concerns identified by the Collins Court had been obviated by subsequent decisions, and the statutory language and legislative history of the provision clearly revealed a congressional intent to reach private conspiracies. Griffin, 403 U.S. at 95-102.
17. Griffin, 403 U.S. at 102.
18. Id.
between two or more persons to deprive "any person or class of persons" of equal protection or equal privileges and immunities. 19 "Any person" is not limited to "class members" and stands in contrast to Congress's explicit use of the term "class of persons," suggesting a negative inference. 20 The use of the term "equal" does not necessarily imply that violations of the statute are limited to unequal treatment based on class-based animus. Indeed, the very legislative history invoked to support the class-based animus requirement in Griffin focuses on the denial of equal rights to individuals, and makes no mention of class-based animus. 21 Thus, the specter of federalism was used to engraft a limiting construction on the statute that was inconsistent with its language and legislative history.

Bray used similar reasoning to hold that "women seeking an abortion" was not a class within the meaning of the Griffin requirement of class-based animus. 22 The Court concluded that the class contemplated by Griffin "cannot be defined simply as the group of victims of the tortious action," because this "definitional ploy" would enable "innumerable tort plaintiffs . . . to assert causes of action under [section] 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with," thus "converting the statute into the 'general federal tort law' it was the very purpose of the animus requirement to avoid." 24

This analysis is flawed for several reasons. In the first place, it rests on a logical non sequitur. Even if defining a "class" as the victims of

---

20. The logical way of wording the statute to read as the Court has interpreted it would be to prohibit conspiracies to deprive "any class or member of a class of persons" of equal protection or equal privileges and immunities.
21. For example, the Court relied on the statement of Representative Shellabarger (who introduced the amendment that contained the language in question) that

"[t]he object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section."

Griffin, 430 U.S. at 100 (quoting Cong. Globe, 42d Cong., 1st Sess. 478 (1871)). Note the absence of any suggestion that the motive for denying equal rights must be the person's membership in a class.
22. Bray, 113 S. Ct. at 759. The Court also held that the alleged conspiracy was not directed at women as a class, because, although it may have been directed at preventing women from having abortions, it was not directed at women because of their sex. Id. For criticism of this analysis, see Beermann, supra note 9, at 234-35.
24. Id. (quoting Griffin, 403 U.S. at 100).
a conspiracy would render the class-based animus requirement meaningless, accepting "women seeking an abortion" as a class does not require such a circular definition. Seeking an abortion is not just any activity; it is a constitutional right protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 25 By requiring the conspiracy to be directed toward depriving persons of constitutional rights, the Court could easily recognize this class as within the scope of section 1985(3) without being compelled to allow victims of all alleged tort conspiracies to bring federal actions. Such a definition would fall squarely within, and give effect to, the language of the statute, which prohibits a conspiracy to deprive "any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." 26 The alleged conspiracy in Bray was intended to deprive the class of pregnant women seeking abortions of their equal protection in the exercise of their constitutional right (i.e., their privilege and immunity under the Constitution) to choose between abortion and childbirth.

Consider, for example, whether a conspiracy to prevent members of a certain religion from entering their place of worship would be within the scope of section 1985(3). 27 This would seem to be the sort of class-based animus that might fall within section 1985(3), assuming the class-based animus requirement extends beyond race at all. Yet such a conspiracy is really a conspiracy based upon how the victims exercise a constitutionally protected choice. Indeed, the Court does not always distinguish sharply between the denial of equal protection and the denial of substantive rights. 28 In Pierce v. Society of Sisters 29 and Meyer v. Nebraska, 30 for example, the Court invalidated laws that interfered with the fundamental right to control the education of one's children. 31 These substantive rights decisions were later characterized in United States v. Carolene Products 32 as involving discrimination on the basis of religion and national origin, only to resurface as fundamental rights

25. For a similar argument, see Beermann, supra note 9, at 235-36.
27. The analogy between blocking access to abortion clinics and places of worship is not so far-fetched, because there is a significant element of religious discrimination involved in the abortion controversy. Those who attempt to block access to abortion clinics typically do so on religious grounds, and reject the religious view of those who believe that abortion is not a sin.
28. See infra note 34 and accompanying text (discussing the fundamental rights strand of equal protection analysis).
29. 268 U.S. 510 (1925).
30. 262 U.S. 390 (1923).
decisions in more recent cases.\textsuperscript{33} We may be more accustomed to thinking of members of a religion (as opposed to abortion-seekers) as a class, because members of a religion typically associate with each other and there are often racial or ethnic, or at least cultural, aspects to religious groups, but the boundaries between “class-based animus” and animus against particular constitutionally protected choices are not as distinct as the Court implies.

This point suggests another flaw in requiring a class-based animus. By the time of the Griffin decision in 1971, it was clear that equal protection doctrine required heightened scrutiny not only of suspect classifications, but also of measures differentially affecting “fundamental rights.”\textsuperscript{34} Thus, a denial of equal protection does not require class-based discrimination. In light of this understanding of equal protection, the language of the statute would encompass conspiracies to obstruct some people’s exercise of their constitutional rights. Of course, if the statute were construed strictly in accordance with legislative intent, subsequent constitutional developments would be irrelevant to interpreting the term “equal protection” as used in the statute (unless it were shown that the legislature intended to incorporate them). But the class-based animus requirement of Griffin and Bray is not based upon such a strict historical reading of the statute.\textsuperscript{35} Moreover, section 1985(3) provides a remedy not only for conspiracies to deny equal protection, but also for conspiracies to deny “equal privileges and immunities,”\textsuperscript{36} which is fully consistent with protection against conspiracies intended to prevent some women’s exercise of their constitutionally protected right to choose between abortion and childbirth.\textsuperscript{37}

More fundamentally for purposes of this essay, the Court’s treatment of the statutory language, legislative history, and federalism concerns regarding section 1985(3) in Bray stands in sharp contrast to its treatment of analogous issues under RICO in NOW. The relevant provision of RICO, section 1962(c), provides a civil remedy against any

\textsuperscript{35} See supra notes 20-21 and accompanying text.
\textsuperscript{36} 42 U.S.C. § 1985(3).
\textsuperscript{37} Of course, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), rendered the Privileges and Immunities Clause of the Fourteenth Amendment meaningless by limiting it to the rights of federal citizenship and then construing those rights narrowly. Id. at 72-75. This construction is part of the broader federalism-based limitation of the Reconstruction Amendments that dominated the Court’s jurisprudence in the 19th Century. See infra notes 98-108 and accompanying text. Ignoring the “equal privileges and immunities” language of § 1985(3) only compounds the error.
enterprise engaged in a pattern of racketeering activity,\(^{38}\) which in turn is defined by reference to violation of various criminal statutes, including a host of crimes traditionally punished under state law.\(^{39}\) Thus, a broad reading of RICO might run the risk of "federalizing" an area traditionally reserved to states—criminal law.\(^{40}\) It is true that states would continue to set the standards of conduct, but this would also be the case under a broad reading of section 1985(3) because the sort of general tort conspiracy feared by the Court would presumably deny equal protection of state tort rules.\(^{41}\) In any event, the addition of federal treble damages remedies to state criminal statutes supplants state determinations as to the appropriate consequences of illegal action, and displaces state jurisdiction by encouraging federal civil suits.\(^{42}\)

As noted above, however, the Court in NOW was completely unconcerned about the federalism implications of a broad construction of RICO. Instead, it treated the language of the statute as sufficiently clear to preclude the incorporation of an "economic motive" requirement, even though, in ordinary parlance, the term "enterprise" often connotes an economic or business entity,\(^{43}\) and it is used in that sense elsewhere in the same statutory provision.\(^{44}\) Likewise, the Court dismissed legislative findings revealing that Congress was primarily concerned with addressing "organized crime" of an economic (rather

---

40. Indeed, the Court in Lopez invoked precisely such a concern to support its conclusion that the impact of violent crime on economic activity was not a "substantial effect" on interstate commerce sufficient to support the exercise of the commerce power to make it a federal crime to possess guns in a school zone. 115 S. Ct. 1624, 1632-34 (1995).
41. To the extent that other "laws," such as federal constitutional safeguards, would be at issue, the concern expressed in Griffin and Bray would be inapplicable. See supra notes 22-26 and accompanying text.
42. This was, of course, precisely what happened in NOW.
43. The American Heritage College Dictionary 456 (2d ed. 1982) (chosen because it happens to be the one I have in my office) defines enterprise as
   1. An undertaking, esp. one of some scope, complication, and risk. 2. A business organization. 3. Industrious and systematic activity. 4. Readiness to venture; initiative.
Given the second definition, it is simply impossible to say that the statutory language in section 1962(c) somehow clearly precludes an economic motivation requirement.
44. See 18 U.S.C. § 1962(a) & (b) (1988). While acknowledging that it "should not lightly infer that Congress intended [a] term to have wholly different meanings in neighboring subsections," 114 S. Ct. at 804 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985)), the Court concluded that a different construction was appropriate because "[t]he term 'enterprise' in subsections (a) and (b) plays a different role in the structure of those subsections than it does in subsection (c)." Id. Specifically, while the enterprise at issue in subsections (a) and (b) was the target of racketeering activity, the enterprise in subsection (c)—at issue in NOW—was the body engaged in racketeering activity. Id. It is unclear why this different role would suggest that Congress intended a different meaning for the same term.
than political) variety as insufficient to overcome this "clear" language, because "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." 45

This argument, however, applies equally well to section 1985(3). The terms "equal protection" and "equal privileges and immunities" are no more conducive to an implied class-based animus requirement than "enterprise" is to an implied economic motive requirement. But while the NOW Court refused to limit the "clear" and consciously chosen language of RICO in light of Congress's primary concern with organized crime, Griffin found legislative history indicating that Congress was primarily concerned with protecting the rights of newly freed slaves from racial animus to be a persuasive justification for limiting the statute, 46 even though the consciously chosen language of the statute appeared to have a much broader sweep, and Bray compounded the Griffin analysis by construing that limiting requirement narrowly.

Thus, divergent assumptions about the appropriateness of federal activity in the individual rights and interstate commerce fields produced strikingly different treatment of the language and history of the two statutes. While NOW rejected a narrowing construction that might be supported by the language and history of RICO, Bray imposed one that was inconsistent with both the language and history of section 1985(3). It is an extraordinary thing to conclude that a statute that expressly creates remedies for conspiracies to deprive "any person" of "the equal protection of the laws, or of equal privileges and immunities under the laws" does not reach a conspiracy that was intended to prevent persons from exercising their constitutionally protected choices in certain ways.

B. State Action

The question whether Congress can reach private action under the Fourteenth and Fifteenth Amendments 47 presents analogous problems to the question whether Congress can regulate intrastate and noncommercial activity under the Commerce Clause. In both situations, the language of the constitutional power is addressed to one category of activity (state action denying protected rights or commerce among the states) and implicitly reserves the remaining sphere of substantive

45. Id. at 805 (quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 248 (1989)).
46. Griffin, 403 U.S. at 101-02.
47. The state action issue does not arise under the Thirteenth Amendment, the language of which prohibits slavery regardless of who imposes it. U.S. CONST. amend. XIII, § 1.
authority to the states (private action or noncommercial/intrastate activity). In both situations, the Court must decide the extent to which Congress may reach the reserved sphere of activity on the basis of a determination that legislation is necessary and proper to the implementation of goals within its constitutional authority. But the Court’s treatment of section 1985(3) in *Bray* and section 1962(c) in *NOW* reflect vastly different responses to these similar questions. While the state action requirement remains a strict limitation on the civil rights statute, the limitation of federal power to interstate commerce is at most a minor nuisance in the drafting of section 1962(c).

Until *Griffin*, the state action requirement48 prevented the application of section 1985(3) to private conduct altogether despite the lack of any such limiting language in the statute.49 But while *Griffin* opened the application of section 1985(3) to some private conspiracies, the state action requirement continued to limit the scope of the statute. Although section 1985(3) provides a remedy against conspiracies to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,” the Court in *United Brotherhood of Carpenters Local 610 v. Scott*50 limited *Griffin*-type private conspiracy actions to conspiracies directed at “rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution,”51 which are not subject to the state action requirement.52

In my view, however, *Carpenters* seriously misread *Griffin*. While the *Griffin* Court did reason that the statute could constitutionally apply to the private conspiracies at issue because they involved the Thirteenth Amendment and the right to travel, which were not limited by the state action requirement,53 the Court by no means suggested that these were the only rights protected against private conspiracies, or the only types

48. The state action requirement was adopted in *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), as a construction of the language of the Fourteenth Amendment, but it also reflects some federalism-based concerns. See generally GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1594-98 (2d ed. 1991). Although current doctrine may well interpret the *Civil Rights Cases* more broadly than necessary, see infra note 105, this discussion of section 1985(3) assumes that the currently prevailing interpretation is correct.

49. The statute provides a remedy “[i]f two or more persons . . . conspire . . .” to deprive persons of equal protection or equal privileges and immunities. 42 U.S.C. § 1985(3). This language is simply inconsistent with a state action requirement, especially when contrasted with 42 U.S.C. § 1983, which applies only to action taken “under color of state law.” 42 U.S.C. § 1983 (1988).


51. Id. at 832-33.

52. Id.

53. Id. at 105-06.
of private conspiracies to which the statute could constitutionally be applied. Indeed, the *Griffin* Court went out of its way to emphasize that:

>[i]n identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment. By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.\(^54\)

Thus, while the Court relied on the Thirteenth Amendment and the right to travel, it expressly declined to limit the scope of private conspiracy actions to those rights. Yet *Carpenters* ignored this language and interpreted *Griffin* as having done so. *Bray*, of course, relied on *Carpenters*.\(^55\)

This limiting construction compounded the narrow reading of the class-based animus requirement in *Bray*.\(^56\) Even if a section 1985(3) private conspiracy plaintiff satisfies the nontextual class-based animus requirement, her protection is limited to a much narrower set of rights than is suggested by the text.\(^57\) Ironically, by limiting section 1985(3) private conspiracy actions in this manner, the Court undermined the justification for a class-based animus requirement. If only rights guaranteed against private impairment are protected, there is no danger that the absence of a class-based animus requirement would convert the statute into a general federal tort remedy.\(^58\)

\(^{54}\) *Griffin*, 403 U.S. at 107.

\(^{55}\) *Bray*, 113 S. Ct. at 762.

\(^{56}\) The Court rejected the plaintiffs' argument that the right to travel was implicated because many women seeking abortions had traveled between states to seek abortions, because the conspiracy was not directed toward interfering with interstate travel, 113 S. Ct. at 762-73, and "[t]he federal guarantee of interstate travel does not transform state-law torts into federal offenses when they are intentionally committed against interstate travelers." *Id.* at 763. The latter point obviously echoes the same federalism concerns used to justify the class-based animus requirement. *See supra* notes 17-18 and accompanying text.

\(^{57}\) *Bray* clearly indicates that the two requirements are cumulative when the opinion reasons that "[r]espondents' federal claim fails for a second, independent reason: 'the absence of proof that the alleged private conspiracy was intended to deprive persons of a right guaranteed against private impairment.'" *Bray*, 113 S. Ct. at 762 (citing *Carpenters*, 463 U.S. at 833).

\(^{58}\) If rights arising under state law, such as the right of property owners to exclude others, were regarded as rights protected against private interference under section 1985(3), then the concern that the statute might create a general federal tort remedy might remain. But since the abortion clinic plaintiffs in *Bray* sought an injunction against trespass on their property, 113 S. Ct. at 758, the right to exclude others is implicitly unprotected under *Bray*. This is true even if the class-based animus requirement is met. *See supra* note 57. Thus, a conspiracy to trespass on the property of African-Americans (say, for purposes of burning a cross) would apparently state no
More importantly for purposes of this analysis, the second limitation on section 1985(3) can only be justified by a narrow view of Congress’s constitutional authority to regulate private activity as necessary and proper to the enforcement of the Fourteenth Amendment’s privileges and immunities, due process, and equal protection limitations on state action.59 Under *McCulloch v. Maryland*,60 Congress may adopt whatever legislation is “appropriate” to carrying out the objects of the federal power, and Congress’s judgment as to what is appropriate ordinarily should receive deference, provided it is consistent with the letter and spirit of the Constitution.61 Although this test applies to the exercise of congressional power under the Reconstruction Amendments,62 the Court has applied it less generously to their grant of individual rights authority than to the commerce power.63

Under a generous reading of congressional power, it would not be difficult to justify giving effect to the broad language of section 1985(3), even if the Equal Protection Clause itself applies only to state

cause of action under section 1985(3), unless the invasion at issue could be considered a badge of slavery under the Thirteenth Amendment or an interference with the right to travel. Although this would clearly be a conspiracy to deny equal protection, equal protection is not a right protected against private action under *Bray*.

59. The language of the statute clearly does not support this construction: it applies “[i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws . . . .” 42 U.S.C. § 1985(3). Even the dissenters in *Carpenters* apparently shared this narrow view of congressional authority to reach private action, avoiding reliance on the Fourteenth Amendment’s grant of federal power, and arguing instead that the state action requirement did not limit the statute because it could be sustained as an exercise of the commerce power. *Carpenters*, 463 U.S. at 849 n.14 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). This inappropriate use of the commerce power to sustain the broad application of an individual rights statute is unnecessary insofar as the application of the statute to all private conspiracies can easily be supported under a generous reading of Section 5 of the Fourteenth Amendment. See *infra* notes 64-68 and accompanying text.


61. *Id.* at 421.

62. The Reconstruction Amendments grant Congress power to enforce their provisions by “appropriate” legislation, which incorporates the *McCulloch* test. See Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (concerning U.S. CONST. amend. XIV, § 5); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (concerning U.S. CONST. amend. XV, § 2): *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879) (concerning U.S. CONST. amend. XIV, § 5). Moreover, while the Reconstruction Amendments were adopted after *McCulloch* was decided, the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, refers to all powers granted by the Constitution, which presumably would include powers granted pursuant to subsequent amendments. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 126 (4th ed. 1991). Likewise, *McCulloch*’s conclusion that the grant of express power necessarily carries with it an implicit grant of incidental powers to effectuate the purposes of the powers granted applies with equal force to power granted after that decision.

63. *See infra* notes 116-31 and accompanying text.
action.\textsuperscript{64} Congress might reasonably conclude that private conspiracies to prevent the exercise of rights would lead to states' denying the equal protection of the laws.\textsuperscript{65} In one sense, it may well be the object of the conspiracy to overwhelm the states' law enforcement capacity, which seems to have been the case regarding Operation Rescue's practices.\textsuperscript{66} But even without such an object, private conspiracies to deprive individuals of interests constitutionally protected against state interference create the risk that states might fail to prevent this private action for constitutionally impermissible reasons,\textsuperscript{67} and Congress can act to create a prophylactic remedy against such possibilities.\textsuperscript{68}

The cramped reading of congressional power to reach private action in \textit{Bray} stands in stark contrast to \textit{NOW}'s generous construction of Congress's power to reach intrastate noncommercial activity under the Commerce Clause.\textsuperscript{69} The alleged conspiracy in \textit{NOW} was not directed

\begin{itemize}
  \item[64.] See Beermann, \textit{supra} note 9, at 236-39.
  \item[65.] Note that in the Commerce Clause context, the Court does not require formal congressional findings. See Perez v. United States, 402 U.S. 146, 155-56 (1971) (reference to congressional findings does not imply "that Congress need make particularized findings in order to legislate"). On the other hand, \textit{Lopez} sends mixed signals regarding congressional findings. The Court noted the absence of findings that might have helped to identify a substantial effect on interstate commerce, but also indicated that such findings would not necessarily receive much deference. United States v. \textit{Lopez}, 115 S. Ct. 1624, 1631-32 (1995). See \textit{infra} note 195 and accompanying text.
  \item[66.] The Court in \textit{Bray} treated this as a separate claim under the "hindrance" clause of section 1985(3) (providing remedies for conspiracy to prevent or hinder the authorities of a state from providing equal protection of the laws), which was not suitable for review. \textit{Bray}, 113 S. Ct. at 764-67. Since this purpose is treated separately by the statute, such conspiracies are arguably not within the scope of the remaining clauses. On the other hand, the initial general conspiracy clause of section 1985(3) is written very broadly and may overlap with the other provisions of the statute.
  \item[67.] Indeed, there is strong historical evidence to suggest that the Fourteenth Amendment conferred broad power on Congress to reach private action for precisely this reason, see generally ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985), and such a risk was certainly part of the background of section 1985(3). See United Bhd. of Carpenters Local 610 v. Scott, 463 U.S. 825, 851 (Blackmun, J., dissenting).
  \item[68.] See City of Rome v. United States, 446 U.S. 156, 177 (1980) (holding that although the Fifteenth Amendment prohibits only purposeful discrimination, "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").
  \item[69.] It is interesting to note that in the wake of \textit{Bray} Congress relied on the commerce power to adopt the Freedom of Access to Clinic Entrances Act (FACE), which makes it a federal crime to block access to reproductive health clinics. 18 U.S.C.A. § 248 (West Supp. 1995). Although one district court has held FACE to be beyond the scope of the federal commerce power, United States v. Wilson, 880 F. Supp. 621, 627-34 (E.D. Wis. 1995), other courts, including the only two United States Circuit Courts of Appeal to rule on the question, have held FACE to be within the scope of the federal commerce power. See Cheffer v. Reno, 55 F.3d 1517, 1521-22 (11th Cir.)
\end{itemize}
toward obstructing interstate commerce any more than the conspiracy in *Bray* was directed toward obstructing interstate travel. Yet Congress's power to reach the conspiracy in *NOW* was never in doubt. Instead, the formulaic statutory requirement that the activity in question "affect" interstate commerce was sufficient to resolve the question.70 Nor was there ever a possibility that this express federalism-based jurisdictional requirement might be read as a significant limitation on RICO's intended scope, such as a requirement that the activity in question be directed toward interstate commerce. Such a limitation would parallel the requirement that a section 1985(3) private conspiracy be directed against rights protected from private interference.71

The discussion in Parts IA and IB is not meant to suggest that the Court in *NOW* misinterpreted the scope of the commerce power or the statutory language requiring an effect on interstate commerce. Rather, it is meant to demonstrate that the Court approached the task of interpreting section 1985(3) and RICO with vastly different assumptions about the role federalism concerns should play in determining the scope of those statutes.72 With respect to section 1985(3), federalism was the principal justification for two limiting constructions, not consistent with the text or history of the statute, which have the combined effect of sharply restricting the availability of a remedy against private conspiracies to deprive persons of their constitutional rights. Parallel federalism

---

70. Section 1962(c) applies to "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(c) (emphasis added). This jurisdictional nexus requirement does not appear to reflect a significant restriction on the scope of the statute. Even after *Lopez*, the Court has construed this requirement broadly. See infra notes 197-98 and accompanying text.

71. Note that such a reading would also support an economic motive requirement.

72. To use Richard Fallon's terminology, *Bray's* emphasis on limited federal authority and the reserved sphere of state autonomy reflects the "federalist" model, while *NOW's* emphasis on congressional authority and readiness to read RICO broadly reflects the "nationalist" model. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151-64 (1988).
concerns are raised by RICO, but were apparently regarded as so inconsequential to the exercise of the commerce power that federalism was not even mentioned in the course of the Court's refusal to incorporate any limiting construction restricting the availability of RICO remedies.

C. Implications of the Assumption

The foregoing analysis demonstrates that divergent assumptions about the federalism issues raised by the exercise of federal authority under the Commerce Clause and the Reconstruction Amendments played a significant role in the construction of the statutes at issue in Bray and NOW. These cases are not isolated examples, but rather illustrate a broader proclivity to rely on federalism-based concerns to justify a relatively parsimonious treatment of federal individual rights power. One need not look very hard to find other instances in which a narrow view of federal individual rights power has influenced the Court's decisions. Federalism concerns have often been invoked to construe other federal individual rights statutes narrowly, and have been a principal justification for the Supreme Court's recent assault on habeas corpus. As noted previously, moreover, although the Court has technically employed a similar test for congressional power under the Commerce Clause and the Reconstruction Amendments, it has been less generous in applying that test to individual rights statutes. More subtly, perhaps, federalism concerns may play a role in some decisions restricting or declining to extend constitutional protection to some individual rights.

73. Although the Court appeared to reverse its prior hostility to civil rights statutes in the 1960s and 1970s, see, e.g., Monell v. Department of Social Servs., 436 U.S. 658, 701 (1978) (holding that municipalities are persons under 42 U.S.C. § 1983, and overruling Monroe v. Pape, 365 U.S. 167 (1961)), since that time it has handed down a number of decisions narrowly construing such statutes. See Beermann, supra note 9, at 242 n.155 (citing cases). Some of these cases expressly invoke federalism concerns. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 183-84 (1989); Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989).


75. For further elaboration of this point, see infra notes 116-31 and accompanying text.

76. Federalism concerns often merge with broader judicial restraint considerations in recent decisions rejecting individual rights claims. See, e.g., DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 203 (1989). Irrespective of the merits of such judicial restraint arguments generally, I would argue that federalism concerns should not add any weight to them.
The assumption that federal authority respecting individual rights is somehow inconsistent with federalism not only influences the substantive outcome of individual cases, but also has been the foundation for the creation of entire doctrines. Consider, for example, the use of abstention to deny access to federal court for plaintiffs who allege denials of federal constitutional rights. In *Railroad Commission v. Pullman Co.* and its progeny, the Court has relied on federalism concerns to justify its refusal to decide difficult constitutional questions that might be avoided by an appropriate construction of ambiguous state law. Federalism is also the basis for other abstention doctrines, such as that based on *Younger v. Harris.* Although abstention applies to claims based on the Commerce Clause and federal preemption as well as individual rights, the most significant impact of abstention doctrines is in the individual rights field. *Pullman* and *Younger* abstention were developed in that context, and the vast majority of cases in which courts abstain involve individual rights claims.

---

77. See generally James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine,* 46 St. L. Rev. 1049 (1994) (reviewing and critiquing various forms of abstention doctrine). Professor Erwin Chemerinsky has noted that abstention and related doctrines create a different sort of inconsistency in the application of federalism principles—the inconsistent treatment of congressional and judicial power. See ERWIN CHEMERSINSKY, THE VALUES OF FEDERALISM 3-4 (USC Law Center Working Paper Series No. 94-7, 1994) (“The Supreme Court has aggressively used federalism as the basis for limiting federal judicial power, but has almost completely refused to employ federalism as the grounds for limiting federal legislative power.”). Professor Chemerinsky also observes that this inconsistency may well be explained by an unspoken hostility to the underlying rights concerned. Id. at 16-17. While the same hostility may explain the relatively parsimonious treatment of the federal individual rights power, the differing outcomes of the *Bray* and *NOW* decisions suggest that something more is at work. See supra note 9 and accompanying text.

78. 312 U.S. 496 (1941).

79. Id. at 500-01.

80. 401 U.S. 37, 43-44 (1971) (relying in part on federalism concerns to refuse to enjoin pending state criminal proceedings on the basis of allegedly unconstitutional statute).


82. Although exact statistics on the relative incidence of abstention were not available, I conducted a comparative Westlaw search to gain a general sense of the application of abstention doctrines in Commerce Clause and individual rights cases. The search “(abstain abstention) p ‘Commerce Clause’” produced—at the time of the search—90 cases, while the search “(abstain abstention) p ‘due process’” produced 876 cases. Although this search is admittedly inexact and does not distinguish between cases where the court abstained and where it refused to abstain, the magnitude of the discrepancy is striking. This discrepancy also understates the difference insofar as only one individual rights provision was included in the search, although the Due Process Clause is likely to have been the most heavily litigated provision. On the other hand, because there are almost certainly many more due process cases than dormant Commerce Clause cases, the proportional application of abstention in individual rights and Commerce Clause cases may be much closer than these statistics would suggest.
The Court's refusal to read broadly the Reconstruction Amendments' vesting of individual rights authority in the federal government has also been at least partly responsible for the distortion and ultimate incoherence of its Eleventh Amendment jurisprudence. Even as originally adopted, it is by no means clear that the Eleventh Amendment should bar actions against states when those actions arise under federal law. Its text prohibits only the construction of the judicial power to extend to suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." 83 The Amendment responded to and reversed the decision in *Chisholm v. Georgia*, 84 which held that federal *diversity* jurisdiction extended to suits against a state. 85 Given this context, the Amendment could easily be read to apply only to diversity suits. 86 Nonetheless, *Hans v. Louisiana* 87 relied on federalism concerns to construe the Eleventh Amendment to bar any suits in federal court against a state without its consent, including those based on federal rights. 88

Accepting for purposes of argument that the Eleventh Amendment originally precluded all suits against states in federal court, it should not preclude suits arising under the Reconstruction Amendments, which were adopted subsequent to the adoption of the Eleventh Amendment and therefore implicitly repeal the Eleventh Amendment to the extent they are incompatible with it. Insofar as it is clear that the Reconstruction Amendments were intended to protect individuals against state action in violation of federal rights, the incompatibility between Eleventh Amendment immunity and the Reconstruction Amendments should be evident. Nonetheless, the Court has routinely extended *Hans*, which was a case arising under the Contracts Clause of the original Constitution, to cases arising under the Reconstruction Amendments. 89

83. U.S. CONST. amend. XI.
84. 2 U.S. (2 Dall.) 419 (1793).
85. Id. at 469.
87. 134 U.S. 1 (1890).
88. Id. at 15.
89. The Court has permitted individual rights suits seeking injunctive relief against state
The Court has recognized implied repeal under the Reconstruction Amendments only as congressional power to abrogate Eleventh Amendment immunity, and it has emphasized federalism concerns to justify reading even this power narrowly by requiring Congress to express explicitly and unmistakably its desire to abrogate state immunity. As a result, most individual rights statutes have been read not to allow suits against states.

This grudging application of implied repeal in the civil rights context contrasts sharply with the Court’s willingness to permit congressional abrogation of Eleventh Amendment immunity pursuant to the commerce power in Pennsylvania v. Union Gas Co. Because the Commerce Clause is part of the original Constitution, there is no basis for an implied repeal rationale. Instead, Union Gas construed the Eleventh Amendment narrowly as directed toward the judiciary alone, and thus held that it did not apply at all to congressional action. Although Union Gas also requires clear statutory language to abrogate Eleventh Amendment immunity, the Court’s willingness to read the Eleventh Amendment in its narrowest possible form to accommodate the Commerce Clause contrasts sharply with its reliance on federalism concerns to apply the Amendment in its broadest possible form so as to limit judicial enforcement of individual rights.

officers under the doctrine of Ex parte Young, 209 U.S. 123 (1908), but continues to limit the remedies available under this doctrine. See, e.g., Quern v. Jordan, 440 U.S. 332, 336-38 (1979) (precluding retroactive award of welfare benefits).


94. Id. at 18. This reasoning is dubious, because Congress has no power to confer jurisdiction on federal courts in excess of Article III’s enumerated bases. See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983). Insofar as the Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another State . . .” it is hard to see how Congress could authorize suits that would otherwise be prohibited by the Amendment.

95. Id. at 7. There is some evidence, moreover, that the Supreme Court may even require “clearer” language to abrogate Eleventh Amendment immunity in the individual rights context than in the Commerce Clause context. See Robert T. Smith, Note, The Eleventh Amendment’s Clear Statement Test After Dellmuth v. Muth and Pennsylvania v. Union Gas Co., 1990 B.Y.U. L. Rev. 1157, 1161-204.

96. If Ann Althouse’s argument that “[f]ears about federal interests, not historical interpretation, have shaped eleventh amendment doctrine” is correct, then it seems evident that the Court regards the federal interest in regulation of interstate commerce to be more significant than its interest in affording remedies for the violation of constitutional rights. See Ann Althouse, When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment, 40 Hastings L.J. 1123, 1185 (1989).
D. Conclusion

In arguing that the Court’s treatment of federal authority under the Reconstruction Amendments differs markedly from its treatment of federal authority under the Commerce Clause, I do not mean to endorse the most expansive elements of the Court’s commerce power jurisprudence. I have taken those elements as a given in order to demonstrate that the Court’s treatment of the individual rights power is not similarly expansive. This difference in treatment is evident not only in Bray and NOW, but also in other aspects of the jurisprudence of federalism.

The Court has not acknowledged this difference, much less attempted to articulate a reason for it. Nonetheless, on close analysis, it seems apparent that the difference rests on the Court’s underlying assumptions about the appropriateness of federal authority in the individual rights and interstate commerce fields. The expansive interpretation of the commerce power gives effect to the underlying assumption that this field is an appropriate one for the exercise of federal authority, while the relatively narrow view of federal authority in the individual rights field reflects the underlying assumption that broad federal authority in that field is somehow inconsistent with the basic principles of federalism. Given the important influence of the latter assumption, the question becomes whether it can be justified in terms of constitutional theory.

II. FEDERAL INDIVIDUAL RIGHTS AUTHORITY AND CONSTITUTIONAL INTERPRETATION

In this part of the essay, I will argue that no justification exists for construing the individual rights authority more narrowly than other federal powers. First, the view of federalism that formed the basis for early decisions construing the Reconstruction Amendments narrowly is no longer valid. These decisions reflect a narrow conception of federal power that applied in almost every field prior to 1937, but the influence of the early individual rights decisions has persisted long after the view of federal power that supported them was abandoned in other contexts. Second, the Court has not articulated any interpretive rationale for treating individual rights authority differently from other federal powers, whether in terms of the Reconstruction Amendments themselves, the original Constitution, or the separation of powers concerns sometimes said to prevent congressional interpretation of the Amendments. Finally, insofar as other federal powers are justified by functional concerns relating to the effective operation of a federal system, such as avoiding interstate friction and the need for uniformity, similar justifications support federal power in the individual rights field.
A. The Deconstruction of Reconstruction

Federalism-based justifications for reading the Reconstruction Amendments narrowly go back to some of the earliest Supreme Court decisions construing them. 97 The Court’s analysis in these decisions, however, rests not on a careful examination of the intention behind the Amendments, but rather on the then-prevailing view of federalism that sharply restricted the scope of federal power in order to preserve state sovereignty. Long after this view of federalism has been discarded in other contexts, however, preserving state sovereignty continues to loom large as a basis for reading federal individual rights powers narrowly. Under the modern view of federal power, there is no basis for this distinctive treatment of individual rights.

1. Individual Rights Authority before the New Deal

Whatever the intent of the Congress that adopted them, 98 the Court’s initial decisions tended to construe the Reconstruction Amendments narrowly, and emphasized federalism-based concerns as a justification for this narrow reading. 99 Despite some cases in which the Court seemed prepared to apply the Fourteenth Amendment aggressively to address state-sponsored racial discrimination, 100 on the whole the Court took a very narrow view of the Amendment. In the Slaughter-House Cases, 101 the Court confined the scope of rights protected by the Fourteenth Amendment’s Privileges and Immunities Clause to the rights of national citizenship, which it defined narrowly, 102 and expressly stated that “[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on

---

97. While the historical evidence suggests that the Reconstruction Amendments were intended to grant broad federal authority to protect the rights of newly freed slaves and their supporters in the south, the political consensus for reconstruction disintegrated by the mid-1870s. See generally ROBERT J. KACZOROWSKI, supra note 67; STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968); Michael W. McConnell, The Forgotten Constitutional Moment, 11 CONST. COMM. 115 (1994).

98. See infra notes 132-42 and accompanying text.

99. Whereas the Thirteenth and Fifteenth Amendments apply to the specific issues of slavery and voting restrictions, the language of the Fourteenth Amendment, and the corresponding congressional authority, is much broader. I will therefore focus my attention on the Fourteenth Amendment.

100. See Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886); Strauder v. West Virginia, 100 U.S. 303, 306-08 (1879). This concern for racial discrimination appeared to have faded by the time of Plessy v. Ferguson, 163 U.S. 537 (1896).

101. 83 U.S. (16 Wall.) 36 (1873).

102. Id. at 72-75; see also United States v. Cruikshank, 92 U.S. 542, 552-53 (1875) (holding that civil rights statute could not be applied to lynching by private parties unless victims were assembled for purposes of petitioning federal rather than state government).
account of their race, will ever . . . come within the purview of [the Fourteenth Amendment].”

Likewise, in a series of decisions culminating in the Civil Rights Cases, the Court limited the scope of congressional power to enforce the Fourteenth Amendment by adopting a state action requirement that prevented Congress from reaching private acts of discrimination.

The principal justification for the narrow reading of federal power was federalism. The reliance on federalism-based concerns was most explicit in the Slaughter-House Cases, where the Court responded to the contention that the Privileges and Immunities Clause protected the right of citizens to pursue a common calling by conjuring up a parade of horribles that would result:

Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition [that the right to pursue a calling was within the scope of the Privileges and Immunities Clause] be sound.

The use of rhetorical questions and negative proof reflects just how strongly the Court rested on the assumption that individual rights should

103. The Slaughter-House Cases, 83 U.S. (16 Wall.) at 81; see also United States v. Reese, 92 U.S. 214, 220-22 (1875) (holding that prosecution of state officials was unconstitutional because voting rights statute was not expressly limited to racially motivated action exceeded congressional authority).

104. 109 U.S. 3 (1883); see also United States v. Harris, 106 U.S. 629, 644 (1882) (civil rights statute could not be applied to purely private conduct of lynch mob); Cruikshank, 92 U.S. at 552-53.

105. The Civil Rights Cases, 109 U.S. at 17. While the Civil Rights Cases might be read more narrowly as allowing congressional regulations of private discrimination if a state has failed to do so (because such a failure constituted the denial of equal protection), modern cases read the decision more broadly to place private conduct beyond the reach of the Fourteenth Amendment, at least under most circumstances. See Geoffrey R. Stone et al., supra note 48, at 1597-98.

106. The Slaughter-House Cases, 83 U.S. (16 Wall.) at 77-78. Other cases also invoke federalism concerns. See, e.g., The Civil Rights Cases, 109 U.S. at 13:

Such legislation [under the Fourteenth Amendment] cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of State legislatures and supersede them.
remain primarily the responsibility of the states.\textsuperscript{107} Moreover, although it was drawing inferences about the intent of the Reconstruction Amendments' Framers, the Court did not consider any direct evidence of the deliberations and debates surrounding the drafting and ratification of the amendments.\textsuperscript{108}

From the end of the Nineteenth Century until the 1930s, of course, the Court's narrow view of federal power was not limited to the Reconstruction Amendments. In a series of well known decisions, the Court struck down various federal regulatory initiatives on the ground that they exceeded the scope of federal power.\textsuperscript{109} In these cases, the Court posited that the Tenth Amendment to the United States Constitution reserved the "police power" to the states and invalidated federal legislation that interfered with this reserved sphere of state power. The narrow construction of federal individual rights authority, particularly the strict enforcement of the state action doctrine (which prevented federal regulation of private behavior within the states' police powers), made perfect sense under this view of federal authority.\textsuperscript{110}

At the same time, however, the \textit{Slaughter-House Cases} narrow reading of the Fourteenth Amendment fell victim to the \textit{Lochner} era's substantive economic due process doctrine.\textsuperscript{111} Thus, by the time of the

\textsuperscript{107} The Court itself acknowledged that "[t]he argument . . . is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument," but continued:

when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions: when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

\textit{The Slaughter-House Cases}, 83 U.S. (16 Wall.) at 78.

\textsuperscript{108} See id. at 67-78.


\textsuperscript{110} \textit{But see} Erwin Chemerinsky, \textit{Rethinking State Action}, 80 NW. U. L. Rev. 503, 542-47 (1985) (arguing that the state action doctrine cannot be defended on federalism grounds).

\textsuperscript{111} See generally \textsc{David P. Currie}, \textit{The Constitution in the Supreme Court: The Second Century: 1888-1986} 3-83 (1990) (analyzing decisions and doctrinal developments). Ironically, however, during the \textit{Lochner} era the Court was reluctant to apply the Reconstruction Amendments for the one purpose it had originally acknowledged, securing the rights of African Americans. \textit{See generally} \textsc{John Braeman}, \textit{Before the Civil Rights Revolution} 57-86 (1988)
New Deal, the Court had afforded judicial protection to a broader range of substantive rights, and even began to incorporate some provisions of the Bill of Rights to make them applicable to states. But since Congress did not pass additional individual rights laws (and particularly no laws enforcing property and contract rights) during this period, the Court did not address the scope of congressional power under the Fourteenth Amendment, and the Civil Rights Cases remained intact. Ultimately, the use of due process to block state regulation of economic activity lends credence to the commonly held assumption that the Court was motivated more by opposition to regulation of economic activity than by any consistent commitment to federalism.

2. Individual Rights Authority in the Modern Era

With the demise of the Lochner era, the Court’s view of federal power underwent a dramatic change. The Court abandoned the notion that the Constitution reserves some sphere of autonomous state authority that is beyond the reach of federal power, reading the Tenth Amendment as a “truism” that merely confirms the doctrine of enumerated powers. Thus, federal authority to act is determined solely by reference to whether a given measure is necessary and proper to the exercise of an enumerated power. Under the Commerce Clause, this question is in turn resolved through the application of the rational basis test, which requires only that a measure be reasonably related to some plausible effect on interstate commerce. Although the Court has ostensibly adopted a similar test for legislation pursuant to the Reconstruction Amendments, it has applied this test more restrictively in this area.

( reviewing decisions).


113. See United States v. Darby, 312 U.S. 100, 124 (1941).

114. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964). Other federal powers underwent a similar expansion. Thus, for example, while the Court had before 1937 read the taxing and spending powers narrowly to preserve federalism-based limits on the commerce power, see supra note 109, it abandoned those restrictions at the same time it relaxed the narrow construction of the commerce power. See Steward Machine Co. v. Davis, 301 U.S. 548, 581-83 (1937). The Lopez decision stiffens the application of the commerce power test somewhat by making clear that any effect on interstate commerce asserted as the rational basis for federal action must be substantial, 115 S. Ct. at 1630, but this development is unlikely to alter significantly the scope of the commerce power. See infra notes 192-98 and accompanying text.

115. See supra note 63 and accompanying text.
The most obvious example of this reluctance is *Oregon v. Mitchell*, 400 U.S. 112 (1970). Although the Court upheld the requirement as applied to state law qualifications for voting in national elections, it did not rely on Congress’s power under the Reconstruction Amendments to do so. The crucial fifth vote for this result was provided by Justice Black, who offered an idiosyncratic and counter-textual reading of Article I, Section 4 (permitting Congress to revise state regulation of the “Times, Places, and Manner of holding Elections for Senators and Representatives”) as qualifying Article I, Section 2 (providing that the “Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”). See id. at 119-24 (opinion of Black, J.).

This assumption avoids any separation of powers concerns that might be raised by allowing Congress authority to expand the substantive content of constitutional rights. See infra notes 160-70 and accompanying text.

117. Although the Court upheld the requirement as applied to state law qualifications for voting in national elections, it did not rely on Congress’s power under the Reconstruction Amendments to do so. The crucial fifth vote for this result was provided by Justice Black, who offered an idiosyncratic and counter-textual reading of Article I, Section 4 (permitting Congress to revise state regulation of the “Times, Places, and Manner of holding Elections for Senators and Representatives”) as qualifying Article I, Section 2 (providing that the “Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”). See id. at 119-24 (opinion of Black, J.).

118. *Id.* at 130 (opinion of *Black, J.*). As noted previously, such findings are not required under the commerce power. See supra note 65.


121. While the Court had previously indicated that age restrictions on voting were permissible,
under *Katzenbach v. Morgan*, Congress might find either that the denial of the vote was prompted by invidious motives or that granting the franchise to eighteen-year-olds would prevent potential discrimination against them in the future.\footnote{124}

Although *Oregon v. Mitchell* strikes down a statute as beyond Congress's authority under the Reconstruction Amendments,\footnote{125} the Court's reluctance to construe that authority broadly is more often reflected in various avoidance tactics. One telling example of avoidance is the Court's preference for resting civil rights legislation on the commerce power rather than on the Reconstruction Amendments. This practice is well illustrated by *Heart of Atlanta Motel, Inc. v. United States*\footnote{126} and *Katzenbach v. McClung*,\footnote{127} where the Court avoided the holding of the *Civil Rights Cases* by relying on the commerce power as the basis for federal authority to prohibit discrimination in public accommodations.\footnote{128} This reasoning is particularly striking in *McClung*,

\begin{quote}
see *Reynolds*, 377 U.S. at 554, *cited in Mitchell*, 400 U.S. at 127, this did not necessarily resolve the specific question of whether any particular age restriction was sufficiently rational to pass equal protection scrutiny. Consider, for example, whether (other constitutional provisions aside) it would be consistent with equal protection for a state to place the voting age at, say, 65. Of course, as Justice Harlan pointed out, Section 2 of the Fourteenth Amendment itself provides for sanctions when the right to vote “is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States.” *Mitchell*, 400 U.S. at 295 n.14. I do not, however, share Justice Harlan's confidence that it therefore follows that such age restrictions are automatically valid. The same provision also limits sanctions to states that deny the franchise to "male inhabitants," yet I suspect that, even absent the Nineteenth Amendment, denying the vote to women would violate the Equal Protection Clause.
\end{quote}

\begin{quote}
\footnote{124} Although Justice Harlan considered the prospect of discrimination against 18- to 21-year-olds unlikely, 400 U.S. at 212 (Harlan, J., concurring and dissenting) (arguing that the notion of discrimination against 18- to 21-year-olds implemented through denial of franchise was "fanciful"), this is the sort of judgment for which Congress might be entitled to some deference under Section 5 of the Fourteenth Amendment. Nor does the prospect of discrimination against 18- to 21-year-olds strike me as fanciful in historical context. It is to be remembered that in 1970 antiwar sentiment among young people generally was high. At the very least, many young men faced the prospect of being drafted to serve in Vietnam, yet lacked a voice in the political process.
\end{quote}

\begin{quote}
\footnote{125} Even as an isolated example, *Mitchell* presents a striking contrast to the commerce power, where the rational basis test has been applied so loosely that, until *Lopez*, no congressional action since 1937 had been found to exceed the scope of that power. It is true that the Court has flirted with Tenth Amendment limits on the commerce power, but this recourse has proven necessary precisely because the Court has refused to recognize any activity as beyond the reach of that power. *See generally* Richard E. Levy, *New York v. United States: An Essay of the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. Kan. L. Rev. 493 (1993).
\end{quote}

\begin{quote}
\footnote{126} 379 U.S. 241 (1964).
\footnote{127} 379 U.S. 294 (1964).
\footnote{128} *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250; *McClung*, 379 U.S. at 300.
\end{quote}
where the connection to interstate commerce was very tenuous.\textsuperscript{129} It does not take an elaborate stretch of the imagination to conclude that prohibition of private discrimination may be necessary to prevent states from “denying equal protection of laws,” insofar as Congress could have easily concluded that states would not tolerate similar kinds of discriminatory burdens against whites.\textsuperscript{130} In other words, the Court preferred to rely on a tenuous connection to interstate commerce rather than on an obvious connection with the purposes of the Fourteenth Amendment.\textsuperscript{131}

With the demise of the \textit{Lochner} era’s restrictive view of federalism, the narrow construction of the federal individual rights power cannot be justified on the mere assertion that a broad reading would infringe upon powers constitutionally reserved to the states. As \textit{Heart of Atlanta Motel, Inc.} and \textit{McClung} make clear, the Court has been unwilling to extend the federal individual rights power to reach activity that it has held to be within the scope of other federal powers. The narrow construction of the individual rights power must be justified, if at all,

\begin{itemize}
\item \textsuperscript{129} Although it is fairly easy to see that discrimination by hotels and restaurants would discourage interstate travel by African Americans, as in \textit{Heart of Atlanta Motel, Inc.}, there was no evidence that the restaurant in \textit{McClung} served any interstate travelers. And although it received food shipped in interstate commerce, 379 U.S. at 296-97, because the evidence at trial showed that desegregation would reduce the restaurant’s clientele, \textit{id.} at 297, it is hard to see how the goal of facilitating the flow of interstate commerce would be furthered by applying the statute. Of course, one might argue that Congress can regulate a class of activities that affect interstate commerce without showing that each individual case does so. See Perez v. United States, 402 U.S. 146, 154 (1971). That rule, however, only serves to underscore how broad the commerce power is in comparison with the individual rights power.
\item \textsuperscript{130} The conclusion that a state’s failure to prohibit acts of discrimination would constitute a denial of equal protection is consistent with the \textit{Civil Rights Cases}. See supra notes 64-68 and accompanying text.
\item \textsuperscript{131} Although \textit{Heart of Atlanta Motel, Inc.} and \textit{McClung} preceded Morgan’s adoption of the \textit{McCulloch} test for individual rights powers, the same preference for relying on the commerce power was evident in the later case of EEOC v. Wyoming, 460 U.S. 226 (1983), where the Court treated the Age Discrimination in Employment Act as an exercise of the commerce power, and avoided the question whether it could be sustained under Section 5 of the Fourteenth Amendment. \textit{Id.} at 243. Chief Justice Burger argued in dissent that there was no basis for the exercise of Congress’s Fourteenth Amendment authority because age discrimination does not violate equal protection, \textit{id.} at 259-63, but this argument read the Court’s refusal to treat age as a suspect classification too broadly. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (upholding mandatory retirement for state police). Even nonsuspect classifications violate equal protection if they fail the rational basis test. See, \textit{e.g.}, \textit{City of Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 448 (1985). Thus, the question would be whether Congress could reasonably conclude that state mandatory retirement laws were irrational. While Chief Justice Burger did argue that Congress had not made the necessary findings to support the law as a means of preventing possible equal protection violations by the state, Congress is not required to make such findings under the Commerce Clause. See supra note 65. A similar flaw is present in the reasoning of \textit{Mitchell}. See supra note 118 and accompanying text.
\end{itemize}
in terms of the distinctive features of that authority. Such a justification might be found in either the interpretation of the Reconstruction Amendments or in the inherent nature of the individual rights authority itself. But, as will be developed more fully below, neither provides a sufficient basis for treating federal authority differently in the individual rights area than in other spheres of federal power.

B. Interpreting the Reconstruction Amendments

There is no compelling reason to approach the interpretation of the scope of federal power under the Reconstruction Amendments differently from the interpretation of other federal powers. Neither the text nor the history of the Amendments compels a narrower reading of federal individual rights authority than of other congressional powers. The fact that the individual rights power was added through amendments might justify differential treatment if the power were so fundamentally incompatible with federalism that a narrow construction would be necessary to reconcile the Amendments with the governmental structure of the original Constitution, but the historical record does not support this view. Nor are separation of powers concerns, which are sometimes invoked as an objection to congressional “interpretation” of individual rights safeguards, an adequate basis for distinguishing the individual rights authority from other federal powers.

1. Text and History

The wording of the Reconstruction Amendments themselves, particularly the Fourteenth Amendment (on which I will focus the following analysis), does not seem to provide a basis for the narrow construction given to federal authority under these provisions. The individual rights safeguards afforded in the Fourteenth Amendment are broadly phrased in terms of privileges and immunities, due process, and equal protection; expansive concepts that readily sustain an interpretation encompassing a broad panoply of rights. There is certainly nothing in the text of the Fourteenth Amendment that would limit it to protecting newly freed slaves (as suggested by the Slaughter-House Cases) or preclude the recognition of nontextual rights.132 And

132. Indeed, there can be little doubt that the Slaughter-House Cases’ construction of the Privileges and Immunities Clause, although still good law, was wrong because it rendered that provision entirely meaningless. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72-75 (1873). Thus, although one may question the view that due process encompasses substantive rights, the language of the Fourteenth Amendment is clearly consistent with the federal protection of substantive rights. Arguments in favor of a narrower construction are generally premised on the intent of the Amendment’s Framers. See infra note 139 and accompanying text.
notwithstanding the text of the Fourteenth Amendment, careful historical analysis suggests that the state action requirement has been applied far too aggressively by the Court.\textsuperscript{133}

The structure of the Fourteenth Amendment does differ from that of the Commerce Clause in a potentially significant way, however. While the Commerce Clause simply vests in Congress the general power to regulate commerce among the states, the Fourteenth Amendment places certain restrictions on states in Section 1 and then vests Congress with the power to enforce these restrictions in Section 5.\textsuperscript{134} In this sense the enforcement power is linked to the substantive content of the rights protected under the Amendment in a way that the commerce power is not.\textsuperscript{135} This difference in structure, however, does not provide an adequate explanation for the difference in treatment the Court has accorded to the two sources of federal authority.\textsuperscript{136}

Although the commerce power is not textually limited to any particular purposes or goals, it is linked to interstate commerce. Yet the Court has not limited congressional authority to the regulation of commerce itself, but rather has permitted the regulation of activity that is not interstate commerce if that activity substantially affects commerce.\textsuperscript{137} Under a parallel construction of the Fourteenth Amendment, Congress’s authority to enforce Fourteenth Amendment rights would extend to activity that does not itself violate those rights (e.g., private conduct) if that activity substantially affects those rights in an adverse way.\textsuperscript{138} Put differently, although the text of the Fourteenth Amendment may authorize congressional regulation of a narrower subject matter, it does not support a narrower reading of congressional discretion as to the necessary and proper means of achieving permissible ends. Such a narrow reading, however, is evident in Bray as a matter of statutory construction, and in Mitchell as a direct limitation on congressional power.

\begin{enumerate}
\item \textsuperscript{133} See ROBERT J. KACZOWSKI, supra note 67; see also supra note 105 (suggesting that recent cases read the \textit{Civil Rights Cases} more broadly than necessary).
\item \textsuperscript{134} The Thirteenth and Fifteenth Amendments have parallel structures.
\item \textsuperscript{135} The equivalent phrasing of the commerce power would be to prohibit states from interfering with interstate commerce, and then to authorize Congress to enforce that prohibition.
\item \textsuperscript{136} Similar issues also arise with regard to the separation of powers concerns sometimes said to justify a narrow reading of Congress’s individual rights authority. See infra notes 160-70 and accompanying text.
\item \textsuperscript{137} United States v. Lopez, 115 S. Ct. 1624, 1630 (1995).
\item \textsuperscript{138} See supra notes 59-68 and accompanying text (discussing possible rationales to support the application of § 1985(3) to private conduct); supra notes 120-24 and accompanying text (discussing justifications for congressional action requiring states to permit eighteen-year-olds to vote).
\end{enumerate}
Likewise, the history of the Reconstruction Amendments does not require a narrow construction of the federal individual rights authority. I shall not attempt a comprehensive review of that history, which is beyond the scope of this essay, and would add little to the already voluminous, but inconclusive, literature on the subject. Some scholars, to be sure, have read the history of the Fourteenth Amendment to provide clear evidence that it should be narrowly construed. A number of other scholars, however, have read that history differently, and would recognize a broad federal power to act, even in the absence of “state action.” Ultimately, there are no clear answers as to the specific scope of power intended under the Fourteenth Amendment. In a broader sense, the historical context of the Reconstruction Amendments would, if anything, suggest that the scope of federal power should be read broadly. There can be little doubt that the Civil War represented a turning point in the relationships between the federal and state governments, or that the Reconstruction Congress sought to assert federal authority over the defeated southern states. And while the political momentum in favor of securing the rights of newly freed slaves soon faded, the Reconstruction Amendments reflected an aggressive assertion of federal power.

Even if it were clear that the Reconstruction Amendments’ Framers specifically contemplated a narrow scope for the federal individual rights power, this would not justify treating the individual rights power differently from other areas of federal authority, such as the commerce power. No one would dispute that the scope of federal power under the Commerce Clause goes far beyond anything expected by the original

139. Most prominently, Raoul Berger (the original originalist) had little difficulty in concluding the Warren Court’s expansion of individual rights was incompatible with the intention of the Fourteenth Amendment’s Framers, a view that would correspondingly narrow the power of Congress to protect individual rights. See RAUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 408 (1977). More recently, Earl Maltz has argued that the original intention of the Fourteenth Amendment precludes congressional power absent affirmative conduct by states. See EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990).


142. See generally 1 BRUCE ACKERMANN, WE THE PEOPLE: FOUNDATIONS 81-104 (1991) (discussing the constitutional significance of the Civil War and Reconstruction).
Constitution’s Framers, but the Court has not limited the commerce power in accordance with those expectations. If other types of federal power are not limited in accordance with the original understanding, it is difficult to see why the individual rights power should be treated any differently. In any event, the Supreme Court has not attempted to justify its reading of the federal individual rights power in terms of the history of the Reconstruction Amendments, but rather has invoked general conceptions of federalism or other concerns.

2. Reconciling the Reconstruction Amendments with the Original Constitution

Given the lack of direct textual or historical support for a narrow construction of federal individual rights power, the federalism-based concerns justifying such a construction seem to derive largely from a vague sense that the individual rights power is a departure from the original structure of federalism. The Framers of the original Constitution consciously chose to leave most matters of individual rights to the states. This decision, understood in the context of the general effort to confine federal power to certain enumerated areas in order to preserve state authority, might be read to suggest a fundamental antipathy toward federal regulation of individual rights that is strong enough to justify a narrow reading of subsequent amendments so as to conform them, to the maximum extent possible, with the underlying structure of federalism created in the body of the Constitution. In my view, this sort of reasoning reads too much into the original Framers’

143. Nothing in Lopez changes this basic point. Justice Thomas’s Lopez concurrence noted that the Court’s “case law has drifted far from the original understanding of the Commerce Clause,” and called on the Court “[i]n future cases . . . to temper [its] Commerce Clause jurisprudence in a manner that both makes sense of [its] more recent case law and is more faithful to the original understanding of that Clause.” 115 S. Ct. 1624, 1642 (1995). No other Justice, however, joined that opinion. Id.

144. See supra notes 106-08 and accompanying text (discussing the Slaughter-House Cases). Recent decisions have also raised separation of powers considerations. See infra note 160 and accompanying text. Of course, the narrow interpretation of § 1985(3) rests in part on the Court’s interpretation of its legislative history, but as discussed in Part I, above, this interpretation is unconvincing and ultimately driven by federalism concerns. See supra notes 15-21 and accompanying text.

145. This notion was explicit in the Slaughter-House Cases. See supra notes 106-08 and accompanying text.

146. While the Framers sought to protect the states, Samuel H. Beer’s recent comprehensive study of the intellectual foundations of American federalism provides compelling evidence that the Framers also envisioned a strong federal government. SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 244-377 (1993).
decision to leave individual rights matters to the states and gives insufficient credence to the amendment process.

It is conventional wisdom that the Framers were relatively unconcerned with individual rights per se. They viewed structural safeguards, particularly the division of governmental authority according to separation of powers and federalism principles, as the primary protection against government excess. To the extent that the Framers expressly acknowledged individual rights as distinct constraints on government action, they did so reluctantly in response to opponents of the Constitution who raised the specter of abuse by the federal government. Thus, the Bill of Rights was adopted as a set of amendments to the original Constitution and applied only to the federal government. Indeed, various provisions of the Constitution expressly prevented federal involvement in the most pressing individual rights issue of the period, slavery.

This conventional wisdom, while largely accurate, overstates the Framers' rejection of a federal role in the preservation of individual rights. The Constitution does prohibit states from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts. In addition, the Privileges and Immunities Clause provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," establishing a norm of equal treatment of residents and nonresidents in each state. Finally, the Guaranty Clause expressly requires the federal government to "guarantee to every State . . . a Republican Form of Government."

To a large extent, these limited individual rights provisions were directed at particular practices that threatened to breed interstate conflict and potentially cause the disintegration of the union. Thus, for example, the Contracts Clause was adopted in response to state debtor relief laws, which often were intended to protect residents at the

147. James Madison’s celebrated essay on factions, THE FEDERALIST No. 10, is the leading exposition of this understanding. See also THE FEDERALIST No. 51 (James Madison) (arguing that separation of powers and federalism will check influence of factions); see generally Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985) (discussing implications of factions and special interests).
148. See, e.g., TRIBE, supra note 11, at 4 n.7.
151. See infra note 159.
153. Id. art. IV, § 2, cl. 1. This provision carries forward a similar provision in the Articles of Confederation. ARTICLES OF CONFEDERATION, art. IV.
154. Id. art. IV, § 4.
expense of nonresidents.\textsuperscript{155} More explicitly, the Privileges and Immunities Clause of Article IV is concerned only with the relative treatment of residents and nonresidents; it does not prescribe a set of "minimum" privileges and immunities, but rather requires that states accord the same minimum to nonresidents as provided for residents.\textsuperscript{156}

Nonetheless, neither the prohibitions on bills of attainder and ex post facto laws nor the Guaranty Clause can be explained as federalism-based provisions.\textsuperscript{157} Instead, they appear to reflect certain noncontroversial and widely recognized constraints on government action. Of course, these provisions fall far short of a comprehensive federal rights regime, and afford only a limited basis at best for the exercise of federal power in an affirmative way to protect individuals against abuses by state governments. Overall, however, the conventional conclusion that the Framers regarded individual rights protections against state action as completely beyond the purview of federal concern overstates the case,\textsuperscript{158} and the original Constitution does not support the conclusion that federal individual rights restrictions on state authority is inherently incompatible with the structure of federalism.

It is clear, however, that the Framers wanted to avoid confrontation over the slavery issue because this was necessary to secure ratification of the Constitution.\textsuperscript{159} To the extent that this intention reflects a more fundamental opposition to federal individual rights authority, it was explicitly overruled by the Reconstruction Amendments, and surely cannot form the basis for a narrow construction of their provisions. If anything, the role of slavery in the construction of the original Constitution suggests that the Framers’ decision to avoid federal

\textsuperscript{155} See generally Benjamin F. Wright, Jr., The Contract Clause of the Constitution 3-26 (1938) (describing history of the Clause); see also Richard E. Levy, Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 430-31 (1995) (arguing that Contracts Clause may be understood as a federalism rather than individual rights provision).

\textsuperscript{156} In this sense, the Privileges and Immunities Clause is a parallel provision to the Full Faith and Credit Clause. U.S. Const. art. IV, § 1. Likewise, the Commerce Clause was adopted to address the problem of protectionist legislation and the discriminatory treatment of out-of-state economic interests, see infra note 172 and accompanying text, and it imposes similar (though not identical) restrictions on state regulation. See generally Tribe, supra note 11, at 401-78.

\textsuperscript{157} See, e.g., Levy, supra note 149, at 263-65 (discussing these provisions, inter alia, as individual rights initiatives of the Committee on Detail).

\textsuperscript{158} Except, of course, in the context of slavery, with respect to which the Framers expressly sought to foreclose federal intervention. This intent, however, was clearly repudiated at the constitutional level by the Reconstruction Amendments.

\textsuperscript{159} See, e.g., U.S. Const. art. I, § 2, cl. 3 (counting slaves as three-fifths of a person for purposes of apportionment); id. art. I, § 9, cl. 1 (providing that Congress may not prohibit importation of slaves until 1808); id. art. IV, § 2, cl. 2 (requiring slaves that escape to another state to be returned to their owners); id. art. V (precluding amendment to art. I, § 9, cl. 1 until 1808).
individual rights authority rested on political considerations rather than the assumption that such an authority was particularly incompatible with the structure of federalism.

But even if the Reconstruction Amendments are incompatible with the original constitutional structure, it is a perverse treatment of the amendment process to suggest that the intentions underlying the original document control the interpretation of the amendment, since the very purpose of the amendment is to change the original. Thus, to the extent there is inconsistency, it is the Reconstruction Amendments that should be controlling.

3. Separation of Powers Concerns

The Court's reluctance to apply the McCulloch-based test for congressional power broadly in the individual rights context has at times been attributed to separation of powers rather than federalism concerns. In particular, it has often been suggested that to allow Congress to define a violation of the Fourteenth Amendment would be to allow Congress to usurp the judicial power, especially if Congress is allowed to declare constitutional state action that the Court has declared violates the Fourteenth Amendment.¹⁶⁰ This argument can draw strength from the structural differences in the text of the Commerce Clause and the Fourteenth Amendment.¹⁶¹ For several reasons, however, I believe this is not an adequate explanation for the narrow construction of congressional authority in the individual rights area. Most importantly, it is simply not necessary to allow Congress to define violations of constitutional rights to accord it broad authority under the Reconstruction Amendments. Under the McCulloch test, so long as legislation is reasonably related to furthering the goals of those Amendments, it should pass constitutional muster.¹⁶² If Congress reasonably believes that a particular activity interferes with, say, the equal protection of the laws as defined by the courts, it should be able to prohibit or regulate that activity, even if the activity itself would not violate the Equal Protection Clause.


¹⁶¹ See supra notes 134-38 and accompanying text.
¹⁶² McCulloch, 17 U.S. at 430.
To the extent that allowing Congress to decide whether conduct interferes with the individual rights protections of the Reconstruction Amendments raises separation of powers concerns, analogous separation of powers concerns have been brushed aside in the Commerce Clause context.\(^{163}\) For example, although pre-1937 cases sought to restrict federal legislation to commerce-related purposes,\(^{164}\) subsequent decisions disavowed any inquiry into the purposes that underlie direct regulation of interstate commerce,\(^{165}\) notwithstanding the *McCulloch* test’s requirement that congressional ends be within the enumerated powers.\(^{166}\) More generally, although the doctrine of enumerated powers presupposes judicially enforceable limits to the commerce power, the Court has (at least until *Lopez*) essentially refused to enforce those limits. In *Garcia v. San Antonio Metropolitan Transit Authority*,\(^{167}\) the Court even suggested that the federal commerce power was subject only to political limits, as opposed to judicial ones, although *New York v. United States* recently reestablished a narrow judicial limit on the commerce power.\(^{168}\) More striking, perhaps, is the doctrine which allows Congress to overrule a prior judicial determination that state action violates the Commerce Clause,\(^{169}\) which permits precisely the kind of result that is said to be impermissible in the context of the Reconstruction Amendments. By these arguments, I do not intend to endorse the Court’s Commerce Clause jurisprudence in general or the suggestion that Congress should be able to permit state action which otherwise violates the Reconstruction Amendments,\(^{170}\) but rather to demonstrate that the

\(^{163}\) See Cohen, supra note 160 (arguing that the broad congressional power to enforce the Fourteenth Amendment approved in *Morgan* is defensible as an extension of the principle that courts will not enforce federalism-based limits on congressional power).

\(^{164}\) See *Hammer v. Dagenhart* (The Child Labor Case), 247 U.S. 251, 276 (1918) (holding that Congress could not prohibit the interstate shipment of goods manufactured in violation of child labor laws because the prohibition served an illegitimate purpose).

\(^{165}\) See, e.g., *United States v. Darby*, 312 U.S. 100, 116 (1941).

\(^{166}\) See supra notes 60-61 and accompanying text.

\(^{167}\) 469 U.S. 528, 550-54 (1985).

\(^{168}\) 112 S. Ct. 2408, 2423 (1992); see generally Levy, supra note 125 (critiquing the Court’s analysis).

\(^{169}\) See, e.g., *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) (upholding state bank acquisition laws that discriminated against out-of-state holding companies because of federal legislation permitting such discrimination). In contrast, the Court has refused to permit discrimination against out-of-state concerns, because it violates equal protection, even when such discrimination is authorized under the Commerce Clause by congressional action. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985).

\(^{170}\) The notion that Congress may strengthen, but not relax, the protections of the Fourteenth Amendment originates in *Katzennbach v. Morgan*, 384 U.S. 641, 651-52 n.10, 653-56 (1966) (suggesting that Congress might disagree with the Court’s prior holding that English literacy tests did not violate the Equal Protection Clause, but explicitly denying that the power to enforce the Fourteenth Amendment includes the power to dilute its provisions). In one area at least, however,
same arguments that are said to justify a narrow construction of the congressional individual rights power are not seen as equally persuasive in the Commerce Clause context.

C. A Functional Justification for Federal Individual Rights Power

Ultimately, the assumption that federal individual rights authority is inappropriate to the structure of federalism seems to rest on the intuitive sense that there are "good reasons" for federal power in areas such as interstate commerce or foreign affairs, but that there are not similar sorts of "good reasons" for federal authority respecting individual rights. Aside from general powers necessary to the functioning of any government (e.g., the power to tax), the fields of federal authority enumerated in the original Constitution seem to be characterized by the need for unitary, uniform action in order to secure the effective operation of the nation, or by the danger that abuses of state power would breed friction and animosity detrimental to the union. These concerns are inherent in the structure of federalism, and federal authority in such areas therefore makes sense in terms of that structure. In contrast, the individual rights powers in the Reconstruction Amendments seem, at first glance, to result from a specific historical and political necessity rather than any inherent need for federal power.

the Court has held that Congress may require race-based treatment in circumstances where states could not: affirmative action. In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Supreme Court held that federal affirmative action programs would be subjected only to intermediate scrutiny, while in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), it applied strict scrutiny to state or local affirmative action programs. Interestingly, Justice Brennan wrote both the Metro Broadcasting and Morgan opinions but did not notice (or mention) the apparent inconsistency. Of course, Metro Broadcasting has recently been overruled by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995), but it at least temporarily suggested that Congress might weaken individual rights safeguards as defined by the Supreme Court. Ultimately, however, Metro Broadcasting and Adarand are better understood as a product of the unique internal conflict within the Court and odd doctrinal positions of individual justices occasioned by the affirmative action controversy, rather than as a broader indication that the Court is prepared to allow Congress to dilute the provisions of the Reconstruction Amendments.

171. The field of foreign affairs is a prime example of this functional concern. Likewise, we might understand the federal government's exclusive power to coin money as reflecting the recognition that a single national currency is essential.

172. Such problems, of course, plagued the United States under the Articles of Confederation and were a primary reason for the new Constitution, and its inclusion of federal power over interstate commerce. Stone et al., supra note 48, at 3. The modern treatment of the Commerce Clause also reflects the need for uniform national regulation.

173. This sense is reinforced by the Framers' omission of individual rights authority from the original Constitution, which suggests that they did not think that federal individual rights authority was necessary to the successful functioning of the new government.
I believe, however, that there are reasons inherent in the structure of federalism that require federal individual rights authority.

First, a uniform national standard of basic individual rights safeguards is necessary to the successful integration of separate states into a single nation. It is well understood that the successful integration of a federal system requires that persons are able to move freely from state to state. This is the premise of the Court's recognition of the federal right to travel.\textsuperscript{174} Without a "floor" of individual rights, however, freedom of movement is easily discouraged. People need to be assured that their basic rights will be protected before they will travel to another state. Indeed, this is the Commerce Clause rationale for \textit{Heart of Atlanta Motel, Inc.},\textsuperscript{175} although the purposes of free interstate movement are not limited to economic ones.\textsuperscript{176}

Second, the failure of some states to preserve individual rights creates interstate friction and turmoil. People place great value on individual rights, not only their own but also those of others. Thus, the failure to respect individual rights has significant repercussions that go beyond the boundaries of the particular state involved. In other words, like commercial regulation or pollution, there are externalities. Most directly, those whose rights are violated may be forced to leave a state, imposing costs on surrounding states.\textsuperscript{177} Even when their own rights are not at stake, many people may feel so strongly about rights issues that they intervene directly or place pressure on their state or the federal government to act, thereby producing conflict.\textsuperscript{178}

\textsuperscript{174} See Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). Free movement of persons is also one of the essential components of the original European Economic Community, and its full realization is a central component of efforts toward further unification. See, e.g., GEORGE A. BERMANN, ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 518-41 (1993).

\textsuperscript{175} See supra note 129.

\textsuperscript{176} In one sense the absence of barriers to free interstate movement is a definitional requirement for a national entity. As a practical matter, the intermingling of persons among the states is essential to producing a sense of national identity and to removal of excessive parochialism.

\textsuperscript{177} There are numerous examples of this refugee phenomenon in recent international experience.

\textsuperscript{178} As an example, consider the interstate implications of the abortion controversy itself. Differing state regulations and economic considerations have made it easier to get abortions in some areas than in others, which causes some women who cannot easily obtain abortions to seek them in other states. At the same time, opponents of abortions feel very strongly that the rights of the unborn child/fetus must be protected, and many travel throughout the country in an effort to prevent abortions. The resulting conflict taxes the resources of communities such as Wichita, Kansas. For examples of cities in which Operation Rescue successfully closed clinics, see Bermann, supra note 9, at 236 n.143. At the present time, there is every indication that the controversy is becoming increasingly violent. See Richter, supra note 9, at 909-10.
Finally, and more fundamentally, basic rights safeguards are integral to a constitutional order based on the rule of law, which is an essential prerequisite of any federal system. Federalism entails, by definition, a division of governmental authority that cannot be changed unilaterally by either the federal or state governments.\textsuperscript{179} Such a division of authority must transcend political expediency or the temporary availability of force to sustain it; it must be respected as fundamental law.\textsuperscript{180} Since such a constitutional order assumes that governments are bound by law, it in turn requires that the states involved respect the rule of law. And the experience of modern government makes clear that the corrupting influence of governmental power is such that without individual rights protections, the rule of law is lost.\textsuperscript{181} Indeed, the Framers of the original Constitution clearly contemplated that the states shared a common commitment to fundamental rights, and expressly provided that the federal government should “guarantee to every State . . . a Republican Form of Government.”\textsuperscript{182}

Although the functional bases for federal individual rights authority may be less intuitively obvious than other areas of federal power, this authority is no less important to the successful operation of a federal system.\textsuperscript{183} In this regard, I think the Civil War provides an important structural lesson that goes beyond the particular circumstances of slavery and conflict between the North and South. A federal system cannot long tolerate significant disparities in the respect accorded individual rights. Thus, far from regarding the Civil War and Recon-

\textsuperscript{179} Although there is widespread disagreement among scholars as to the specific elements that are essential to a federal system, this general conception is widely accepted. See, e.g., Peter Hay, \textit{Federalism and Supranational Organizations: Patterns for New Legal Structures} 97-98 (1966); Ronan Paddison, \textit{The Fragmented State} 98 (1983); K.C. Wheare, \textit{Federal Government} 11 (1947).

\textsuperscript{180} Federal systems that are imposed primarily by force and that lack a constitutional order to sustain them do not survive for long, as the breakups of the Soviet Union and the former Yugoslavia attest. For a discussion of the law-based state (or lack thereof) in Russia and the Soviet Union, see Molly W. Lien, \textit{Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion}, 30 Stan. J. Int’l L. 41 (1994). Although federal arrangements may, as in the case of the United States, be temporarily preserved through use of force in times of crisis, over the long term they cannot be sustained by force alone.

\textsuperscript{181} Of course, the rule of law is in itself an individual right. But even rights that are not directly encompassed in the rule of law, such as political rights, preserve the accountability of government to the rule of law.

\textsuperscript{182} U.S. \textit{Const.}, art. IV, § 4.

\textsuperscript{183} It is interesting to note, for example, that the European Convention on Human Rights was understood as the first step toward the unification of Europe. See, e.g., 2 \textit{The International Dimensions of Human Rights} 454-55 (Karel Vasak ed., 1982) (“Intended to pave the way towards a united Europe of which it would constitute the ‘axis’, the European Convention on Human Rights . . . both sustains and is sustained by a policy of European integration.”).
struction Amendments as a necessary but unfortunate departure from the basic structure of federalism, we ought to recognize that the Framers' failure to provide for a federal individual rights authority was a fundamental flaw in the structure of the federal system, one that could be corrected only through the Civil War and the Reconstruction Amendments.

III. CONCLUSION

On the surface, the *Bray* and *NOW* decisions seem to be about statutory construction. In addition, many observers have and will attempt to analyze them in terms of their implications for abortion rights. These are important issues worthy of discussion. At bottom, however, the *Bray* and *NOW* decisions also tell us as much about the Court's understanding of federalism as they do about its approach to statutory construction or its current perspective on the abortion controversy. They tell us that the Court does not accept individual rights as an appropriate field of federal authority in the same way as it accepts other fields, such as interstate commerce. In this regard, *Bray* and *NOW* are but recent manifestations of a much broader phenomenon.

I think it is wrong to treat federal individual rights authority as an unwelcome stranger to the structure of federalism. There is no compelling reason from either the text or the history of the Reconstruction Amendments to construe the power they grant to the federal government any differently from other federal powers. Notwithstanding the Framers' initial decision not to give the federal government individual rights authority, such an authority is not inherently incompatible with the structure of federalism. And, just as there are good structural reasons to give the federal government authority over interstate commerce and foreign affairs, there are good structural reasons to believe that the federal government requires authority to establish minimum individual rights safeguards.

Federalism affords no basis for treating individual rights issues any differently from other issues involving the exercise of federal power. Since Congress can ordinarily reach virtually any activity it wants through the exercise of the commerce power, the issue may seem moot.\(^1\)\(^8\)\(^4\) The significant influence of the assumption that individual rights is an inappropriate field for federal action goes far beyond the

\(^1\)\(^8\)\(^4\) After all, *NOW* allowed a federal action against the conduct that *Bray* did not, and Congress in the Free Access to Clinic Entrances Act relied on the commerce power to address specifically the problem of blockades to abortion clinics. Likewise, *Heart of Atlanta Motel, Inc.* and *McCling* avoided any problems under § 5 of the Fourteenth Amendment by relying on the commerce power to uphold the civil rights laws in question.
constitutionality or construction of particular statutes, however.\textsuperscript{185} Thus, the point is an important one worth making.

\textbf{AUTHOR'S POSTSCRIPT}

While this essay was in process, the Supreme Court decided \textit{United States v. Lopez},\textsuperscript{186} which for the first time since 1937 invalidated a federal statute as beyond the scope of the commerce power.\textsuperscript{187} The full import of \textit{Lopez} remains unclear, but it is evident that the Court is now prepared to place at least some limits on that power. \textit{Lopez} has obvious implications for the analysis in this essay,\textsuperscript{188} but it does not undermine my basic thesis that the Court has been unnecessarily inconsistent in its treatment of the federal individual rights power and the commerce power.

Whatever \textit{Lopez} may tell us about the Court's approach to the commerce power from this point on, it does nothing to alter the Court's prior treatment of the commerce and individual rights powers. Thus, the inconsistencies identified throughout this essay—which have long characterized the Court's decisions and extend beyond the specific problems discussed in connection with \textit{Bray} and \textit{NOW}—remain inconsistencies. The consistency and coherence of the Court's jurisprudence must be viewed from the perspective of the doctrine as it stood at the time of an individual decision, not in light of the subsequent evolution of the law (although that evolution may tell us something about why certain decisions were reached).

Even under \textit{Lopez}'s somewhat more restrictive reading of the commerce power, moreover, a more generous reading of individual rights statutes and of congressional authority would still be appropriate. \textit{Lopez} does not affect congressional authority to regulate "the channels of interstate commerce"\textsuperscript{189} or to regulate and protect "the instrumentalties of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."\textsuperscript{190} And although the Court may have limited Congress's power to "regulate those activities having a substantial relation to interstate commerce, . . .

\textsuperscript{185} See \textit{supra} notes 73-96 and accompanying text.
\textsuperscript{186} 115 S. Ct. 1624 (1995).
\textsuperscript{187} Specifically, the Court struck down the Gun-Free School Zones Act of 1990, which forbids any individual knowingly to possess a firearm in a place that he or she knows to be a school zone. 18 U.S.C. § 922(q) (Supp. V 1993).
\textsuperscript{188} Some of these implications are noted at various points in the essay. See \textit{supra} notes 65, 69, 114, 143.
\textsuperscript{189} \textit{Lopez}, 115 S. Ct. at 1629 (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)). This power includes the power to keep them free from immoral and injurious uses. \textit{Id.}
\textsuperscript{190} \textit{Id.} at 1629.
. i.e., those activities that substantially affect interstate commerce,"191 those limits do not appear to portend a dramatic shift in commerce power jurisprudence.192 In essence, the Court limited this strand of commerce power authority in three ways. First, it made clear that the regulated activity’s relationship to or effect on interstate commerce must be “substantial,” but did not suggest that any effect previously recognized as sufficient would now be regarded as providing an inadequate basis for federal action.193 Second, and perhaps most significantly, it confined the “cumulative effects” rationale (under which intrastate activity with little effect on interstate commerce may be regulated if the cumulative effect of all such activity is substantial) to situations in which the underlying activity is economic or commercial in character. 194 Third, the Court suggested both that findings may be important in upholding that exercise of the commerce power and that it may be less deferential to congressional fact finding regarding an activity’s effect on interstate commerce.195

It is by no means clear that these limits represent any substantial diminution of congressional authority,196 and analogous limitations on federal individual rights authority would not necessarily prevent the use of the individual rights power to reach, for example, private conspiracies such as the one at issue in Bray. Shortly after Lopez, in United States v. Robertson,197 the Court refused to read RICO’s jurisdictional nexus requirement narrowly, reversing a Ninth Circuit Court of Appeals decision that had overturned a RICO conviction on the ground that the jurisdictional nexus requirement had not been met.198 The Court apparently did not even regard Robertson as presenting any difficult issues; it disposed of the case unanimously in a short per curiam

191. Id. at 1629-30.
192. Justice Thomas’s call for a broader reconsideration of the Court’s entire Commerce Clause jurisprudence received no support. See id. at 1651-65 (Thomas, J., concurring).
193. Id. at 1630.
194. Id. Thus, the rationale did not apply to the Gun-Free School Zones Act, because the possession of a gun is not a commercial activity. Id. at 1630-31.
195. Noting that there were no findings accompanying the act that would enable it “to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye,” the Court nonetheless indicated that it would merely “consider” congressional findings as part of its “independent evaluation of constitutionality under the Commerce Clause.” Id. at 1632.
196. Even after Lopez, for example, the United States Court of Appeals for the Eleventh Circuit had no difficulty upholding FACE as within the scope of the commerce power, distinguishing Lopez on the ground that FACE regulates a commercial activity (the provision of reproductive health services), and relying on congressional findings that blocking access to clinics threatened interstate commerce. See Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir. 1995).
198. Id. at 1733.
opinion. Thus, even after Lopez, the Commerce Clause does not appear to place any significant restrictions on RICO. Conversely, applying Lopez-like restrictions to the individual rights power would not prevent the exercise of that power to reach private conspiracies to prevent access to abortion clinics. Such conspiracies represent “substantial” threats to constitutionally protected rights, the underlying private activity is “individual rights” in character, and the legislative history of the Ku Klux Klan Act is replete with credible concerns about the impact of private conspiracies on the exercise of constitutionally protected rights.

To the extent Lopez does narrow the scope of the commerce power somewhat, it may also bring the scope of that power and the individual rights power into closer alignment. On the other hand, if the Court’s interest in limiting the commerce power reflects a broad-based mistrust of federal authority, Lopez may be a precursor to further restrictions on the federal individual rights power which could not only continue the sort of disparities described in this essay, but could also exacerbate them, considering the Court’s recent record of limiting the judicial protection of many individual rights. That possibility makes the arguments presented in this essay all the more important.

While this essay has taken the prevailing commerce power doctrine as a given, it has not been meant to endorse that doctrine, which is certainly difficult to square with the underlying constitutional principle of enumerated powers. Alignment of various federal powers under a more coherent conception of federalism and federal authority would be a welcome development. I expect to explore such questions in future projects.

199. See supra notes 65-68 and accompanying text.
200. It is not even clear that this type of restriction is relevant in this context, since the justification for reaching private conspiracies is not dependent on a cumulative effects rationale.
201. See supra note 67.
202. See Levy, supra note 155, at 351.