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# Limiting Federal Restrictions on State and Local Government

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# FIRST MONDAY—LIMITING FEDERAL RESTRICTIONS ON STATE AND LOCAL GOVERNMENT*

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## I. INTRODUCTION

The Fourteenth Amendment to the U.S. Constitution, adopted in 1868, clearly limits the power of state and local government. In 1871, Congress passed a statute[1] providing a cause of action and remedies for persons whose Fourteenth Amendment rights, as well as other federal rights, are violated. In federalism terms, these provisions expand federal power and reduce state power. While they were dormant for many years, two relatively recent Supreme Court decisions—*Brown*[2] in 1954 and *Monroe*[3] in 1961—gave reason for optimism that these provisions could live up to their promise and provide meaningful protection for civil rights. However, the Court has gradually eroded them to the point where much of the promise now has a hollow ring for many victims of official lawlessness. Again in federalism terms, by making it more difficult to obtain relief under the Fourteenth Amendment and section 1983, the Court is shifting power from the federal government to the states.

Many examples and decisions could be cited to support this premise. I will address just two aspects of the issue: the Court's modification of section 1983, particularly by creating defenses, and its interpretation of the Equal Protection Clause.

## II. SECTION 1983—ENFORCEMENT OF FOURTH AMENDMENT

Using a Fourth Amendment claim, I will attempt to place the § 1983 issues in context. Assume the following facts. Ms. Sosa was arrested by a state police officer for shoplifting and brought to the Valparaiso Police Department where she was subjected to a strip-search by the arresting officer and a city police officer, both males. Ms. Sosa files a lawsuit in

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* This speech was given on October 5, 1998 (the First Monday).

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[1] 42 U.S.C. § 1983 (1994).

[2] Brown v. Board of Education, 347 U.S. 483 (1954).

[3] Monroe v. Pape, 365 U.S. 167 (1961).

federal court alleging the strip-search violates the Fourth Amendment, which prohibits "unreasonable searches and seizures."[4]

A federal statute, 42 U.S.C. § 1983,[5] states:

> Every person[6] who, under color of [state law][7] subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,[8] shall be liable to the party injured in an action at law,[9] suit in equity,[10] or other proper proceeding for redress.

The defendants are the Indiana State Police Department (in effect, the state), the state police officer, the City of Valparaiso, and the city police officer. Ms. Sosa seeks compensatory and punitive damages, as well as an order enjoining such conduct in the future.

The following are some of the hurdles Ms. Sosa will face:

1. Indiana State Police Department - because of the Supreme Court's interpretation of the Eleventh Amendment, the State cannot be sued for damages in federal court; also, the Court has determined

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[4] In some circumstances a strip-search, which often includes a search of body cavities, is justified by the demands of institutional security and a belief that the person arrested is concealing a weapon or contraband. Such searches are very demeaning and embarrassing, particularly when conducted by a member of the opposite sex, and they are often used as a means of harassment. Reasonableness will depend on the circumstances.

[5] This statute, passed in 1871, three years after adoption of the Fourteenth Amendment, was passed at least in part to

> afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies....The federal remedy is supplementary to the state remedy.

*Monroe*, 365 U.S. at 180 and 182. This statute, along with its federal court jurisdictional counterpart, 28 U.S.C. § 1343, made it clear that Congress intended to make a federal forum available for § 1983 actions.

[6] Here "person" refers to potential defendants.

[7] The "under color of state law" requirement limits the reach of section 1983, like much of the Constitution, to government action and, more particularly, state and local government action.

[8] Only rights "secured by the Constitution and laws" can be enforced in an action based on section 1983. In other words, section 1983 does not provide any substantive rights, only a cause of action to enforce rights secured by the U.S. Constitution and federal statutes (not state-created rights).

[9] An "action at law" is an action for damages.

[10] A "suit in equity" generally refers to an action seeking injunctive relief.

the State, as well as its agencies and officials in their official capacity, is not a "person" and thus not subject to suit under section 1983.

2. State police officer - can be sued in federal court in his official capacity for an injunction and in his individual capacity for damages; but, Sosa is not entitled to an injunction unless she shows a likelihood of encountering this again, and Sosa is not entitled to damages unless the Fourth Amendment right she asserts was "clearly established" at the time of the incident (qualified immunity).

3. City of Valparaiso - while a city is a "person" subject to suit under section 1983, the city is not protected by the Eleventh Amendment and does not enjoy a qualified immunity from damages. The city is liable for the action of the city police officer only if the officer acted pursuant to city policy, and its liability is generally limited to compensatory damages (not punitive).

4. City police officer - same as state police officer.

So, Ms. Sosa could prove a violation of the Fourth Amendment, but be denied any relief in her federal court action. Each of these hurdles or Court-imposed restrictions will be discussed below.

The Eleventh Amendment (1798) to the U.S. Constitution limits the Article III power of the federal courts.[11] It is generally agreed that this amendment was passed to overrule the *Chisholm*[12] decision in which the Court allowed a South Carolina plaintiff to sue the State of Georgia in federal court, based on diversity jurisdiction, for breach of a contract. However, in 1890, the Court, in one of its more active moments, effectively amended the Eleventh Amendment to exclude from the federal courts suits against a state brought by its own citizens.[13]

A few years later, in *Ex parte Young*,[14] a case arising out of a shareholders' derivative suit to enjoin enforcement of a Minnesota statute establishing maximum railroad rates on the grounds that it violated the Fourteenth Amendment, the Court created an exception for suits in federal

[11] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, . . . ." U.S. CONST. amend. XI.
[12] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
[13] Hans v. Louisiana, 134 U.S. 1 (1890).
[14] *Ex parte* Young, 209 U.S. 123 (1908).

court seeking prospective equitable relief against a state official to prohibit the state official from enforcing an unconstitutional state law. This exception was recently limited when an Indian tribe sought to require the State of Florida to comply with the Indian Gaming Regulatory Act (IGRA),[15] *i.e.*, engage in good faith negotiations for the purpose of entering into a compact.[16] One issue was whether, based on *Ex parte Young*, the tribe could obtain an injunction against the governor. The Court decided the exception did not apply because Congress had provided a specific remedial scheme for enforcement of the IGRA, a scheme that the court found unconstitutional as beyond the power of Congress!

As a federalism matter, the Eleventh Amendment itself protects state sovereignty and the Court's interpretation of it provides even greater protection than that intended by the amendment. It is indeed ironic that the Fourteenth Amendment, which clearly represents a constitutional limit on the states, cannot be fully enforced in the federal courts.

In 1978 the Court held that a municipal entity is a "person,"[17] but eleven years later, in *Will*,[18] it held that a state is not a "person" for section 1983 purposes. The Court in *Will* relied heavily on Eleventh Amendment principles. As stated by Justice Brennan in his dissent, the Eleventh Amendment "lurks everywhere in today's decision and, in truth, determines its outcome."[19] This decision is important because it eliminates (i) section 1983 actions against states even in *state* courts, and (ii) section 1983 actions against states in federal courts even where Congress has abrogated their Eleventh Amendment protection or a state has waived it. However, the *Ex parte Young* exception survives *Will*.

As a result of *Will*, a local governmental entity is a "person" for section 1983 purposes, but a state is not. This is ironic in light of the fact that section 1983 was passed, at least in part, because Congress did not trust the states to enforce either state or federal rights of minority individuals. The effect of the Eleventh Amendment and *Will* is that no relief is available against the State of Indiana, even if the state police officer acted unconstitutionally.

Injunctions against police abuse, absent a specific policy authorizing abuse, are not favored by the Court because it is unwilling to accept the fact

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[15] 25 U.S.C. § 2701, et seq.
[16] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
[17] Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).
[18] Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).
[19] *Id.* at 72.

that at least certain segments of our society are routinely abused by the police, whether or not they have done anything illegal. In *Lyons*,[20] a case challenging the routine use of a deadly "chokehold" by the Los Angeles police department, particularly when dealing with African Americans, the Court used the standing doctrine to preclude injunctive relief.

According to the majority, the plaintiff did not have standing because it was "no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury."[21] A majority of the Justices obviously have a much different view of the Los Angeles police than either the black residents of many neighborhoods in Los Angeles or Justice Marshall who wrote a compelling dissent explaining how the chokehold was actually used in the black community.[22] The effect of *Lyons* is that Sosa will receive no injunctive relief.

The most effective barrier to relief under section 1983 is the "qualified immunity" affirmative defense created by the Court. In short, this defense enables government officials to avoid individual liability for damages, even where they violated the constitution or a federal statute, unless the plaintiff can show that the right asserted was "clearly established" at the time of the challenged conduct.[23] It is not enough to show it was "clearly established" that strip searches must be reasonable to satisfy the Fourth Amendment; rather, Sosa must show here it was "clearly established" that the search of her person violated the Fourth Amendment.[24] Because the state is protected for reasons discussed above, if the state police officer escapes individual liability for damages, there will be no monetary relief based on the actions of this officer.

Going back to the language of section 1983, there is nothing in the statute suggesting such a limitation on damages. To justify this judicially-created defense, the Court pointed to the "social costs" of litigation against government and public officials, including: the expenses of litigation; the diversion of official energy from pressing public issues; the deterrence of able citizens from acceptance of public office; and a danger that fear of

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[20] City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
[21] *Id.* at 108.
[22] *See id.* at 114-19.
[23] Crawford-El v. Britton, 118 S. Ct. 1584 (1998).
[24] Anderson v. Creighton, 483 U.S. 635 (1987).

being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.[25]

While rejecting an absolute immunity from liability, because it had to concede some cases against public officials have merit, the Court arrived at what the majority felt was the appropriate balance. In short, public officials are immune from personal liability if they acted in "good faith," *i.e.*, they did not violate any "clearly established" right of the plaintiff. To fully serve its purpose, the Court says the qualified immunity must be viewed as an immunity from suit, rather than merely a defense to liability. Accordingly, the availability of the immunity should be determined at an early stage in the litigation, usually in response to a motion for summary judgment. If immunity is rejected, the ruling is usually appealable immediately.[26]

Clearly Congress, when it passed section 1983, was not as concerned with these social costs as was the Court, because Congress said nothing about an immunity defense. There may be several reasons why Congress did not include the immunity defense in the "plain language" of the statute. Even if these social costs exist, Congress might have determined that they represent the price we must pay for vindication of important federal rights. Or, Congress might have concluded that these costs are not as great as the Court suggests. It should be noted that the Court did not present empirical data to support its assertions about social costs.

There are several questions not addressed by the Court. What are the actual expenses of defending civil rights litigation? Who pays these expenses, government or the individual officials? What portion of the total expenses of defending civil rights litigation is avoided by the immunity defense, since successful assertion of the defense avoids only individual damage liability and frequently does not end the litigation? How much more does the damage claim divert the energy and attention of government officials, keeping in mind that the litigation may proceed even if the defense is successful and the fact that attorneys provide most of the energy and attention necessary to defend litigation? Do "able citizens" really avoid government jobs because of the threat of civil rights liability, or do they avoid such jobs because of the bureaucracy, low salary, etc.? What evidence is there that the threat of damage liability actually "dampen[s] the ardor" of government officials? The point is simply that the Court makes assumptions about matters, for the purpose of justifying its creation of the

[25] Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[26] Mitchell v. Forsyth, 472 U.S. 511 (1985).

immunity defense, that are best left to Congressional fact finding and deliberation.

To the extent the Court is really concerned about the prompt termination of insubstantial lawsuits, this is a concern that is not unique to civil rights cases. We have not addressed this concern in other areas by creating a doctrine that frequently absolves wrongdoers of all liability. If we are really concerned about imposing individual liability for damages on the police officer who makes a good faith judgment in the course of making an arrest, but it is later determined his judgment violated the Fourth Amendment, there is a simple solution. States and municipalities can simply adopt laws agreeing to pay such judgments. In this way, the community would bear the cost of unconstitutional action, rather than the victim. The effect of qualified immunity is that the state police officer is immune from individual damage liability unless Sosa establishes that her Fourth Amendment right was "clearly established."

After holding in *Monroe*[27] that "person" does not include governmental entities, such as states, counties and cities, the Court reversed itself in *Monell*.[28] While *Monell* opens the door to municipal liability, based on the illegal actions of the agents and employees of the municipality, the opening is quite narrow because the plaintiff must establish that the agent or employee who inflicted the harm was acting pursuant to municipal "policy." This can be done by showing: (a) an explicit policy adopted by the policymaking body of the municipality; (b) the agent or employee inflicting the harm is a policymaker to whom state or local law delegates authority to make the challenged decision; or (c) an implied policy, based on the municipality's failure to properly train or supervise its agents and employees, that constitutes deliberate indifference to the rights of the victim and that caused the injury.

Respondeat superior liability, *i.e.*, responsibility for the actions of one's employees and agents, is common in tort law and there are no policy reasons that compel a different result for municipalities under section 1983. Full compensation of the victims of official lawlessness should be the goal of section 1983, particularly in light of the fact that only the municipality is in a position to either prevent the injury or spread the loss among all members of the community.

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[27] Monroe v. Pape, 365 U.S. 167 (1961).
[28] Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).

Under *Monell*, it is very difficult to hold a municipality liable for the illegal conduct of its non-policymaking employees or agents. This is true because most entities do not adopt explicit policies authorizing violations of federally protected rights. Cases holding that municipalities are responsible for the acts of their policymakers are often of no help because it is the lower level employees who have the most contact with the public, as in the strip search example.

Municipal liability for the misconduct of non-policymakers, like the police officers in the strip search example, will normally have to be based on a failure to train, supervise or discipline. The Court held in *Harris*[29] that failure to train police officers amounts to "policy or custom" only where the failure "amounts to deliberate indifference to the rights of persons with whom the police come into contact."[30] In addition to showing that the failure to train amounts to deliberate indifference, the victim must show a causal connection between the failure to train and the injury suffered. Needless to say, this can be a difficult standard for the victim to meet.

In addition to improving the victim's chances of receiving full compensation for injuries suffered as a result of official lawlessness, municipal liability based on the respondeat superior theory should help to deter such lawless conduct. The municipality has the ability to discharge or otherwise discipline the responsible employee(s). Liability will provide an incentive for municipalities to police their employees. Voters who oppose the use of tax dollars to compensate the victims of official misconduct can express their disapproval on election day. There is no reason why official misconduct and abuse of power should not be issues on election day. The effect of *Monell* is that it will be difficult for Sosa to establish a municipal "policy," so the City will not be liable even if its officer acted unconstitutionally.

Municipal liability for punitive damages is less crucial than liability for compensatory damages, but it is still important as a deterrent. Because the victims of civil rights violations often suffer little out-of-pocket loss but substantial intangible harm, such as emotional and mental distress, humiliation, and embarrassment, compensatory damage awards are often quite small. Absent broken bones, blood, physical injuries, and medical bills, judges and juries seem reluctant to provide substantial compensation, even where the violation of rights is outrageous. Therefore, the deterrent role of punitive damages is far greater than in cases where substantial

[29] City of Canton, Ohio v. Harris, 489 U.S. 378 (1989).
[30] *Id.* at 388.

compensatory damages are awarded. Unfortunately, too few municipalities are willing to take corrective action against employees who violate the civil rights of citizens. The more likely response of municipalities is to blindly take the side of the responsible employees and agents. This may take the form of an investigation with a predetermined outcome and prompt exoneration. Awards of punitive damages would cause elected officials to take civil rights violations seriously, even absent large awards of compensatory damages.

While recognizing that a "major objective" of punitive damages is to prevent future misconduct and that an "important purpose" of section 1983 is to deter future abuses of power, the Court in *Fact Concerts, Inc.*[31] held that a municipality is immune from punitive damages under section 1983. The reasons advanced by the Court, such as (i) the ineffectiveness of punitive damages as a deterrent if they are assessed against the municipality rather than the individual, (ii) corrective action by the municipality is just as likely without punitive damages, (iii) personal liability for punitive damages is more effective, and (iv) concern for the fiscal integrity of municipalities, are not compelling and are based on unsupported assumptions. One could just as reasonably conclude that the threat of punitive damages, to be paid by the entity, will cause government employees and agents to act more responsibly because this threat will encourage elected officials and their high-level appointees to make compliance with the federal constitution and laws a priority. Further, awards of punitive damages are a serious risk to the financial integrity of municipal government only if government employees and agents regularly engage in serious violations of civil rights. Why shouldn't there be a serious risk to the financial integrity of a municipal entity that tolerates and/or encourages official lawlessness? Keep in mind that punitive damages are awarded only where there is proof of malice or reckless disregard for the federally protected rights of the victim.[32] The effect of *Fact Concerts* is that the plaintiff generally cannot receive an award of punitive damages against the City.

## III. EQUAL PROTECTION CLAUSE: A FALSE PROMISE OF EQUALITY?

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[33] At first glance, one would have reason to believe this clause, adopted in 1868,

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[31] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).
[32] Smith v. Wade, 461 U.S. 30 (1983).

would establish equality as a guiding principle in our society. However, it has a checkered history.

When we think of low points in the history of the Court, the *Dred Scott*[34] decision in 1856, holding that black slaves were not citizens of the United States and that the Missouri Compromise was invalid because it deprived slave owners of their "property" rights without due process, obviously comes to mind. Two Equal Protection Clause cases are not far behind: (i) *Plessy*,[35] holding a Louisiana law mandating "separate but equal" railway passenger cars did not violate equal protection, and (ii) *Korematsu*,[36] holding the exclusion of American citizens of Japanese descent from certain areas, because this country was at war against Japan, did not violate equal protection (being Japanese was a proxy for disloyalty).

However, with the decision in *Brown*[37] in 1954, concluding that in the field of public education the doctrine of "separate but equal" has no place and such separate educational facilities violate equal protection, there was cause for optimism. There was finally, many years after its passage in 1868, reason to believe that the Equal Protection Clause might fulfill its promise of equality. Unfortunately, the optimism was short-lived. I will address two lines of decisions that severely restrict the ability of the Equal Protection Clause to accomplish its goal—equality.

The first concerns the type of discrimination reached by the Equal Protection Clause: does it prohibit only intentional discrimination, or does it also prohibit neutral laws and practices that have a discriminatory impact? This is important because much discrimination today falls in the latter category. When faced with this issue in 1976, the Court limited the reach of the Equal Protection Clause to intentional discrimination and held that the disparate impact of an employment test (black applicants failed at a rate four times greater than white applicants) alone does not prove intentional discrimination.[38] Or, as the Court said a few years later, the plaintiff must show that a veteran's preference for government employment in Massachusetts was adopted at least in part "because of, not merely in spite of," its adverse effects on females.[39]

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[33] U.S. CONST. amend. XIV.
[34] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
[35] Plessy v. Ferguson, 163 U.S. 537 (1896).
[36] Korematsu v. United States, 323 U.S. 214 (1944).
[37] Brown v. Board of Educ., 347 U.S. 483 (1954).
[38] Washington v. Davis, 426 U.S. 229 (1976).
[39] Personnel Admin. v. Feeney, 442 U.S. 256, 279 (1979).

It is not readily apparent why the adoption of a facially neutral law or practice, knowing it will discriminate against racial minorities or women, does not violate the Equal Protection Clause. Certainly the veterans' preference was nearly as successful in eliminating women from government employment as a flat ban on hiring women would have been. Similarly, in many communities, the neighborhood school concept is just as effective as the Kansas law at issue in *Brown* in assuring segregated schools. Nevertheless, segregation resulting from neighborhood schools does not violate equal protection, assuming a school system has eradicated all traces of past intentional discrimination.

As a result of its decision in *Davis*, the Court's message to government is quite clear: if it wants to discriminate on the basis of race or gender, look for a neutral proxy, express a neutral purpose, and make it difficult for anyone to prove the real purpose. The Court could have sent a far different message: if its neutral actions have a discriminatory effect, it must determine whether there is a less discriminatory means of accomplishing its compelling or important goal. This message would be much more consistent with the goal of equality.

Second, by labeling certain attempts to eliminate race discrimination as "affirmative action" or "reverse discrimination," and assuming such benign attempts are as bad as invidious discrimination, the Court has justified the use of "strict scrutiny," *i.e.*, government needs a compelling justification and must use means narrowly tailored to accomplishing its purpose, when determining the legality of such attempts. Use of the "strict scrutiny" standard is another way of saying certain government action carries a strong presumption of illegality, with the burden on government to overcome that presumption. Or, more cynically, it is a way of justifying the conclusion that the Court wants to reach.

Such a strong presumption of illegality makes sense when government acts for the purpose of hurting people because of their race, at least in part because it is rare that such a purpose can be justified. On the other hand, does such a presumption make sense when government acts for the purpose of generally leveling the playing field of education or employment? In other words, when the government's ultimate goal is equality, it is not so clear that we should engage in a presumption of illegality. One could say, as the Court does when it wants to reject a First Amendment challenge to a content-based regulation of speech, that the predominant concern of government was the secondary effects of the

speech, not the content.[40] Here, the predominant concern of government is equal opportunity (a level playing field), and a short-term secondary effect might be that someone who wanted a job or a seat in law school did not get it, at least not immediately.[41]

The point is simply this: at least since the *Croson*[42] decision in 1989, the U.S. Supreme Court has made the Equal Protection Clause one of the greatest barriers to true racial and gender equality in this country! How ironic. As a result, state and local governments that want to promote equality by taking affirmative steps to end discrimination are told that the Equal Protection Clause will not allow it. This must be standing federalism on its head; in other words, the Court is saying implicit in federalism is the notion that states will not do anything to protect the rights of individuals and, when they do, federalism will be ignored.

The Court completed its agenda in 1995 when it determined that Congress, which is explicitly given the power in section 5 of the Fourteenth Amendment to pass laws enforcing the Equal Protection Clause, cannot take affirmative steps to end race discrimination unless it satisfies the strict scrutiny standard described above.[43] While *Marbury*[44] may give the Court this power, it is one thing for the Court to tell Congress that it, in passing a law pursuant to its Commerce Clause power, violated another constitutional provision, such as the First Amendment. It is another thing for the Court to tell Congress that it, in passing a law pursuant to its section 5 power to enforce the Fourteenth Amendment, exceeded its section 5 power. The latter situation is more like telling Congress that it exceeded its Commerce Clause power in passing a law pursuant to the Commerce Clause. Here, at least until *Lopez*,[45] the Court restrained itself in the exercise of its self-awarded *Marbury* power and gave great deference to the judgment of Congress.

*Adarand* is like the Religious Freedom Restoration Act case,[46] but worse because the Fourteenth Amendment is more obviously about racial equality than religious freedom. However, *Adarand* was necessary for the Court to accomplish its anti-equality agenda. Indeed, this is a sad state of

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[40] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986).

[41] Of course, given the current balance of power in this country, a system that excludes white males is more likely to be changed to accommodate everyone than a system that excludes African American females.

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

[43] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[44] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[45] United States v. Lopez, 514 U.S. 549 (1995).

[46] City of Boerne v. Flores, 521 U.S. 507 (1997).

affairs. One can understand why the two elected branches react to the political winds and opinion polls, but what is the Court's excuse?

## IV. CONCLUSION

It is not clear that federalism concerns are driving the Court's narrow interpretation of § 1983 and the Equal Protection Clause. However, the result is clear: except in their efforts to eliminate race discrimination through affirmative programs, states have reclaimed much power as the federal protection of individuals shrinks.