FEDERALISM AND SEPARATION OF POWERS

THE SPENDING CLAUSE IMPLICATIONS OF *RUMSFELD V. FORUM FOR ACADEMIC AND INDIVIDUAL RIGHTS*

*BY WILLIAM E. THRO**

In *Rumsfeld v. Forum for Academic & Institutional Rights*,[1] the Supreme Court of the United States upheld the constitutionality of the Solomon Amendment,[2] which mandates that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters,[3] the *entire* institution would lose certain federal funds.[4] "Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association" the Solomon Amendment is consistent with the First Amendment.[5] Indeed, the Court chastised the Forum for Academic and Institutional Rights for attempting "to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. . . . [T]he law schools' effort . . . plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents."[6] Yet, while *Rumsfeld* is significant for its discussion of the interplay between the First Amendment and the Armed Forces Clauses,[7] its greater significance is its pronouncements about the Spending Clause.[8]

Quite simply, *Rumsfeld* represents a fundamental shift in the Court's Spending Clause jurisprudence. The Court, in an opinion written by Chief Justice Roberts and joined by every participating Justice,[9] announced a new bright line rule—if the Constitution prohibits Congress from accomplishing an objective *directly*, the Constitution also prohibits Congress from using the Spending Clause to accomplish the objective *indirectly*.[10] Put another way, Congress' power under the Spending Clause is no greater than its authority under other Article I powers or its powers to enforce the Constitution.[11] In effect, *Rumsfeld* adopts the "Madisonian view" of the Spending Clause while implicitly rejecting the "Hamiltonian view" of the Spending Clause, which has dominated for the past seventy years.[12]

The purpose of this article is twofold. First, it seeks to explain how the Court adopted a new rule for evaluating Spending Clause statutes. Second, it seeks to explore the implications of that new rule.

I. *RUMSFELD*'S ADOPTION OF THE MADISONIAN INTERPRETATION OF THE SPENDING CLAUSE

Seventy years ago, in *United States v. Butler*,[13] the Court declared, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[14] In other words, as the Court observed in 1987 in *South Dakota v. Dole*,[15] "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[16] Thus, the Spending Clause was "limited only by Congress' notion of the general welfare [and] the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'"[17] Indeed, Congress had "a seemingly easy end run around any restrictions the Constitution might be found to impose on its ability to regulate the states. Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states."[18]

Rumsfeld repudiates this reasoning. Instead of recognizing that Congress could use the Spending Clause to accomplish whatever it desired, the Court declared:

> Other decisions, however, recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." Under this principle, known as the unconstitutional conditions doctrine, *the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students*.

**William E. Thro is the State Solicitor General of the Commonwealth of Virginia. During the 2005 Term, he argued two Supreme Court cases dealing with significant federalism issues*—Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), and* Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006). In addition, he has argued a number of cases involving Congress' powers under the Spending Clause.* See Madison v. Virginia*, No. 06-6266 (4th Cir. filed Feb. 21, 2006);* Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005);* Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000).*

The views expressed in this article are entirely those of the author and do not necessarily represent the views of the Attorney General of the Commonwealth of Virginia.

> This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice offered in [*Grove City Coll. v. Bell*] becomes an unconstitutional condition. *It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds*.[19]

Thus, when confronted with a claim that a Spending Clause statute is unconstitutional, federal courts must focus on whether Congress could enact the legislation *directly* using one of its other constitutional powers.[20] If Congress could have enacted the measure directly, then the Spending Clause statute is constitutional. Alternatively, if Congress could not have enacted the measure directly, then it cannot enact the measure using the Spending Clause. Put another way, the Spending Clause is not an independent source of congressional authority, but merely an indirect way for Congress to exercise authority conferred elsewhere in the Constitution.

The Court's adoption of the Madisonian view of the Spending Clause is not dicta. Rather, it is an essential part of the analytic framework for resolving the constitutionality of the Solomon Amendment—it establishes that the critical inquiry is whether Congress could use the Armed Forces Clauses to compel universities to accept military recruiters. Although the Court did not explicitly overrule or limit those decisions suggesting that Congress could use the Spending Clause to achieve objectives indirectly that it could not achieve directly using its other constitutional powers,[21] the Court did explicitly rely on an obscure decision limiting the government's power to achieve a result indirectly.[22] While the Court has emphasized that its decisions cannot be overruled by implication,[23] the Court recently has adopted new constitutional rules that substantially limited or overturned previous decisions without explicitly stating that it was doing so.[24]

Furthermore, there is circumstantial evidence that Chief Justice Roberts, who has a reputation for using precise language and excluding extraneous material, intended to change the Court's Spending Clause jurisprudence. As a young lawyer, John Roberts co-authored an amicus brief on behalf of the National Beer Wholesalers' Association in *Dole*.[25] The amicus brief urged the Court to reject "an intrusion on state authority by Congress simply because Congress proceeds *indirectly under the Spending Clause*."[26] Indeed, "Congress is not free to impose its will on the States, either *directly or through conditions on the receipt of funds* the States cannot do without."[27] During deliberations in *Rumsfeld*, the Chief Justice revived his idea that if Congress cannot act directly, then it cannot use the Spending Clause to act indirectly. Although the Court was unpersuaded by Roberts the lawyer, it was persuaded by Roberts the Chief Justice.

II. The Implications of the Madisonian Interpretation

Rumsfeld's bright line rule—if Congress cannot enact a measure *directly* using its other constitutional powers, then Congress may not enact the measure *indirectly* using the Spending Clause—does not mean that the Spending Clause is eviscerated or that Congress may not impose non-discrimination requirements on recipients of federal funds. For example, Congress, in the exercise of its powers under the Fourteenth Amendment Enforcement Clause,[28] may compel the States to comply with the Constitution.[29] Thus, Congress, in the exercise of its powers under the Spending Clause, may enact Title VI[30] and Title IX,[31] both of which are co-extensive with the Equal Protection Clause.[32] Similarly, Congress, in the exercise of its powers under the Interstate Commerce Clause, can prohibit disability discrimination throughout society by enacting the Americans with Disabilities Act.[33] Consequently, Congress, in the exercise of its powers under the Spending Clause, may prohibit disability discrimination by recipients of federal funds through Section 504[34] of the Rehabilitation Act of 1973.[35] Moreover, Congress may abrogate sovereign immunity for federal statutory claims *that are also constitutional claims*.[36] Therefore, Congress may use the Spending Clause to exact a waiver of sovereign immunity for statutory claims *that are also constitutional claims*.[37]

Yet, although *Rumsfeld* does not eviscerate Congress' Spending Clause powers, it does impose significant limitations on the Spending Clause powers. Prior to *Rumsfeld*, the States were "at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate."[38] As Professors Baker and Berman explained:

> [A]llowing Congress to spend for objectives that it could not pursue under its other enumerated powers at least partially undermines the limitations upon those other powers. Indeed, this was obvious to the Court back in *Butler* when it first confronted the need to choose between the Madisonian and Hamiltonian views of the spending power, and even explains the schizophrenic character of that decision—nominally adopting the Hamiltonian conception, but ruling in seeming accord with the Madisonian. But during the sixty years following *Butler* this observation had more academic than practical significance. The steady expansion of Congress's commerce power rendered the spending power's circumventionist potential relatively inconsequential. For this reason, *Dole* was of no great moment back in 1987.
>
> Its true importance became plain, though, as soon as the Rehnquist Court started to impose constraints. Indeed, mere days after the Court announced its decision in *Lopez*, the *New York Times* already reported that President Clinton was considering conditioning federal education

> funds on each state's enactment of a state gun-free school zone law that would replicate the provisions of the newly invalidated federal law. Congress ultimately decided against this strategy but only because it happened upon an even more attractive means of circumvention: adding a "jurisdictional element" to the statute.[39]

Rumsfeld removes the possibility that Congress can use the Spending Clause to circumvent limitations on its other powers. In other words, it aligns the scope of the Spending Clause power with the scope of the other powers. The Spending Clause power is no greater—and no less—than any other congressional power. Constitutional symmetry has been achieved. This constitutional symmetry manifests itself in three important ways.

First, Congress may not use the Spending Clause to circumvent the textual and structural restrictions on its powers.[40] Most obviously, because Congress may not use the Interstate Commerce Clause[41] to regulate activities that do not substantially affect interstate commerce,[42] it may not use the Spending Clause to regulate purely local matters.

A further illustration is provided by Congress' responses to the Supreme Court's decision in *Employment Division v. Smith*,[43] which significantly narrowed the scope of the Free Exercise Clause.[44] For its initial response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA")[45] by relying on its powers to enforce the Fourteenth Amendment.[46] However, in *City of Boerne v. Flores*,[47] the Supreme Court rejected that argument and invalidated RFRA as it applies to the States and local governments.[48] After *Flores* and for its second response to *Smith*, Congress used the Spending Clause to enact the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[49] In other words, Congress believed that it could use the Spending Clause to circumvent a constitutional holding of the Supreme Court.[50] Yet, under the logic of *Rumsfeld*, RLUIPA is unconstitutional insofar as it requires the States to provide a religious accommodation that is not required by the Constitution.[51] If Congress cannot use its Fourteenth Amendment Enforcement Clause to circumvent *Smith*,[52] then Congress cannot use the Spending Clause to circumvent *Smith*.[53]

Second, Congress may not use the Spending Clause to interfere with the States' sovereign authority.[54] Recognizing that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"[55] and that "the erosion of state sovereignty is likely to occur a step at a time,"[56] the Supreme Court has declared that the National Government may not require state officials to enforce federal law,[57] compel the States to pass particular legislation,[58] change the qualifications of state judges,[59] or dictate the location of the State Capitol.[60] Thus, Spending Clause statutes that force States to enforce federal law, pass particular legislation, change the qualifications of judges, or move the State Capitol would be unconstitutional.[61] Similarly, to the extent that Spending Clause statutes regulating K-12 education[62] could not be enacted using the Interstate Commerce Clause or the Fourteenth Amendment Enforcement Clause, those statutes are unconstitutional.

Third, because Congress may not abrogate sovereign immunity for statutory claims *that are not also constitutional claims*,[63] Congress may not use the Spending Clause to exact a waiver of sovereign immunity for statutory claims that *are not also constitutional claims*.[64] As a practical matter, this means that Congress' attempt to exact a waiver for all Spending Clause statutes that prohibit discrimination[65] is unconstitutional *as applied to statutory claims that are not also constitutional claims*.[66]

CONCLUSION

Our Constitution "secures the blessings of Liberty"[67] by creating a National Government of enumerated, hence limited, powers.[68] In the two centuries since the Constitution was ratified, the Court has often lost sight of this principle. Indeed, the Court's Spending Clause jurisprudence practically invited Congress to use the lure of money to circumvent the constitutional limits on its power. *Rumsfeld*, by adopting a bright line rule against Congress using the Spending Clause to circumvent the textual and structural limits on its powers, restores the "Madisonian Balance" while still permitting Congress to exercise vast, yet limited, power.

FOOTNOTES

[1] 126 S. Ct. 1297 (2006).

[2] Under federal law, a person generally may not serve in the United States Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. 10 U.S.C. § 654. Consequently, military recruiters *must* engage in sexual orientation discrimination. A homosexual recruit is automatically rejected while a heterosexual recruit is considered on his own merits. Because sexual orientation discrimination offends the values of many colleges and universities, many institutions object to the presence of military recruiters on campus. Indeed, many institutions—particularly law schools—sought to exclude or limit access of military recruiters because of disagreement with the military's policy of sexual orientation discrimination. In response, Congress passed the Solomon Amendment, which "forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding." *Rumsfeld*, 126 S. Ct. at 1303. Although this choice of doing what Congress demands or forfeiting all federal funds may seem draconian, it is essentially the same choice imposed by many non-discrimination statutes.

[3] 10 U.S.C. § 983. Specifically, the statute denies federal funding to an institution of higher education that "has a policy or practice . . . that either prohibits, or in effect prevents" the military "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." *Id.* § 983(b). The statute provides an exception for an institution with "a longstanding policy of pacifism based on historical religious affiliation." *Id.* § 983(c)(2).

[4] The Solomon Amendment is limited to funding from the Departments of Defense, Homeland Security, Transportation, Labor,

Health and Human Services, and Education, the Central Intelligence Agency and the National Nuclear Security Administration of the Department of Energy. *Id.* § 983(d)(1). Although the statute does not apply to funds provided for student financial assistance, *id.* § 983(d)(2), the loss of funding applies institution wide, *id.* § 983(b).

[5] *Rumsfeld*, 126 S. Ct. at 1313.

[6] *Id*.

[7] U.S. CONST. art. I, § 8, cls. 12-13.

[8] *Id.* § 8, cl. 1.

[9] Justice Alito did not participate, as he was not a member of the Court at the time of argument. Justice O'Connor had departed by the time the decision was announced.

[10] *Rumsfeld*, 126 S. Ct. at 1307 ("Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students."); *id.* ("It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly."); *id*. ("Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.").

[11] *Cf.* United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003) ("'[T]he government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit.'" (quoting Bd. of Comm'rs, Wabaunsee County v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))) (second alteration in original); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("The government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . . ."); Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

[12] *See* Litman v. George Mason Univ., 186 F.3d 544, 556 & n.* (1999) (discussing the difference between the "Hamiltonian view" of the Spending Clause and the "Madisonian view" of the Spending Clause).

[13] 297 U.S. 1 (1936).

[14] *Id*. at 66.

[15] 483 U.S. 203 (1987).

[16] *Id.* at 207 (quoting *Butler*, 297 U.S. at 65).

[17] *Id.* at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S. at 78).

[18] Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 101-02 (1998).

[19] Rumsfeld v. Forum for Academic & Institutional Rights, 126 S. Ct. 1297, 1306-07 (2006) (emphasis added) (alterations in original) (citations omitted).

[20] *See id.*

[21] S*ee Dole*, 483 U.S. at 207; *Butler*, 297 U.S. at 66.

[22] *See* Speiser v. Randall, 357 U.S. 513, 526 (1958).

[23] Agostini v. Felton, 521 U.S. 203, 237 (1997).

[24] *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951, 1961-62 (2006) (holding that a speech made by public employees in the course of their duties is not constitutionally protected); Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1002 (2006) (holding that states surrendered their sovereign immunity for bankruptcy claims necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts); Ayotte v. Planned Parenthood, 126 S. Ct. 961, 969 (2006) (holding that federal courts' injunctive power is limited to the unconstitutional applications of a statute).

[25] Brief of Amici Curiae the National Beer Wholesalers' Association et al. in Support of Petitioner, South Dakota v. Dole, 483 U.S. 203 (1987) (No. 86-260).

[26] *Id*. at 4 (emphasis added).

[27] *Id.* at 25.

[28] U.S. CONST. amend. XIV, § 5.

[29] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[30] 42 U.S.C. § 2000d.

[31] 20 U.S.C. § 1681.

[32] U.S. CONST. amend. XIV, § 1; *see* Grutter v. Bollinger, 539 U.S. 306, 342 (2003); Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) (finding Title VI to be coextensive with the Equal Protection Clause). Although *Grutter* and *Gratz* were addressing only Title VI, the reasoning is equally applicable to Title IX. Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[33] 42 U.S.C. §§ 12101–12213.

[34] 29 U.S.C. § 794.

[35] *See* Garcia v. S.U.N.Y. Health Sci. Ctr., 280 F.3d 98, 113 (2d Cir. 2001) (recognizing that Title II of the ADA and Section 504 of the Rehabilitation Act should be treated identically); Reickenbacker v. Foster, 274 F.3d 974, 977 n.17 (5th Cir. 2001) (same).

[36] United States v. Georgia, 126 S. Ct. 877, 881 (2006); *see also* William E. Thro, *Toward A Simpler Standard for Abrogating Sovereign Immunity*, 6 ENGAGE: J. FEDERALIST SOC'Y'S PRAC. GROUPS 65 (Oct. 2005) (advocating that the Court adopt a standard where the issue of abrogation depends upon whether the plaintiff has stated a constitutional claim).

[37] *See* Sandoval v. Hagan, 197 F.3d 484, 493-94 (11th Cir. 1999) (Title VI claims), *rev'd on other grounds sub nom*. Alexander v. Sandoval, 532 U.S. 275 (2001); Litman v. George Mason Univ., 186 F.3d 544, 554-55 (4th Cir. 1999) (Title IX claims). As explained above, Title VI and Title IX are coextensive with the Equal Protection Clause. Thus, conduct that violates Title VI or Title IX also violates the Constitution. Because Congress can abrogate sovereign immunity for constitutional claims and because all Title VI and IX claims are constitutional claims, *Sandoval* and *Litman* are fully consistent with *Rumsfeld*.

[38] Lynn A. Baker, *Conditional Federal Spending and State's Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 105 (2001).

[39] Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 499-501 (2003) (footnotes omitted); *see also* William E. Thro, *Immunity or Intellectual Property*: *The Constitutionality of Forcing the States to Choose*, 173 EDUC. L. REP. 17 (2003) (arguing that the States cannot be

forced to surrender their sovereign immunity as a condition of receiving intellectual property rights).

[40] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("[T]hat those limits may not be mistaken, or forgotten, the constitution is written.").

[41] U.S. CONST. art. I, § 8, cl. 3.

[42] United States v. Morrison, 529 U.S. 598, 617-19 (2000); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995); *cf.* Gonzales v. Oregon, 126 S. Ct. 904, 925 (2006) (holding that the National Attorney General may not shift "authority from the States to the Federal Government to define general standards of medical practice in every locality.").

[43] 494 U.S. 872, 890 (1990).

[44] U.S. CONST. amend. I. In *Smith*, the Supreme Court effectively overruled *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), and held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). In other words, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[45] 42 U.S.C. §§ 2000bb-1 to -4.

[46] U.S. CONST. amend. XIV, § 5.

[47] 521 U.S. 507 (1997).

[48] *Id.* at 532-36.

[49] 42 U.S.C. §§ 2000cc to -5.

[50] In enacting RLUIPA, Congress also relied upon the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. However, the Commerce Clause can justify RLUIPA only whenever the burden on religion or its removal affects "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). In those circumstances where the burden on religion does not affect commerce, the Commerce Clause cannot justify RLUIPA.

[51] Of course, Congress can enact statutes that create private remedies for violations of the Constitution. *See* United States v. Georgia, 126 S. Ct. 877, 881 (2006). Thus, to the extent that RLUIPA requires the States to provide a religious accommodation that is *also required* by the Constitution, it is constitutional.

[52] *See Flores*, 521 U.S. at 532-36.

[53] *See* College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683-84 (1999) (stating that because Congress may not use its Fourteenth Amendment enforcement powers to abrogate the State's sovereign immunity, it may not use its Article I powers to exact constructive waivers of sovereign immunity).

[54] Nevertheless, Congress may use the Fourteenth Amendment Enforcement Clause to diminish the States' sovereignty. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[55] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

[56] South Carolina v. Baker, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting).

[57] Printz v. United States, 521 U.S. 898, 919 (1997).

[58] New York v. United States, 505 U.S. 144, 162 (1992).

[59] *Gregory*, 501 U.S. at 460.

[60] Coyle v. Smith, 221 U.S. 559, 579 (1911).

[61] Of course, there are dicta in *New York* suggesting that Congress could use the Spending Clause to require the States to pass particular legislation. *See New York*, 505 U.S. at 195 (White, J., concurring in part, dissenting in part); *see also Printz*, 521 U.S. at 936 (O'Connor, J., concurring). However, the Supreme Court is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 996 (2006); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

[62] *See, e.g.*, 20 U.S.C. §§ 1401–1450 (Individuals with Disabilities Education Act); 20 U.S.C. §§ 6301–6339, 6421–6472, 6751–6777, 6811–6871, 7101–7165, 7201–7217e (No Child Left Behind Act).

[63] *See generally* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000); Alden v. Maine, 527 U.S. 706, 748 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996). The Court held in all of these cases that the States were immune from statutory claims that did not involve constitutional violations.

[64] *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683-84 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe.* Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin."); *see also Kimel*, 528 U.S. at 79 ("Indeed, in *College Savings Bank*, we rested our decision to overrule the constructive waiver rule . . . in part, on our *Seminole Tribe* holding.").

[65] 42 U.S.C. § 2000d-7.

[66] In other words, the required waiver is effective for Title VI or Title IX claims, all of which are constitutional claims, and for Section 504 claims and Age Discrimination Act claims that involve constitutional claims. However, the waiver is ineffective for Section 504 claims and Age Discrimination Act claims that do not involve constitutional claims.

[67] U.S. CONST., pmbl.

[68] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).