The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism

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"Everything that exceeds its limit changes into its opposite."
Al-Ghazali (1058-1111)

I. INTRODUCTION

One of the greatest challenges facing our legal system is how to deal with the great diversity that exists in contemporary society. Judge J. Harvie Wilkinson recently suggested a partial solution to handling the problem of diversity: detachment in developing and applying process. He declared: "In an increasingly diverse country with many competing visions of the good, it is critical for law to aspire to agreement on

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process—a task both more achievable than agreement on substance and more suited to our profession than waving the banners of ideological truth." He added:

A multicultural nation may find in process a means of muting differences. A society beset by bewildering change may find in process stable ways of making that change come about. A culture torn over questions of personal autonomy may discover in process a means of decentralizing and diversifying outcomes. What agreement future Americans achieve may center on process, in part because cultural consensus may not withstand the waves of demographic and technological change. Our Constitution encourages this continuing commitment to process—it is one way our changing country remains the same.4

Process for Judge Wilkinson is what decisionmaker should address a particular problem.5 He asserted that "by refusing to ask the institutional questions a priori, we deny ourselves a sense of detachment."6 He elaborated:

There is a price to be paid for confusing legal roles. Think for a moment of how it feels to be bested by someone who does not follow the rules. Then multiply your sense of personal disillusionment by the millions. There is nothing so corrosive to public confidence in public institutions as the idea that a decision, whether right or wrong, represented at heart an arrogation of authority. Such usurpation is unbecoming in constitutional democracies that should rest on the idea that the crude displacement of proper decisionmaking channels is little better than a putsch.7

Federalism, whether the Constitution has assigned the decision-making power to the federal government or the states, is one area that relates to the issue of which institution should decide a question. Over the last decade, the Rehnquist Court has been deeply concerned with this question ("the new federalism").8 In fact, Judge Wilkinson referred

3. Id. at 1387.
4. Id. at 1393-94.
5. Id. at 1387.
6. Id. at 1388.
7. Id. at 1390-91.
to this area of the Court’s jurisprudence as “contemporary judicial activism.”

There are two principal grounds to the new federalism: (1) limits on Congress’s powers to enact statutes under the Constitution, including those implied in Article I and specifically set forth in the Tenth Amendment, and (2) limits on Congress’s power under general concepts of federalism. *United States v. Lopez*10 illustrates the first ground. In this case, the Court held that Congress lacked power to pass the Gun-Free School Zones Act of 199011 under the Commerce Clause because violence at schools does not affect interstate commerce.12 The Court’s analysis in *Alden v. Maine*13 typifies the second ground. In *Alden* the Court held that overtime provisions of the Fair Labor Standards Act of 193814 did not apply to state governments because “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”15 The Court added that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”16

Several writers have criticized the new federalism as being political—lacking detachment.17 These criticisms have a great deal of merit.


12. 514 U.S. at 549.
15. 527 U.S. at 712.
16. Id. at 713.
Some of the Court's decisions lack a principled basis for their outcomes. However, as this Article will show, if one removes these unprincipled decisions from those that are well-grounded in the Constitution's text, a method of constitutional analysis remains that can achieve detachment.

The thesis of this Article is that the first ground of the new federalism is principled because it enforces specific provisions of the United States Constitution, but the second ground is unprincipled because it is based on a general conception of state sovereignty that is not in the Constitution's text. In its first ground, the new federalism attained the detachment Judge Wilkinson advocated because it neutrally enforces the allocation of authority set forth by the Constitution. However, the second ground lacks detachment because the absence of support in a specific constitutional provision makes it political. The second ground enforces a concept of states' rights without a principled basis for that concept.

Part II of this Article examines the first ground of the new federalism—constitutional limitations on Congress's power to enact statutes under Article I, section 5 of the Fourteenth Amendment, and the Tenth Amendment. As stated above, it concludes that this ground is principled because it enforces the Constitution's text. Part III analyzes the second ground of the new federalism, which is based on general concepts of federalism. It discusses the two subcategories of this ground: (1) whether Congress can abrogate a state's sovereign immunity, and (2) whether Congress has the power to coerce states to enact statutes or to force local officials to enforce federal schemes. Part III concludes that both subcategories are unprincipled because they are unsupported by properly enacted constitutional text. This Article ends with a call for an approach to constitutional jurisprudence that neutrally enforces the federalism structures set forth in specific constitutional provisions, but does not go beyond the Constitution's text.

II. THE PRINCIPLED GROUND OF THE NEW FEDERALISM: CONSTITUTIONAL LIMITS ON CONGRESS'S POWER TO ENACT STATUTES UNDER ARTICLE I, SECTION 5 OF THE FOURTEENTH AMENDMENT, AND THE TENTH AMENDMENT

A. The Principled Ground of the New Federalism

The principled ground of the new federalism is that there are constitutional limits on Congress's power to pass statutes. There are dual sources for this ground: (1) the implicit limits on Congress's power under Article I,\textsuperscript{18} and (2) the restrictions set forth in the Tenth Amendment.\textsuperscript{19} First, the federal government is a government of limited powers.\textsuperscript{20} James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."\textsuperscript{21} Therefore, Congress is implicitly limited to the powers given by Article I of the Constitution. Chief Justice Rehnquist declared: "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. The powers of the legislature are defined and limited; and that those limits may not be mistaken, [sic] or forgotten, the constitution is written."\textsuperscript{22} He has further asserted that "[u]nder our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace."\textsuperscript{23} The implicit limits on Congress's powers under Article I were made explicit by the Tenth Amendment: "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{24} Justice Roberts declared that "[t]he Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, 

\textsuperscript{18} U.S. Const. art. I.
\textsuperscript{19} U.S. Const. amend. X.
\textsuperscript{20} Boerne, 521 U.S. at 516 ("Under our Constitution, the Federal Government is one of enumerated powers."); Lopez, 514 U.S. at 552 ("The Constitution creates a Federal Government of enumerated powers.").
\textsuperscript{21} The Federalist No. 45, at 328 (James Madison) (Benjamin Fletcher Wright ed., 1961).
\textsuperscript{22} Morrison, 529 U.S. at 607 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)).
\textsuperscript{23} Id. at 616.
\textsuperscript{24} U.S. Const. amend. X.
that powers not granted to the United States were reserved to the States or to the people.\textsuperscript{25}

Under the first ground of the new federalism, the Court asks whether Congress has power to pass a statute under a specific Constitutional provision—Article I’s Commerce Clause\textsuperscript{26} or section 5 of the Fourteenth Amendment.\textsuperscript{27} The cases that restricted Congress’s power to enact statutes under the Commerce Clause asked whether a statute had a substantial relationship to interstate commerce.\textsuperscript{28} For example, in \textit{United States v. Morrison},\textsuperscript{29} the Supreme Court struck down the Violence Against Women Act\textsuperscript{30} ("VAWA") because Congress lacked authority to enact it.\textsuperscript{31} In \textit{Morrison} Christy Brzonkala alleged two Virginia Polytechnic Institute football students assaulted and raped her. Dissatisfied with the results of university disciplinary procedures, Brzonkala filed suit against the football players and the University in federal court based on the VAWA. The lower court held that Brzonkala had stated a claim against the football players under the VAWA, but Congress did not have authority to enact the statute, so it dismissed her complaint.\textsuperscript{32} A divided panel of the Fourth Circuit Court of Appeals reversed, but on a rehearing en banc the Fourth Circuit affirmed the lower court’s opinion.\textsuperscript{33}

The Supreme Court began its analysis by stating that "due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."\textsuperscript{34} The petitioners asserted that Congress had the power to pass the VAWA under the substantial relation prong of its commerce powers.\textsuperscript{35} \textit{Lopez} had distinguished between the regulation of economic and noneconomic activity under the Commerce Clause, with the latter being beyond

\textsuperscript{25} United States v. Sprague, 282 U.S. 716, 733 (1931); see also \textit{New York}, 505 U.S. at 156-57.
\textsuperscript{26} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{27} U.S. CONST. amend. XIV, § 5.
\textsuperscript{28} \textit{See Morrison}, 529 U.S. at 607-19; \textit{Lopez}, 514 U.S. at 558-59.
\textsuperscript{29} 529 U.S. 598 (2000).
\textsuperscript{31} 529 U.S. at 598.
\textsuperscript{32} \textit{Id.} at 602-04. The court also dismissed Brzonkala’s claim against the university under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, for failure to state a claim upon which relief can be granted. \textit{Id.}
\textsuperscript{33} \textit{Id.} at 604-05.
\textsuperscript{34} \textit{Id.} at 607.
\textsuperscript{35} \textit{Id.} at 609.
The Court declared, 

"Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."  

Based on Lopez, the Court concluded that "gender-motivated crimes of violence are not . . . economic activity." Unlike Lopez, the VAWA was supported by congressional findings concerning "the serious impact that gender-motivated violence has on victims and their families." However, the Court thought the existence of such findings alone were not enough to sustain a law's constitutionality; whether a statute is constitutional is a judicial, not a legislative, question. Congress found that "gender-motivated violence affects interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate business . . . and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." The Court, however, had rejected similar reasoning in Lopez on the ground it was attenuated. The Court declared:

Given these findings and petitioners' arguments, the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.

36. Id. at 610-11 (citing Lopez, where the Court invalidated the Gun-Free School Zones Act of 1990, on the ground that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567).
37. Id. at 611.
38. Id. at 613. In addition, like the statute in Lopez, the VAWA "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." Id.
39. Id. at 614.
40. Id.
41. Id. at 615 (quoting H.R. CONF. REP. NO. 103-711, at 385).
42. Id. at 612, 615.
43. Id. at 615 (citation omitted).
The Court added: "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."\(^{44}\)

The Court, therefore, rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."\(^{45}\) The Court stressed that "[t]he Constitution requires a distinction between what is truly national and what is truly local."\(^{46}\) The Court added:

The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.\(^{47}\)

In many of these cases, the Court also examined whether Congress had the power to enact a statute under section 5 of the Fourteenth Amendment.\(^{48}\) Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."\(^{49}\)

The petitioners in Morrison argued alternatively that Congress had authority to pass the VAWA under section 5 of the Fourteenth Amendment.\(^{50}\) They contended there was a "pervasive bias in various state justice systems against victims of gender-motivated violence" and that this bias "is supported by a voluminous legislative record."\(^{51}\) The petitioners further asserted that "this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter further instances of discrimination in the state courts."\(^{52}\)

\(^{44}\) Id. at 615-16.
\(^{45}\) Id. at 617.
\(^{46}\) Id. at 617-18 (citing Lopez, 514 U.S. at 568).
\(^{47}\) Id. at 618 (citations omitted).
\(^{48}\) Id. at 619-27.
\(^{49}\) U.S. CONST. amend. XIV, § 5.
\(^{50}\) 529 U.S. at 619.
\(^{51}\) Id. at 619-20.
\(^{52}\) Id. at 620.
The Court held that Congress could not pass the VAWA under section 5. The Court declared that, although section 5 “includes authority to ‘prohibit conduct which is not itself unconstitutional and [to] intrude[e] into “legislative spheres of autonomy previously reserved to the states,’’” Congress’s power under section 5 is not unlimited. One of these restrictions is that the Fourteenth Amendment only prohibits state action. This limitation is “necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”

Section 5 does not give Congress authority to enact the VAWA because the VAWA is directed “at individuals who have committed criminal acts motivated by gender bias,” not any state or state actor. The Court declared that in the present case the VAWA “visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonka-la’s assault.”

Even when a law is directed at the states, there are limits on Congress’s power under section 5. The Court ruled that Congress’s powers under the clause are remedial, not plenary. As Justice Kennedy stated, “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’” In City of Boerne v. Flores, the Court struck down the Religious Freedom Restoration Act of 1993 because Congress lacked authority to pass

53. Id. at 627.
54. Id. at 619 (quoting Boerne, 521 U.S. at 518) (alterations in original).
55. Id. at 621 (citing Shelley v. Kraemer, 334 U.S. 1 (1948); the Civil Rights Cases: United States v. Stanley, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883)).
56. Id. at 629.
57. Id. at 626.
58. Boerne, 521 U.S. at 522.
59. Id. at 629 (quoting Marbury, 5 U.S. (1 Cranch) at 177).
60. Id. at 507 (1997).
   Free exercise of religion protected
   (a) In general
      Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
   (b) Exception
      Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
         (1) is in furtherance of a compelling governmental interest; and
         (2) is the least restrictive means of furthering that compelling governmental interest.
Justice Kennedy declared: "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."64

B. Evaluation of the First Ground

The first ground of the new federalism attains detachment by allocating power between the federal and state governments based on the Constitution's text.65 The new federalism has revived an interest in "the structural guarantees of dual sovereignty" that had been ignored for over fifty years.66 In doing so, it allocates authority between federal and state sovereigns without considering the allocation's effect on the substantive outcome. As Judge Wilkinson declared, "As a matter of oxen, the gored are determined by infringements upon our federal system, not by judicial disdain for enacted policies."67

The types of statutes the new federalism has struck down provides evidence of its neutrality. It has equally invalidated statutes favored by "conservative" and "liberal" causes.68 As Judge Wilkinson observed, although the cases have involved a wide range of interest groups, "the identity and alignment of those groups varies, foreclosing the possibility that the judiciary will be seen as politically choosing sides in a single epic struggle."69 The Court in Lopez struck down a gun control law (the

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63. Id. § 2000bb-1.
64. 521 U.S. at 536.
65. Id. at 519.
66. Professor Steven G. Calabresi has written, "The constitutional text's overarching concern is with questions of institutional competence, and its main theme is the division and allocation of power with a focus on who decides what questions and subject to what checks and balances." Steven G. Calabresi, Textualism and the Countermajoritarian Difficulty, 66 GEO. WASH. L. REV. 1373, 1373 (1998) [hereinafter Calabresi, Textualism].
67. Brzonka, 169 F.3d at 893 (Wilkinson, J., concurring). Elsewhere, Judge Wilkinson has noted, "The Supreme Court, meanwhile, was so wary from its confrontations with the Executive and Legislative Branches during the Progressive Era and the New Deal that it abdicated any meaningful Commerce Clause review for almost sixty years, to the general detriment of the Constitutional structure and to the particular misfortune of the states." Wilkinson, Federalism, supra note 1, at 535. The cases in which this abdication began were NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942).
68. 169 F.3d at 894. He continued: "[I]n the present period, the preservation of federalism values—not the maintenance of laissez faire—is the binding principle." Id.
69. In addition, the states' rights argument does not always prevail. See, e.g., Reno v. Condon, 528 U.S. 141 (2000) (a unanimous Court upheld the Driver's Protection Act from a Commerce Clause/Tenth Amendment challenge).
70. 169 F.3d at 894 (Wilkinson, J., concurring).
Gun-Free School Zones Act),\textsuperscript{70} and the Court in \textit{Morrison} invalidated the VAWA, statutes often favored by liberals.\textsuperscript{71} On the other hand, the Court in \textit{Boerne} held unconstitutional the Religious Freedom Restoration Act, a statute often favored by conservatives.\textsuperscript{72} Additionally, numerous lower federal courts have upheld Congress's power to regulate the environment under its Commerce Clause powers, and section 2(a) of the Defense of Marriage Act\textsuperscript{73} would undoubtedly be found unconstitutional.\textsuperscript{74}

The first ground of the new federalism is also detached because it approaches textual interpretation in a moderate, restrained manner. Judge Wilkinson observed:

\begin{quote}
The Supreme Court affirmed in \textit{Lopez} the notion that 'commerce' must mean something short of everything . . . . This is not a radical principle. Rather than lashing out to greatly confine national power, the judiciary is proceeding, cautiously, to find a limiting principle at the margin. The \textit{Lopez} limit on Congressional power is not a strict one, but it is a limit.\textsuperscript{75}
\end{quote}

The first ground of the new federalism is also detached because it does not foreclose a substantive outcome; it merely ensures that the proper lawmaker has made the substantive decision. Judge Wilkinson noted:

\begin{quote}
States remain free after \textit{New York} to reach regional solutions to their hazardous waste problems, after \textit{Lopez} to criminalize the act of bringing a firearm within a school zone, after \textit{Printz} to cooperate voluntarily with federal law enforcement efforts, and after today's decision to provide civil remedies to women who are battered or raped.
\end{quote}

\textsuperscript{70} 519 U.S. at 549.
\textsuperscript{71} 529 U.S. at 598.
\textsuperscript{72} 521 U.S. at 507.
\textsuperscript{74} No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.
\textsuperscript{75} Id.


\textsuperscript{75} \textit{Brzonkala}, 169 F.3d at 895 (citation omitted); see also Jesse H. Choper & John C. Yoo, \textit{The Scope of the Commerce Clause after Morrison}, 25 OKLA. CITY U. L. REV. 843 (2000) ("[P]lacing outer limits on the reach of the Commerce Clause does not amount to a stunning rejection of the modern welfare state." \textit{Id.} at 854.).
No court blocks the path of legislative initiative in any of these substantive areas.\textsuperscript{76}

Because this ground merely allocates authority, there is no interference with democracy. As Professor Calabresi pointed out: "Federal judicial enforcement of structural constitutional values raises no counter majoritarian difficulty because the Court is addressing the jurisdictional question of which majority is entitled to rule."\textsuperscript{77} In fact, giving rule-making authority to the proper lawmaker enhances democracy, as demonstrated below.\textsuperscript{78}

The proper allocation of authority between sovereigns is basic to protecting our freedoms—not only from the tyranny of the majority, but also the tyranny of the elites.\textsuperscript{79} In fact, this allocation was fundamental in the original constitutional structure, with protection of individual freedoms not appearing until the Bill of Rights.\textsuperscript{80} James Madison wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.\textsuperscript{81}

\textsuperscript{76} 169 F.3d at 895 (Wilkinson, J., concurring).
\textsuperscript{77} Calabresi, Textualism, supra note 65, at 1394.
\textsuperscript{78} See the discussion below, infra notes 82-88 and accompanying text.
\textsuperscript{79} Professor Yoo has declared, "Sovereignty is not maintained for sovereignty's sake, but instead is necessary to check those driven by power for power's sake." John C. Yoo, Sounds of Sovereignty: Defining Federalism in the 1990s, 32 IND. L. REV. 27, 32 (1998) [hereinafter Yoo, Sounds of Sovereignty]. Similarly, Professor Calabresi has asserted: "Letting the wrong democratic jurisdiction make or influence decisions beyond the scope of its legal competence leads either to the evils of imperial colonialism or to the evil of minority rule." Calabresi, Textualism, supra note 65, at 1391. Finally, Professor Glendon has written: "Whom should we fear more: an aroused populace, or the vanguard who know better than the people what the people should want." Mary Ann Glendon, Comment, in A MATTER OF INTERPRETATION 113 (1997).
\textsuperscript{80} The existence of the Constitution's structural protections were the main argument against the adoption of a bill of rights. Alexander Hamilton argued that bills of right "have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations." THE FEDERALIST No. 84, at 357 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).
\textsuperscript{81} THE FEDERALIST No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).
Professor Yoo observed, "the framers deeply feared that the national government would seek to burst the written restrictions on its powers. Federal officials would do so not to help the rich and powerful, or the weak and needy, but to grab power for the institution of which they were a part." In addition, Justice Thomas noted: "Since people can vote with their feet, by moving to states with whose policies they agree, they force the states into a competition to offer policies that best protect individuals and their rights."

Not only does structural federalism protect our freedoms, it allows localities to adopt the normative preferences of its inhabitants. There is often more than one reasonable answer to moral questions. Judge Wilkinson declared: "Federalism offers . . . the promise of compromise. It allows morality to be defined more from the grass roots up than from the High Court down . . . . Federalism . . . fosters national unity through local diversity by avoiding all-or-nothing outcomes and allowing each side to prevail in some places." For example, some states may want to employ local officials to help enforce federal gun control laws, while other states may want to protect its citizens in other ways. Similarly, states should be able to decide how general land use laws affect religious organizations. Likewise, a state should be able to decide how it will deal with crime. Justice Kennedy asserted:

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

More local control permits experimentation. Congress's answer to a problem is not the only or necessarily the best solution. Justice Louis Brandeis proclaimed the value of the states as laboratories for social and economic experiments, and other contemporary writers have reiterated this proclamation.

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82. Yoo, Sounds of Sovereignty, supra note 79, at 31.
84. Wilkinson, Federalism, supra note 1, at 526.
86. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting); see also Wilkinson, Federalism, supra note 1, at 524.
Greater local control also permits more responsive government. The federal government does not have time to respond to the needs of a few, no matter how important. What may seem minor on a grand scale may be vitally important to an individual. Professor Barry Friedman asserted: "When we despair of the operations of our national government, we tend to criticize special-interest influence and bemoan the apathy and lack of participation of average citizens." 87

Finally, structural federalism may be able to heal some of the divisiveness that has plagued contemporary American society. Professor Calabresi asserted: "Federal structures are thus ideally suited for liberal, tolerant societies that value and respect cultural pluralism." 88

Similarly, Judge Wilkinson argued:

Shifting responsibility to smaller units of government, however, may help to replace racial loyalties with civic ones. Local, not national, government permits a community to work on common concerns, such as improving schools or simply enhancing livability. Micro-allegiances to state, local and community enterprises are the ones that will most effectively compete in the next century with appeals to ethnicity and race. 89

Professor Calabresi went even further to argue social diversity is a threat to stable democracy, and federalism can reduce this threat by allowing minorities a level of government in which they are the geographical majority. 90

Some might argue that the change from guardian review to bifurcated review in constitutional analysis in the twentieth century eliminated the Court's authority to review federalism questions—that such questions should be left to the political processes or reviewed with judicial restraint. 91 Bifurcated review is best summed up by Justice Stone's

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89. Wilkinson, Federalism, supra note 1, at 527; see also Friedman, Valuing Federalism, supra note 87, at 397-400; Lopez, 514 U.S. at 581 (Kennedy, J., concurring).
91. E.g., Lopez, 514 U.S. at 603-04 (Souter, J., dissenting).

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint" . . . . In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.
famous *Carolene Products* footnote. Justice Stone felt that the Court should generally uphold the constitutionality of a statute if it rested "upon some rational basis within the knowledge and experience of the legislators." However, in the famous footnote Justice Stone singled out for more searching review: (1) legislation that on its face appears to be within a specific prohibition of the Constitution; (2) legislation that restricts political processes that can ordinarily be expected to bring about repeal of undesirable legislation; and (3) statutes directed at particular religious and racial minorities and "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." While cases after the footnote gave heightened review to First Amendment cases, voting rights cases, and equal protection cases involving racial or gender classifications rather than federalism cases, federalism cases fall within Justice Stone's first criteria for more searching review because they involve specific constitutional provisions including the Commerce Clause and the Tenth Amendment. In addition, federalism cases do not evaluate an enactment's wisdom, but establish whether the lawmaker had the power to make the enactment. Thus, as noted above, there is no anti-majoritarian difficulty in the proper allocation of power. Therefore, under the underlying principles of the *Carolene Products* footnote, a court should review an entity's power to enact a law more closely than a court evaluates the wisdom of the law.

Article III, section 2 bestows the power of judicial review on the federal courts: "The judicial Power shall extend to all Cases, in Law and
Equity, arising under this Constitution . . .

96. Nothing in the Constitution states that one provision should be enforced by judicial review and another provision left to political processes.97 As Judge Wilkinson proclaimed, "It is hard to understand how one can argue for giving capacious meanings to some constitutional provisions while reading others out of the document entirely . . . . How one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution."98 Similarly, he declared:

The judiciary rightly resolves structural disputes. Just as the relationship of the Bill of Rights to the Fourteenth Amendment was a legitimate structural question for the Court, so too is the debate over the relationship of Article I, § 8 to the Tenth Amendment. It is just as important for the federal government to live within its enumerated powers as it is for state governments to respect the Bill of Rights.99

Likewise, Justice Kennedy wrote:

Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.100

Finally, Professor A.E. Dick Howard contended that "it is hard to escape the conclusion that the Founders assumed that limiting national power

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98. Brzonkala, 169 F.3d at 894-95 (Wilkinson, J., concurring).
99. Id. at 896.
100. Lopez, 514 U.S. at 578 (Kennedy, J., concurring) (citations omitted).
in order to protect the states would be as much a part of the judicial function as any other issue.101

Alexander Hamilton clarified that the federal courts had the power and duty of judicial review in *The Federalist* No. 78:

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority . . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.102

He saw the danger of allowing Congress to decide whether its acts were constitutional:

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.103

Hamilton added that this power does not make the courts superior to the legislature:

> It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.104

Justice Breyer argued, concerning Congress's power under the Commerce Clause:

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103. *Id.*

104. *Id.*
Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.\textsuperscript{106}

Initially, Congress is the better institution to determine whether it has the power to pass a statute under the Commerce Clause because its fact finding capabilities are superior to those of courts. However, once Congress has determined that it has power to pass a statute under the Commerce Clause, a court can review that determination, and should have the final say because it is disinterested (and, of course, because it has the power of judicial review).\textsuperscript{106} In a democracy adhering to the rule of law, a lawmaker should not have the final say over the extent of its lawmaking powers.

C. Application of the First Ground in a Detached Manner

Some commentators have criticized the ability of judges to act neutrally, even when process is involved.\textsuperscript{107} This criticism, of course, stems from the behavioralist view of judges that dominated jurisprudence during much of the twentieth century—that judges cannot separate application of the law from their own political views.\textsuperscript{108} While this position has some merit, it has gone too far. There is a significant difference between law and politics, especially if the legal

\textsuperscript{105} Lopez, 514 U.S. at 616-17 (Breyer, J., dissenting). Similarly, Justice Souter stated, The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Morrison, 529 U.S. at 628 (citation omitted).

\textsuperscript{106} Professor Calabresi argued, "[T]he line-drawing and fact-finding problems here are no more difficult than they are in the context of determining what constitutes an impermissible endorsement of religion or when an abortion law violates the doctrinally recognized right to privacy or when unprotected obscenity becomes protected pornography." Calabresi, In Defense of Lopez, supra note 90, at 804.


profession stresses those differences. For example, recent studies show that the shift in constitutional jurisprudence from guardian review to bifurcated review that is usually attributed to the New Deal politics, particularly the political influence of the "court-packing plan," in reality occurred much more slowly than previously thought. The shift occurred both before and after the New Deal and involved the gradual evolution of legal doctrine rather than politics. Moreover, Judge Wilkinson asserted that "[p]rocess values should prove neither liberal nor conservative . . . . Properly applied, process values may come to represent neutral principles in much the same sense that the First Amendment protects ideas we love and those we hate." He also noted: "Concern with process is a distinguished tradition in the law . . . . [Scholars who have emphasized the importance of process] reaffirm that process calls upon us to realize the best of law's possibilities."

The lower federal courts have been able to apply the first ground of the new federalism in a detached manner, applying the Constitution's structural principles separate from a political agenda. For example, in *Gibbs v. Babbitt*, Judge Wilkinson, usually considered a conservative judge, rejected a challenge to the constitutionality of a Fish and Wildlife

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109. As Judge Wilkinson argued, "Looking to process as a source of legitimacy for our decisions and unity for our nation will help arrest the subjugation of law to ideology." Wilkinson, The Question of Process, supra note 2, at 1397-98. This Author believes that judges want to conform to the proper judicial role. If we tell judges that they should come up with whatever decision they want and then find some way to justify the decision, they will. However, if we tell judges that they should follow the rules, even if this produces an outcome they disagree with, most of them will follow the rules.


111. See White, supra note 110. Professor White has written concerning the work of the last two scholars,

In the same time period Barry Cushman and Richard Friedman began their reexaminations of constitutional jurisprudence between the two World Wars, attempting to view constitutional decisions as exercises in extending or modifying currently authoritative doctrinal propositions rather than through the established political categories of the conventional account. By adopting this approach Cushman . . . and Friedman . . . found that causal connections between the introduction of the Court-packing plan and a dramatic shift in the Court's constitutional jurisprudence were attenuated, and that constitutional change over the first three decades of the twentieth century had been imperfectly described by the conventional account.

Id. at 21-22.


113. Id. at 1393.

114. 214 F.3d 483 (4th Cir. 2000).
Service Regulation (promulgated under the Endangered Species Act). The Regulation limited the taking of red wolves on private land, and the court held that the Regulation as applied did not exceed Congress's power under the Commerce Clause.

Congress passed the Endangered Species Act of 1973 because of growing concern over the extinction of many plant and animal species. The Act's key provision was section (9)(a)(1), "which prohibit[ed] the taking of any endangered species without a permit or other authorization." The Act defined "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The Endangered Species Act authorizes the Fish and Wildlife Service to issue regulations necessary to conserve threatened species. The Act also states that a state provision may be more restrictive than the Act, but not less.

In 1982, Congress amended the Endangered Species Act to increase the Fish and Wildlife Service's flexibility in reintroducing endangered species into parts of their historical ranges by adding section 10(j), which permits the Service to designate certain reintroduced populations of endangered or threatened species as "experimental." Under this designation, members of an experimental population are treated as threatened rather than endangered, which permits the Service to promulgate regulations for their preservation. In addition, when the populations are "non-essential" and "experimental," the Service can create "special regulations for each experimental population that will address the particular needs of that population," including regulations that permit the taking of experimental reintroduced populations under limited circumstances.

The Service had concluded that "the demise of the red wolf [an endangered species] was directly related to man's activities, especially land changes, such as drainage of vast wetland areas for agricultural purposes . . . and predator control efforts at the private, State, and
Federal levels." The Service had trapped the remaining red wolves in the mid-1970s, placed them in a captive breeding program, and reintroduced them in a wildlife refuge in eastern North Carolina. Some of the reintroduced wolves had wandered from the refuge onto private property. The challenged regulation allowed a person to take red wolves on private land under limited circumstances: 1) when "such taking is not intentional or willful, or is in defense of that person's own life or the lives of others," and 2) "when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident." A landowner may also 'harass red wolves found on his or her property . . . Provided that all such harassment is by methods that are not lethal or injurious to the red wolf,' and landowners may take red wolves after the Service has abandoned efforts to capture the animals and the service has approved such taking in writing.

The appellants challenged the federal government's power to protect red wolves on private land, claiming that the Regulation exceeded Congress's Commerce power. The district court on cross-motions for summary judgment held that Congress had the power under the Commerce Clause to regulate conduct that might harm red wolves on private property. The court declared that "the red wolves are 'things in interstate commerce' because they have moved across state lines and their movement is followed by 'tourists, academics, and scientists,'" and that the tourism generated substantially affects interstate commerce.

Judge Wilkinson affirmed the lower court's opinion "because the regulated activity substantially affects interstate commerce and because the Regulation is part of a comprehensive federal program for the protection of endangered species." He declared, "Judicial deference to the judgment of the democratic branches is therefore appropriate."

Judge Wilkinson analyzed whether the federal government had exceeded its authority in promulgating the Regulation using the
analytical framework set forth in *Morrison* and *Lopez*. Concerning this standard, he declared:

While this is rational basis review with teeth, the courts may not simply tear through the considered judgments of Congress. Judicial restraint is a long and honored tradition and this restraint applies to Commerce Clause adjudications. "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."\(^{134}\)

In addition, *Lopez* and *Morrison* had not changed the presumption of constitutionality of a congressional enactment.\(^ {135}\) Judge Wilkinson added that "[w]e must enforce the structural limits of Our Federalism, but we must also defer to the political judgments of Congress, recognizing that the 'Commerce Clause represents a broad grant of federal authority.'\(^ {136}\) To ignore this grant "would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones."\(^ {137}\)

Judge Wilkinson thought the determination of whether Congress has the power to pass a statute should not involve a substantive evaluation of the law: "[A] judge's view of the wisdom of enacted policies affords no warrant for declaring them unconstitutional."\(^ {138}\) Judge Wilkinson averred, "An indiscriminate willingness to constitutionalize recurrent political controversies will weaken democratic authority and spell no end of trouble for the courts."\(^ {139}\) He also stated:

In enforcing limits on the Congress, we must be careful not to overstep the judicial role. To strike down statutes that bear substantially upon commerce is to overstep our own authority even as we fault Congress for exceeding limits on its power. The irony of disregarding limits on ourselves in the course of enforcing limits upon others will assuredly not be lost on those who look to courts to respect restraints imposed by rules of law.\(^ {140}\)

In upholding the Regulation's constitutionality, Judge Wilkinson used the third of the *Lopez* and *Morrison* factors: "'Congress' commerce

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133. *Id.* at 490-92.
134. *Id.* at 490 (quoting *Morrison*, 529 U.S. at 607).
135. *Id.* at 504.
136. *Id.* at 490 (quoting *Brzonkala*, 169 F.3d at 830).
137. *Id.* at 504.
138. *Id.*
139. *Id.* at 505.
140. *Id.* at 492.
authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.\textsuperscript{141} Under this factor, the activity must be “of an apparent commercial [or economic] character,”\textsuperscript{142} and courts should view commercial or economic character broadly to avoid overstepping the bounds of the judicial role.\textsuperscript{143}

Judge Wilkinson held that the taking of red wolves on private land was an economic activity.\textsuperscript{144} First, the main reason for the taking of the wolves was protection of commercial assets.\textsuperscript{145} Judge Wilkinson stated that “[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops.”\textsuperscript{146} Because the takings were an economic activity, they could be combined for Commerce Clause analysis: “While the taking of one red wolf on private land may not be ‘substantial,’ the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation.”\textsuperscript{147} Moreover, the Regulation was part of a larger scheme of endangered species regulation.\textsuperscript{148}

Second, the Regulation was connected to other economic activities.\textsuperscript{149} For example, tourists traveled to North Carolina for “‘howling events’—evenings of listening to wolf howls accompanied by educational programs.”\textsuperscript{150} These events were estimated to increase tourism related revenues in northeastern North Carolina between 39.61 and 183.65 million dollars per year; additionally, revenues in the Great Smoky Mountains National Park were estimated between 132.09 and 354.50 million dollars per year.\textsuperscript{151} Even though these howling events were on national park lands or wildlife refuges, the limitations on the taking of wolves on private lands affected tourism because it was essential to the reintroduction program.\textsuperscript{152} In addition to tourism, the Regulation affected other economic activities including scientific research, the

\begin{footnotesize}
141. Id. at 490 (quoting Lopez, 514 U.S. at 558-59).
142. Id. at 491 (quoting Morrison, 529 U.S. at 611 n.4).
143. Id. at 491-92.
144. Id. at 497.
145. Id. at 492.
146. Id.
147. Id. at 493.
148. Id.
149. Id.
150. Id.
151. Id. at 493-94.
152. Id. at 494.
\end{footnotesize}
possibility of a renewed trade in fur pelts, and interstate markets for agricultural products and livestock.\textsuperscript{153}

In enacting the Endangered Species Act, Congress was also concerned about "the unknown uses the endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet."\textsuperscript{154} Judge Wilkinson declared that "Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained."\textsuperscript{155} In addition, the value of a genetic heritage is incalculable.\textsuperscript{156}

Judge Wilkinson also upheld the Regulation as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."\textsuperscript{157} In response to the argument that individual takings of red wolves did not have a substantial effect on interstate commerce, Judge Wilkinson declared: "A single red wolf taking may be insubstantial by some measures, but that does not invalidate a regulation that is part of the ESA and that seeks conservation not only of any single animal, but also recovery of the species as a whole."\textsuperscript{158}

Judge Wilkinson maintained that upholding the Regulation was "consistent with the 'first principles' of a Constitution that establishes a federal government of enumerated powers."\textsuperscript{159} First, federal regulatory power limits state control over wildlife.\textsuperscript{160} Second, even though the Regulation applied to private land, it did not intrude on the states' traditional police power to regulate land use because Congress can regulate private land use for environmental and wildlife conservation.\textsuperscript{161} Judge Wilkinson declared, "In contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation."\textsuperscript{162} The Regulation did not blur the boundaries between federal

\textsuperscript{153} Id. at 494-95. Congress can regulate interstate commerce even if that regulation harms interstate commerce. Moreover, limitations on the taking of red wolves may have a beneficial effect on farming because the red wolves might prey on animals that destroy crops. Id. at 495.

\textsuperscript{154} Id. at 496 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 178-79 (1977)).

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 497 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 561 (1995)).

\textsuperscript{158} Id. at 497-98.

\textsuperscript{159} Id. at 499.

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 499-500.

\textsuperscript{162} Id. at 500.
and state responsibility for red wolf preservation because the ultimate responsibility for the red wolf is with the federal government and because, before 1994, North Carolina had no law concerning the red wolf.  

The Regulation is an example of "principled limitations on federal power." As Judge Wilkinson declared, "The [R]egulation applies only to a single limited area-endangered species. It does not in any way grant Congress 'an unlimited police power inconsistent with a Constitution of enumerated and limited federal powers.'" Moreover,

If the federal government cannot regulate the taking of an endangered or threatened species on private land, its conservation and preservation efforts would be limited to only federal lands. A ruling to this effect would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation . . . . To invalidate this [R]egulation would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones.

In Gibbs Judge Wilkinson attained the detachment that he called for in his process article. He recognized that a judge must be careful in evaluating a statute's constitutionality based on the Constitution's federalism clauses. Congress is not the only branch that can overstep its bounds. A judge should evaluate only whether Congress has the authority to enact a law, not whether that enactment was wise. In making this determination, the judge should strike down a statute only if it is clear that Congress overstepped its constitutional limits.

Judge Wilkinson evaluated the Regulation's constitutionality in a careful, detailed analysis. The test he used—whether the statute involved a commercial or an economic activity—is relatively easy to apply. He applied that test in a detailed manner, giving reasoned

163. Id. at 502-03.
164. Id. at 503.
165. Id. (quoting Brzonkala, 169 F.3d at 852).
166. Id. at 504.
167. Judge Wilkinson understands the importance of adhering to the judicial role instead of making improper policy decisions. Elsewhere, he has written that "[f]rustrated with the gridlock of Congress, savvy activists will often skip the political process altogether and bring their grievances directly to the third branch. When lawsuits become the vehicle of preference for important changes of policy, power shifts from the people to the judges." Wilkinson, The Question of Process, supra note 2, at 1388. He later stated: "There is something disquieting about this morphing of institutional roles—with courts as the second act of a protracted legislative debate." Id. at 1390.
168. Judge Wilkinson has declared, "[I]n enforcing meaningful limits upon the exercise of Congress's enumerated powers, the Courts cannot simply assume an open-ended authority of its own." Wilkinson, Federalism, supra note 1, at 535.
deference to Congress's findings. While he did rely on general principles of federalism as part of his decision, he did not solely (or principally) rely on these general principles; rather, he used them to help support his analysis based on the Constitution's text. At no point in his analysis did Judge Wilkinson consider the Regulation's wisdom; rather, he determined only whether Congress had the power to pass the statute—who the proper decisionmaker was. Thus, he achieved detachment in the structural analysis of the Constitution.

III. THE UNPRINCIPLED PRONG OF THE NEW FEDERALISM: STATE SOVEREIGN IMMUNITY AND CONGRESS'S POWER TO COERCE STATES TO ENACT STATUTES OR TO REQUIRE THAT LOCAL OFFICIALS ENFORCE A FEDERAL SCHEME

The unprincipled ground of the new federalism concerns two different types of cases: (1) Congress's ability to pass statutes that apply to states (the states' sovereign immunity), and (2) Congress's power to coerce state legislatures to enact statutes or to require local officials to enforce federal schemes. Both types share the same failing: They are grounded in general principles of federalism rather than a specific constitutional passage.

A. State Sovereign Immunity

1. Limitations on Congress's Ability to Enact Statutes That Apply to the States. In recent years, the Supreme Court has incrementally limited Congress's ability to enact statutes that apply to the states. First, the Court limited Congress's power to pass statutes that allowed a state to be sued in federal court by expanding the meaning of the Eleventh Amendment beyond the text's literal words. Next, the Court eliminated Congress's ability to pass statutes under the Commerce Clause that applied to the states, regardless of the court where the suit was brought. Then, the Court limited Congress's ability to enact laws that encompassed the states under Congress's section 5 enforcement powers of the Due Process Clause of the Four-

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169. Courts should be cautious in basing their decisions on traditional boundaries between federal and state responsibility. Such traditional boundaries can help the court's inquiry, but, ultimately, it is the Constitution that defines those boundaries.
170. Garrett, 121 S. Ct. at 955; Kimel, 528 U.S. at 62; Alden, 527 U.S. at 706; Coll. Sav. Bank, 527 U.S. at 666; Fla. Prepaid, 527 U.S. at 627; Seminole Tribe, 517 U.S. at 44.
171. Printz, 521 U.S. at 898; New York, 505 U.S. at 144.
172. Seminole Tribe, 517 U.S. at 44.
Finally, the Court has severely restricted Congress's ability to pass statutes under section 5 of the Fourteenth Amendment as that section relates to the Equal Protection Clause.\(^\text{175}\)

The Eleventh Amendment partially limits the states' susceptibility to suit in federal court: "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, or by Citizens or Subjects of any foreign State."\(^\text{176}\) A literal reading of the Amendment only limits the judicial power under Article III, not Congress's power to pass statutes under Article I. Moreover, it does not specify that a state's citizens may not sue a state in federal court. Arguably, because the Amendment tracks the language of the grant of diversity jurisdiction in Article III, it applies only to diversity cases, not federal question cases.

The Court, however, has not limited its reading of the Eleventh Amendment's text to those instances given above. It has eliminated a state's amenability to suit in federal court when Congress has passed a statute under its Article I powers,\(^\text{177}\) and it has severely restricted Congress's ability to abrogate a state's sovereign immunity to suit in federal court when it has enacted a statute under its Fourteenth Amendment section 5 powers.\(^\text{178}\)

When considering whether Congress has abrogated the states' sovereign immunity, a court must answer two questions: (1) has Congress "unequivocally expresse[d] its intent to abrogate the immunity," and (2) has Congress "acted 'pursuant to a valid exercise of power.'"\(^\text{179}\) For many years, whether a federal statute applied to the states seemed to be a question of statutory interpretation rather than constitutional law. A statute applied to the states if Congress had clearly indicated its intent to apply that law to the states (the plain meaning canon).\(^\text{180}\) For example, in Pennsylvania v. Union Gas Co.,\(^\text{181}\) a plurality of the Court held that Congress could abrogate state

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175. Garrett, 531 U.S. at 356; Kimel, 528 U.S. at 62.
176. U.S. CONST. amend. XI.
177. Seminole Tribe, 517 U.S. at 44.
sovereign immunity under the Commerce Clause.\textsuperscript{182} The Court stated that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages."\textsuperscript{183}

In \textit{Seminole Tribe v. Florida},\textsuperscript{184} however, the Court overruled \textit{Union Gas} and began to chip away at Congress's power to pass statutes that applied to the states.\textsuperscript{185} This case involved a federal law\textsuperscript{186} that required states to negotiate in good faith with Indian tribes to develop a compact for the tribes to conduct certain gaming activities.\textsuperscript{187} When Florida refused to negotiate such a compact, a tribe sued the state in federal court.\textsuperscript{188}

The Court held that Congress lacked authority to abrogate the states' sovereign immunity not to be sued in federal court under the statute.\textsuperscript{189} The Court thought Congress had expressed its intent to abrogate the states' sovereign immunity in the law.\textsuperscript{190} However, the Court concluded that Congress lacked the power to do so.\textsuperscript{191}

The key question was whether the statute was passed under a constitutional provision that granted Congress the power to abrogate.\textsuperscript{192} Previously, the Court had found that Congress had authority to abrogate under only two provisions—the Commerce Clause (\textit{Union Gas}) and section 5 of the Fourteenth Amendment.\textsuperscript{193} Congress enacted this law pursuant to the Indian Commerce Clause,\textsuperscript{194} and "[t]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."\textsuperscript{195} However, the Court rejected the \textit{Union Gas} rationale, declaring that "[i]t was well established in 1989 when \textit{Union Gas} was decided . . . that state sovereign immunity limited the federal courts' jurisdiction under Article III."\textsuperscript{196} The Court averred:

\begin{itemize}
\item \textsuperscript{182} \textit{Id.} at 5.
\item \textsuperscript{183} \textit{Id.} at 19.
\item \textsuperscript{184} 517 U.S. 44 (1996).
\item \textsuperscript{185} \textit{Id.} at 66.
\item \textsuperscript{186} 25 U.S.C. § 2710(d) (1994).
\item \textsuperscript{187} \textit{Seminole Tribe}, 517 U.S. at 47-51.
\item \textsuperscript{188} \textit{Id.} at 51-52.
\item \textsuperscript{189} \textit{Id.} at 53.
\item \textsuperscript{190} \textit{Id.} at 57.
\item \textsuperscript{191} \textit{Id.} at 72-73.
\item \textsuperscript{192} \textit{Id.} at 59.
\item \textsuperscript{193} \textit{Id.}
\item \textsuperscript{194} U.S. CONST. art. 1, § 8, cl. 3.
\item \textsuperscript{195} \textit{Seminole Tribe}, 517 U.S. at 62.
\item \textsuperscript{196} \textit{Id.} at 64.
\end{itemize}
Never before the decision in Union Gas had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.¹⁹⁷

The Court asserted, “Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, ‘we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’”¹⁹⁸ The Court continued: “That presupposition, first observed over a century ago . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that ‘it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.’”¹⁹⁹ This presupposition finds “its roots not solely in the common law of England, but in the much more fundamental ‘jurisprudence in all civilized nations.’”²⁰⁰

The Court responded to the claim that the Eleventh Amendment only applied to diversity jurisdiction by referencing the decision in Chisholm v. Georgia,²⁰¹ which held that the states could be sued under diversity jurisdiction.²⁰² The Court in Seminole Tribe stated that Chisholm created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted. The dissent’s lengthy analysis of the text of the Eleventh Amendment is directed at a straw man—we long have recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of. The text dealt in terms only with the problem presented by the decision in Chisholm; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.²⁰³

The Court concluded:

¹⁹⁷. Id. at 65 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).  
¹⁹⁸. Id. at 54 (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).  
¹⁹⁹. Id. (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890)).  
²⁰⁰. Id. at 69 (quoting Hans, 134 U.S. at 17).  
²⁰¹. 2 U.S. 419 (1793).  
²⁰². Id. at 420.  
²⁰³. Seminole Tribe, 517 U.S. at 69-70 (citations omitted).
In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment . . . restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.\(^{204}\)

Next, the Court severely limited Congress’s ability to enact a statute that could be enforced against the states in any court. *Alden* is the most important of these cases because it established that Congress cannot generally abrogate a state’s sovereign immunity in its own courts.\(^{205}\) In other words, Congress lacks power under Article I to enact laws that can be enforced against the states. *Alden* concerned whether state probation officers could sue Maine under the Fair Labor Standards Act of 1938.\(^{206}\)

The Court felt that a state’s sovereign immunity is not derived from or limited by the Eleventh Amendment.\(^{207}\) The Court declared:

> [A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.\(^{208}\)

The Constitution recognizes the states as sovereign entities, and the Tenth Amendment “confirms the promise implicit in the original document.”\(^{209}\) There are two aspects of state sovereignty under the Constitution.\(^{210}\) First, the Constitution reserves to the states “a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”\(^{211}\)

Second,

\(^{204}\) *Id.* at 72-73.

\(^{205}\) 527 U.S. at 706.


\(^{207}\) 527 U.S. at 713.

\(^{208}\) *Id.*

\(^{209}\) *Id.* at 713-14.

\(^{210}\) *Id.* at 714.

\(^{211}\) *Id.*
even as to matters within the competence of the National government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"\(^2\)

The Court asserted: "The States thus retain 'a residuary and inviolable sovereignty' . . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."\(^2\)

According to the Court, the framer's generation regarded "immunity from private suits central to sovereign dignity."\(^2\) The Court stated that "[t]he leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity,"\(^2\) and the state conventions interpreted the Constitution as preserving the states' immunity.\(^2\)

The Court felt Chisholm had taken a literal view of Article III, and the outrage it caused and the speed by which it was overruled by the Eleventh Amendment demonstrated it was an incorrect understanding of state sovereign immunity.\(^2\) The Court proclaimed that "[t]he text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design."\(^2\)

The Court continued, "Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision."\(^2\)

The Court declared:

\(^2\)Id. (quoting Printz, 521 U.S. at 919-20).
\(^2\)Id. at 715 (quoting THE FEDERALIST NO. 39 (James Madison) (Benjamin Fletcher Wright ed., 1961)).
\(^2\)Id. The Court argued that "[a]lthough the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." Id. at 715-16.
\(^2\)Id. at 716.
\(^2\)Id. at 718.
\(^2\)Id. at 719-27. "The more reasonable interpretation, of course, is that regardless of the views of four Justices in Chisholm, the country as a whole—which had adopted the Constitution just five years earlier—had not understood the document to strip the States of their immunity from private suits." Id. at 724.
\(^2\)Id. at 723.
\(^2\)Id. at 724.
The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush.  

The Court concluded: "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."  

The Court maintained that it had been consistent in the above views. The Court stated, "we have looked to 'history and experience, and the established order of things,' rather than '[a]dhering to the mere letter' of the Eleventh Amendment, in determining the scope of the States' constitutional immunity from suit." The Court noted that its "holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."  

The Court rejected the petitioners' arguments that the states had been forced to relinquish a portion of their sovereign immunity. First, the Court rejected the petitioner's Supremacy Clause argument. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Court asserted, "As is evident from its text... the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design." Thus,  

[t]he Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising

220. Id.
221. Id. at 727 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239 n.2 (1985)).
222. Id.
223. Id. (quoting Hans, 134 U.S. at 13-14 (citations omitted)).
224. Id. at 728.
225. Id. at 732.
226. Id. at 733.
227. U.S. CONST. art. VI, cl. 2.
228. 527 U.S. at 731 (quoting U.S. CONST art. VI, cl. 2).
under federal law merely because that law derives not from the State itself but from the national power.\textsuperscript{229}

The Court also rejected petitioners' arguments concerning isolated statements in some of the Supreme Court cases that suggest the Eleventh Amendment is not applicable in state courts.\textsuperscript{230} The Court declared:

This, of course, is a truism as to the literal terms of the Eleventh Amendment. As we have explained, however, the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit. The cases, furthermore, do not decide the question presented here—whether the States retain immunity from private suits in their own courts notwithstanding an attempted abrogation by the Congress.\textsuperscript{231}

With the states' sovereign immunity established, the next question was whether Congress has the power to abrogate a state's sovereign immunity under Article I.\textsuperscript{232} The historical record is generally silent on this question.\textsuperscript{233} Concerning this silence, the Court proclaimed:

We believe, however, that the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' wartime debts, together with the well-known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.\textsuperscript{234}

The Court thought early congressional practice and Supreme Court cases supported its historical analysis.\textsuperscript{235} The fact that Congress authorized suits in state courts without any authorization of suits against nonconsenting states in state courts suggests a lack of such power.\textsuperscript{236} In addition, the Court has "often described the States' immunity in sweeping terms, without reference to whether the suit was

\begin{itemize}
  \item \textsuperscript{229} Id. at 732.
  \item \textsuperscript{230} Id. at 735-36.
  \item \textsuperscript{231} Id.
  \item \textsuperscript{232} Id. at 741.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id. at 743-48.
  \item \textsuperscript{236} Id. at 744.
\end{itemize}
prosecuted in state or federal court," and it has stated on many occasions that states retain sovereign immunity in their own courts.

The Court also considered whether Congress's authority to enact statutes that allowed suits against states in their own courts was consistent with the Constitution's structure. In undertaking this inquiry, the Court examined both "the essential principles of federalism and . . . the special role of the state courts in the constitutional design." Concerning federalism, the Court asserted, "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." The Court continued:

The founding generation thought it "neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons. . . . The principle of sovereign immunity preserved by constitutional design thus accords the States the respect owed them as members of the federation." The Court also rejected the petitioners' contention that immunity from suit in federal court preserves the states' dignity on the ground that a congressional power to abrogate a state's immunity in its own courts is even more offensive to a state's dignity than the ability to authorize suits in federal court. Moreover, such a power threatens the states' financial integrity, causes unanticipated interference in the process of government, and interferes with the states' ability to govern in accordance with their citizens' will.

The Court summed up the federalism subfactor by stating:

By "split[ting] the atom of sovereignty," the Founders established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who

237. Id. at 745.
238. Id.
239. Id. at 748.
240. Id.
241. Id.
242. Id. 748-49 (quoting In re Ayers, 123 U.S. 443, 505 (1887)).
243. Id. at 749.
244. Id. at 750-52. The Court contended that "[w]hile the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc." Id. at 751.
sustain it and are governed by it. . . . The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.246

In addition, Congress's ability to abrogate a state's sovereign immunity in its own courts blurs "the separate duties of the judicial and political branches of the state governments, displacing state decisions that go to the heart of representative government."247 Moreover,

If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very constitution from which its existence derives.248

Most significantly, the federal government would have more power over states in state courts than the federal government does in its own courts.249 Concerning the argument that the Supremacy Clause imposes specific obligations on state judges, the Court replied, "There can be no serious contention, however, that the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself."250

The Court concluded its decision by stating:

This case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance. Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.251

245. Id. at 751 (quoting Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999) (quotations omitted); Printz v. United States, 521 U.S. 898, 920 (1997) (citations omitted)).
246. Id.
247. Id. at 752.
248. Id.
249. Id. at 753.
250. Id. at 758.
The next step was for the Court to limit Congress’s ability to enact a statute under section 5 of the Fourteenth Amendment, which was intended to “enforce” the Due Process Clause, in two cases decided the same day as *Alden*: *Florida Prepaid Secondary Expense Board v. College Savings Bank* and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (involving the same parties and facts). The first case, *Florida Prepaid*, concerned claims of patent infringement against a state actor. Because *Seminole Tribe* had foreclosed a claim that Congress could abrogate a state’s sovereign immunity in federal court under Article I, College Savings argued Congress had properly abrogated the states’ Eleventh Amendment immunity in federal court pursuant to section 5 of the Fourteenth Amendment to enforce the guarantees of the Due Process Clause of section 1 of the Amendment. Section 1 states that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” The Court agreed that a patent was a form of property. However, legislation must still be proper under section 5 as set forth in *Boerne*—the legislation must be remedial in nature. The Court stated that “for Congress to invoke [section] 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” However, Congress failed to identify a pattern of patent infringement, let alone a pattern of constitutional violations when it passed the Patent Remedy Act. The Court concluded:

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of “widespread and persisting deprivation of constitutional rights” of the sort Congress has faced in enacting proper prophylactic [section] 5 legislation . . . . Because of this lack, the provisions of the Patent Remedy Act are “so out of proportion to a supposed remedial or preventative object that [they] cannot be under-

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253. 527 U.S. at 627.
254. Id. at 633.
255. Id.
256. U.S. CONST. amend XIV, § 1.
257. 527 U.S. at 637.
258. 521 U.S. at 519.
260. Id. at 639.
261. Id. at 640.
stood as responsive to, or designed to prevent, unconstitutional behavior.\textsuperscript{262}

The Court in \textit{College Savings Bank}, the companion case, rejected a similar Fourteenth Amendment argument because no property was involved in that case.\textsuperscript{263} This case involved a claim against a state actor under the Trademark Remedy Clarification Act,\textsuperscript{264} which created a state private right of action against any person who uses false descriptions or makes false representations in commerce under the Lanham Act.\textsuperscript{265} Justice Scalia thought the Lanham Act's false advertising provision did not involve the right to exclude, which is the hallmark of a protected property interest.\textsuperscript{266} He also rejected claims that the common-law tort of unfair competition protects property under the Due Process Clause and that businesses are property within the Due Process Clause.\textsuperscript{267}

Both cases also rejected the argument that the state had impliedly or constructively waived its sovereign immunity by running an enterprise, operating in a field traditionally occupied by private persons or corporations, or by engaging in activities significantly removed from core state functions.\textsuperscript{268} The Court stated that "[t]he classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'"\textsuperscript{269} The Court added:

Nor do we think that the constitutionally grounded principle of state sovereign immunity is any less robust where, as here, the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of "market participants". . . . Since sovereign immunity itself was not traditionally limited by these factors, and since they have no bearing upon the voluntariness of the waiver, there is no principled reason why they should enter into our waiver analysis.\textsuperscript{270}

\begin{thebibliography}{99}
\bibitem{262} \textit{Id.} at 645-46 (quoting \textit{Boerne}, 521 U.S. at 526, 532).
\bibitem{263} 527 U.S. at 672.
\bibitem{264} Pub. L. No. 102-542, 106 Stat. 3567.
\bibitem{266} 527 U.S. at 673.
\bibitem{267} \textit{Id.} at 674-75.
\bibitem{268} \textit{Id.} at 675-87; \textit{Fla. Prepaid}, 527 U.S. at 635.
\bibitem{269} 527 U.S. at 682 (quoting \textit{Johnson v. Zerbst}, 304 U.S. 458, 464 (1938)).
\bibitem{270} \textit{Id.} at 684.
\end{thebibliography}
With Article I unavailable for Congress to use to apply federal statutes to the states, it remained to be seen how far section 5 of the Fourteenth Amendment would support Congressional enactments in connection with the Equal Protection Clause. The Court severely limited the use of section 5 for such purposes in Kimel v. Florida Board of Regents.271 The Court held section 5 did not give Congress the authority to extend the Age Discrimination in Employment Act ("ADEA"),272 which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age,"273 to the states.274 The statute allowed suits against states "in any Federal or State court of competent jurisdiction."275 First, the Court found Congress intended to abrogate the states' immunity in the statute.276 Next, the Court reaffirmed the Seminole Tribe holding that "Congress'[s] powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."277 The majority added that "[i]ndeed, the present dissenters' refusal to accept the validity and natural import of decisions like Hans, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution."278

In analyzing whether section 5 supported the ADEA, the Court used traditional equal protection analysis—rational basis versus strict scrutiny review.279 The Fourteenth Amendment limits the Eleventh Amendment and state sovereignty.280 Concerning section 5, the Court wrote, "[section] 5 is an affirmative grant of power to Congress. It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference."281 However, "the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power . . . ." Congress cannot decree the substance of the Fourteenth Amendment's

273. Id. § 623(a)(1).
274. 528 U.S. at 67.
275. Id. at 68 (quoting 29 U.S.C. § 216(b) (1994)).
276. Id. at 73.
277. Id. at 80 (citing Seminole Tribe, 517 U.S. 44, 76).
278. Id. at 79-80.
279. Id. at 80-92.
280. Id. at 80.
281. Id. at 80-81 (quoting Flores, 521 U.S. at 536).
restrictions on the states, it can only enforce the substance set out in the Amendment.\textsuperscript{282} Accordingly, "'[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'\textsuperscript{283}"

Based on the congruence and proportionality test, the Court concluded that the ADEA was not constitutional under section 5 because "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."\textsuperscript{284} In age discrimination cases under the Fourteenth Amendment, the Court had held age classifications should be analyzed under the rational basis test rather than the strict scrutiny test.\textsuperscript{285} The Court declared: "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'\textsuperscript{286} Older persons have not been subjected to a history of purposeful mistreatment, and they are not a discrete and insular minority.\textsuperscript{287} Thus, old age is not a suspect classification.\textsuperscript{288} Therefore, "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."\textsuperscript{289}

Because the rational basis test applies to age discrimination under the substance of the Fourteenth Amendment, "the ADEA is 'so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'\textsuperscript{290} In other words, because the ADEA makes certain types of age discrimination illegal that are not unconstitutional under the Fourteenth Amendment, section 5 of the Fourteenth Amendment cannot be used as a foundation for the statute. In addition, the ADEA's legislative history does not show Congress had any reason to believe states were unconstitutionally discriminating against their employees based on age.\textsuperscript{291} The Court concluded: "In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of

\textsuperscript{282} Id. at 81.
\textsuperscript{283} Id. (quoting Boerne, 521 U.S. at 520).
\textsuperscript{284} Id. at 83.
\textsuperscript{285} Id. at 83-84.
\textsuperscript{286} Id. at 83 (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 86 (quoting Boerne, 521 U.S. at 532).
\textsuperscript{291} Id. at 91.
widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under [section] 5 of the Fourteenth Amendment. 292

Finally, Board of Trustees of the University of Alabama v. Garrett 293 employed the same principles to hold Congress could not extend the Americans with Disabilities Act of 1990 ("ADA") 294 to the states. 295 In Cleburne v. Cleburne Living Center, Inc., 296 the Court applied rational basis review to an equal protection challenge to a city ordinance that required a special use permit for the operation of a group home for the mentally retarded. 297 The Court in Garrett stated, "Thus, the result of Cleburne is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." 298 With "the metes and bounds of the constitutional right" established, the Court looked at whether Congress had identified a history and pattern of unconstitutional employment discrimination by the states against the disabled. 299 The Court found minimal evidence of unconstitutional employment discrimination against the disabled. 300 The Court maintained,

Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in City of Boerne . . . . For example, whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing

292. Id.
294. 42 U.S.C. § 12111-12117 (1994). The ADA prohibits certain employers, including states, from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Id. § 12112(a). The ADA requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of[the employer]." Id. § 12112(b)(5)(A).
295. 531 U.S. at 358.
297. Id. at 446.
298. 531 U.S. at 367.
299. Id. at 368.
300. Id.
facilities, the ADA requires employers to "mak[e] existing facilities used by employees readily accessible to and usable by individuals."  

The Court concluded:

Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in Cleburne. Section 5 does not so broadly enlarge congressional authority.

In sum, the Court has severely restricted Congress's ability to extend general statutes to the states based on the Court's conception of the Eleventh Amendment and general conceptions of sovereign immunity that allegedly existed at the time of the Constitution's framing. Based on the notion that "[t]he ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court," Congress lacks the power to abrogate state sovereign immunity in federal court under the Commerce Clause. Similarly, under general concepts of federalism, Congress lacks the authority under Article I to apply statutes to the states in any court. The only possible clause Congress can use to enact statutes that apply to the states is section 5 of the Fourteenth Amendment. However, Congress cannot change the substance of the Fourteenth Amendment using section 5 and make conduct that was not unconstitutional under that amendment illegal. It can only enforce the Amendment's existing substantive provisions.

2. Evaluation of the Sovereign Immunity Ground of the New Federalism. The sovereign immunity ground of the new federalism is unprincipled because nothing in the Constitution supports it. A

301. Id. at 372 (quoting 42 U.S.C. § 12111(a)) (citation omitted).
302. Id. at 374.
303. Id. at 363.
general understanding at the time of the Constitution does not attain constitutional status unless it is specifically included in the constitutional text. The rule of law is not based on silence.

The Eleventh Amendment is narrow concerning its limitations on suits against states in federal court. Its literal language proscribes suits against states in federal court brought by citizens of another state or citizens or subjects of a foreign state. It says nothing about suits of citizens of a state against that state. Moreover, it is a limitation on the judicial power under Article III; it does not refer to Congress's power under Article I.

Despite the narrowness of its language, the Court has extended state sovereign immunity from diversity suits to all types of parties in federal court. Such constitutional interpretation is unprecedented; even the often criticized right to privacy cases have a textual basis—liberty under the Due Process Clause of the Fourteenth Amendment. This is particularly surprising considering the judges making this interpretation are generally textualists in both constitutional and statutory interpretation. For example, Justice Scalia wrote, “What I look for in the Constitution is precisely what I look for in a statute: the original


305. U.S. CONST. amend. XI.
306. Id.
307. Justice Souter has averred: “I know of only one other occasion on which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision.” Seminole Tribe, 517 U.S. at 167 (Souter, J., dissenting). Justice Souter has also written, [N]o clause in the proposed (and ratified) Constitution even so much as suggested such a position. It may have been reasonable to contend (as we will see that Madison, Marshall, and Hamilton did) that Article III would not alter States’ pre-existing common-law immunity despite its unqualified grant of jurisdiction over diversity suits against states. But then, as now, there was no textual support for contending that Article III or any other provision would “constitutionalize” state sovereign immunity, and no one uttered any such contention.

Id. at 106.
meaning of the text, not what the original draftsman intended."\textsuperscript{308} As Justice Scalia has averred, "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."\textsuperscript{309} As Judge Frank Easterbrook declared, "The process [of interpretation] is objective; the search is not for the contents of the authors' heads but for the rules of language they used.\textsuperscript{310} In addition, many textualists believe groups like legislatures cannot have intentions. For example, Judge Easterbrook wrote, "Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.\textsuperscript{311}

As this author has explained elsewhere, "Authors express their intentions through symbols—words—that have established meanings."\textsuperscript{312} Such symbols must be separable from intent; otherwise, they have no meaning. Because words are separable from intent, the text is autonomous; the text is the only proper "thing" to be interpreted.

No textualist could interpret the Eleventh Amendment as forbidding suits by a citizen of a state against that state; there is nothing in the text to support such an interpretation.\textsuperscript{313} As Justice Scalia has stated


\textsuperscript{309. SCALIA, supra note 308, at 17.}

\textsuperscript{310. \textit{In re Sinclair}, 870 F.2d 1340, 1342 (7th Cir. 1989).}


\textsuperscript{312. Fruehwald, \textit{Pragmatic Textualism}, supra note 308, at 999-1000.}

\textsuperscript{313. One might rightly argue that Constitutional interpretation differs from statutory analysis to a certain extent because the Constitution and statutes are different types of documents. For example, Justice Scalia has written that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear." SCALIA, supra note 308, at 37. However, the very specific language of the Eleventh Amendment cannot be interpreted as providing the broad limitations the Court says it does. Rules of language apply to constitutional texts.

In addition, although he does not look outside the text in connection with statutory interpretation, Justice Scalia looks at \textit{The Federalist} in connection with constitutional analysis. \textit{Id.} at 38. However, he does this to understand how the framers' generation understood the text, not to determine what the original draftsmen intended. \textit{Id.} This Author agrees as long as the judge is interpreting the text, not creating missing text.}
in connection with statutory interpretation, "Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible." One could reasonably interpret the Eleventh Amendment as precluding all lawsuits in federal court brought against states by citizens of other states or citizens or subjects of foreign states. That is what the Amendment says. In that case, the outcome of Seminole Tribe would be correct because the suit was by an Indian tribe against a state. However, as mentioned above, one could argue that the Eleventh Amendment is limited to suits brought under diversity jurisdiction because that was the "evil" the Amendment was intended to change.

Looking at a text's context to help interpret the words is a proper device for many textualists. However, there is no way a textualist could read the Eleventh Amendment to include words that are not in the text! To paraphrase Justice Scalia, such an interpretation is unfair; it enforces what the framers intended (if they so intended) rather than what they promulgated. Further, it enforces what the justices think the drafters should have intended, destroying any sense of detachment.

The Court in Seminole Tribe cited the quick passage of the Eleventh Amendment after Chisholm as evidence the Eleventh Amendment merely restored the sovereign immunity in the Constitution. However, all Chisholm's quick passage means is Congress and the people did not want states to be subject to suits for debts in federal courts at the time the Eleventh Amendment was enacted. It says nothing about what the original framers and ratifiers intended. Moreover, the fact that only one judge dissented demonstrates it was not the general understanding at the time of the Constitution's enactment that the states had sovereign immunity under Article III. The Court's reliance on the lone dissenter, Judge Iredell, is also misplaced. Justice Iredell did not rely on the Constitution but on the Judiciary Act of 1789. According to

311. Id. at 24.
316. Fruehwald, Pragmatic Textualism, supra note 308, at 1002-03.
317. See supra note 309 and accompanying text.
318. 517 U.S. at 69.
319. 2 U.S. (2 Dall.) at 433-34 (Iredell, J., dissenting); see also Seminole Tribe, 517 U.S. at 78-79 (Stevens, J., dissenting); Seminole Tribe, 517 U.S. at 108 (Souter, J., dissenting); John V. Orth, The Truth about Justice Iredell's Dissent in Chisholm v. Georgia (1793), 73 N.C. L. REV. 255 (1994).
Justice Iredell, the federal courts possessed only the jurisdiction Congress had provided, and the Judiciary Act limited federal jurisdiction to what could be exercised in accordance with the "principles and usages of law." He thought this meant the federal courts must interpret their jurisdiction in relation to the common law, which included the doctrine of sovereign immunity.

The Court also misread *Hans v. Louisiana.* In *Hans* a citizen sued a state for an alleged violation of the Contracts Clause. *Hans* did not address whether Congress had abrogated a state's sovereign immunity. Justice Stevens declared: "Thus, the opinion's thorough historical investigation served only to establish a presumption against jurisdiction that Congress must overcome, not an inviolable jurisdictional restriction that inheres in the Constitution itself." In addition, cases cited in *Seminole Tribe* did not decide whether Congress can abrogate a state's sovereign immunity in federal question cases under constitutional principles; any statements in this case concerning such jurisdiction were dicta.

An alternate amendment introduced in Congress shortly after *Chisholm* demonstrates Congress knew how to draft an amendment that created broad sovereign immunity. The text of the alternative stated:

[T]hat no state shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.

Professor Akhil Reed Amar has observed: "Textualism presupposes that the specific constitutional words ultimately enacted were generally chosen with care." With the above alternative available, why would Congress have adopted the narrow Eleventh Amendment when what they really wanted was broad state immunity in federal court?

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320. 2 U.S. (2 Dal.) at 433 (Iredell, J., dissenting).
321.  Id. at 434-35.
322. 134 U.S. 1 (1890).
323.  Id. at 1.
324. Justice Souter stated: "Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation." *Seminole Tribe,* 517 U.S. at 119 (Souter, J., dissenting).
325. 517 U.S. at 125 (Souter, J., dissenting).
326. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1922).
Justice Stevens concluded, concerning the scope of the Eleventh Amendment: "In sum, little more than speculation justifies the conclusion that the Eleventh Amendment's express but partial limitation on the scope of Article III reveals that an implicit but more general one was already in place." He added:

The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment. It rests rather on concerns of federalism and comity that merit respect but are nevertheless, in cases such as the one before us, subordinate to the plenary power of Congress.

Concerning whether Congress has the legislative power to extend its enactments to the states, the Court in these cases did not rely solely (or mainly) on the Eleventh Amendment, but also sought support in the Constitution's structure, history, and the Court's authoritative interpretations to create broad state sovereign immunity. The Constitution's structure (Article I, the Tenth Amendment, the Eleventh Amendment) demonstrates that the states retained a great deal of sovereignty. These passages reserve specific powers to the states. However, nothing in the Constitution creates state sovereign immunity beyond that specified in the Eleventh Amendment. The sum of the parts is not more than the individual parts. They do not indicate an unwritten, but nonetheless constitutional, restriction on Congress's power to regulate the states. Nothing in the Constitution's text supports the proposition that when a statute is within Congress's competence under Article I, Congress, nevertheless, cannot apply that statute to the states.

329. 517 U.S. at 83.
330. Id. at 95.
331. The Eleventh Amendment does not apply to state courts; it is a limit on the judicial power of federal courts.
332. Justice Souter has noted that "the 1787 draft Constitution contained no provision for adopting the common law at all." Seminole Tribe, 517 U.S. at 137 (Souter, J., dissenting). He added that

the Framers chose to recognize only particular common-law concepts, such as the writ of habeas corpus, U.S. Const., Art. I, § 9, cl. 2, and the distinction between law and equity, U.S. Const., Amend. 7, by specific reference in the constitutional text... This approach reflected widespread agreement that ratification would not itself entail a general reception of the common law of England.

Id. at 137-38 (citations omitted). He also noted that "the Framers' very insistence that no common-law doctrine would be received by virtue of ratification was focused in their fear that elements of the common law might thereby have been placed beyond the power of Congress to alter by legislation." Id. at 159-60.
Justice Scalia criticized similar unprincipled lawmaking:

My favorite example of a departure from text . . . pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments of the United States Constitution, which says that no person shall “be deprived of life, liberty, or property without due process of law.” It has been interpreted to prevent the government from taking away certain liberties beyond those, such as freedom of speech and of religion, that are specifically named in the Constitution . . . . Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.333

History cannot support the Court’s position on state sovereign immunity. History can be used to help interpret specific passages by showing the words’ context. However, history cannot be used to create Constitutional provisions out of thin air when they do not exist in the specific text. Justice Scalia wrote in relation to statutory interpretation: “Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver.”334 The Court may or may not be right that the framers’ generation viewed sovereign immunity as a vital part of sovereignty and the Constitution would never have been ratified if the ratifiers had felt the Constitution stripped the states of their sovereign immunity.335 The fact remains the framers did not protect state sovereign immunity in the document; silence does not enact an understanding. Thus, unlike specific passages, state sovereign immunity did not go through the ratification process. Moreover, because the framers’ generation’s interpretation is open to debate, there is the danger the Court is reading history to support its normative views, rather than the views of the framers’ generation.336 As the members

333. SCALIA, supra note 308, at 24-25.
334. Id. at 17.
335. See Justice Souter’s dissents in Seminole Tribe, 517 U.S. at 142-50 and Alden, 527 U.S. at 764-94. Professor David L. Shapiro has stated, “even for an originalist, history did not compel the Alden result; that history is far too ambiguous, and indeed the fundamental critiques of sovereign immunity by all the judges but one in Chisholm v. Georgia, as well as in other materials, undercut any historical support for that result.” Shapiro, supra note 304, at 753.
336. Justice Scalia has written the following concerning statutory interpretation:
of the majority in the sovereign immunity cases often stressed, the only way to amend the Constitution is through the procedures set forth in Article V, and Amendment V may be the most important safeguard for minorities in the Constitution. Without Amendment V the rest of the constitutional protections are meaningless. Justice Scalia contended the democratic "system is destroyed if the smug assurances of each age are removed from the democratic processes and written into the Constitution." 337 In sum, to give the states sovereignty beyond that specified in the Constitution, or at least reasonably inferable from the text, is unprincipled lawmaking—amending the text without following proper procedures.

In this kind of analysis, the Court is employing a new type of constitutional originalism. In the traditional type of originalism advocated by many "conservative" scholars and judges, the Court is supposed to determine the original meaning of the text. 338 In the "new originalism," the Court is attempting to establish the original understanding of a principle separate from the text. As Professor Ernest A. Young has pointed out, "It is hard to see how a textualist could view Alden as anything other than a disaster." 339

The practical threat is that, under the guise or even the self-delusion of pursuing unexpected legislative intents, common law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it meant, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that the law means what you think it ought to mean—which is precisely how judges decide things under the common law.

SCALIA, supra note 308, at 17-18; see also Pub. Citizen v. U.S. Dept of Justice, 491 U.S. 440 (1989) (Kennedy, J., concurring) ("The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice." Id. at 473.).

338. SCALIA, supra note 308, at 45.
339. Ernest A. Young, Alden v. Maine and the Jurisprudence of Structure, 41 WM & MARY L. REV. 1601, 1602 (2000). Professor Young approves of this approach to constitutional adjudication, but he thinks that the Court applied it poorly in Alden. Id. at 1651-58, 1665-75. He declared that "Alden stands both as a hopeful indication of new interpretive possibilities and a sobering reminder of how structural interpretation can go astray." Id. at 1676. The present Author disagrees with this approach to constitutional analysis for the reasons given in the text.
The framers' generation's view of sovereignty is also irrelevant because the Constitution created a new type of sovereign. A traditional sovereign has complete sovereignty and does not have to respect another sovereign's laws. The Constitution created dual sovereignty—some of the sovereignty was given to the federal government while other parts were reserved to the states. Moreover, the states have to respect the federal government's laws under the Supremacy Clause and other state's laws under the Full Faith and Credit Clause. Thus, it is extremely difficult to say the states retained all attributes of traditional sovereignty because they specifically lacked certain attributes.

Respecting a state's dignity is no ground for a constitutional decision. While Congress should respect the states, nothing in the Constitution supports the argument that they must respect the states' dignity. This is a gloss on a gloss (the general conception of federalism). In addition, other burdens Congress places on states, such as requiring states to accept federal conditions to receive federal funds, affects the states' dignity. Similarly, while federal statutes may threaten the state fiscally, nothing in the Constitution prevents Congress from doing this. Normative observations do not become constitutional principles without textual support. Whether Congress should do something and whether Congress can do something are separate questions. The former question is left up to the political process—Congress.

A detached reading of the Constitution's text demonstrates states lack sovereign immunity beyond that specified in the Eleventh Amendment. Article I gives Congress enumerated powers. The Tenth Amendment makes clear Congress's powers do not go beyond those enumerated, but

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340. Justice Souter has observed,

[I]t is clear that the act of ratification affected their [the states'] sovereignty in a way different from any previous political event in America or anywhere else. For the adoption of the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy.

517 U.S. at 150. In addition, Professor Amar has observed that the Constitution broke with tradition, including governmental sovereignty. Amar, *Foreword*, supra note 328, at 115.

341. Justice Souter noted that "[b]efore the new federal scheme appeared, 18th-century political theorists had assumed that 'there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself." 517 U.S. at 150-51 (quoting B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967)).


343. U.S. CONST. art. IV, § 1.
it does not otherwise limit Congress's powers to enact statutes. If Congress has a plenary power under Article I and no other constitutional provision restricts Congress's use of this power, then Congress should be able to enact statutes under Article I that encompass the states. To phrase the argument another way, the Constitution has given sovereignty to Congress in particular areas and not given sovereignty to the states in those areas. If Congress has sovereignty in an area and the states lack sovereignty in that area, Congress cannot interfere with the States' sovereign immunity because they have no sovereignty in that area.

To phrase the argument a third way, a sovereign has immunity only when it is the source of the law. Finally, when there is a need for a federal solution, significant entities like state governments cannot be exempted from that federal solution.

The Court's sovereign immunity cases ignore the Supremacy Clause. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When Congress enacts a law like the ADA or the ADEA, it is doing so pursuant to its Article I powers, and, thus, the enactment is the supreme law of the land. State judges are bound by that law, despite anything in state law, including common-law or statutory state sovereign immunity. In addition, as Justice Souter has observed,

[T]he doctrine of separation of powers prevails in our Republic. When the state judiciary enforces federal law against state officials, as the Supremacy Clause requires it to do, it is not turning against the State's executive any more than we turn against the Federal Executive when

344. Justice Souter asserted: "There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood . . ." *Alden*, 527 U.S. at 761 (Souter, J., dissenting).

345. As Professor Amar has noted, "[w]here governments are acting within the bounds of their delegated 'sovereign' power, they may partake of sovereign immunity; where not, not." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1490-91 n.261 (1987).

346. *Alden*, 527 U.S. at 796 ("[T]he Court fails to realize that under the natural law theory, sovereign immunity may be invoked only by the sovereign that is the source of the right upon which suit is brought." *Id.*).

347. U.S. CONST. art. VI, § 2.
we apply federal law to the United States: It is simply upholding the rule of law.\textsuperscript{348}

The second ground of the new federalism provides opposite protections from the first ground. The first ground protects the individual from overreaching by the federal government,\textsuperscript{349} while the second ground protects a government—the states—from individuals. This is not the dual protection Madison spoke of in \textit{The Federalist}.\textsuperscript{350} As Justice O'Connor has observed, "the Constitution divides authority between federal and state governments for the protection of individuals."\textsuperscript{351} Professor Chemerinsky pointed out that in the \textit{Alden} trilogy the Court made a value judgment to favor states over individuals without acknowledging or justifying this choice.\textsuperscript{352} Thus, employing the second ground of the new federalism weakens the first.\textsuperscript{353} Furthermore, the second ground's protection of the states from individuals contravenes the very basis of our Constitution. Professor Amar noted that "[a]ccording to the document, the People are sovereign and governments are limited. According to modern doctrine . . . governments are sovereign and sovereignty means being able to violate the constitutional rights of small fry without making them whole."\textsuperscript{354}

This author agrees with the Court that Congress lacks the power to apply the ADA, the ADEA, or similar statutes to the states under section 5 of the Fourteenth Amendment.\textsuperscript{355} Section 5 does not give Congress the power to define constitutional rights; it is a remedial section. If the Fourteenth Amendment does not extend strict scrutiny equal protection to categories like age or physical impairment, section 5 does not give

\textsuperscript{348} 527 U.S. at 801 n.34 (Souter, J., dissenting).
\textsuperscript{349} Of course, this ground also protects the states' lawmaking powers.
\textsuperscript{350} See supra note 81 and accompanying text.
\textsuperscript{351} New York, 505 U.S. at 181; see also Thomas, supra note 83, at 235.
\textsuperscript{353} Professor Wilson has further claimed that conservative justices are enforcing left-leaning philosophies. Wilson, \textit{supra} note 304, at 1716-17. For example, many left-leaning philosophies deplore our culture's emphasis on "rights-talk" because it produces "false consciousness" and makes the individual the locus of analysis. The sovereign immunity cases reduce individual rights by making the states immune—or, as Professor Wilson phrases it, "the Supreme Court has eviscerated the very concept of 'rights.'" \textit{Id.} at 1714.
\textsuperscript{354} Amar, \textit{Foreword, supra} note 328, at 78.
\textsuperscript{355} However, section 5 should allow Congress to apply federal property rights to the states. In applying these laws to the states, Congress is taking remedial action, not redefining constitutional rights. Notably, neither the Due Process Clause nor section 5 requires a "pattern" of violations. If a right is property, then a deprivation of that right is a violation of due process, and Congress can remedy such a violation, even if it is a single instance.
Congress the authority to do so. However, section 5 is irrelevant because Congress has plenary power under the Commerce Clause to pass statutes that concern employment discrimination that relates to interstate commerce, and, as stated above, nothing in the Constitution limits this power concerning the states.

There are also normative grounds to disallow states to have sovereign immunity from federal statutes. First, as history has shown, states are not perfect in how they treat their citizens, and even when a state is acting in good faith not all of its employees are acting similarly. Thus, state employees need protection from employment discrimination based on age or disability and the benefits of federal wage and hour laws. Similarly, the holder of intellectual property should be able to recover from a state for the state's use of his or her intellectual property without relying on the state's "benevolence." Second, it is against the rule of law to allow a government to ignore valid laws. Finally, there is a need for uniform laws in many areas, such as patent law.

Of course, normative views are not the law, especially when the Constitution is concerned. But that is the point of this Article: the Court should be enforcing the structural provisions of the Constitution, not its normative views of what the Constitution should be. While it is naive to think normative views never creep into constitutional interpretation, the Court in the sovereign immunity cases has gone far beyond the sense of detachment that is so important under the rule of law. Justice Souter declared: "It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own."  

One might ask how the states are protected, if the Constitution does not protect them from Congress's overreaching in areas in which it has plenary power. The answer lies in the political processes. The states and the people can bring political pressure upon Congress not to apply certain statutes to the states. Why then would this safeguard apply to state sovereignty but not to the first ground of the new federalism? The answer is that this is the way the Constitution divided sovereignty between the states and the federal government. Congress's ability to pass statutes is implicitly limited by Article I and specifically limited by the Tenth Amendment. Thus, these restrictions are grounded in specific

356. Judge Breyer has contended: "There is no particular reason to believe that they [the states] are immune from the 'stereotypic assumptions' and pattern of 'purposeful unequal treatment' that Congress found prevalent." Garrett, 531 U.S. at 378 (Breyer, J., dissenting).
357. Alden, 527 U.S. at 802 (Souter, J., dissenting).
constitutional provisions and there is nothing in the Constitution to suggest the courts lack the power to enforce these provisions. On the other hand, the framers chose not to include state sovereign immunity in the Constitution, so any protection of the states from statutes enacted by Congress under its enumerated powers must come from the political processes. In this way, we attain the dual protections Madison spoke of.\textsuperscript{358}  

B. Congress's Power to Coerce States to Enact Statutes or to Force Local Officials to Enforce Federal Schemes  

The other type of unprincipled decisions under the new federalism—Congress's power to coerce states to enact statutes or to force local officials to enforce federal schemes—resembles the sovereign immunity cases in that they are primarily grounded in general conceptions of federalism, rather than specific constitutional passages.\textsuperscript{359} In \textit{New York v. United States},\textsuperscript{360} the Court struck down a federal statute that attempted to coerce New York and other states to enact legislation concerning the disposal of radioactive waste.\textsuperscript{361} Justice O'Connor declared: “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”\textsuperscript{362} Although Congress can regulate interstate commerce directly under the Commerce Clause, it cannot “regulate state governments’ regulation of interstate commerce.”\textsuperscript{363} The people created a federal government through the Constitution that acted directly on its citizens in place of a limited federal government that acted only upon the states.\textsuperscript{364}  

The problem with this analysis is there is nothing in the Constitution to support the Court's reasoning. Again, the Court's reasoning rests on a supposed understanding of the framers and the ratifiers. However, nothing in the text (at least nothing that is cited by the Court)\textsuperscript{365}  

\begin{footnotesize}  
358. See supra note 81.  
361. \textit{Id.} at 188.  
363. \textit{Id.} at 166.  
364. \textit{Id.} at 162.  
365. This Author has argued elsewhere that the Court could have grounded its decision in the Guarantee Clause. Fruehwald, \textit{The New Judicial Activism}, supra note 9, at 468-69.  
\end{footnotesize}
limits Congress's ability under the Commerce Clause. As mentioned above, if Congress has a power there is no limitation on that power unless a specific section of the Constitution creates such a limitation. The statute in question may upset the balance between federal and state governments in a way that is disturbing to the Court. However, the Court cannot rewrite the Constitution to conform to its concept of federalism and the dignity that should be given to the states. As Professors Adler and Kreimer noted: "A jurisprudence that consists of nothing more than some arbitrary rules of 'etiquette' ought to be, and we hope soon will be, outgrown."

In Printz the Court held Congress could not impose duties on local officials under a gun control act. First, historical understanding and practice suggested Congress could not place duties on federal and state officers. Second, federalism principles made the act unconstitutional, because the Constitution gave Congress the power to regulate individuals, not the states. Third, the act violated the separation of powers on the federal level; local officials were performing duties that should have been performed by federal officers. Finally, the Court stated that "we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law." The Court summed up its ruling by declaring,

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Only one of the above grounds supports the Court's decision on a principled basis—the separation of powers argument. Article II states that "[t]he executive Power shall be vested in a President of the United States...."

The Guarantee Clause requires the United States to "guarantee to every State in this Union a Republican Form of Government...." U.S. CONST. art. IV, § 4. In short, "If a sovereign can force another sovereign's legislature to enact a regulatory scheme, the other sovereign lacks a republican form of government." Fruehwald, The New Judicial Activism, supra note 9, at 469.

366. Adler & Kreimer, supra note 359, at 143.
367. 521 U.S. at 935.
368. Id. at 905-14.
369. Id. at 919-20.
370. Id. at 922-23.
371. Id. at 925.
372. Id. at 928.
States.\footnote{373} Congress has violated this clause by giving duties to local officials that are constitutionally vested in the federal executive branch.\footnote{374} Thus, this is not a federalism case, but a separation of powers case.

The remainder of the Court's reasons to strike the statute are unprincipled because they are not supported by the Constitution's text.\footnote{375} First, historical understanding and practice are not the law. A historical understanding and practice becomes law when it is enacted using the proper procedures. Second, for the same reasons, general federalism principles are not the law. Third, Court practice based on faulty reasoning should not continue. Justice Scalia warned, "The starting point of the [constitutional] analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding."\footnote{376} Finally, while the Court may be correct that dragooning local officials into administering federal law may upset the balance between the federal and state governments and interfere with state sovereignty, that alone is not enough to support striking a statute on constitutional grounds.

IV. CONCLUSION

Considering the great diversity in contemporary American society and the globalization of our world, courts need an approach to constitutional analysis that will foster diversity while being detached from favoring substantive outcomes. This approach does not have to be radically new; it can simply consist of enforcing the structures contained in our Constitution. However, in enforcing those structures courts need to be careful not to go too far the other way and create a new type of injustice.

The new federalism contains the seeds of an approach to constitutional analysis that will allow diversity in a detached manner by permitting

\footnote{373} U.S. CONST. art II, § 1, cl. 1. 
\footnote{374} The Supreme Court stated:
   The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known . . . . That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws. Printz, 521 U.S. at 922-23 (citations omitted).
\footnote{375} The Court could not have used the Guarantee Clause to support its decision because this clause does not apply to local governments. \textit{E.g.}, Johnson v. Genesee County, 232 F. Supp. 567, 570 (E.D. Mich. 1964).
\footnote{376} SCALIA, supra note 308, at 39.
the proper decision maker to enact laws and by fostering greater decisionmaking on the state and local levels. These seeds are contained in the decisions that have enforced the limits on Congress's lawmaking powers in a reasoned manner based on the constitutional text, such as Lopez, Boerne, Morrison, and Gibbs. However, the Court has gone too far in certain cases, such as Alden and its progeny, by relying on unenacted general conceptions of federalism rather than specific constitutional provisions. The new federalism will not be widely accepted unless it is detached and grounded in a principled manner. The Court needs to recognize judicially enforceable federalism is a constitutional principle based on a text, not a value. Moreover, unprincipled constitutional adjudication opens the possibility of other unprincipled constitutional adjudication.

Judge Wilkinson declared: "The neglect of process has produced confusion on a broad scale. We no longer know who is to perform what role. Worse still, we are no longer persuaded that it matters."

Process does matter. It is time we start to care who makes the decisions that affect our lives, because the division of sovereignty embodied in our Constitution is the original protection of our liberty and because federalism will help us live peacefully in a diverse society.

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377. Professor Michael B. Rappaport has declared, "[I]f conservatives are seen as departing from the text in order to promote federalism, they will be open to the charge of inconsistency . . . of pursuing their own political agenda under the cover of inconsistently applied neutral principles." Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions, 93 NW. U. L. REV. 819, 821 (1999).

378. Professor Rappaport has asked, "[I]f one may ignore the text when finding state immunities, then why not also when establishing a right to abortion." Id. at 821. Similarly, Justice Scalia has written, "[i]f the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants . . . ." SCALIA, supra note 308, at 47.