1-1-2024

Disability and the Ongoing Federalism Revolution

Karen M. Tani  
*University of Pennsylvania Carey Law School*, ktani@law.upenn.edu

Katie Eyer  
*Rutgers Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty_articles](https://scholarship.law.upenn.edu/faculty_articles)

**Recommended Citation**

133 Yale L. J. 699 (2024)

This Article is brought to you for free and open access by the Faculty Works at Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact biddlerepos@law.upenn.edu.
Disability and the Ongoing Federalism Revolution

**Abstract.** The Supreme Court’s “new federalism” revolution remains one of the most important developments in recent U.S. legal history. The Court revitalized “states’ rights” doctrines under the Tenth and Eleventh Amendments, rendering states partially or wholly immune from many types of federal litigation. Simultaneously, the Court retrenched the authority of national legislators—and aggrandized its own authority—by limiting what Congress may do under its Commerce Clause, Spending Clause, and Fourteenth Amendment powers.

But one important facet of this “new federalism” revolution has gone unappreciated: the load-bearing role of earlier disability-related cases. In the 1970s and 1980s, this Feature shows, the Court used disability-related cases to revive the all-but-moribund Eleventh Amendment, even as it declined to embrace Eleventh Amendment arguments in cases involving school desegregation and sex discrimination. So, too, it was disability cases that established and entrenched federalism-grounded “clear statement” rules of statutory interpretation in the 1980s and early 1990s. Likewise, a disability case in the early 1990s previewed the Court’s later diminution of Congress’s authority under Section 5 of the Fourteenth Amendment.

In crucial ways, we show, these disability precedents enabled the “new federalism” revolution of the late 1990s and early 2000s. Cases such as *Seminole Tribe of Florida v. Florida* (1996) could not have been reasoned as they were without earlier disability precedents. The real-world consequences have been striking: the disability-related cases we discuss—and the better-known “new federalism” cases that built on them—have reduced the enforceability of federal civil rights guarantees, threatened wide swaths of social welfare legislation, and diminished Congress’s ability to respond to pressing problems.

Moving forward, disability-related federalism precedents will remain important. Doctrines and language from these cases offer some of the best tools that state and local defendants have for extending the more dangerous facets of the “new federalism”—as evidenced by recent litigation in the lower courts involving voting rights and LGBTQ discrimination, among other high-stakes issues. Moreover, at the Supreme Court, disability cases have continued to provide the site for new retrenchments in Congress’s spending power, alongside robust assertions of the Court’s own authority. Thus, while conventional wisdom treats the “new federalism” revolution as a historical artifact, this Feature reveals such an assessment to be both perilous and premature.

**Authors.** Katie Eyer is Professor of Law, Rutgers Law School. Karen M. Tani is Seaman Family University Professor, University of Pennsylvania. For helpful comments on earlier drafts of this Feature, the authors thank Rebecca Aviel, Mitch Berman, Curtis Bradley, Sophia Lee, Katherine Macfarlane, Earl Maltz, David Noll, Allan Stein, and John Fabian Witt. The authors also thank
attendees at faculty workshops at the University of Denver Sturm College of Law, Fordham School of Law, the University of Pittsburgh School of Law, and the University of Virginia, as well as participants in the University of Pennsylvania “Writers’ Bloc,” the University of Chicago Public Law and Legal Theory Workshop, the University of Michigan Public Law Workshop, the Power in the Administrative State Workshop, and the Summer 2023 Federalism Schmooze. Patrick Kerwin, Ryan Reft, and Paul Riermaier provided invaluable assistance with archival records and hard-to-find sources. James Callison, Amalia Ellison, Shicong Kelvin Fang, Care Shoaibi, and Ethan Swift supplied excellent research assistance. Christopher D’Urso, Amy Jeon, Jordan Kei-Rahn, Sara Méndez, and Jonathan Perez-Reyzin of the Yale Law Journal offered superb substantive feedback and editorial suggestions.
# Feature Contents

## Introduction 843

### I. A New Look at the “New Federalism” 850
   A. The Transformations in Governance Undergirding the “New Federalism” 850  
   B. The Supreme Court’s “New Federalism” Revolution 853

### II. The 1970s: Disability as the Gateway to Modern Federalism 855
   A. Desegregation Litigation and the Constrained Eleventh Amendment 856  
   B. Institutionalized Populations, Disabled Welfare Recipients, and the Reinvigoration of the Eleventh Amendment 860  
   C. Non-Disability Contexts: Eleventh Amendment Equivocation 866  
   D. How a Disability Case Saved State Immunity from § 1983 869

### III. The 1980s: Disability Civil Rights Legislation as a Seedbed for “New Federalism” Advances 875
   A. Deinstitutionalization and the Policing of Congress’s Spending Power 876  
   B. A “Rare Opportunity” to Bond the Eleventh Amendment to State Sovereign Immunity 880  
   C. Disability Rights Meets the “New Federalism” 882  
   D. Saving Hans via the Accretive Power of Disability Precedents 887  
   E. How a Disability Case Secured Victory for the “Extreme Plain Statement” Rule 890

### IV. The Early 1990s: Disability and Federalism-Based Justifications for Retrenching Congressional Power 895
   A. Guarding the Federal-State Balance via the Specter of the Disabled Judge 896  
   B. The Americans with Disabilities Act as Legislative Constitutionalism 899  
   C. *Heller v. Doe* and the ADA’s Disregarded “Findings” 902

### V. The Rehnquist Revolution and Beyond 905
   A. The Expansion of State Sovereign Immunity 906  
   B. The Narrowing of Congress’s Authority Under Section 5 910
C. Clear Statement Rules and Death by “Clarity Tax” 915

VI. THE ONGOING FEDERALISM REVOLUTION: WILL HISTORY REPEAT ITSELF? 919
   A. Spending Power Retrenchment as the Rehnquist Revolution’s Unfinished Business: Sex Discrimination as the Stumbling Block 920
   B. Disability and the Contemporary Threat to Spending Clause Legislation 924

CONCLUSION 929
INTRODUCTION

It was November 1, 1971, and Supreme Court nominee William H. Rehnquist had a problem. The Court had become a highly visible facet of American government, especially with regard to the future of state-sanctioned racism, and Rehnquist’s reputation had raised red flags among the civil rights establishment. He looked better, to be sure, than the Southern appellate-court judges that President Richard Nixon had tried and failed to get confirmed in previous years. But Rehnquist had left enough of a paper trail—including opposition to local civil rights measures in Arizona—for the National Association for the Advancement of Colored People (NAACP) to issue a blunt warning to its members: “[Rehnquist’s] philosophy will kill you,” cautioned Executive Director Roy Wilkins.

With concerns mounting, Rehnquist prepared a memo for Nixon advisor Leonard Garment offering “information” that he hoped might inform “press coverage.” The memo described Rehnquist’s efforts to advance the career of a promising Black civil servant, his role in defending affirmative action in federally funded construction projects, and his hospitality towards a visiting official from Nigeria. He even mentioned the handful of Black children on his son’s sports

1. See James M. Naughton, Early Vote Asked: President Asserts His Nominees Epitomize Conservative View, N.Y. TIMES, Oct. 22, 1971, at 1, 25 (noting that President Nixon announced the William Rehnquist and Lewis Powell nominations on national television and quoting Nixon as saying, “Presidents come and go, but the Supreme Court through its decisions goes on forever”).


6. Id. at 1-2.
teams and the Black “clientele” that benefited from his wife’s volunteer work. The exercise veered uncomfortably close to “saying, ‘Some of my best friends . . . etc.,’” Rehnquist admitted. But he hoped the “fragments” he offered would prove useful in the lead-up to the confirmation hearing. Ultimately, the Senate voted to confirm Rehnquist, but only after several days of acrimonious proceedings and with a relatively large (for the time) number of “nay” votes.

Given the public’s close attention to Rehnquist’s potential role on the Court—and especially to how his presence might affect state efforts to preserve Jim Crow orderings—what came next would seem unintuitive. Starting as early as 1973, we argue, Rehnquist and like-minded colleagues began recalibrating the respective powers of state governments and branches of the federal government. After many decades in which “federalism . . . provided no judicially enforceable limits on congressional power,” plus several decades of significant federal involvement in undoing Jim Crow, the Court articulated a “new federalism.” Famously, it included limits on what Congress could do under its constitutionally enumerated powers, alongside more robust protections for the states, especially

7. Id. at 3.
8. Id. at 4.
9. Id. at 1; see also Leroy F. Aarons & Ken W. Clawson, Rehnquist: Admired yet Decried, WASH. POST, Nov. 3, 1971, at A1 (citing the memo’s anecdote about the Black civil servant as a counterpoint to concerns about Rehnquist’s hostility towards civil rights).
10. Rehnquist’s civil rights record was not the only issue, but it was significant. See, e.g., Glen Elsasser, Rehnquist Assailed as Segregationist, CHI. TRIB., Nov. 9, 1971, at B5, B5; Fred P. Graham, Rehnquist Role in Election Confirmed, N.Y. TIMES, Nov. 13, 1971, at 37, 37.
11. Rehnquist, Scalia Win Senate Confirmation, 42 C.Q. ALMANAC 67 (1986), https://library.cqpress.com/cqalmanac/cqal86-1149676 [https://perma.cc/8L64-SR9R] (reporting that at the time, Rehnquist was “tied for the second-highest number of ‘nay’ votes received by a twentieth-century Supreme Court nominee who won confirmation”).
13. See id. at 1 (“When historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism.”). In casting this development as “surprising,” we draw on the widely recognized relationship between federalism and race. Going back to the Founding Era, articulations of states’ rights vis-à-vis the federal government were closely connected to the institution of racialized slavery (though they were also at times deployed by slavery’s opponents). EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 60–62 (2007). In the mid-twentieth century, after federal officials began deploying federal power in ways that were actively hostile to Jim Crow, defenders of white supremacy seized on federalism arguments with renewed zeal. See, e.g., 102 CONG. REC. 4515-16 (1956) (statement of Rep. Howard W. Smith); see also infra Section II.A (discussing federalism-grounded efforts to oppose court-ordered desegregation).
when it came to their accountability in federal court for alleged violations of individual rights.\textsuperscript{14}

How did this reorientation happen, exactly? This Feature breaks new ground in showing that not only did the seeds of the “new federalism” germinate early in Justice Rehnquist’s tenure on the Court, but also that bedrock “new federalism” principles often emerged first in cases that involved a specific context: not race, but \textit{disability}. In the 1970s and 1980s, \textit{disability} cases regularly provided the site for the Court’s early revival of federalism doctrines, as well as its development of new ones. This is not to say that without \textit{disability} cases, the Court could not or would not have reoriented its jurisprudence. It is simply to observe that, time and again, \textit{disability}-related cases\textsuperscript{15} were crucial building blocks of what would become the “new federalism.” In this same historical period, meanwhile, the Court declined similar opportunities in non-\textit{disability}-related cases.

If the pattern is as clear as we suggest, why have other scholars and Court watchers missed it?\textsuperscript{16} And why, at the time, did people who might have opposed the “new federalism” often fail to ring alarm bells in these cases? Our evidence suggests that \textit{disability} cases tended to be unracialized in the minds of the Justices and the broader public and therefore less likely than, say, desegregation cases, to provoke widespread attention when disputes did reach the Court. Moreover, \textit{disability} was a type of difference that, to many people at the time,

\begin{itemize}
\item \textsuperscript{14} In this regard, the “new federalism” was as much about intra-branch dynamics as it was about federal/state divisions of power. \textit{See infra} Section I.B.
\item \textsuperscript{15} In invoking “\textit{disability},” we are alert to this concept’s slipperiness and changeability (despite a current tendency to define \textit{disability} as a documentable medical problem). Who appears “\textit{disabled}” in any given period has depended on “factors such as gender, race, sexuality, education, levels of industrialization or standardization, access to adaptive equipment or privacy, and class.” \textsc{Kim E. Nielsen}, \textit{A Disability History of the United States}, at xiv (2012). The cases we treat as “\textit{disability}-related” are ones that we believe people at the time would have so characterized, based on litigants’ invocation of \textit{disability}-focused laws or their descriptions of the populations principally involved.
\item \textsuperscript{16} Legal scholars have published extensively on the “new federalism,” \textit{see infra} Section I.B, but have paid scant attention to the role that \textit{disability} played in key doctrinal developments. To the extent they have discussed the \textit{disability}-related cases we emphasize, they have tended to treat \textit{disability} as a background fact rather than a theme that connects foundational cases. We are aware of only a few exceptions. \textit{See} Karen M. Tani, \textit{The Pennhurst Doctrines and the Lost Disability History of the “New Federalism,”} 110 \textsc{Calif. L. Rev.} 1157, 1157 (2022); cf. Jamelia Morgan, \textit{Disability’s Fourth Amendment}, 122 \textsc{Colum. L. Rev.} 489, 491-92 (2022) (observing that \textit{disability} has often been the unremarked backdrop of Fourth Amendment cases). Legal scholars have been more alert to the role of racial contexts in developing ostensibly neutral legal principles. We build on their important work. \textit{See}, e.g., Dylan C. Penningroth, \textit{Race in Contract Law}, 170 \textsc{U. Pa. L. Rev.} 1199, 1201-11 (2022); Justin Simard, \textit{Citing Slavery}, 72 \textsc{Stan. L. Rev.} 79, 81-85 (2020).
\end{itemize}
had a natural connection to one’s degree of civic and social inclusion. There is a deep American history of conflating disability with societal burden—of casting disabled people as unsightly, expensive, and a threat to public welfare. We argue that in the 1970s and 1980s, the fragility and apparent novelty of disabled citizens’ claims on the polity, paired with the fiscal and economic concerns that came to pervade American governance, made the disability context simply feel different from the other, more highly charged contexts in which federalism arguments tended to surface. Phrased differently, state-protective legal arguments could seem genuinely urgent in the disability context and, at the same time, appear less tainted by a latent association between “states’ rights” and white supremacy.

The result was that, for those legal actors who wanted the Court to develop a more state-protective jurisprudence, disability cases provided fertile terrain. Meanwhile, for legal actors who did not share these motivations but might have obstructed the “new federalism,” disability cases often appeared less consequential—in contrast to cases involving race and sex, which many of the same actors approached with interest and vigilance. As such, disability cases formed a readily available site for the early expansion of the “new federalism” at a time when cases involving other issues did not.

---

17. See David Pettinicchio, Politics of Empowerment: Disability Rights and the Cycle of American Policy Reform 95 (2019) (noting that in the late 1970s, in the wake of major disability rights laws, there remained “uncertainty about the validity of disability rights and the extent to which these were equivalent to rights afforded to other minority groups”); Jasmine E. Harris, The Frailty of Disability Rights, 169 U. Pa. L. Rev. Online 29, 30 (2020) (“[D]isability rights laws . . . have always been viewed as ‘nice to do’ and not ‘must do.’”).

18. Beatrice Adler-Bolton & Artie Vierkant, Health Communism: A Surplus Manifesto 21 (2022) (identifying a tendency to cast disabled people as both a “eugenic burden” and a “burden of public debt” (emphasis omitted)).


20. Deborah A. Stone, The Disabled State 3, 189 (1984) (noting disability’s importance as a “path[] to public aid” and observing the “sense of crisis about public disability programs” at the time of her writing); Nate Holdren, Injury Impoverished: Workplace Accidents, Capitalism, and Law in the Progressive Era 230 (2020) (describing how, in the wake of Progressive-Era workers’ compensation laws, employers’ concerns about cost resulted in the exclusion of people whom employers perceived as “impaired” or likely to become impaired).

21. See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (explaining that “public welfare” might “call upon those who already sap the strength of the State” to sacrifice their reproductive capacity); Douglas C. Baynton, Disability and the Justification of Inequality in American History, in The New Disability History: American Perspectives 33, 45-50 (Paul K. Longmore & Lauri Umansky eds., 2001) (documenting how perceptions of impairment or abnormality triggered early twentieth-century immigration inspectors to classify potential immigrants as likely to become dependent on public support and therefore excludable).
If the cases we discuss only affected disabled people, they would be important— but our claim is broader. Doctrinal innovations that were often articulated first in disability cases are the stuff out of which the “new federalism” was made, and the “new federalism” has had profound effects. Perhaps most notably, it has reduced the enforceability of federal civil rights guarantees by making alleged violations less justiciable and less monetizable. It has also diminished the authority of Congress, especially when it comes to enforcing the equal protection guarantee of the Fourteenth Amendment and advancing democratically inspired visions of what equality means (a vital facet of “legislative constitutionalism”). Simultaneously, it has aggrandized the power of the Supreme Court in ways that have contributed directly to today’s fierce critiques of that institution. Reasonable minds can differ on the merits of the “new federalism,” but its transformational power is beyond debate.

Our thesis comes with a few caveats. First, in claiming the importance of disability-related cases to the “new federalism,” we do not claim that these cases were vital to all the doctrines that contributed to this shift. This Feature focuses (1) on the Supreme Court’s revitalization of the Eleventh Amendment and, with it, the concept of state sovereign immunity, and (2) on the Court’s increasing


25. A challenge of writing about state-immunity doctrine during this period is that, in both case law and scholarship, the meanings of key terms were in flux. In some texts, authors appear to use “Eleventh Amendment immunity” to mean the same thing as “state sovereign immunity,” but in other texts, especially ones from the later years of the twentieth century, “Eleventh Amendment immunity” is but one facet of a broader state immunity principle, derived originally from the common law. See William P. Marshall, The Battle over State Immunity, in THE REHNQUIST LEGACY 240, 242 (Craig M. Bradley ed., 2006). In discussing the Court’s state-immunity decisions, we do our best to reconstruct the understandings that were in circulation
restriction of Congress’s legislative authority vis-à-vis the states—apparent both in its interpretations of authority-conferring constitutional provisions and its articulation of new canons of statutory interpretation. In contrast, we acknowledge that disability law cases played a lesser role in several other parts of the “new federalism” revolution.

Second, in noting the importance of disability-related cases for the “new federalism,” we make only modest claims about intentionality. Although we sometimes note opportunism, especially on the part of Justice Rehnquist, our main contribution is documenting a pattern. We do this by showing that early expansions of “new federalism” consistently took place in the disability context (simultaneously examining how the Court treated cases that did not involve disability), and by showing how subsequent cases built on disability-related precedents.

Finally, by focusing on disability, we do not suggest that no other factors or forces produced the “new federalism.” Our argument depends on and incorporates other scholars’ observations about the significance of President Nixon’s...
appointments to the Court and the politics animating those choices. Also clearly relevant were the fiscal pressures that state and local governments experienced in the 1970s and 1980s. These pressures had complex origins, but federally imposed mandates and new federal rights were part of the picture. So, too, were state attorneys general, who were becoming more coordinated and better able to articulate states’ frustrations to the Supreme Court.

This Feature also, however, breaks new ground. To start, we offer a richer account of the early years of the “new federalism” (a phenomenon we summarize briefly in Part I, for those who are unfamiliar). Specifically, we show the key role of disability-related disputes in seeding legal change (Parts II-IV), thereby providing a new explanation for how crucial facets of the “new federalism” came to pass. We then trace our findings into the twenty-first century (Part V) and up to the present (Part VI) to show that disability-related federalism precedents not only were key pillars of the “new federalism,” but also remain some of the best tools that state and local litigants have for extending the more dangerous facets of this jurisprudential movement today.

We conclude with lessons for both scholars and advocates, with a focus on those who lament what the “new federalism” has wrought. A tendency to neglect or “silo” disability law, and to treat disabled litigants as “other,” has led to an underappreciation of the capacity of disability precedents to wreak large-scale legal and institutional change. We urge a different perspective.

28. See Eric N. Waltenburg & Bill Swinford, Litigating Federalism: The States Before the U.S. Supreme Court 16-17, 26 (1999) (discussing the significance of President Nixon’s appointees to the Court). Justice Rehnquist, in particular, was deeply committed to a more state-protective federalism and has been widely recognized as an institutional and intellectual leader. See, e.g., Jeff Powell, The Compleat Jeffersonian: Justice Rehnquist and Federalism, 91 YALE L.J. 1317, 1317-20 (1982). Also critical to this shift was Justice Lewis F. Powell, Jr., who had served on the Richmond School Board in the aftermath of Brown v. Board of Education and was skeptical about the extent of federal intervention in the South via civil rights measures. See Earl M. Maltz, The Triumph of the Southern Man: Dowell, Shelby County, and the Jurisprudence of Justice Lewis F. Powell, Jr., 14 DUKE J. CONST. L. & PUB. POL’Y 169, 171-72 (2019).


30. See Waltenburg & Swinford, supra note 28, at 43-55 (describing the increasing efficacy of state attorneys general, starting around the 1980s, in pursuing states’ policy goals before the Supreme Court).

31. This general insight builds on scholarship in federal Indian law and Native American history. Cf. Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 HARV. L. REV. 1787, 1794-95 (2019) (arguing that “[i]nteractions with Native Nations, Native peoples, and Native lands were central to the development of many public law doctrines” and critiquing
I. A NEW LOOK AT THE “NEW FEDERALISM”

Today, the “new federalism” is so woven into our legal fabric that it is easy to forget what once made it novel. In this Part, we briefly describe the legal and political landscape as it existed before the “new federalism” to illuminate what motivated the proponents of this legal shift (Section I.A). We also review the doctrinal architecture of the “new federalism” and explain why, despite a flurry of academic writing on this topic from the late 1990s and early 2000s, there is more to learn (Section I.B).

A. The Transformations in Governance Undergirding the “New Federalism”

Before the jurisprudential “new federalism” of the late twentieth century, there was another phenomenon that attracted the “new federalism” moniker. Starting in the late nineteenth century and increasing dramatically during the Progressive Era and the New Deal, the federal government and the states engaged in intergovernmental policymaking in areas of mutual interest (e.g., infrastructure building, food and drug regulation, and child and maternal welfare). In accordance with Americans’ longstanding preference for keeping the power of the centralized, national government “out of sight,” and in deference to a constitutional system of enumerated federal powers, the federal government’s contribution to these earliest intergovernmental projects often took the form of money and expertise rather than on-the-ground administration. States, for their part, supplied administrative capacity and sometimes financial support. In this fashion, a paradigm of “dual federalism” gave way to the

32. See generally Kimberley S. Johnson, Governing the American State: Congress and the New Federalism, 1877-1929 (2007) (offering an empirical picture of intergovernmental policy instruments in the six decades before the New Deal); Jane Perry Clark, The Rise of a New Federalism: Federal-State Cooperation in the United States (1938) (documenting many examples of intergovernmental cooperation in the decades leading up to the New Deal); Cecile Goldberg, Development of Federal Grant Allocations, 10 Soc. Sec. Bull. 3 (1947) (discussing the rise of federal grants-in-aid to states between 1900 and 1946).


paradigm of “cooperative federalism” that is central to modern American governance.35

After the Great Depression and U.S. participation in two world wars, Americans had grown accustomed to a larger federal presence in their lives,36 but intergovernmental policymaking remained appealing. Grants-in-aid under Congress’s spending power, sometimes also called categorical grants, were an especially useful governance mechanism.37 Total federal aid to state and local governments reached $15.2 billion in 1967, by which point there were 379 categorical grant programs in ninety-five subject-matter areas.38 But as state and local governments grew more reliant on federal money,39 some also complained about the number and complexity of the terms attached to federal funds.40 When Congress began tethering antidiscrimination mandates to federal funds, as it did with Title VI of the 1964 Civil Rights Act (and other statutes thereafter), these complaints escalated.41

In these same years, great transformations occurred in constitutional interpretation and in the role of the federal courts in American life. In the late nineteenth century, the Supreme Court had patrolled vigilantly for legislative attempts at class favoritism, which sometimes meant curbing legislative authority.42 During the New Deal, however, the Supreme Court began deferring more to federal and state legislatures as they attempted to regulate commerce

40. Id. at 13.
42. See Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 20-22 (1993) (explaining that during the later decades of the nineteenth century, many judges believed that they must patrol the line between legislation with a valid public purpose and legislation designed to favor a particular group).
and pursue the general welfare. Decisions offered generous interpretations of constitutional grants of congressional authority and refrained from so vigorously policing incursions on “economic liberty.” To the extent that the Court showed greater vigilance vis-à-vis other institutions of government, it was in protecting racial minorities and other marginalized groups. This trend became discernible in the 1920s, escalated during World War II, and defined the post-Brown years of the Warren Court.

Americans found much to celebrate in the results that flowed from this pattern of governance, but by the 1960s, critiques also abounded. Of particular relevance to the “new federalism” were three interrelated charges. The first was that the Warren Court had been too liberal in its interpretations of federal law, especially as those interpretations pertained to individual rights vis-à-vis state and local governments. Not everyone welcomed what these interpretations meant for schools, prisons, police departments, and other local institutions. Second, critics increasingly alleged that the federal government was wielding its power in unfair

43. See generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (documenting the reorientation of the Supreme Court’s public-law jurisprudence between 1934 and the early 1940s).


45. See Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 COLUM. L. REV. 847, 847 (1979) (noting that from the mid-1930s until 1976, the growth of domestic programs and accompanying changes in federal-state relations “occurred with substantial judicial approval,” except insofar as they interfered with (noneconomic) individual rights).


ways. These critiques were, in one sense, as old as the New Deal itself, but they also reflected a sense that “cooperative federalism” had changed—becoming so coercive as to imperil states’ ability to govern themselves. Third, some critics lamented the changes that had occurred in recent decades to traditional modes of social ordering, changes that many people associated with federal power. People who had benefited from the traditional social order, or who aspired to do so, welcomed a legal reversal of this trend.

B. The Supreme Court’s “New Federalism” Revolution

The “new federalism” that emerged from the Supreme Court in the late twentieth century was a response to these great changes and to the critiques leveled against them. Doctrinally, it manifested in two general ways, both of


50. For example, the issue received mention in Barry Goldwater’s famous 1960 political manifesto. Barry M. Goldwater, The Conscience of a Conservative 19-20, 26 (1960) (critiquing both major political parties for “summon[ing] the coercive power of the federal government,” including via federal-state grants); see also Tani, supra note 37, at 155-244 (offering examples from the public assistance context of ever-louder critiques of federal grants in the 1950s and 1960s). Although Goldwater lost his 1964 bid for the Presidency, his viewpoints were emblematic of an ascendant conservative movement. See generally Rick Perlstein, Before the Storm: Barry Goldwater and the Unmaking of the American Consensus (2001) (narrating the history of modern U.S. conservatism via a political biography of Goldwater). Critiques also appeared in academic and policymaking circles. See, e.g., Cappalli, supra note 38, at 13 (describing post-1964 grant-making as “characterized by domineering federal agencies and strong-handed federal authority”); John E. Chubb, Federalism and the Bias for Centralization, in The New Direction in American Politics 273, 278 (John E. Chubb & Paul E. Peterson eds., 1985) (linking “grant expenditures” to “political control” and noting the “explo[sion] in worth and number” of federal grants in the 1960s and 1970s).

51. In describing these two general categories, we draw on a robust legal literature on the “new federalism.” Contributors to this literature categorize cases in different ways and offer various starting points for the “revolution,” but tend to cite the same suite of decisions from the early 1990s to the early 2000s. See, e.g., John C. Yoo, The Judicial Safeguards of Federalism, 70 S. CAL. L. REV. 1311, 1334 (1997); John J. Dinan, The Rehnquist Court’s Federalism Decisions in Perspective, 15 J.L. & POL. 127, 139, 140, 145, 166 (1999); Vicki C. Jackson, Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law, 31 RUTGERS L.J. 691, 691-92, 710 (2000) [hereinafter Jackson, Seductions of Coherence]; Vicki C. Jackson, Federalism and the Court: Congress as the Audience?, 574 ANNALS AM. ACD. POL. & SOC. SCI. 145, 146-47 (2001); Larry D. Kramer, Foreword: We the Court, 115 HARV. L. REV. 5, 137-38, 142, 144 (2001); Calvin Massey, Federalism and the Rehnquist Court, 53 HASTINGS L.J. 431, 404-471, 484 (2002); Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69
which embodied the conclusion that “the Court . . . must enforce limits on national power.”\(^{52}\) Collectively, these developments substantially limited the power of the federal government vis-à-vis the states, imposing meaningful limitations on the post-New Deal order.

One tranche of “new federalism” case law squarely addressed the respective powers and responsibilities of the federal government and the states.\(^{53}\) Cases belonging in this category gave teeth to Tenth Amendment values (albeit with some setbacks)\(^{54}\) and reinvigorated the Eleventh Amendment by recognizing a constitutionally grounded principle of state immunity that was at once embodied by the Eleventh Amendment and also broader than that Amendment’s text.\(^{55}\) Also in this category are cases that articulated federalism-inspired “clear statement” rules for interpreting federal statutes.\(^{56}\) Collectively, these cases rendered significant swaths of federal law largely unenforceable against state defendants, and also provided fodder for more incremental limitations on states’ and localities’ federal obligations.\(^{57}\)

A second tranche of “new federalism” case law intervened in American federalism less explicitly but equally powerfully, via doctrines that curbed federal legislative authority—and thus the ability of the federal government to influence the workings and finances of subnational governments. Cases in this category

\(^{52}\) Purcell, supra note 38, at 172.


\(^{57}\) See infra Part V.
articulated new limits on what Congress could do under its major grants of authority, including most notably the Commerce Clause and Section 5 of the Fourteenth Amendment. 58 Because this trend affected all types of potential defendants, it is not always recognized as part of the “new federalism,” but it was a particular boon to state and local correctional systems, police departments, school districts, universities, and similar institutions. 59

II. THE 1970S: DISABILITY AS THE GATEWAY TO MODERN FEDERALISM

One of the first doctrinal arenas to register a “new federalism” reorientation was the Court’s Eleventh Amendment jurisprudence. 60 From a position of near irrelevancy in the aftermath of Brown, Eleventh Amendment doctrine became a vibrant source of protection for embattled states by the end of the 1970s. 61 That transformation is the focus of this Part. We note that although arguments for expanded state immunity came from all quarters during the 1970s, victories for defendants arose only in cases that were linked to the rights and well-being of people with disabilities. 62 This pattern is all the more striking given that the Justices often avoided taking up state immunity arguments until around 1972 or


60. See U.S. Const. amend. XI (“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.”). It is broadly accepted that the Supreme Court’s decision in Chisholm v. Georgia, 2 U.S. 419 (1793), spurred the ratification of the Eleventh Amendment, although there is now disagreement as to what principle the drafters and ratifiers of the Eleventh Amendment intended to enshrine in 1795. See infra Sections II.A & III.D.


rejected them outright in closely analogous circumstances that did not involve disability.\textsuperscript{63}

We hypothesize that in this era, disability was a less fraught and thus easier context for the Court’s initial revitalization of state immunity arguments. Unlike the desegregation cases on the Court’s docket or the cases involving the highly contentious Aid to Families with Dependent Children Program, disability cases were not obviously racialized. Nor did they appear to have any kind of political movement behind them, as this was mostly before the coalescence of a nationally recognized disability rights movement. At the same time, they did appear to raise urgent financial concerns for state governments.

\textbf{A. Desegregation Litigation and the Constrained Eleventh Amendment}

Understanding the magnitude of the Supreme Court’s reinvigoration of the Eleventh Amendment and the related notion of state sovereign immunity requires a sense of the “before.” At the dawn of the 1970s, the Supreme Court had not decided an Eleventh Amendment case\textsuperscript{64} in favor of a state defendant since before \textit{Brown}.\textsuperscript{65} So diminished was the Amendment’s relevance that preeminent constitutional-law scholar and federal appellate judge William A. Fletcher claimed to have “never heard of [it]” when he graduated from law school in 1975.\textsuperscript{66}

\textsuperscript{63} See infra Sections II.A-C.

\textsuperscript{64} Here, we refer to cases that invoked either the Eleventh Amendment or the holding of \textit{Hans v. Louisiana}, 134 U.S. 1 (1890), discussed infra notes 68-71 and accompanying text, which many courts and scholars have treated as an interpretation of that Amendment. See, e.g., Ann Althouse, \textit{When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment}, 40 Hastings L.J. 1123, 1125 (1989) (interpreting \textit{Hans} as a case that was about “eleventh amendment immunity”). During his tenure on the Court, Justice Brennan showed greater interest in keeping Eleventh Amendment immunity distinct from whatever immunity \textit{Hans} suggested. See, e.g., \textit{Parden}, 377 U.S. at 187 (taking pains to distinguish the Eleventh Amendment from “the expanded immunity doctrine of the \textit{Hans} case”). But there are many examples of cases from this era in which the Justices referred to state-immunity arguments as Eleventh Amendment arguments, irrespective of whether those arguments were rooted in the text of the Eleventh Amendment or instead in \textit{Hans}. See, e.g., \textit{Griffin v. Cnty. Sch. Bd.}, 377 U.S. 218, 228 (1964); \textit{Employees}, 411 U.S. at 280.

\textsuperscript{65} See Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573, 577-80 (1946).

\textsuperscript{66} William A. Fletcher, \textit{The Eleventh Amendment: Unfinished Business}, 75 Notre Dame L. Rev. 843, 843 (2000). To the extent courts recognized a principle of sovereign immunity that was distinct from the Eleventh Amendment, it likewise had a more modest reach. See James E. Pfander, \textit{Once More unto the Breach: Eleventh Amendment Scholarship and the Court}, 75 Notre Dame L. Rev. 817, 826 (2000) (“Twenty-five years ago, it appeared sensible to say that sovereign immunity was simply a matter of judge-made common law that Congress might well override.”).
Indeed, if Judge Fletcher had studied the Eleventh Amendment in the early 1970s, the key lessons would have been relatively simple. After receiving an initially narrow reading by the Marshall Court, the Eleventh Amendment gained a more expansive reach after the Civil War, when Southern states sought to avoid paying their debts and the Court sought to avoid issuing judgments it could not practically enforce. Particularly notable was Hans v. Louisiana in 1890, where the Court appeared to derive from the Eleventh Amendment the principle that a federal court may not entertain an action by a state's own citizen against a state to enforce a federal constitutional Contract Clause claim. This interpretation did not match the text of the Eleventh Amendment, but according to the Court, it found support in Founding Era “history and experience and the established order of things.”

The other major development occurred in the 1908 case Ex parte Young, where the Court allowed a federal suit for injunctive relief against a state official acting in contravention of federal law. Adopting the notion that such officials, acting unlawfully, are not “states” entitled to state immunity but remain state actors for the purposes of the Fourteenth Amendment, Ex parte Young made clear

67. See Cohens v. Virginia, 19 U.S. 264, 412 (1821) (reading the Eleventh Amendment narrowly and according to its text as simply withdrawing certain diversity fonts of Article III jurisdiction); Osborn v. Bank of the United States, 22 U.S. 738, 857 (1824) (“[T]he 11th amendment . . . is, of necessity, limited to those suits in which a State is a party on the record.”).


69. 134 U.S. at 12, 15-16 (deriving from “the force and meaning” of the Eleventh Amendment the principle that, at the time of the Founding, “[t]he suability of a State, without its consent, was a thing unknown to the law”); see also Marshall, supra note 25, at 245 (“[T]he Court explained [in Hans] that no explicit textual basis for its holding was necessary because the Eleventh Amendment embodied a constitutionally based principle of sovereign immunity that predated the Amendment.”).

70. Many scholars have noted and critiqued this facet of Hans. See, e.g., Althouse, supra note 64, at 1123, 1125 (referring to Hans's interpretation of the Eleventh Amendment as a “legal fiction” and a “great extraliteral leap”); John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1673 (2004) (describing Hans as an “atexual . . . interpretation of a precise constitutional text”).


that *Hans* would not prevent courts from enforcing federal protections against states or their officers. With *Hans* thus restricted, Eleventh Amendment arguments appeared largely irrelevant to most federal litigation by the 1940s.

Eleventh Amendment arguments took on a new life amidst the assault on Jim Crow but did not fare well. When state officials embraced Eleventh Amendment arguments with renewed vigor in the aftermath of *Brown*, federal district and appellate courts responded with forceful rejections, which the Supreme Court echoed across a series of summary opinions. When even these defeats did not appear to settle the matter, the Court conveyed the message clearly in *Griffin v. County School Board* in 1964. The Court not only rejected the

---

73. See id. A fuller account of the Amendment’s history would include other developments. See, e.g., William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 630 (2021) (calling attention to “the first time the Supreme Court actually held the Eleventh Amendment to be waivable”).


79. 377 U.S. 218, 224 (1964) (involving a request from Black schoolchildren that the Court enjoin their local school board “from refusing to operate an efficient system of public free schools”
defendant’s Eleventh Amendment argument but also endorsed the district court’s authority to essentially force local funding of a nondiscriminatory public school system.

There were only a few cases outside of the desegregation context in which the Supreme Court even considered Eleventh Amendment arguments in the 1960s, and the tone was as unsympathetic as in Griffin. Exemplary is Parden v. Terminal Railway, in which the Court found an implicit waiver of the state defendant’s immunity for purposes of the Federal Employers’ Liability Act. Combining the dismissive tone of Griffin with a generous view of congressional power, the Court held that a state waived its immunity simply by engaging in an activity that Congress had regulated under its Commerce Clause authority.

But just because the Supreme Court was cold towards Eleventh Amendment claims does not mean that litigants abandoned them. Thanks to the “rights revolution” in the federal courts in the mid-1960s—including prisoner rights, welfare rights, and the rights of public employees—there were contexts outside of desegregation in which states were desperate to claim immunity. In the years immediately following Griffin, the Court avoided these arguments, denying certiorari in some cases and declining to address state immunity arguments in others.

But as we detail in the next Section, the Court would soon change course.

80. Griffin, 377 U.S. at 228 (“[S]uits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment.”).

81. Id. at 233.


83. Parden, 377 U.S. at 184-96.

84. Id. at 192.

85. For petitions on Eleventh Amendment issues between 1965 and 1973, see, for example, Petition for Writ of Certiorari at 5-8, Delong Corp. v. Oregon State Highway Commission, 382 U.S. 877 (1965) (No. 336); Petition for Writ of Certiorari at 6-8, Johnson v. NAACP, 385 U.S. 820 (1966) (No. 172); Petition for Writ of Certiorari at 9-12, Board of Trustees of Arkansas A. & M. College v. Davis, 393 U.S. 962 (1968) (No. 524); and Petition for Writ of Certiorari at 2, Sagers v. Briggs, 400 U.S. 829 (1970) (No. 403). The Supreme Court then denied
B. Institutionalized Populations, Disabled Welfare Recipients, and the Reinvigoration of the Eleventh Amendment

Starting in the 1972 Term, the Court showed a new receptivity toward Eleventh Amendment arguments. The most obvious explanation is Court composition: by early 1972, two defenders of states’ rights, Justices Rehnquist and Powell, had replaced more liberal members of the Court. But as we discuss below, this change in personnel, while important, did not produce consistent victories for state immunity. The disability context remained the principal site for expansion of state immunity until well into the 1980s. This Section introduces and supports this argument via the two cases from the 1972 to 1974 period in which the Supreme Court first re-embraced states’ Eleventh Amendment arguments: Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare and Edelman v. Jordan. Both involved responsibilities that states had assumed on behalf of disabled populations, alongside states’ allegations that federal rules and standards had heightened these responsibilities to an unfair degree.

The first of these cases, Employees of the Department of Public Health & Welfare, involved workers who staffed Missouri’s state hospitals and schools for children with disabilities and these workers’ allegations that Missouri had violated the wage and overtime provisions of the Fair Labor Standards Act (FLSA) (as amended in 1966). Missouri characterized the case as a suit against an unwilling state, in contravention of the Eleventh Amendment, and moved to certiorari to these cases. Delong, 382 U.S. at 877; Johnson, 385 U.S. at 820; Davis, 393 U.S. at 962; Siqers, 400 U.S. at 829. For cases in which the Court entertained a case raising an Eleventh Amendment argument, but reserved or ignored that argument, see, for example, Wirtz, 392 U.S. at 190-200, which reserved the Eleventh Amendment argument; Shapiro v. Thompson, 394 U.S. 618 (1969), which ignored an Eleventh Amendment issue raised in the jurisdictional statement; Rosado v. Wyman, 397 U.S. 397 (1970), which ignored an Eleventh Amendment argument raised in merits briefing; and Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam), which did the same. Cf. Jurisdictional Statement at 8, Shapiro, 394 U.S. 618 (No. 9) (arguing that the Eleventh Amendment precluded relief awarded); Brief for Respondents at 37-38, Rosado, 397 U.S. 397 (No. 540) (arguing that the Eleventh Amendment precluded the suit); Brief for Appellants at 32-38, Younger, 404 U.S. 15 (No. 70-9) (arguing that the Eleventh Amendment barred a federal court from issuing a mandatory injunction which would require legislative appropriation for compliance).

86. See, e.g., Maltz, supra note 28, at 175, 223; DONALD E. BOLES, MR. JUSTICE RENQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 121 (1987); Schwartz, supra note 51, at 156-57.
89. 411 U.S. at 280-83.
dismiss.\textsuperscript{90} After defeats at the district and appellate levels, the employees petitioned for Supreme Court review.

From one vantage point, the case looked like a sure win for the employees. As a statute enacted to regulate interstate commerce, the FLSA was analogous to the statute in \textit{Parden}, where the Warren Court found an implied waiver of state immunity as soon as the defendant entered the regulated arena.\textsuperscript{91} But changes to the Court’s composition made it possible to limit and thereby evade \textit{Parden}\textsuperscript{92}—and that is precisely what happened in \textit{Employees}.

Writing for himself and the Court’s more conservative members, Justice Douglas emphasized the distinction between the “for profit” operations in \textit{Parden} (railway transportation) and the “[s]tate mental hospitals, state cancer hospitals, and training schools for delinquent girls” at issue in \textit{Employees}.\textsuperscript{93} A former “cripple” himself, according to his autobiography, Douglas had pondered the harsh fate of disabled people in society.\textsuperscript{94} Perhaps that is why he showed sympathy for the institutional defendants, casting them as an improvement over the patchwork system of provision that had come before.\textsuperscript{95} To be sure, Congress could regulate this arena and thereby “place new or even enormous fiscal burdens on the States,” Douglas noted,\textsuperscript{96} showing the deference to federal power for which he was better known.\textsuperscript{97} But he insisted that (in this context, at least) the

\textsuperscript{90} Id. at 280.

\textsuperscript{91} See J. Harvie Wilkinson III, Clerk, U.S. Sup. Ct., Certiorari Memorandum 2, Empls. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare, No. 71-1021 (Mar. 20, 1972) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 380, Folder 7) (noting that the issue in \textit{Employees} was “incredibly similar” to the one adjudicated in \textit{Parden}). Congressional intent to reach states was even clearer in \textit{Employees} than in \textit{Parden}. As the Court observed in \textit{Maryland v. Wirtz}, an earlier Fair Labor Standards Act (FLSA) case, the pertinent amendments were directed explicitly at certain state institutions (including state hospitals). 392 U.S. 183, 188-99 (1968).

\textsuperscript{92} The four Justices who had joined Justice Brennan to form the \textit{Parden} majority were now gone. Justice William J. Brennan, Jr., Case Notes, at LII, Empls. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare, No. 71-1021 (1972) (on file with the William J. Brennan, Jr. Papers, Library of Congress, Box II:6, Folder 16).

\textsuperscript{93} \textit{Employees}, 411 U.S. at 283-85.

\textsuperscript{94} \textit{William O. Douglas, Go East, Young Man: The Early Years} 34-35 (1974).

\textsuperscript{95} See \textit{Employees}, 411 U.S. at 284 n.2 (noting that before these institutions were established, “the insane commonly languished in local jails and poorhouses or lived with family and friends” (quoting \textit{David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic} 130 (1971))).

\textsuperscript{96} Id. at 284-85.

\textsuperscript{97} See \textit{Waltenburg & Swinford}, \textit{supra} note 28, at 33 tbl.3.2 (rating Justice Douglas above all his 1973 colleagues on the Court in the level of support he showed for federal power across cases).
Court not presume a congressional intention to expose states to expensive lawsuits; the relevant statute must provide a clear indication of that intention.98

This last move was significant and would reappear in subsequent disability-related cases (and, from there, bleed into other arenas). Whereas the *Parden* majority had firmly rejected any kind of “clear statement” rule,99 *Employees* introduced one via its insistence on “clear [statutory] language” indicating that Congress had “swept away” a state’s “constitutional immunity.”100 *Employees* thus marked the start of what would become a major movement on the Court: toward the requirement that Congress speak unmistakably clearly, on pain of judicial refusal to effectuate its enactments.

The next Term, the Court decided a second case that helped revive the Eleventh Amendment—again, in a context that involved state responsibility for disabled populations and the heightened costs that a federal statute appeared to impose. *Edelman v. Jordan* began when John Jordan sued state and local officials in charge of administering Illinois’s federal-state programs of Aid to the Aged, Blind, and Disabled (AABD).101 On behalf of himself and other applicants to the AABD program, Jordan alleged that the defendants failed to evaluate his application in a timely manner.102 This delay left Jordan and other class members without badly needed resources.103 Ultimately, the district court ordered the defendants to process applications within federally required time limits and to issue retroactive payments to eligible claimants whose applications had not been

---

98. Employees, 411 U.S. at 284-85.
100. Employees, 411 U.S. at 285.
101. 415 U.S. 651, 651 (1974). Aid to the Aged, Blind, and Disabled (AABD) was a state-run, federally subsidized program in which states’ receipt of federal funds required adherence to federal rules. Although structured similarly to Aid to Families with Dependent Children (AFDC), AABD did not have that program’s racial valence and was not generally controversial. See Ellen Reese, Backlash Against Welfare Mothers: Past and Present 37-47, 55-63 (2005) (discussing the racialization of the AFDC program); Jennifer L. Erkulwater, How the Nation’s Largest Minority Became White: Race Politics and the Disability Rights Movement, 1970-1980, 30 J. Pol’y Hist. 367, 371-72 (2018) (noting that white men tended to dominate disability activism in the 1930-1950 period, when the federal government laid the groundwork for disability-based income support).
103. Jordan’s “substantial mental deficiency” meant that, without added income from AABD, he could neither feed himself adequately nor address pressing health problems, according to Jordan’s lawyers. Id. at 2-3, 5.
timely processed. The Seventh Circuit affirmed, and the defendants petitioned the Supreme Court for review, arguing that the case presented an urgently important Eleventh Amendment question.

Justice Powell, a key ally of Justice Rehnquist in formulating the “new federalism” cases, played a decisive role in Edelman’s outcome. Notes from the postargument conference suggested a majority in favor of affirming the Seventh Circuit (i.e., rejecting the Eleventh Amendment argument). But shortly after conference, Powell shifted from a tentative vote for affirming to a vote for reversal. He acknowledged the tragedy of leaving the plaintiffs “remediless,” but when it came to “compelling . . . a state to pay money from general tax funds to private citizens,” he explained to his colleagues, he saw no way to avoid the Eleventh Amendment other than finding that Illinois had waived the Amendment’s protection—which (citing Employees) he did not believe the state had done. Privately to one of his law clerks, Powell explained himself more simply: the Eleventh Amendment had “already . . . been eroded to the point that its application is far more limited than was ever intended,” and he “d[id]n’t wish to be a party

104 Memorandum Opinion and Order at 1-4, Swank, No. 71 C 70 (available in the Joint Appendix to Edelman, 415 U.S. 651 app. at 117).
105 Bryant ex rel. Jordan v. Weaver, 472 F.2d 985, 989-90, 999 (7th Cir. 1973).
106 Petition for a Writ of Certiorari at 8-11, Edelman, 415 U.S. 651 (No. 72-140). Part of our argument in this Feature is that, although disability cases were sometimes of low salience to the broader public, they mattered to state and local governments. For Illinois’s Department of Public Aid, the Edelman petition was part and parcel of several years of litigating welfare rights lawsuits, including expensive defeats. See, e.g., Cornelia Honchar, Court Order to Cost ‘Strapped’ Aid Agency $10 Million, Chi. Trib., Aug. 19, 1971, at N1 (noting that the Department was under pressure “to find $10 million, possibly more,” to make the retroactive payments ordered in Rodriguez v. Swank); Rodriguez v. Swank, 318 F. Supp. 289, 289-90 (N.D. Ill. 1970) (involving allegations of long delays in processing applications to the state’s AFDC program); Doe v. Swank, 332 F. Supp. 61, 63-64 (N.D. Ill. 1971) (ordering the Department to make retroactive payments to AFDC applicants who met statutory eligibility criteria but had been denied benefits on account of refusal to provide information about their children’s paternity), aff’d sub nom. Weaver v. Doe, 404 U.S. 987 (1971) (mem.); A Welfare Dilemma, Chi. Trib., Oct. 14, 1972, at 12 (estimating the cost of fulfilling the Doe v. Swank judgment at over $20 million).
107 Notes show an initial six votes to affirm the Seventh Circuit and one to reverse, with two Justices “passing” on the first vote. By the end of conference, this vote had shifted to five to affirm and three to reverse (with Chief Justice Burger still deferring his vote). See Justice Lewis F. Powell, Jr., Conference Notes, Edelman v. Jordan, No. 72-1410 (Dec. 14, 1973) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 399, Folders 1-3).
to its total burial.”109 Subsequently, Chief Justice Burger joined those favoring reversal and a draft opinion by Rehnquist became the majority opinion.

The Rehnquist decision was noteworthy for several reasons. The first was its articulation of a distinction between the kind of prospective relief at issue in *Ex parte Young* and the retroactive payments ordered in *Edelman*. It was the difference between structuring a state official’s decision as to future conduct, Justice Rehnquist explained, and ordering a state official to use state funds “to make reparation for the past.”110 It was true, Rehnquist conceded, that orders of prospective relief also affected state revenues, but this did not stop him from introducing a sharp line into the doctrine. After *Edelman*, orders of prospective injunctive relief against states remained consistent with the Eleventh Amendment, but orders of retroactive relief did not.111

As for the possibility that the state waived its Eleventh Amendment immunity, which might have made unnecessary that momentous line-drawing, Justice Rehnquist further narrowed any openings that the Court’s precedents had conceded. Rehnquist emphasized that in both *Parden* and *Employees*, the text of the statute at issue “authorized suit . . . against a general class of defendants which literally included States or state instrumentalities.”112 That “threshold fact” was “wholly absent” here.113 This left only the argument that Illinois “constructively consented” to waiver by “mere” participation in a federal-state welfare


111. Althouse, *supra* note 64, at 1140 (referring to *Edelman’s* retrospective-prospective distinction as “[t]he most prominent doctrine limiting the potential reach of Young”). Before *Edelman*, *Ex parte Young* could have been interpreted to permit various forms of equitable relief. See, e.g., Bryant ex rel. Jordan v. Weaver, 472 F.2d 985, 991 (7th Cir. 1973) (“We think the teaching of *Ex parte Young* is . . . that, where appropriate to deal with defiance of federal law, a federal court’s equitable intervention may take an effective form.”).


113. *Edelman*, 415 U.S. at 672. Yes, Justice Rehnquist acknowledged, the Social Security Act placed restrictions on states in the form of conditions attached to federal money, but it “did not authorize suit against anyone.” *Id.* at 674. And yes, § 1983 arguably did authorize private suits to enforce the terms of the Social Security Act, but there was a difference between suing a state official (something clearly contemplated by § 1983) and suing “the State itself.” *Id.* at 674-77. Rehnquist did not elaborate on this last idea—that states themselves were not suable under § 1983—but, as we discuss, it was important. *See infra* Section II.D.
program.114 Rehnquist treated this argument as almost offensive: “Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.”115

A third facet of Justice Rehnquist’s opinion—less significant at the time, but crucial later, we will argue—was the way Rehnquist discussed *Hans v. Louisiana*, the confusingly noncontextual state immunity case from the late nineteenth century. Although *Hans* retained precedential authority, it had been decades since the Court had emphasized *Hans’s* quasi-historical underpinnings as a basis for a contemporary Eleventh Amendment decision.116 *Edelman* revived with gusto *Hans’s* historical account. Thus, Rehnquist emphasized a Founding Era fear of a federal judiciary that was able to “summon a State as defendant and to adjudicate its rights and liabilities”;117 followed by explicit assurances from prominent Founders that the Constitution contemplated no such thing.118 The Court’s contrary decision in *Chisholm v. Georgia* was an event that “literally shocked the Nation,” Rehnquist continued, resulting in an Eleventh Amendment that reinscribed the Framers’ original understanding of state immunity—an understanding far broader than the Eleventh Amendment’s actual text.119 These historical premises were, in fact, eminently contestable, but as we will show, they would become foundational to the better-known state immunity decisions of the Rehnquist Court.120

---


115. Id. Notably, Justice Douglas (the author of *Employees*) dissented. Id. at 679-87 (Douglas, J., dissenting) (arguing that Illinois had waived its immunity).


117. *Edelman*, 415 U.S. at 660 (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1973)).

118. Id.

119. See id. at 660-62. John F. Manning would make note of this decades later, observing that “[t]he Rehnquist Court has not only credited *Hans* under rules of stare decisis, but has also endorsed and utilized its strongly purposive method of constitutional reasoning.” Manning, supra note 70, at 1669. This tendency, we argue, dates back to *Edelman*.

120. See infra Parts III & V.
C. Non-Disability Contexts: Eleventh Amendment Equivocation

"Employees and Edelman demonstrated the Court’s willingness to revitalize its moribund Eleventh Amendment doctrine. And yet, if defendants hoped that these cases marked a decisive turning point in the Court’s state-immunity doctrine, they would be disappointed. In race and sex cases in the years that followed, this Section shows, the Justices who were the most stalwart supporters of state immunity either could not secure a majority on Eleventh Amendment issues and/or decided to prioritize other goals. At this stage, it appears, resuscitating state immunity remained a tricky project, which its proponents could accomplish only in certain contexts—including disability, but not including race or sex.

Among the most significant of these race and sex cases was the “reverse discrimination” dispute Fitzpatrick v. Bitzer. The plaintiffs were male employees of Connecticut who alleged that the state retirement plan violated Title VII by allowing women full pension benefits based on lesser duration of service. The district court found for the plaintiffs but further found, per Edelman, that the Eleventh Amendment barred a federal court order of backpay/benefits. The Second Circuit affirmed, and the Supreme Court granted certiorari. Fitzpatrick arguably should have been an easy win for the state defendant: the district court had ordered retrospective relief, which, practically speaking, would come out of state funds. In other words, it crossed the sharp lines that the Court had just recently drawn in Edelman. But at conference, all Justices that voted on the merits agreed that the Eleventh Amendment should not be interpreted to bar back-pay relief under Title VII. For the Court’s more federalism-protective Justices, we suspect that this reluctance stemmed from the high

122. Fitzpatrick v. Bitzer, 390 F. Supp. 278, 279-80, 289-90 (D. Conn. 1974). The plaintiffs also included an equal protection claim, but the district court chose to base its decision solely on Title VII, which was amended in 1972 to include state employees. Id. at 290.
123. Id. at 289 (treating the back-pay/benefits-award issue as “clearly resolved” in the negative by Edelman).
disability and the ongoing federalism revolution

salience of race and sex discrimination, both of which would be implicated by the Court’s Fitzpatrick ruling.127

The rationale the Justices ultimately settled on was that the Fourteenth Amendment affected the meaning of the Eleventh Amendment. In giving Congress enforcement authority, Section 5 of the Fourteenth Amendment authorized Congress to supersede the states’ sovereign immunity—and Congress had in fact done so via Title VII.128 It was an interpretation that Justice Rehnquist, as the opinion’s author, could apparently live with, although he did try (and failed) to add a subtle “new federalism” flourish. An early draft warned Congress that expanding “the substantive area ‘carved out’ of the State’s sovereignty” beyond the proscriptions in Section 1 of the Fourteenth Amendment would “pose constitutional questions,” but he dropped that language when colleagues objected.129

---


128. Fitzpatrick, 427 U.S. at 456; see also Justice William H. Rehnquist, Draft Opinion 5-11, Fitzpatrick v. Bitzer, Washington & Lee University School of Law, Box 440, Folders 12-14 [hereinafter Fitzpatrick Rehnquist Opinion] (adopting this rationale). By the mid-1970s, the notion that the Fourteenth Amendment altered the reach of the Eleventh was not novel. But in Fitzpatrick, the interpretation had the weight of the Nixon Administration’s Solicitor General, Robert Bork, behind it. See Brief for the United States as Amicus Curiae at 11-39, Fitzpatrick, 427 U.S. 445 (Nos. 75-251, 75-283); see also Justice Harry A. Blackmun, Case Notes, Fitzpatrick v. Bitzer, Nos. 75-251, 75-283 (Apr. 16, 1976) (on file with Harry A. Blackmun Papers, Library of Congress, Box 229, Folder 7) (summarizing, before argument, the “rather substantial brief filed by the SG” and registering agreement).

129. See Fitzpatrick Rehnquist Opinion, supra note 128, at 12. Justice Rehnquist thus strongly intimated that the application of Title VII in Fitzpatrick was a constitutional exercise of Congress’s authority only because the underlying retirement provisions would also be unconstitutional under the Equal Protection Clause. Id. This interpretation of congressional authority was inconsistent with existing precedent and with the views of several of the Justices who had voted in the majority. See Justice William J. Brennan, Jr., Case Notes, at C, Fitzpatrick v. Bitzer, Nos. 75-251, 75-283 (1975) (on file with William J. Brennan, Jr. Papers, Library of Congress, Box II:7, Folder 2) [hereinafter Fitzpatrick Brennan Summary] (observing that both Justices White and Stewart objected to these portions of the Rehnquist opinion and that Rehnquist subsequently amended the opinion as a result); see also, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (adopting a broad, deferential standard for judicial review of the exercise of congressional enforcement powers under the Reconstruction Amendments and stating that those powers were not limited to simply forbidding violations of those amendments). As for why we read Rehnquist’s draft language in “new federalism” terms, we find it doubtful that Rehnquist sincerely viewed the conduct in Fitzpatrick as a violation of the Equal Protection
The *Fitzpatrick* opinion is noteworthy for one more reason: after finding that the Fourteenth Amendment permitted congressional abrogation of Eleventh Amendment immunity, the Court probably should have addressed the applicability of *Employees v. Department of Public Health and Welfare*. *Employees* suggested that state immunity remained intact unless there was a “clear statement” of congressional intent to pierce it.\(^{130}\) And Title VII, like the statute at issue in *Employees*, was not explicit on this point.\(^{131}\) Although at least one Justice would later privately note the discrepancy, no Justice at the time argued for applying a clear statement rule in the *Fitzpatrick* context; instead, they simply ignored the contradiction.\(^{132}\)

Another Eleventh Amendment case from the next Term, *Milliken v. Bradley* (*Milliken II*), illustrates the same dynamic.\(^{133}\) On remand from an initial trip to the Supreme Court in 1974, the district court had issued a new remedial desegregation order, part of which required the state to pay $5.8 million dollars in support of education programs designed to aid desegregation.\(^{134}\) Such an order was of dubious validity under *Edelman*.\(^{135}\) The state conduct at issue was

---

\(^{130}\) See *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 284-85 (1973) (looking for a clear signal from Congress that it intended to make state immunity subject to waiver, despite the fact that the statutory protections at issue were targeted explicitly at state conduct).


\(^{132}\) “[I]t is plain that we have been more lenient in finding a clear statement in *Fitzpatrick* than in *Employees*,” Justice Stevens later conceded, privately. See Justice John Paul Stevens, Draft Letter, Hutto v. Finney, No. 76-1660 (n.d.) (on file with the John Paul Stevens Papers, Library of Congress, Box 89, Folder 6). This quote is crossed out in original document.


D. How a Disability Case Saved State Immunity from § 1983

The next significant development in the Supreme Court’s Eleventh Amendment jurisprudence occurred when the disability benefits case Edelman v. Jordan reappeared on the Court’s docket in 1978, this time captioned Quern v. Jordan. Legal scholars have not treated Quern as a landmark case, for on the surface it merely clarified Edelman. But from the perspective of where civil rights law might have gone at this juncture, Quern was a major victory for the “new federalism.” Through Quern, Justice Rehnquist established that when Congress enacted 42 U.S.C. § 1983—the Reconstruction Era statute that was the primary vehicle for bringing litigation against states by the 1970s—it did not abrogate states’ Eleventh Amendment immunity.

This legal holding is even more striking in light of the case’s predecision history. From the petition for certiorari through oral argument and conference, Quern was not about § 1983. It was about the plaintiffs’ creative attempt to evade the Court’s 1973 Edelman ruling (via a request for “notice relief”) rather

136. See, e.g., Preliminary Memorandum from Alex Kozinski, Clerk, U.S. Sup. Ct. 7, Milliken v. Bradley, No. 76-477 (Nov. 2, 1976) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Boxes 404-05, Folders 1-8, 25-28) (noting that the court of appeals’ justification for permitting the relief despite Edelman appeared to “stretch Edelman quite a bit” and was “undercut by the CA’s own justification elsewhere in its opinion to the effect that the reason the State is called upon to pay for one half the cost of the programs is because it had been, in the past, guilty of promoting de jure segregation”).


than retroactive benefits). But rather than focus on this narrow issue, Justice Rehnquist took the opportunity to have the last word in a conversation that had percolated through various cases from the previous Term and that the parties in Quern had tried not to dispute: Did § 1983 allow suits against states themselves—and thereby abrogate any Eleventh Amendment immunity?

Although two previous Rehnquist opinions had suggested that the answer was “no,” the question gained new life, and real urgency, after the Court decided Monell v. Department of Social Services, a pregnancy-discrimination case in which a group of New York City employees asked the Court to treat municipalities and municipal agencies as suable under § 1983. In holding that local governments did, in fact, fall within the ambit of § 1983, the Court arguably invited reexamination of whether the same reasoning applied to state governments.

---

140. Barred from seeking an award of retroactive benefits, the plaintiffs convinced the district court to order notice to all class members (“[Y]ou were denied public assistance to which you were entitled in the amount of $— — —”) and to provide information about how to use state administrative channels to secure back-benefits. Quern, 440 U.S. at 335. On appeal, the Seventh Circuit sitting en banc interpreted this notice relief as, in effect, “a type of money judgment against the state” barred by Edelman. Jordan v. Trainor, 563 F.2d 873, 875 (7th Cir. 1977) (en banc). But it also approved a more modest notice, informing class members that a state administrative procedure was available “if they desire to have the state determine whether or not they may be eligible for past benefits.” Jordan, 563 F.2d at 875-78. The defendants sought, and were granted, certiorari review on the question of whether this more modest notice relief was consistent with the Eleventh Amendment. See Brief for the State Petitioner at 3, Quern, 440 U.S. 332 (No. 77-841).

141. On how narrowly both the parties themselves and members of the Court understood the issue, see, for example, Reply Brief for the State Petitioner at 14, Quern, 440 U.S. 332 (No. 77-841), which expressly disclaimed an intent to raise the §1983 issue. See also Quern Powell Notes, supra note 139 (showing that none of the discussion at Conference appears to have focused on the § 1983 issue, as opposed to the narrow notice issue); Quern Brennan Summary, supra note 139, at LXXXIV-XC (offering a detailed account of the internal deliberations in Quern, and making clear the role that Justice Rehnquist played in injecting the §1983 issue into the case).

142. See Reply Brief for the State Petitioner at 14, Quern, 440 U.S. 332 (No. 77-841) (“That [§ 1983] issue is not the issue before this Court on Petitioner’s Writ for Certiorari.”); Brief for Respondents at 55 n.37, Quern, 440 U.S. 332 (No. 77-841) (“[I]t is unnecessary in this case to confront directly the far-reaching question of whether Congress intended in § 1983 to provide for relief directly against States . . . .”)

143. Edelman v. Jordan, 415 U.S. 651, 672 (1974) (finding no intent to abrogate or waive state immunity, since there was no threshold authorization to sue states under § 1983); Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976) (noting that Monroe v. Pape, 365 U.S. 167, 187-91 (1961), had held that § 1983 did not extend to cities, and thus § 1983 “could not have been intended to include States as parties defendant”).


145. See id. at 700 (overruling, in relevant part, Monroe, 365 U.S. 167).
This notion—that after Monell, § 1983 should also be understood to reach states—was hardly spurious, and the stakes were high. If § 1983 were understood to allow suits against states, it would seem to follow (per Fitzpatrick) that § 1983 also abrogated state immunity. And given that § 1983 was, by the 1970s, the primary vehicle for most state-defendant claims, such a finding would mean that, in practice, the Eleventh Amendment meant much less. For those Justices trying to advance a “new federalism” agenda, this would be a disastrous development.

Because the stakes were so high, other cases from the Monell Term (immediately preceding Quern) had produced sharp exchanges on this issue, most notably in two prison-conditions lawsuits. In Hutto v. Finney, Justice Stevens’s majority opinion skillfully avoided the § 1983 question, but other Justices

146. The Dictionary Act, ch. 71, § 2, 16 Stat. 431, 431 (1871), which was passed only months before § 1983, defined “person” to include “bodies politic and corporate,” unless context suggested otherwise. See Monell, 436 U.S. at 688–89. Many contemporaneous sources included states within this definition. Quern, 440 U.S. at 356–57 (Brennan, J., concurring). So, too, many statements in the legislative history of the Civil Rights Act stressed the need to preserve individual rights against the unconstitutional misconduct of states. Id. at 357–65.

147. See Fitzpatrick, 427 U.S. at 456 (holding that Congress could abrogate state sovereign immunity where it subjects states to liability under its Fourteenth Amendment, Section 5 authority); see also Hutto v. Finney, 437 U.S. 678, 708–09 (1978) (Powell, J., concurring in part and dissenting in part) (referring to § 1983 as the “quintessential Fourteenth Amendment measure”).

148. See, e.g., Supplemental Memorandum from Eric G. Andersen, Clerk, U.S. Sup. Ct., to Justice Lewis F. Powell, Jr. 2, Quern v. Jordan, No. 77-841 (Jan. 3, 1979) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 493, Folders 6–10) (noting that if the Court interpreted § 1983 to apply to the states and abrogate their sovereign immunity, this could “amount to a virtual repeal of [the Eleventh Amendment]”).

149. Hutto was about whether the Eleventh Amendment precluded “an award of attorney’s fees to be paid out of Department of Corrections funds.” 437 U.S. at 680.

debated it fiercely in separate writings.\textsuperscript{151} Subsequently, in \textit{Alabama v. Pugh},\textsuperscript{152} Justice White drafted a per curiam opinion implying that, as a matter of settled law, § 1983 did \textit{not} abrogate states’ immunity.\textsuperscript{153} This provoked a sharp rebuke: “Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in \textit{Hutto},” Justice Stevens chided in dissent.\textsuperscript{154}

Justice Stevens’s words proved prescient. In \textit{Quern}—where, again, the § 1983 issue was neither briefed nor argued—Justice Rehnquist’s draft opinion cited \textit{Pugh} for the proposition that § 1983 did \textit{not} reach states and did \textit{not} abrogate state immunity.\textsuperscript{155} Such a finding, expressed so definitively, was not necessary to explain the agreed-upon outcome.\textsuperscript{156} And, as Justice Brennan urged behind the

\textsuperscript{151} \textit{Hutto}, 437 U.S. at 678 (offering a variety of arguments for why the attorney’s fees awards at issue did—or did not—violate the Eleventh Amendment). In brief, four of the Justices considered \textit{Edelman} and its expressed view that § 1983 did not reach states as critical to the Court’s ability to award attorney’s fees. \textit{Id.} at 707-08. (Powell, J., joined by Burger, C.J., concurring in part and dissenting in part; and joined by White & Rehnquist, JJ., dissenting in part). Because \textit{Hutto} had been brought under § 1983, which under \textit{Edelman} did not permit states to be joined as parties, these Justices reasoned there could be (under the clear statement rule) no inferred intent by Congress to abrogate or waive state sovereign immunity, even as to fees. \textit{Id.} at 708-10. Justice Brennan, by contrast, contended that because of the Court’s then-forthcoming opinion in \textit{Monell}, there was no longer a presumption that § 1983’s reference to “persons” did \textit{not} reach states. \textit{Id.} at 703 (Brennan, J., concurring). Full resolution of the issue should “await consideration in an appropriate case.” \textit{Id.} at 704.

\textsuperscript{152} 438 U.S. 781, 781 (1978) (per curiam). In this case, the State and its Department of Corrections contended that their joinder violated the Eleventh Amendment. \textit{Id.}

\textsuperscript{153} The opinion did so by citing \textit{Edelman}, which implied the continued validity of what Justice Rehnquist wrote in that case regarding the reach of § 1983. \textit{See id.} at 781-82; \textit{see also} Justice Byron R. White, Draft Dissent from Denial of Certiorari, \textit{Alabama v. Pugh}, No. 77-1107 (May 26, 1978) (on file with Harry A. Blackmun Papers, Library of Congress, Box 881, Folder 2) (showing that the opinion that was ultimately issued as a per curiam in \textit{Pugh} was initially drafted as a dissent from denial of certiorari by Justice White).

\textsuperscript{154} \textit{Pugh}, 438 U.S. at 783 n.* (Stevens, J., dissenting). This issue was neither briefed nor argued by the parties in \textit{Pugh}. Indeed, the \textit{Pugh} briefs were filed before \textit{Monell} (i.e., before there was even a reason to raise the issue). \textit{See Petition for Writ of Certiorari, Pugh}, 438 U.S. 781 (No. 77-1107) (Apr. 1, 1978); Brief for Respondents in Opposition to the Petition for Writ of Certiorari, \textit{Pugh}, 438 U.S. 781 (No. 77-1107) (Apr. 6, 1978); Monell v. Dept’ of Soc. Servs., 436 U.S. 658 (1978) (decided on June 6, 1978).


\textsuperscript{156} Justices Stevens and Powell urged Justice Rehnquist to rely on the principle of stare decisis rather than suggesting that, via \textit{Pugh}, the Court had already done a post-\textit{Monell} reevaluation of the language from \textit{Edelman}. \textit{See Memorandum from Justice John Paul Stevens to Justice William H. Rehnquist 1, Quern v. Jordan, No. 77-841 (Jan. 9, 1979) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 493, Folders 6-10) (suggesting that the opinion rely on stare decisis and opining that “the new sentence in the text...
scenes, it was a distressing deviation from the Court’s usual way of resolving intra-Court disagreement. The published opinion shows that Rehnquist was unmoved. In this low-salience disability-benefits case, in which the Court appeared to simply affirm a narrow remedial order, Rehnquist apparently saw an opportunity to crush a major threat to state immunity, and he seized it.

* * *

Summing up the developments of the 1970s, there are at least two ways of telling the story. In one version, the revitalization of the Eleventh Amendment in Employees and in Edelman was short lived and vulnerable, especially in light of cases such as Fitzpatrick and Milliken II. Not until 1996, this story goes, would the Court truly rehabilitate state immunity. Another version of the story—the one we find more compelling—emphasizes the impressive foundation that the Court constructed in this period via the cases we have emphasized. Moreover, unlike the Court’s revival of the Tenth Amendment in this era (via the 1976 case National League of Cities v. Usery), Employees and Edelman were never overruled. Via Quern, meanwhile, the Court’s conservatives secured a major victory in the battle over § 1983 by definitively rejecting the notion that this provision abrogated state immunity.

In telling this second version of the story we also call attention to disability. This is what unites Edelman (disability benefits), Employees (the pay and working conditions of institutional employees who cared for people with disabilities), and Quern (again, disability benefits). Disability mattered, in that the Justices who might have been inclined to resist “new federalism” advancements proved less committed to rights enforcement (or perhaps more alert to competing concerns, such as cost) in these disability-related contexts than they were in other cases in which Eleventh Amendment issues arose. Meanwhile, the Justices who were most keen on the “new federalism” did not feel compelled to temper their
ambitions in these contexts. They also may have found in these cases ample confirmation of the kinds of problems that they associated with an unreconstructed federalism jurisprudence.

Thus, many of the Justices were willing to stretch to permit sizeable monetary relief from a state treasury in *Milliken II* (a high-salience school-desegregation case). However, in *Edelman* (a disability-benefits case) an initial 6-1 vote for the plaintiffs slid easily into a 5-4 decision for the defendants, and the resulting opinion was full of “new federalism” “easter eggs.” Likewise, although members of the majority discerned and quickly cabined Justice Rehnquist’s ambitions in *Fitzpatrick* (a sex-discrimination case that, to Rehnquist, invited musings on the limited reach of Section 5 of the Fourteenth Amendment), they failed to do so in *Quern* (another disability-benefits case). As Justice Blackmun’s clerk observed, Blackmun “had no interest at all” in *Quern*. And Justice Stevens apparently cared so little about *Quern* that he quickly joined Rehnquist’s opinion even though Rehnquist included language about § 1983 to which Stevens had recently strongly objected. Just as “hard cases make bad law,” disability-related cases apparently made good law for a particular vision of federalism.

---

160. Compare *supra* Section II.C (discussing *Milliken II*), with *supra* Section II.B (discussing the original and final disposition of *Edelman*).

161. Compare *Fitzpatrick* Brennan Summary, *supra* note 129, at c (noting that White and Stewart “were also disturbed” by Justice Rehnquist’s attempts to gratuitously retrench congressional authority in *Fitzpatrick* and “intended to talk to WHR”) and *Fitzpatrick* Rehnquist Opinion, *supra* note 128, at 1 (noting, via handwritten notes, Rehnquist’s intention to “mak[e] substantial revisions at request of Byron and Potter”), with *Quern* Brennan Summary, *supra* note 139, at LXXXV-XC (suggesting that none of the Justices, including those who actually objected to Justice Rehnquist’s language, took any steps to address it with Rehnquist until Justice Brennan actively pushed the issue – and even then, went along when Rehnquist declined to alter it).


163. Compare Memorandum from Justice John Paul Stevens to Justice William H. Rehnquist, *Quern* v. *Jordan*, No. 77-841 (Dec. 4, 1978) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 493, Folders 6-10) (joining Justice Rehnquist’s draft opinion three days after it was circulated, despite the opinion’s claim that *Pugh* had resolved the § 1983/state-immunity issue), with *Alabama v. Pugh*, 438 U.S. 781, 783 n.* (1978) (Stevens, J., dissenting) (“Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in *Hutto*.”).
The 1980s ushered in dramatic change for the Court’s federalism jurisprudence. First, there were two significant developments in Court composition. In 1981, Justice Potter Stewart, a centrist, retired, allowing President Ronald Reagan to appoint Sandra Day O’Connor to the Court. Justice O’Connor’s jurisprudence proved complex, but her positions on federalism cases often aligned with those of the Court’s more state-protective members. Then, in 1986, Chief Justice Warren Burger retired, clearing the way for Justice Rehnquist’s elevation. Burger’s replacement, Antonin Scalia, initially questioned aspects of the “new federalism” agenda but ultimately voted in ways that were crucial to that agenda’s success.

But although Court composition goes a long way towards explaining the rise of the “new federalism,” it is not the whole story. Doctrinal change relies on actual “cases and controversies,” and the 1980s brought to the Court new cases and controversies involving disability, specifically three new and contentious laws. Between 1973 and 1976, Democratic-controlled Congresses had enacted three major disability rights laws, all of which implicated the states and leveraged the power of the federal purse: (1) Section 504 of the Rehabilitation Act of 1973, which prohibited recipients of federal funds from discriminating on the basis of disability; (2) the Education for All Handicapped Children Act of 1975, which

---


165. See infra Sections III.D-E (describing Justice Scalia’s initial questioning of the Court’s sovereign immunity doctrine but ultimate willingness to go along with the profederalism wing of the Court). Another change to Court composition occurred in 1988, when Anthony Kennedy replaced Lewis Powell. Linda Greenhouse, Senate, 97 to 0, Confirms Kennedy to High Court, N.Y. Times, Feb. 4, 1988, at A18.

addressed the exclusion of children with disabilities from the benefits of public education and articulated a right to a “free appropriate public education”; and (3) the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DD Act), which made more funding available to states for services to persons with developmental disabilities and also set forth the rights of the Act’s disabled beneficiaries. Disputes over how to interpret this legislation bubbled up to the Court in the ensuing years, sometimes via cases that represented a related trend: affirmative litigation on behalf of disabled people living in the kind of state-run institutions that the Court had considered in *Employees.*

The decisions that resulted generally did not favor people with disabilities, at least when it came to holding states accountable. By the end of the 1980s, this Part shows, the Court would hold that two of those three disability civil rights laws did not abrogate state immunity and that some of the most important guarantees of the third law were not enforceable. The Court also interpreted the Eleventh Amendment to effectively proscribe federal enforcement of state disability rights laws against the states themselves, at least in the absence of a waiver of state immunity.

The significance of these cases goes far beyond disability law, however. Through them, the Court established federalism principles that were transsubstantive. That is, they had the capacity to spill over into nondisability contexts, and by the end of the decade, they would.

### A. Deinstitutionalization and the Policing of Congress’s Spending Power

*Pennhurst State School & Hospital v. Halderman (Pennhurst I)*, filed in 1974, is emblematic of the deinstitutionalization litigation of this era. It also implicated new federal disability laws. The complaint alleged that Pennhurst was

---

*Section 504’s similarity to Title VI and Title IX was “not accidental,” and that the legislative history of Section 504 demonstrates that “the Section was modeled after both Title VI and Title IX”).*

---


169. *See supra* notes 93–98 and accompanying text.


173. 451 U.S. 1.
overcrowded and underresourced, resulting in neglectful and abusive treatment, as well as the deterioration of individuals entrusted to the state's care.\textsuperscript{174} Citing statutory and constitutional violations, a federal district court ultimately ordered that the defendants move all of Pennhurst’s residents into other settings, which would have effectively shut the institution down.\textsuperscript{175}

Sitting en banc, the Third Circuit largely affirmed the district court order but, following the constitutional avoidance canon, focused on the federal DD Act rather than the Constitution.\textsuperscript{176} According to that court, the DD Act “expressly provided . . . a right to treatment or habilitation” and authorized private suits against entities that accepted DD Act funding.\textsuperscript{177} The defendants’ petitions for certiorari asked the Court to review both issues (the right to sue and the content of the DD Act’s promises), in language that emphasized high stakes for state independence.\textsuperscript{178} Eight members of the Court voted to grant the petition, for reasons that appeared to cluster around cost and federalism.\textsuperscript{179}

The resulting decision by Justice Rehnquist was remarkable in its boldness and innovation. As a preliminary matter, it held Congress tightly to its specific grants of authority, asking which constitutional provision authorized the enactment of the DD Act—Section 5 of the Fourteenth Amendment or the Spending

\textsuperscript{174} Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1302-13 (E.D. Pa. 1977); see also Tani, supra note 16, at 1165-77 (providing a deeper history of the deteriorating conditions and failed reform efforts that set the stage for the \textit{Pennhurst} litigation).

\textsuperscript{175} \textit{Pennhurst}, 446 F. Supp. at 1318, 1325.

\textsuperscript{176} Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 114-16 (3d Cir. 1979) (affirming the district court's order, except insofar as it ordered the closure of the institution).

\textsuperscript{177} \textit{Id.} at 95, 97. The Third Circuit also cited a state-law ground for part, but not all, of its decision. See \textit{id.} at 100-03.

\textsuperscript{178} See Petition for Writ of Certiorari at 2, \textit{Pennhurst I}, 451 U.S. 1 (No. 79-1404). In the words of one petition, filed by intervenor Pennhurst Parents-Staff Association, an unreviewed appellate-court decision would take what should be a matter of state and local discretion—how to care for people with intellectual disabilities—and transfer “principal responsibility” to federal district courts. \textit{Id.} at 7.

Clause—and then suggesting that both were more constrained than previous cases implied. The DD Act was not enacted pursuant to Section 5, Rehnquist determined, because Congress had not been clear about its intention to invoke this power. In the absence of such express invocation, Rehnquist reasoned, the Court “should not quickly attribute to Congress an unstated intent” to do so. 

Pennhurst I thus joined Employees in establishing another new “clear statement” rule, requiring explicit congressional invocation of the Fourteenth Amendment.

As for the spending power, Justice Rehnquist emphasized its limits, reversing the thrust of decades of precedent. These limits came into view via a now-famous analogy: “[L]egislation enacted pursuant to the spending power is much in the nature of a contract,” Rehnquist explained; “[t]he legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”

Thus followed still another “clear statement” rule: “[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”

Tellingly, for purposes of this Feature, the only sources of support Rehnquist cited were two relatively recent Eleventh Amendment decisions, both of which also emerged from disability-related disputes: Employees (1973) and Edelman (1974).

Applying these principles and finding the DD Act wanting, the Court reversed the Third Circuit’s decision and remanded the case for reconsideration.

This course of action mattered greatly for beneficiaries of the DD Act, but it had even more powerful implications for the Court’s federalism jurisprudence.

---

181. Id.
182. Id.; see also Powell, supra note 28, at 1353 (describing Pennhurst I as a “surprising departure from the usual presumption that Congress intends to exercise all its powers when legislat ing”).
183. Pennhurst I, 451 U.S. at 17. Though now taken for granted, the contract-law analogy was not intuitive to others who studied federal-state grants in this era. See Cappalli, supra note 38, at 53 (“On a superficial level the grant-in-aid project appears similar to a normal contractual undertaking . . . . The analogy, however, is false.”).
185. Id. The dissenters noted the oddity of these citations. Employees and Edelman involved situations where states were said “to have waived fundamental constitutional rights merely by participating in a federal program.” Id. at 48 n.14 (White, J., dissenting in part). Such concerns were inapposite in this case.
186. Id. at 16, 31 (majority opinion).
187. The implication was that unless and until Congress amended that Act, states could receive federal funding, but courts would likely not hold them accountable to individual citizens for violating the rights that the Act specified. See Tani, supra note 16, at 1198-99 (explaining the
These implications went apparently unappreciated by some of the Court’s more liberal members, perhaps because they had come to view disabled populations as a distinct and challenging public responsibility.\(^\text{188}\) Thus, the majority opinion in *Pennhurst I* drew dissent but not meaningful debate over its most momentous statements extending the “new federalism.”\(^\text{189}\)

Conservative Court watchers, in contrast, quickly appreciated the federalism stakes of *Pennhurst I*. For example, in remarks at the first conference of the Federalist Society, conservative lawyer Michael McConnell, who was then in the Reagan Administration and would later become a federal judge and academic, praised *Pennhurst I* for infusing Tenth Amendment values into the interpretation of all Spending Clause statutes.\(^\text{190}\) The case’s “new principle of statutory construction” “could be an extremely useful” one for the states, McConnell predicted, “because very few [federal] statutes . . . phrase their conditions in anything close to precise language.”\(^\text{191}\)

\(^\text{188}\). Justice Marshall, whom one might expect to have been alert to any diminution of Congress’s Section 5 authority, made no mention of this after reading a draft of Justice Rehnquist’s opinion. He objected instead to the draft’s implication that “Congress’s deliberate effort to do something” about horrible institutional conditions was “merely hortatory.” Memorandum from Justice Thurgood Marshall to the Conference 1, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (Mar. 11, 1981) (on file with Thurgood Marshall Papers, Library of Congress, Box 272, Folder 5) (quoting *Pennhurst I*, 451 U.S. at 24). One of Justice Blackmun’s law clerks pointed out the “rather disturbing things about federalism and separation of powers” that Rehnquist included in his discussion of Section 5, but while Blackmun dissented in part, he did so entirely on other grounds. See Memorandum from Susan G. Lahne, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 2, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (Feb. 12, 1981) (on file with Harry A. Blackmun Papers, Library of Congress, Box 327, Folder 4) (flagging the federalism language); *Pennhurst I*, 451 U.S. at 32-33 (Blackmun, J., concurring in part and dissenting in part) (focusing exclusively on the statutory interpretation issues and not addressing the majority’s discussion of the scope of Congress’s authority).

\(^\text{189}\). See *Pennhurst I*, 451 U.S. at 48 n.14 (White, J., dissenting) (relegating to a footnote his discussion of the majority’s contract-law analogy and the “clear statement” rule).


B. A “Rare Opportunity” to Bond the Eleventh Amendment to State Sovereign Immunity

A mere year later, the Pennhurst litigation returned to the Court and once again enabled further development of the Court’s “new federalism” doctrines. Ironically, the return trip began with the Third Circuit dutifully following the Court’s cues from Pennhurst I. Recognizing the problems with the plaintiffs’ federal statutory claims, the court looked to state law and found an independent and adequate basis for the district court’s remedial decree. On remand, the Third Circuit had also considered, and rejected, a new contention: that the Eleventh Amendment barred federal court consideration of the plaintiffs’ state law claim, even though that claim was “pendent” to a colorable federal claim. Just a few years earlier, the Third Circuit’s interpretation of the Eleventh Amendment would have been utterly uncontroversial. Indeed, when the Supreme Court considered Pennhurst I, law clerks and justices alike assumed that the Court could review the state-law claim if it wanted to. But the Court was in a different place in the spring of 1982, when Pennhurst II arrived. So were the attorneys general from seventeen states, who filed an amicus brief that made clear the federalism stakes of the issue. The Court granted certiorari, and the case was docketed for the 1982 Term.


193. See id. at 656 (describing the Eleventh Amendment argument as “unique” and commenting on the “dearth of authorities cited in its support”).


195. See Brief for Alabama et al. as Amici Curiae Supporting the Grant of a Writ of Certiorari at 1, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (No. 81-2101). On how state attorneys general were coming together at this juncture and attempting to influence Supreme Court decision-making, see Cornell W. Clayton & Jack McGuire, State Litigation Strategies and Policymaking in the U.S. Supreme Court, 11 KAN. J.L. & PUB. POL’Y 17, 17-18 (2001), which examines the increasing size, capacity, and coordination of state attorneys general offices between 1960 and 1995; and Douglas Ross, Safeguarding Our Federalism: Lessons for the States from the Supreme Court, 45 PUB. ADMIN. REV. 723, 727-28 (1985), which describes efforts by the National Association of Attorneys General to improve state advocacy before the Supreme Court.
Compared to other cases from that Term, Pennhurst II did not generate much outside attention, but internally it proved tricky, because of the doctrinal leap it tempted the Court’s conservatives to take. Following oral arguments in February 1983, the vote at conference was 5-4 to reverse. But after assigning the opinion to Justice Powell and seeing multiple drafts, Chief Justice Burger withheld his “join,” leaving Powell without a majority.

Privately, Chief Justice Burger signaled to Justice Powell that “the breadth of [Powell’s] opinion” gave him “pause” and that, rather than join, he might file a concurrence. Powell begged the Chief not to do so. He emphasized his “fundamental” commitment to “reinforcing . . . the substantive principle of federalism”—a commitment he thought Burger shared—and his desire not to waste “the rare opportunity” the case afforded. Eventually, the case was scheduled for a fall 1983 reargument, after which a majority came together more quickly, but the case remained polarizing.

The sharp intra-Court disagreement reflects how dramatically Justice Powell’s opinion proposed to shift the Court’s state immunity jurisprudence. Recall that the 1890 case Hans v. Louisiana had relied on a quasi-historical account to apparently untether the Eleventh Amendment from its text and to characterize that Amendment as emblematic of a broader constitutional principle of state sovereign immunity. Eight decades later, Hans’s holding (that sovereign immunity barred suits by state citizens against their own states) remained good law, but the Court rarely relied on the underlying narrative when deciding cases.

---


199. See supra Section II.A.

Reversing this trend (or, more precisely, continuing the reversal that Justice Rehnquist initiated in *Edelman*), Justice Powell’s proposed decision in *Pennhurst II* embraced *Hans*’s historical account and gave that account new practical significance. As Powell explained, and as a majority of the Court ultimately agreed, history proved that the Eleventh Amendment represented a broad, nontextual background principle of state sovereign immunity. This background principle, in turn, prevented a federal court from enjoining state officials from violating state law, even when a colorable federal law claim established federal court jurisdiction.

From today’s vantage, coming after the “Rehnquist Revolution,” such an interpretation may seem unremarkable. But at the time, it was significant. As Professor David L. Shapiro observed in 1984, *Pennhurst II* “[b]ond[ed]” the Eleventh Amendment to state sovereign immunity in a way that appeared to represent a sharp and alarming “turn” in the Court’s jurisprudence. In Part V, we will show the profound significance of this “bonding” – but first, we chart other disability and federalism entanglements in the Court’s cases from the 1980s.

C. Disability Rights Meets the “New Federalism”

In combination, the federalism cases *Pennhurst I* and *Pennhurst II* eviscerated a significant portion of the DD Act and refused to enforce its state-law

---

201. See *Pennhurst State Sch. v. Halderman (Pennhurst II)*, 465 U.S. 89, 97-98 (1984) (relying on the historical account first laid out in *Hans* to reiterate that the Eleventh Amendment’s drafters not only narrowly addressed the “shock” of *Chisholm* but also memorialized the Founders’ original understanding of a principle of state sovereign immunity that generally precluded suits against states).

202. See *id.* at 98 (noting that the Eleventh Amendment’s “greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III”).

equivalents. But as of the mid-1980s, the Court had yet to address the implications of its federalism doctrines for the two most significant disability civil rights laws: Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act (EAHCA). The Court would reach the first of these statutes in *Atascadero State Hospital v. Scanlon*, which is this Section’s focus.

This intersection of federalism and disability civil rights law was complex. On one hand, because of the role of federalism arguments in post-*Brown* resistance, the realm of civil rights remained a potentially complicated one for advancing state-protective doctrines. And although disability civil rights were relatively new to the scene, legislators, administrators, and advocates had persistently tried to tether them to the African American struggle for freedom and equality.

On the other hand, the “Reagan Revolution” gave voice to some Americans’ impatience with civil rights claims, leading to open efforts by the Reagan Administration to retrench. Meanwhile, public discourse reflected continued skepticism toward disability civil rights, especially in the realms of public transportation and education, where inclusion appeared especially costly. (These

---

205. See supra Section II.A (discussing the role of federalism arguments in resistance to *Brown*); *Fitzpatrick*, 427 U.S. at 453-56 (recognizing that the Fourteenth Amendment was an especially privileged source of congressional authority vis-à-vis the Eleventh Amendment).
206. See *Lennard J. Davis, Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights* 17-18 (2015) (“The disability rights movement was undoubtedly modeled after the civil rights movement.”); *Richard K. Scotch, From Good Will to Civil Rights* 41-59 (2d ed. 2001) (noting that by the early 1970s, members of Congress had analogized disability-based discrimination and race-based discrimination, leading eventually to an antidiscrimination mandate—Section 504—that was modeled directly on Title VI of the 1964 Civil Rights Act); Scotch, supra, at 60-67, 75-81 (explaining how federal administrators’ experience with the 1964 Civil Rights Act informed their interpretation of Section 504).
concerns also existed in earlier years, to be sure, but economic recession and a politics of austerity had raised the stakes.\textsuperscript{209} It is no coincidence that when the Reagan Administration began its much-heralded deregulation initiative, Section 504’s relatively liberal regulations were a target.\textsuperscript{210}

Moreover, the Court’s initial encounters with Section 504 and the EAHCA outside of the federalism context appeared to embrace this more skeptical view. By the mid-1980s, the Court had heard seven cases arising out of one of these statutes, and disability advocates had lost five.\textsuperscript{211} In many of these decisions, the Court expressed a narrow, stingy view of disability rights—as if Congress and its administrative designees could not have meant what they actually said.\textsuperscript{212}

Even Justice Marshall, a longtime civil rights champion, showed little interest in advocating for generous legal interpretations. “[T]he handicapped typically are not similarly situated to the nonhandicapped,” he explained in the Section 504 case \textit{Alexander v. Choate}.\textsuperscript{213} Because that was so, Section 504’s equality

\textit{Hearing on H.R. 3697, supra}, at 94 (statement of Bernard F. Hillenbrand, Exec. Dir., Nat’l Ass’n of Cnty’s.) (same); \textit{Hearing on H.R. 3697, supra}, at 34-35 (statement of Robert D. Reischauer, Deputy Dir., Cong. Budget Off.) (noting particular concern about estimating the costs of complying with disability rights laws, especially regarding education); \textit{Hearing on H.R. 3697, supra}, at 70 (study prepared by Congressional Budget Office discussing the estimated cost of compliance for educational institutions).

\textsuperscript{209} \textit{See} \textit{Benjamin Holtzman, The Long Crisis: New York City and the Path to Neoliberalism} 11-13 (2021) (documenting “relentless pressure on local policymakers” in New York City to retrench public services in the 1970s, following economic difficulties and federal cutbacks).


\textsuperscript{212} \textit{See}, \textit{e.g.}, \textit{Davis}, 442 U.S. at 406 (adopting a narrow understanding of what it means to be “otherwise qualified” for an educational program or job); \textit{Rowley}, 458 U.S. at 203 (adopting a low standard for what it means for a school district to provide a “free appropriate public education”).

\textsuperscript{213} 469 U.S. at 298.
guarantee had to be kept “within manageable bounds.”\textsuperscript{214} In rejecting the plaintiffs’ argument (involving a change to Medicaid coverage that would have allegedly caused disproportionate harm to disabled people), Marshall went so far as to cast this argument as a misplaced or even disingenuous use of civil rights law—as if the disabled plaintiffs sought to “require” favoritism in a process that was, at bottom, about how to distribute scarce resources.\textsuperscript{215}

It was against this general backdrop that federalism and disability civil rights, packaged together, arrived at the Court’s doorstep in 1984. \textit{Atascadero State Hospital v. Scanlon}\textsuperscript{216} began when Douglas Scanlon alleged that a state hospital withdrew his offer of employment as a recreational therapist because of his disabilities: diabetes and lack of sight in one eye. Scanlon sought damages under Section 504. In response, the hospital argued that the Eleventh Amendment required dismissal.\textsuperscript{217} The district court agreed, but on appeal the Ninth Circuit took the opposite view. It found that, by implication, Section 504 included states among those subject to private suits and therefore California waived its sovereign immunity when it accepted federal funds.\textsuperscript{218} The Court granted certiorari to answer the question of whether Congress had been adequately clear in abrogating—or in setting the stage for waiver of—state immunity.

At the time, both case law and legal scholarship contributed to uncertainty about which way the Court would go. California, joined by the United States as amicus curiae,\textsuperscript{219} cited precedents (all disability related) that required explicit references to suits against states in statutory text. Cutting the other way, however, were non-disability cases (e.g., \textit{Fitzpatrick}) that appeared not to follow any sort of plain statement rule in cases that implicated Congress’s Fourteenth Amendment, Section 5 powers.\textsuperscript{220} In the background, meanwhile, was a bevy of new Eleventh Amendment and state immunity scholarship (inspired by the Court’s recent handiwork in the disability-related cases that we have

\begin{itemize}
  \item \textsuperscript{214} \textit{Id.} at 299.
  \item \textsuperscript{215} \textit{Id.} at 308.
  \item \textsuperscript{216} 473 U.S. 234 (1985).
  \item \textsuperscript{217} \textit{Id.} at 236.
  \item \textsuperscript{218} \textit{Id.} at 237.
  \item \textsuperscript{219} The Civil Rights Division of the Department of Justice was, by this time, headed by William Bradford Reynolds, a devotee of Reagan’s retrenchment agenda. Reynolds was among the attorneys on the brief in \textit{Atascadero}. \textit{See} Brief for the United States as Amicus Curiae, \textit{Atascadero State Hosp. v. Scanlon}, 473 U.S. 234 (1985) (No. 84-351). This represented a reversal from the position that the United States had taken as amici in the Court of Appeals under the Carter administration. \textit{See} \textit{id.} at 2.
  \item \textsuperscript{220} These latter cases were arguably the most relevant because the \textit{Atascadero} defendants had conceded below that Section 504 was Fourteenth Amendment, Section 5 legislation. \textit{Atascadero}, 473 U.S. at 244 n.4.
\end{itemize}
highlighted). Much of this scholarship criticized *Hans*, noting that the historical interpretation at the core of the decision ignored the most relevant historical evidence and treated the minority view of the issue as authoritative.\(^{221}\)

These critiques had merit, as even Justice Powell (privately) acknowledged.\(^{222}\) But the reality was that, by the 1980s, a raft of Eleventh Amendment cases depended on *Hans*, as did the Court’s emergent state immunity revival.\(^{223}\) It is perhaps not surprising, then, that *Atascadero*’s five-Justice majority barely engaged with critical reexaminations of *Hans*, giving them but a single footnote.\(^{224}\) Instead, relying on the settled law that suits by individuals against their own states were presumptively barred by the Eleventh Amendment, the Court held that Congress did not clearly abrogate state immunity when it enacted Section 504.\(^{225}\)

\(^{221}\) See Brief for Respondent at 33-34, *Atascadero*, 473 U.S. 234 (No. 84-351) (“In recent years constitutional historians have been in virtually unanimous agreement that the historical analysis on which *Hans* was based was faulty. . . . The time has come to reconsider whether *Hans* was properly decided.”).

\(^{222}\) See Fitzpatrick Powell Notes, supra note 126 (noting that he would “consider reversing precedents construing 11th as applied to citizens of the defendant state”). Many years later he would also express these views more publicly. See Justice Lewis F. Powell, Notes for Federal Courts Class 8 (Mar. 15, 1990) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 779, Folders 23-29) (including in his University of Virginia teaching notes the observations that *Hans* “cannot be squared with the language of the Amendment” and that it “was . . . questionable . . . when it was written”).

\(^{223}\) Almost all the cases in which the Court had ruled for defendants in this era involved citizens suing their own state on federal-question claims, as did *Atascadero*. Moreover, not only had the Court relied on *Hans*’s legal holding, but, as we have detailed, it had started leaning into *Hans*’s historical narrative and the associated notion that the Eleventh Amendment reaffirmed a broader “background principle” of state sovereign immunity. See supra Sections II.B & III.B (discussing *Edelman* and *Pennhurst II*).

\(^{224}\) See *Atascadero*, 473 U.S. at 243 n.3.

\(^{225}\) Justice Lewis F. Powell, Conference Notes 1-2, Atascadero State Hosp. v. Scanlon, Case No. 84-351 (Mar. 27, 1985) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 637, Folders 14-21) (showing that among the Justices in the majority, there was little discussion of overruling *Hans* or of the problems with *Hans*’s interpretation of history, although those issues were raised by other Justices); Justice Harry A. Blackmun, Conference Notes 1-2, Atascadero State Hosp. v. Scanlon, Case No. 84-351 (Mar. 27, 1985) (on file with Harry A. Blackmun Papers, Library of Congress, Box 428, Folder 1) (same). Justice Powell, the author of the majority opinion, expressed annoyance with Justice Brennan for engaging with history in his dissent, despite Powell’s own foray into history in *Pennhurst II*. Memorandum from Justice Lewis F. Powell to Annmarie Levins, Clerk, U.S. Sup. Ct. 4, Atascadero State Hosp. v. Scanlon, Case No. 84-351 (June 21, 1985) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 637, Folders 14-21) (characterizing Brennan’s opinion as a “historical essay” that was “more appropriate for some historical society publication than a Supreme Court decision”).
In this manner, *Atascadero* not only further entrenched *Hans* by refusing to reexamine it in the face of strong critique but also solidified the “clear statement” rule for Eleventh Amendment abrogation. As previously discussed, the Court had developed this rule in the 1970s and early 1980s in disability-related cases, but had waffled on it in cases involving sex, race, and prisoners’ rights. In Justice Powell’s words in *Atascadero*, “Congress must express its intention to abrogate the Eleventh Amendment in *unmistakable language in the statute itself*.”

Language that referred to states by implication (Section 504 covered “*any* recipient of Federal assistance”) was, by itself, not enough. Practically speaking, lamented one legal-aid lawyer, this meant that “waiver or abrogation arguments will rarely succeed.”

**D. Saving Hans via the Accretive Power of Disability Precedents**

After *Atascadero*, the Court’s more liberal members continued to argue that *Hans* should be overruled, but absent a change in Court composition, prospects were dim. The landscape shifted on September 26, 1986, with the appointment of Antonin Scalia to replace Chief Justice Burger. Though a staunch conservative, Scalia was hardly doctrinaire in his views on federalism or sovereign immunity. Moreover, although Scalia was not yet known as an intellectual leader of the textualism and originalism movements, he had already begun to engage with ideas around the importance of legal texts and history to judicial interpretation. And, as numerous legal scholars had by then argued, both history and text were in tension with *Hans*’s ruling.

---

226. 473 U.S. at 243 (emphasis added).
227. *Id.* at 245 (quoting Section 504).
232. See supra Section III.C (discussing scholarly critiques of *Hans*).
These impulses became manifest in Justice Scalia’s first Eleventh Amendment case, *Welch v. Texas Department of Highways & Public Transportation*. While Scalia signaled a potential willingness to vote in favor of the state defendant, his take on *Hans*—that it was “wrong”—alarmed the Court’s “new federalism” proponents and made opinion drafting a high-stakes endeavor. Justice Powell drafted an opinion holding for the defendant, while Justice Brennan drafted a dissent reiterating his views on *Hans* and attempting to lure Scalia into his camp.

Ultimately, it was the accretive power of the Court’s disability-related precedents that appears to have protected the Eleventh Amendment revival at this precarious moment. As of mid-May, Justice Scalia had not signed on to Justice Powell’s draft opinion, leaving Powell one vote shy of a majority. Powell’s chambers responded with a lengthy revised draft, crafted “to impress[] Justice Scalia with the seriousness of his responsibility.” The revision featured a

233. 483 U.S. 468, 470 (1987) (taking up the question of “whether the Eleventh Amendment bars a state employee from suing the State in federal court under the Jones Act”).


237. Memorandum from Justice Lewis F. Powell to Chief Justice William H. Rehnquist 1, Welch v. Tex. Dep’t of Highways & Pub. Transp., No. 85-1716 (May 18, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16) (noting that “Bill Brennan has a draft of a strongly written opinion expressing his familiar views” and that “the ‘grapevine’ information is that Nino is still considering overruling *Hans*”).


thoroughgoing defense of *Hans*, both on the merits and—crucially—as a matter of stare decisis. Justice Powell stressed instead that “we do not write on a clean slate”; “at least 17 cases” would have to be overruled if the Court overruled the principle holdings of *Hans*. Notably for our thesis, *all* of the post-1945 cases that Powell cited were either disability-related or relied directly on the authority of recent disability-related precedents.

Justice Powell’s revised draft proved persuasive. Shortly after receiving it, Justice Scalia circulated a brief opinion concurring in part and concurring in the judgment. The opinion surfaced Scalia’s doubts about the correctness of *Hans*—which he referred to as a “complex” question—but left the question for another day.

In the final analysis, then, *Welch* left intact and even expanded the Court’s recent Eleventh Amendment jurisprudence. Justice Scalia remained a potential threat to the foundation of the Court’s Eleventh Amendment revival, but, so far, the force of the disability-related precedents had kept him in check. The next Section shows how Scalia’s uncertain position on state immunity persisted into

---


241. *Id.* at 13.

242. *Id.* at 24 & n.26.


244. *Id.* (citing Papasan v. Allain, 478 U.S. 265 (1986), and Green v. Mansour, 474 U.S. 64 (1985), both of which relied on *Edelman*, and Cnty. of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985), which relied on *Pennhurst II*).


246. *Id.* (noting that the issue “was introduced by an amicus, addressed only briefly in respondent’s brief, and touched upon only lightly at oral argument”). Justice Scalia was able to concur in the judgment and part of the opinion because, in his view, the Congress that enacted the Federal Employers’ Liability Act (FELA) legislated against the backdrop of *Hans*. In light of that backdrop, it was wrong for the Court to interpret FELA as reaching the states. *Id.* at 1-2.

247. *Welch*, 483 U.S. at 478 (“[T]o the extent that *Parden* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.”).
the 1988 Term but ultimately resolved in favor of the “new federalism” and produced one more powerful federalism precedent—again in a disability context.

E. How a Disability Case Secured Victory for the “Extreme Plain Statement” Rule

By 1987, victories under the Court’s resurgent Eleventh Amendment jurisprudence were no longer restricted to disability-related contexts. Nevertheless, it remained unclear whether Justice Scalia would be the faithful advocate for federalism doctrines that former Chief Justice Burger had been. Moreover, there were still cases on the books from outside of the disability context that implied a weaker Eleventh Amendment. All of these issues came to a head during the 1988 Term, with the Court definitively rejecting a clear opportunity to overrule *Hans* while also “extend[ing] with a vengence [sic]” the Court’s “plain statement” rule for abrogating Eleventh Amendment immunity. It did so in a disability civil rights case—*Dellmuth v. Muth*—where, ironically, Congress had memorialized its intentions vis-à-vis the states with striking clarity.

Understanding the significance of *Dellmuth* requires a momentary foray into the infamously messy case *Pennsylvania v. Union Gas Co.* In brief, *Union Gas* was about whether Congress had properly abrogated state immunity when it used its power under the Commerce Clause to enact an environmental clean-up law. Ultimately, a five-Justice majority found that Congress had sufficiently clearly abrogated state immunity when enacting the statute at issue, while a separate five-Justice majority agreed that Congress could use its Commerce Clause authority to abrogate state immunity—that is, abrogation was not limited to the Fourteenth Amendment, Section 5 context. It was an odd, fractured

---

250. See *Dellmuth v. Muth*, 491 U.S. 223, 227-30 (1989). Outside the disability context, it remained unclear how strong the “plain statement” rule really was. That same Term, some members of the Court applied the rule more leniently in *Union Gas*. See infra notes 251-258 and accompanying text. However, as we will argue, *Dellmuth* proved a durable and important precedent. See infra Section V.C.
252. Id. at 5-6.
253. Id. at 7-13.
254. Id. at 13-23, 56-57.
decision, which, to some observers, called into question the Court’s federalism revival. 255

But from the internal perspective that the Justices’ papers now provide, a more nuanced picture of Union Gas comes into view—one that bears directly on this Feature’s broader arguments. First, disappointing the hopes of the Court’s progressives, Union Gas was the case in which Justice Scalia made the momentous choice not to join Hans’s detractors. 256 Second, and even more important for our purposes, internal discussions in Union Gas show that Scalia was not a natural ally of Chief Justice Rehnquist and other proponents of the “clear statement” rules we have discussed. (He apparently viewed such rules as inconsistent with his then-nascent embrace of textualism.) 257 He thus declined to join the Court’s conservatives’ position on that issue. 258

But while Justice Scalia would consistently adhere to his endorsement of Hans in the years after Union Gas, he would almost immediately depart from his rejection of “clear statement” requirements in the disability case Dellmuth v. Muth. At issue in Dellmuth was whether Congress had validly abrogated state immunity under the EAHCA, the central federal law ensuring equal access to education for children with disabilities. The stakes were high, both for families with disabled children and for states. 259 Russell Muth Jr., the parent, had largely

---


256. Justice Harry A. Blackmun, Conference Notes 2, Pennsylvania v. Union Gas Co., No. 87-1241 (Nov. 2, 1988) [hereinafter Union Gas Blackmun Notes] (on file with Harry A. Blackmun Papers, Library of Congress, Box 520, Folder 2) (quoting Justice Scalia that “Hans [was] wrong” but that there was nevertheless “sufficient” reliance on it to “dissuade me [from] ORg it”).

257. See Memorandum from Justice Antonin Scalia to Chief Justice William H. Rehnquist, Pennsylvania v. Union Gas Co., No. 87-1241 (May 26, 1989) (on file with Byron R. White Papers, Library of Congress, Box 109, Folder 10) (indicating his intent to revise a portion of his opinion so as to agree with Justice Brennan on finding a sufficiently clear statement); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION 28 (2d ed. 2018) (articulating the view, in an essay originally published in 1997, that “[t]o the honest textualist, all of these preferential rules [including clear statement rules . . . are a lot of trouble”).

258. Union Gas, 491 U.S. at 29 (Scalia, J., concurring in part and dissenting in part).

259. Because of the long duration of the litigation process and the time sensitivity of children’s educational needs, EAHCA cases often involved requests for retroactive relief (reimbursements to parents for educational services they had paid for out of pocket). Indeed, Dellmuth involved conduct from six years earlier, which had resulted in a parent paying a full year of private-school tuition. See Dellmuth v. Muth, 491 U.S. 223, 225-26 (1989).
prevailed in the lower courts, over vigorous objections from Pennsylvania’s Secretary of Education.260

At the time the Court granted certiorari,261 there was little doubt that Congress could abrogate state immunity in this context: in enacting the EAHCA, Congress had explicitly invoked Section 5 of the Fourteenth Amendment, and although the Justices disagreed about whether Congress could abrogate when legislat ing under other grants of authority, there was consensus on Section 5.262 This left a statutory interpretation question: did Congress validly abrogate state immunity in the EAHCA? The Court’s answer—a resounding “no”—would commit it even more firmly to Atascadero’s high bar for congressional clarity, this time with Justice Scalia joining the majority.263

Lest this conclusion seem foreordained, we pause to underscore how unob vious the Dellmuth outcome was, lending further support to our hypothesis that there was something special about disability-related cases during this time. In response to the Court’s ruling in Atascadero that the Rehabilitation Act did not sufficiently clearly abrogate state sovereign immunity, Congress had amended the Rehabilitation Act to provide that “[a] State shall not be immune under the


261. Some Justices may have imagined that Dellmuth would be the vehicle through which they would finally confront the validity of Hans. Following the cert grant, Muth secured an ideal lawyer for this argument: Harvard Law Professor Martha A. Field. See Memorandum from McKinnie on Motion of Respondent Russell A. Muth for Leave to Proceed Further Herein In Forma Pauperis, Gilhool v. Muth, No. 87-1855 (Oct. 25, 1988) (on file with Harry A. Blackmun Papers, Library of Congress, Box 526, Folder 5) (recording that Muth was unrepresented at the time of the cert petition and struggling financially); Email from Martha A. Field to Katie Eyer (Feb. 11, 2023) (on file with the authors) (noting that Mr. Muth hired Professor Field because of her involvement in sovereign immunity and disability issues); see generally Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States, 126 U. Pa. L. REV. 515 (1978) (engaging with Eleventh Amendment and sovereign immunity issues); Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States, 126 U. Pa. L. REV. 1203 (1978) (same). By the time the case was argued, however, the Justices had already hashed out their views on Hans, via Union Gas. See Union Gas Blackmun Notes, supra note 256, at 1-2; see also Bench Memorandum from Unidentified Clerk to Justice Thurgood Marshall 4, Gilhool v. Muth, No. 87-1855 (Mar. 1, 1989) (on file with Thurgood Marshall Papers, Library of Congress, Box 453, Folder 3) (“As a threshold matter, rstp Muth argues that the Court should overturn Hans v. Louisiana. This claim was raised and rejected in Pennsylvania v. Union Gas (argued in [D]ecember).”).


263. See Dellmuth, 491 U.S. at 232 (“[T]he statutory language of the [EAHCA] does not evince an unmistakably clear intention to abrogate the States’ constitutionally secured immunity from suit.”).
Eleventh Amendment of the Constitution . . . from suit in Federal court for a violation of [the Rehabilitation Act] . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.”

As Muth’s lawyer, law professor Martha A. Field, noted, it was hard to see how the EAHCA did not fall within the amendment’s language: it was a funding statute that prohibited discrimination against disabled children. When one adds to this picture Justice Scalia’s apparent rejection of “clear statement” rules in Union Gas (as well as another non-disability case that Term, Hoffman v. Connecticut Department of Income Maintenance), it was not at all evident why the Court should treat the EAHCA as insufficiently clear.

At conference, however, Justice Scalia voted to do just that: “Let Cong[ress] pass a stat[ute]” if they wished to abrogate, Scalia reportedly argued. Congress would promptly do so, overruling Dellmuth as part of the Education of the Handicapped Act Amendments of 1990. But this congressional response did not change the doctrine that Dellmuth stood for. As the majority put it in the final opinion, “Lest Atascadero be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual.” Indeed, this language was not only a reaffirmation of Atascadero but an extension of it. “[T]he battle over the extreme plain statement requirement ha[d] been lost,” pronounced one of Justice Blackmun’s clerks.

* * *


265. Id. at *31-32. While the effective date of the Rehabilitation Act amendments postdated the conduct in Muth’s suit, the amendments arguably reflected “Congress’ intent in enacting the EHA.” Id. at *32 n.48. Moreover, the EAHCA itself arguably expressed a clear intent to hold states responsible for the kind of financial remedies Muth sought. The EAHCA included many references to the States, to provisions that contemplated the necessity of state-funded reimbursement, and to terms that gave States administrative responsibility. Id. at *32-33.


269. Dellmuth, 491 U.S. at 230 (emphasis added). Justice Scalia filed a concurring opinion to qualify his support of this statement, a posture that, as Justice Brennan’s clerk noted, was “forced on [him]” because of his late-breaking decision to find that the statute in Union Gas did abrogate immunity. Memorandum from Timothy S. Bishop, Clerk, U.S. Sup. Ct., to Justice William J. Brennan, Dellmuth v. Muth, No. 87-1855 (n.d.) (on file with William J. Brennan Papers, Library of Congress, Box 1:811, Folder 7).

270. Hoffman Foley Memorandum to Blackmun, supra note 249, at 2.
Again, there is more than one way to tell the story of the federalism developments of the 1980s. By one account, the decade ended in a decidedly anticlimactic way for proponents of the “new federalism.” Union Gas, by allowing abrogation of state immunity pursuant to Congress’s commerce power, seemed to ensure Congress’s ability to avoid the Court’s revived Eleventh Amendment jurisprudence (assuming sufficient legislative clarity). And as cases outside of the disability context showed, there remained sufficient ambiguity in the Court’s doctrine for the Court to evade the natural consequences of its state-immunity principles in fraught contexts, such as still-ongoing school-desegregation disputes.

But viewed from another vantage point—the one that centers disability cases—the Court spent the 1980s laying critical groundwork for what would shortly become the much-critiqued “new federalism” revolution. Via Pennhurst I, the Court adopted the “contract theory” of Spending Clause legislation and its associated “clear statement” rule for the statutory rights defined by such legislation. Via Pennhurst II, the Court revived the quasi-historical and textually unbounded account of state sovereign immunity. And in numerous disability cases, including Pennhurst I, Atascadero, and Dellmuth, the Court adopted and strengthened a host of other “clear statement” rules—rules by which the Court arrogated to itself wider authority vis-à-vis Congress.

In a departure from the 1970s and early 1980s, the Court’s more liberal members were, by the mid-1980s, attuned to the stakes of these disability federalism cases. In some of them, they fought vigorously against “new federalism”

272. See, e.g., Missouri v. Jenkins, 494 U.S. 274 (1989) (affirming a multimillion-dollar judgment against the state in a desegregation case over an Eleventh Amendment objection during the same Term as Dellmuth and Union Gas). In making this point, we acknowledge the Court’s increased willingness to disappoint the expectations of civil rights claimants. See Lynda G. Dodd, Contours of Civil Rights Counterrevolution, in The Rights Revolution Revisited, supra note 207, at 224, 229 (“Nearly all of the Burger Court’s landmark civil rights statutory decisions came under assault in the Rehnquist Court’s 1988 [T]erm.”). The Court’s conservatives may nonetheless have benefitted from a two-track federalism jurisprudence, in which they could make advances on the lower-salience track while avoiding controversy in higher-salience cases.
outcomes. By this time, however, the Court’s disability federalism precedents had taken on a life of their own. They served as potent authority for those who sought to maintain and expand upon the revival of state immunity (as evidenced by such cases’ disciplining effects on Justice Scalia in Welch), as well as for efforts to expand state-protective clear-statement requirements (as evidenced by the role that disability cases played in all of the clear-statement developments of the 1980s, including overcoming Justice Scalia’s initial discomfort with this interpretive approach).

In short, viewed through the lens of disability, the trajectory of the Court’s jurisprudence during the 1980s is clear—toward increased protections for states, and away from robust deference to federal congressional authority. Thus, what would become apparent to scholars more fully only with the advent of the “Rehnquist Revolution” of the mid-1990s was already apparent a decade earlier—albeit still primarily limited to the disability sphere.

IV. THE EARLY 1990S: DISABILITY AND FEDERALISM-BASED JUSTIFICATIONS FOR RETRENCHING CONGRESSIONAL POWER

The next several years—just before what Court watchers would come to call the “Rehnquist Revolution”—were a quiet time in the Court’s state immunity jurisprudence. But during the same time frame, other “new federalism” opportunities ripened, once again in the context of the rights of people with disabilities (or those perceived to be disabled). Even though the Court had by then narrowed the reach of various existing federal disability rights laws, such as the Rehabilitation Act and EAHCA, these laws remained capable of generating conflict. So did other disability-related civil rights laws from the same era of liberal congressional dominance, such as the Age Discrimination in Employment Act

276. See supra Sections III.C-E (describing progressive Justices’ efforts from the mid-to late 1980s to overturn Hans).

277. See supra Section III.D (describing the role that Justice Powell’s invocation of modern disability law cases played in convincing Justice Scalia not to join an opinion overturning Hans).

278. See, e.g., Dellmuth, 491 U.S. at 227-28 (citing Atascadero and Pennhurst I in expanding a clear statement rule); Atascadero, 473 U.S. at 243 (invoking Quern, Edelman, and Pennhurst II when adopting a clear statement rule); Pennhurst I, 451 U.S. at 17 (citing Employees and Edelman in adopting a Spending Clause clear statement rule); supra Section III.E (describing Justice Scalia’s inconsistent treatment of the disability law context as compared to other contexts in his willingness to embrace a clear statement rule).

279. A notable exception to this statement was the Court’s decision clarifying that tribal governments would not enjoy the same Eleventh Amendment stature as states or the federal government when they sued states. See Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991).
Moreover, Congress continued to legislate in this area, most notably via the Americans with Disabilities Act (ADA), which we highlight in this Part as an underappreciated example of “legislative constitutionalism.”

In this Part we discuss two cases, one that arose from the ADEA and one that was grounded in the Constitution but implicated the ADA. Through these cases, we see the tension building between Congress and the Supreme Court, as well as the Court’s turn to federalism doctrines as a disciplinary tool. The disability-related case *Gregory v. Ashcroft* further expanded the clear statement rules that the Court had developed in its disability cases of the 1970s and 1980s. In doing so, it provided the clearest example yet of how “new federalism” doctrines intersected with interbranch power dynamics—here, aggrandizing the power of the Court at the expense of Congress. Along similar lines, the disability case *Heller v. Doe* previewed the Court’s dismissiveness of congressional interpretations of the Fourteenth Amendment that were more expansive than its own. Interpretations of this Amendment, of course, directly affect the states, making *Heller v. Doe* another early example of the intersection of federalism and interbranch power struggles.

### A. Guarding the Federal-State Balance via the Specter of the Disabled Judge

Legal scholars may not think of *Gregory v. Ashcroft* as a disability case because on its face it was about age. Dissatisfied with a Missouri constitutional provision that created a mandatory retirement age of seventy for state-court judges, a group of older judges alleged that this provision violated both the federal ADEA and the Fourteenth Amendment. But disability was all over the record in *Gregory* and figured prominently in its disposition at all levels of the judiciary.

At the district-court level, where the State prevailed on its motion to dismiss, the connection between advanced age and physical and mental inability was the first factor the court cited in explaining why the mandatory-retirement provision

---


withstood constitutional challenge. In affirming this decision, the Court of Appeals for the Eighth Circuit referenced the same concerns. And after the Supreme Court granted the plaintiffs’ petition for certiorari, disability-related arguments remained a prominent facet of the briefs.

The other prominent facet of the briefs was federalism. Missouri Attorney General John Ashcroft argued strongly that the issue was state sovereignty: the plaintiffs’ interpretation of the ADEA amounted to federal preemption of a state constitutional provision, implicating the Tenth Amendment. Numerous states and various state- and local-government associations filed or joined amicus briefs in support of Missouri’s position, as did the conservative Washington Legal Foundation.

Both arguments (regarding the disability-related incapacity of older judges and the Tenth Amendment) had the potential for awkwardness. Four Justices were over seventy at the time of argument, and Chief Justice Rehnquist’s


286. For example, in seeking to win reversal on the equal protection argument, the plaintiffs emphasized the Court’s previous recognition of the stigma and unfounded stereotypes that some groups of disabled people encountered. See Brief for Petitioners, Gregory, 501 U.S. 452 (No. 90-50), 1990 WL 10013069, at *28-30 (referencing the Court’s decision in Cleburne). Missouri, for its part, invoked the state’s negative experience with judges who “serve[d] beyond the years of their physical and mental abilities.” See Brief for Respondent, Gregory, 501 U.S. 452 (No. 90-50), 1991 WL 521348, at *40.


290. See Linda Greenhouse, Supreme Court Roundup: Justices to Hear Appeal in Retirement Age Case, N.Y. TIMES, Nov. 27, 1990, at B8.
chronic back pain noticeably interfered with his work.\textsuperscript{291} Moreover, the Court had only recently reversed course on the Tenth Amendment, holding that the Amendment posed no substantive bar to federal interference with even “traditional governmental functions” where Congress otherwise possessed Commerce Clause authority.\textsuperscript{292}

Ultimately, however, neither concern got in the way of the Court finding in favor of Missouri and, in doing so, notching a major win for the “new federalism.” Relying on the disability cases \textit{Atascadero} and \textit{Pennhurst I}, Justice O’Connor’s opinion for the majority not only reaffirmed but also dramatically expanded the plain statement rules of the 1980s. Reasoning that the congressional actions at issue here “would upset the usual constitutional balance of federal and state powers,” she deemed it “incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ this balance.”\textsuperscript{293}

Certainty, O’Connor continued, could come only through “unmistakably clear” statutory language.\textsuperscript{294} Finding no clear statement of an intent to \textit{include} state-court judges within the category of “employees,” the majority sided with Missouri.\textsuperscript{295}

The upshot of \textit{Gregory} was a “clear statement” rule of potentially stunning scope: anywhere federalism values were implicated, the super-strong statement requirements of the disability cases would arguably apply.\textsuperscript{296} \textit{Gregory} also

\begin{itemize}
\item \textsuperscript{293} \textit{Gregory}, 501 U.S. at 460 (quoting \textit{Atascadero State Hosp. v. Scanlon}, 473 U.S. 234, 243 (1985)).
\item \textsuperscript{294} \textit{Id.} (quoting \textit{Atascadero}, 473 U.S. at 242).
\item \textsuperscript{295} \textit{Id.} at 470.
\item \textsuperscript{296} This is, of course, not the only possible reading of \textit{Gregory}: some courts have limited the key language in \textit{Gregory} to situations where the argued-for change would affect a fundamental aspect of state sovereignty. \textit{See}, \textit{e.g.}, United States v. Lot 5, 23 F.3d 359, 362 (11th Cir. 1994)
\end{itemize}
illustrates a trend that most scholars would not spot until at least several years later: the “new federalism” was as much about the Court’s power vis-à-vis Congress as it was about the states’ power vis-à-vis the federal government.297 Once again, disability and its apparent burdens and dangers helped pave the way.

B. The Americans with Disabilities Act as Legislative Constitutionalism

Mere months before the Court granted certiorari in Gregory v. Ashcroft,298 Congress enacted the ADA and thereby dramatically extended the promises of earlier, narrower disability rights laws.299 Sweeping in scope, the ADA touched on numerous aspects of American society—from restaurants and stores to public transit, to private employment, to public services—and established that disabled people had a right to be free from discrimination.300

In articulating these important substantive guarantees, the ADA’s drafters also showed awareness of recent trends in the Supreme Court’s constitutional jurisprudence. Absorbing the lesson of Pennhurst I, where the Court indicated that it would not lightly assume that Congress had relied on its Fourteenth Amendment, Section 5 authority, the drafters of the ADA memorialized their intent “to invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment.”301 Responding to the “clear statement” requirement that the Court had articulated in cases like Dellmuth, Atascadero, and Employees, the ADA’s drafters also included a section titled “State Immunity,” which declared that “[a] State shall not be immune under the [E]leventh
Amendment...from an action in Federal or State court...for a violation of this Act."

But beyond these efforts to comply with the Court’s recent dictates, the ADA also included an independent, legislative interpretation of the constitutional status of disabled people—an interpretation that departed markedly from the Court’s 1984 decision in City of Cleburne v. Cleburne Living Center. In brief, Cleburne reversed a Fifth Circuit ruling that people with intellectual disabilities were a “quasi-suspect class” for purposes of analyzing an alleged equal protection violation and instead designated them a nonsuspect class whose treatment under the law required only “rational basis” review.

The ADA’s drafters signaled their disagreement when they made a “finding” about each factor the Court had used in Cleburne to determine the appropriate standard of review—and, in each instance, reached a different conclusion from the Court’s. According to the ADA, people with disabilities were a “discrete and insular minority,” “subjected to a history of purposeful unequal treatment” and “relegated to a position of political powerlessness” based on “stereotypic assumptions.” Moreover, those “stereotypic assumptions” did not reflect valid judgments about disabled people’s “ability...to participate in, and contribute to, society.” In this fashion, the ADA appeared to repudiate Cleburne and

---

302. See id. § 502, 104 Stat. at 370 (codified as amended at 42 U.S.C. § 12202); see also Zoom Interview by Katie Eyer with Chai Feldblum, C.R. Advoc. & Scholar (Sept. 8, 2022) (emphasizing that this was the main federalism-based concern that was in the minds of those involved with the drafting at the time).

303. 473 U.S. 432, 442 (1985); see also Zoom Interview with Chai Feldblum, supra note 302 (explaining that disability rights groups and some of those on the Hill involved in the ADA’s drafting wanted to address Cleburne in the statute).

304. Cleburne, 473 U.S. at 442 (“[T]he States’ interest in dealing with and providing for [people with intellectual disabilities] is plainly a legitimate one.”); see also id. at 440-41 (explaining why differential treatment based on intellectual disability was different from differential treatment based on sex or race). The Court went on to find in favor of the Cleburne plaintiffs based on evidence of “irrational prejudice,” id. at 450, but the Court’s rejection of heightened scrutiny, coupled with its previous articulation of exceedingly lenient standards for rational basis review, left many disability rights advocates worried for the future. See Katie R. Eyer, The Canon of Rational Basis Review, 93 NOTRE DAME L. REV. 1317, 1321 (2018) (explaining that, although rational basis review affords greater opportunities for social-movement successes than most legal scholars have recognized, it also fails to guarantee meaningful review in the way that suspect or quasi-suspect status might).


306. Id.; Zoom Interview with Chai Feldblum, supra note 302. This language remained in the ADA until it was removed as a part of the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3554-55 (2008).
“provide a clear mandate for the Court to consider disabled persons a quasi-suspect class.”

Such a move by Congress—revisiting or even reversing one of the Court’s constitutional decisions—was arguably not unprecedented, or at least might not have felt that way to the ADA’s drafters. In 1970, Congress used its Section 5 authority to prohibit a type of state conduct (literacy tests as a prerequisite to voting) that the Court had previously found facially constitutional; when states challenged Congress’s action, the Court upheld it. Also in the backdrop was the 1966 case Katzenbach v. Morgan, a voting-rights case that stressed the broad scope of Congress’s Section 5 power and established that Congress might act even in the absence of a judicial determination that particular conduct violated the Fourteenth Amendment. At the time of the ADA’s drafting, Morgan was a canonical case.

In retrospect, however, this seemingly settled understanding of Congress’s Section 5 power was vulnerable. Via a discussion of Heller v. Doe, a case that confronted the Court with the ADA’s legislative constitutionalism, we preview the Court’s dismissiveness of Congress. This dismissiveness would later become a central focus of scholarly critiques of the “new federalism,” but at the time of Heller largely escaped notice.

307. See Amy Scott Lowndes, Note, The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons, 44 Fla. L. Rev. 417, 419 (1992). In highlighting this drafting decision, we do not claim that all members of Congress were alert to these “findings” or understood their relationship to Cleburne. The ADA was a massive, complicated piece of legislation, with many far more obviously controversial provisions. See Davis, supra note 206, at 155-65 (detailing many serious disputes over the ADA, not including this issue).

308. Zoom Interview with Chai Feldblum, supra note 302 (explaining that although she did not think Congress’s findings would lead the Rehnquist Court to feel compelled to revisit Cleburne, she also did not view this language as out of bounds).

309. Oregon v. Mitchell, 400 U.S. 112, 118 (1970). The Court did, however, also hold in the same case that Congress could not lower the voting age for state and local elections to age eighteen pursuant to its Fourteenth Amendment, Section 5 authority, suggesting that authority did possess some meaningful limits. Id. at 117-18.

310. 384 U.S. 641, 646-47 (1966); see also Williams v. Ohio Dep’t of Mental Health, 960 F. Supp. 1276, 1281-82 (S.D. Ohio 1997) (relying in part on the findings, coupled with the authority given under Morgan, as a reason for finding the ADA to be valid Fourteenth Amendment, Section 5 legislation, just prior to City of Boerne v. Flores).


C. Heller v. Doe and the ADA’s Disregarded “Findings”

Although journalists and politicians did not place much emphasis on the ADA’s “findings” regarding the constitutional status of people with disabilities, litigators took note. Almost immediately, advocates for people with disabilities argued that because of the ADA, disability-based equal protection claims must be subject to heightened review. These arguments quickly made their way to the Supreme Court. Less than six months after the ADA’s enactment, the Court received a petition for certiorari arguing that the ADA had modified the equal protection standard of review for people with disabilities. While the Court would not grant certiorari in that case, two years later, the issue would arise again in Heller v. Doe.

Heller, a long-running equal protection and due process case, involved an allegation of discrimination among groups of disabled people. Under Kentucky law, involuntary-commitment standards for people with mental health disabilities were more stringent than for people with intellectual disabilities. In the lower courts, the case had been litigated on the assumption that rational basis review applied to the plaintiffs’ equal protection claims, but even under that standard, the plaintiff class had prevailed. Nevertheless, at the Supreme Court, the plaintiffs argued for heightened equal protection scrutiny, both because of the fundamental right at issue (liberty) and because Congress, via the

313. See More v. Farrier, 984 F.2d 269, 271 n.4 (8th Cir. 1993); Tomsha v. City of Colo. Springs, 856 P.2d 13, 14 (Colo. App. 1992). Law students and legal academics also noted this argument, with differing predictions as to how courts would respond. See Lowndes, supra note 307, at 419; see also Robert E. Rains, A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications, 11 ST. LOUIS U. PUB. L. REV. 185, 201-02 (1992) (suggesting that, under existing precedents, the Court could allow Congress to “ratchet” up the guarantees of the Fourteenth Amendment, but noting that the Court had never applied the “Ratchet Theory” to the tiers-of-scrutiny context).


315. 509 U.S. 312.

316. Id. at 317-18. For people with diagnoses of mental illness, involuntary commitment required that the state prove particular elements (e.g., “danger or a threat of danger to self, family, or others”) “beyond a reasonable doubt,” whereas for people with intellectual disabilities, the standard was “clear and convincing evidence.” Id.

317. See Doe ex rel. Doe v. Cowherd, 965 F.2d 109, 112 (6th Cir. 1992) (finding “no evidence whatsoever” that people with intellectual disabilities were “not ‘stigmatized’” by involuntary commitment or “that the treatment they receive is less ‘intrusive’ than the treatment administered to mentally ill persons” and characterizing the state’s “mere assertion of distinctions” between these groups as “clearly insufficient” to justify differing standards), rev’d sub nom. Heller v. Doe, 509 U.S. 312 (1993).
ADA, had deemed heightened scrutiny the appropriate Fourteenth Amendment standard for people with disabilities.\footnote{Brief for Respondents, \textit{Heller}, 509 U.S. 312 (No. 92-351), 1993 WL 290154, at *27-28 (arguing that “Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the fourteenth amendment” and noting that in the ADA’s findings section Congress gave “a clear indication that all forms of discrimination against individuals with disabilities should be subject to strict judicial scrutiny”). The plaintiffs also argued that they were entitled to prevail under a rational basis standard. \textit{See Heller}, 509 U.S. at 319.}

Internal Court documents and the oral argument transcript show that the Justices recognized and understood the ADA-based argument.\footnote{\textit{See Transcript of Oral Argument, \textit{Heller}, 509 U.S. 312 (No. 92-351), 1993 WL 754953, at *10-11; Memorandum from Radhika Rao, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 27 n.6, \textit{Heller} v. Doe, No. 92-351 (Mar. 19, 1993) (on file with Harry A. Blackmun Papers, Library of Congress, Box 624, Folder 2).} Justice Blackmun’s law clerk, for example, noted her own agreement with the notion that people with intellectual disabilities “are a discrete and insular minority who have experienced a history of discrimination” and who therefore deserved heightened protection.\footnote{Memorandum from Radhika Rao, \textit{supra} note 319, at 27 n.6.} But she was “extremely doubtful . . . that a majority of this Court” would embrace that position.\footnote{\textit{Id.}} Indeed, Congress’s “findings” appeared to persuade no Justice who had not already been inclined towards this view, and even those well-inclined Justices did not cite the ADA in their intra-Court conversations about the correct disposition of \textit{Heller}.\footnote{\textit{See}, e.g., Justice Harry A. Blackmun, Draft Dissent 1, \textit{Heller} v. Doe, No. 92-351 (June 23, 1993) (on file with Harry A. Blackmun Papers, Library of Congress, Box 624, Folder 1) (dissenting separately to note his view that heightened scrutiny should be applied, but not relying on the ADA findings).}

Ultimately, the Court would apply rational basis review and uphold the Kentucky law.\footnote{At conference, a majority of Justices appeared to favor applying rational basis review and partially affirming the appellate court, but Justice White tipped the scales the other way when he joined Justice Kennedy’s draft dissent, giving that opinion the majority. \textit{See Justice Harry A. Blackmun, Conference Notes, Heller} v. Doe, No. 92-351 (Mar. 24, 1993) (on file with Harry A. Blackmun Papers, Library of Congress, Box 624, Folder 2); Memorandum from Justice Byron R. White to Justice Anthony Kennedy, \textit{Heller} v. Doe, No. 92-351 (June 15, 1993) (on file with Byron R. White Papers, Library of Congress, Box 202, Folder 10).} The majority’s only reference to the ADA-based argument was in a paragraph where it deemed the level-of-scrutiny question “not properly presented” because “both parties have been litigating this case for years on the theory of rational-basis review.”\footnote{\textit{Heller}, 509 U.S. at 319. “It would be imprudent and unfair,” Justice Kennedy explained, “to inject a new standard at this stage.” \textit{Id.}} Even the dissent—while noting the ADA
argument— premised its reasoning only on the failure of the distinctions at issue to meet rational basis review.325

In the aftermath of Heller, litigants continued to argue that the ADA had deemed people with disabilities a protected class, thus superseding Cleburne. But despite a string of lower-court opinions addressing the issue (largely, though not always, rejecting this argument) and several subsequent petitions for certiorari, the Court declined to take it up.326 Not until the more famous case of City of Boerne v. Flores,327 which was decided contemporaneously with the last of these certiorari petitions, would it become clear how unreceptive the Justices were to the notion that Congress possessed the authority to override the Court’s own interpretations of the Fourteenth Amendment.

*   *   *

In certain ways, the early 1990s were a time of relative quiescence for the Court’s new federalism jurisprudence—in sharp contrast to the decade from 1995-2005, which scholars commonly identify with the “Rehnquist Revolution.” But the disability-related cases of Gregory and Heller—while not landmark cases of the kind that the Court would shortly take up—held signs for those who cared to see them of the Court’s lack of receptivity to rights-expanding uses of congressional power and its discovery of just how capacious constitutional federalism could be, even without the vehicle of the Tenth Amendment.

Indeed, in retrospect, Gregory’s key language sounds strikingly similar to the states’ rights rhetoric under which the Court would later substantially expand federalism protections (as we discuss in Part V). Observing that “our Constitution establishes a system of dual sovereignty between the States and the Federal Government” and (quoting Atascadero) that “the Framers” adopted “[t]he

325. Heller, 509 U.S. at 335 & n.1 (Souter, J., dissenting).


‘constitutionally mandated balance of power’ between the States and the Federal Government . . . to ensure the protection of ‘our fundamental liberties,’” Gregory attached its vision of federalism to deep and cherished traditions in American law.\textsuperscript{328} Moreover, to the extent that federalism doctrines had once been tarnished by their association with white supremacy and therefore unavailing in many contexts, Gregory suggested a sanitization or relegitimation — such that these doctrines could now be enforced even in the context of (at least disability and age) civil rights.\textsuperscript{329}

Similarly, Heller — while even more clearly not a landmark case — holds important clues, in retrospect, as to the expansive federalism-promoting (and Congress-restraining) rulings that the Court would soon hand down. As the Justices’ internal papers from Heller demonstrate, even the Court’s progressives were far from enthusiastic about the prospect of engaging with, much less endorsing, congressional efforts to overrule the Court’s understandings of the Constitution.\textsuperscript{330} Heller did, however, expose the Court to the existence of such efforts, setting the stage for confrontations to come.\textsuperscript{331} As the subsequent years would show, the Court was far from receptive to this legislative constitutionalism, viewing constitutional interpretation as exclusively its own domain.\textsuperscript{332}

\section*{V. THE REHNQUIST REVOLUTION AND BEYOND}

Parts II-IV have shown how disability cases provided the initial points of expansion in the 1970s, 1980s, and early 1990s for key aspects of the “new federalism.” In Part V, we connect these precedents to the federalism cases at the heart of the “Rehnquist Revolution.” We also show how these older precedents have continued to provide fodder for lesser-known “new federalism” advancements in the lower courts, in areas ranging from racial discrimination to social welfare to LGBTQ rights. This pattern has continued into the present, we argue in Part VI, with disability-related disputes providing opportunities for the Court


\textsuperscript{329} Id.

\textsuperscript{330} See, e.g., Justice Harry A. Blackmun, Draft Dissent 1, Heller v. Doe, No. 92-351 (June 23, 1993) (on file with Harry A. Blackmun Papers, Library of Congress, Box 624, Folder 1) (dissenting separately to note his view that heightened scrutiny should be applied, but not relying on the ADA findings).

\textsuperscript{331} See, e.g., Brief for Respondents, supra note 318, at *28 (arguing that in the ADA’s findings section Congress gave “a clear indication that all forms of discrimination against individuals with disabilities should be subject to strict judicial scrutiny”).

\textsuperscript{332} See infra Section V.B.
to limit Congress’s spending power. In this sense, the “new federalism” revolution is far from over—nor is the role of disability in its advancement.

A. The Expansion of State Sovereign Immunity

One of the most remarked-upon developments of the Rehnquist Court era was the expansion of state immunity (beyond the disability context) and its ultimate decoupling from the Eleventh Amendment’s text.333 Two decisions in particular—Seminole Tribe of Florida v. Florida334 and Alden v. Maine335—expansively interpreted the principle of state sovereign immunity and thereby rendered broad swaths of federal rights essentially unenforceable in federal or state court. Importantly—but underappreciated by scholars of the “new federalism”—each of these cases relied heavily upon the principles (re)established by disability-related precedents from the 1970s and 1980s.336

Seminole Tribe famously resurfaced the question that the Court grappled with in Union Gas (shortly after Justice Scalia joined the Court, but before the arrival of Rehnquist ally Clarence Thomas): did any provision of the Constitution other than the Reconstruction Amendments grant Congress the authority to abrogate state sovereign immunity?337 Recall that in Union Gas, a plurality of the Court had found that the Commerce Clause did.338 In Seminole Tribe, the Court overruled this aspect of Union Gas.339

The result of Seminole Tribe was a sharp curtailment of Congress’s authority to subject states to suits by individual citizens across a range of policy areas. As Justice Stevens noted in dissent, the Court’s holding arguably “prevent[ed] Congress from providing a federal forum for a broad range of actions against States,

333. See, e.g., Ernest A. Young, State Sovereign Immunity After the Revolution, TEX. L. REV. (forthcoming) (manuscript at 1-2), [https://ssrn.com/abstract=4350164 [https://perma.cc/SHJ7-U42W] (describing the significance of the Rehnquist Court’s state sovereign immunity decisions); Jackson, Seductions of Coherence, supra note 51, at 697 (“[T]he apparent textual hook of the Eleventh Amendment is now totally demooted from its text.”).


336. As described supra Section II.A, the Court initially established these principles in turn-of-the-twentieth-century cases like Hans v. Louisiana, 134 U.S. 1 (1890). But by the 1970s, while Hans nominally remained good law, the Court generally did not rely on its theoretical and historical underpinnings as the basis for adjudicating Eleventh Amendment or state immunity cases. See supra Section II.B (discussing Edelman); supra Section III.B (discussing Pennhurst II).

337. 517 U.S. at 52-53.

338. Pennsylvania v. Union Gas Co., 491 U.S. 1, 14-19 (1989) (reasoning that when the states ratified the Commerce Clause, they necessarily ceded their right to be immune from suit in matters that fell within this plenary grant of authority).

339. 517 U.S. at 66.
from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.”340

Scholars were similarly alarmed. Professor Vicki C. Jackson memorably called the decision “a clear mistake from which the Court should retreat as quickly as possible.”341

But under existing doctrine — specifically, the disability precedents we have discussed — *Seminole Tribe* was not so obviously a “mistake” (even if it was alarming). Recall that two disability cases, *Pennhurst II* and to a lesser extent *Edelman*, had revitalized the *historical account* at the center of *Hans* and, with it, the conclusion that the Eleventh Amendment was simply a stand-in for a much broader, nontextual principle of state sovereign immunity. That conclusion and its associated historical narrative, more than the actual holding of *Hans*, made possible *Seminole Tribe* by giving the Court a nontextual constitutional foundation for insisting on a previously unrecognized restraint on congressional power.342

And although two members of the *Seminole Tribe* majority had privately conceded the debatable accuracy of this revived historical account, the Court’s decision

---

340. *Id.* at 77 (Stevens, J., dissenting). Although many of Justice Stevens’s most important predictions have come to pass, others have not, because the Court has subsequently held that several non-Fourteenth Amendment powers can provide the basis for the abrogation of state sovereign immunity. See, e.g., *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2460 (2022) (holding that Congress could abrogate state sovereign immunity pursuant to its powers “[t]o raise and support Armies” and “[t]o provide and maintain a Navy”); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251-52 (2021) (holding that states “surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution”); see also *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004) (“[A] proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment . . . .”)


342. Thanks to *Pennhurst II*, Chief Justice Rehnquist explained in *Seminole Tribe*, it was “well established” at the time of *Union Gas* that the Eleventh Amendment stood for a broader “constitutional principle”: that “state sovereign immunity limited the federal courts’ jurisdiction under Article III.” 517 U.S. at 64. This understanding of the Eleventh Amendment precluded Congress from using its power under Article I to effectively expand the type of lawsuits that Article III allowed the federal courts to entertain, Rehnquist explained. *Id.* at 65. In making this point, Rehnquist acknowledged cases such as *Parden*, which suggested that Congress might enact a statute under the Commerce Clause and the states might waive their immunity from being sued under that statute, but he characterized this proposition as “completely unrelated” to Congress’s threshold authority to abrogate sovereign immunity. *Id.* In this manner, the questions of waiver and abrogation became distinct in a way that they had previously not been.
conveyed no such ambivalence, making the reclaimed *Hans* narrative central to its analysis.\footnote{343} Three years later, in *Alden v. Maine*,\footnote{344} the Court’s conservative majority made an even bolder advance. Repudiating dozens of precedents, including many of recent vintage, the Court held that, absent state consent or proper congressional abrogation, a state cannot be sued by a private individual in *state court* for violations of federal rights (in this case, the much-litigated FLSA).\footnote{345} Jettisoning the last major textual limitation of the Eleventh Amendment (its reference to precluding suits only in *federal court*), the Court cut state sovereign immunity entirely free from what had once been its textual roots and established it as a nontextual constitutional principle.\footnote{346} Once again, the Court justified this holding by invoking the principles and history at the core of *Hans*—that is, the

\footnote{343. See, e.g., Memorandum from Justice Anthony Kennedy to Chief Justice William H. Rehnquist 1, Seminole Tribe of Fla. v. Florida, No. 94-12 (Feb. 27, 1996) (on file with John Paul Stevens Papers, Library of Congress, Box 725, Folder 3) (acknowledging “the strong case often made against *Hans* and its progeny,” but declining to change his position); *Union Gas* Blackmun Notes, supra note 256, at 2 (quoting Justice Scalia that “*Hans* [was] wrong” but nevertheless concluding that there was “sufficient] reliance on it t[o] dissuade me [from] ORg it”); cf. *Seminole Tribe*, 517 U.S. at 64-69 (embracing the nontextual quasi-historical account of *Hans* revived by *Pennhurst II* and *Edelman*).


345. Id. at 759–60. For prior litigation over the extension of the FLSA to states and localities, see, for example, *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court held that insofar as the FLSA extended to employees performing traditional governmental functions, it violated the Tenth Amendment; *Maryland v. Wirtz*, 392 U.S. 183 (1968), which affirmed Congress’s Commerce Clause authority to extend the FLSA to certain state- and local-government employees but reserved the question of Eleventh Amendment immunity; and *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279 (1973). The announcement of *Alden* occurred on the same day as two other opinions which further extended *Seminole Tribe*’s reasoning to limit Congress’s ability to abrogate or “waive” state sovereign immunity under other Article I, Section 8 powers and which also further retrenched Congress’s Fourteenth Amendment, Section 5 powers. See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

narrative that Justice Rehnquist had quietly reclaimed in *Edelman* and that Justice Powell made central to *Pennhurst II*.\(^{347}\)

Were *Seminole Tribe* and *Alden* the only outgrowths of the state immunity cases we have discussed, that would be significant, for these cases have sharply circumscribed access to many federal rights when the relevant violator is a state actor.\(^{348}\) But the courts have continued to expand state immunity even after the nominal end of the “Rehnquist Revolution.”\(^{349}\) For example, in 2019, the Supreme Court reversed the forty-year-old precedent of *Nevada v. Hall*, which had held there was no constitutional sovereign immunity constraint on suits against states in the courts of their sister states.\(^{350}\) So, too, in the lower courts, the revived historical approach has allowed state immunity to expand, including by prohibiting plaintiffs from even seeking prospective relief (under *Ex parte Young*) against allegedly unconstitutional state conduct.\(^{351}\)

Perhaps even more significant than these specific cases is a more general observation: there is no obvious endpoint of the nontextual expansion of state immunity that the *Hans* historical account (revitalized in the disability cases of

---

\(^{347}\) The Court also prominently quoted the disability case *Atascadero* for the proposition that “[t]he 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.” *Alden*, 527 U.S. at 727 (quoting *Atascadero*, 473 U.S. at 238 n.2).

\(^{348}\) To some scholars, these Rehnquist Revolution decisions do not merit the alarm they caused because the federal government has other ways to enforce its priorities against the states. See, e.g., Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 215 (2006) (“[R]ecent cases only remove a single tool—individual civil actions against states as entities for retroactive money damages—from the universe of options available to the federal political branches to establish uniform national policy over those areas within its constitutional competence.” (footnote omitted)); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 92 (1999) (“In practice, both absolute immunity and absolute liability are less important than they first appear.”). Although this may be true in theory, the alternatives that scholars point to, such as direct federal enforcement, have never in practice been sufficiently funded to meaningfully fill the gap of private lawsuits. *See Funding Federal Civil Rights Enforcement: 2000-2003*, U.S. COMM’N ON C.R. 2 (Apr. 2002), https://www.usccr.gov/files/pubs/archives/crfund02/report.pdf [https://perma.cc/A8CU-PBBR]. Moreover, alternative methods of private enforcement, such as damages suits against individual state officials, face innumerable obstacles (e.g., qualified immunity). *See, e.g.*, Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 494–95 (2011).

\(^{349}\) *But cf.* *Young*, supra note 333 (manuscript at 32-38) (noting recent developments that have circumscribed the impact of the Rehnquist Court’s approach to state sovereign immunity).

\(^{350}\) *Hyatt*, 139 S. Ct. at 1492-99.

\(^{351}\) *See, e.g.*, Seminole Tribe of Fla. v. Fla. Dep’t of Revenue, 750 F.3d 1238, 1248-50 (11th Cir. 2014) (Jordan, J., concurring in part and dissenting in part) (noting that the majority’s opinion narrowly interpreting *Ex parte Young* meant that the plaintiff could not seek prospective relief as to an ongoing alleged constitutional harm).
Edelman and Pennhurst II) allows.352 If the extraordinarily well-established and longstanding principle that the Constitution posed no bar to state court litigation could be cast aside (as in Alden), based on a contra-textual and historically contested account of state immunity, why not others? Why do we assume that the ability of the United States to sue states, even to enforce individual rights,353 is secure? Or that the ability of individuals to sue counties and municipalities will remain unburdened by sovereign immunity?354 Although such retrenchments have not yet occurred, they are not clearly out-of-bounds in a world where the doctrine depends on an expansive and textually ungrounded sovereign immunity principle.

B. The Narrowing of Congress’s Authority Under Section 5

At the beginning of the period we have covered, the Fourteenth Amendment appeared to be a strong and special source of congressional authority.355 As the years went on, however, the Court made clear that Congress’s power under Section 5 had limits, paralleling similar holdings regarding the Commerce Clause.356

352. This is especially true today, when even the initial opponents of the Seminole Tribe approach have conceded it is binding precedent. See Allen v. Cooper, 140 S. Ct. 994, 1008-09 (2020) (Breyer, J., concurring in the judgment); see also Young, supra note 333 (manuscript at 1-2) (remarking on this development).

353. See, e.g., Alden v. Maine, 527 U.S. 706, 759 (1999) (suggesting that the Alden litigation would not have been barred by sovereign immunity had it been brought by the federal government). But cf. Memorandum, 3 Areas to Hit in Oral Argument/Conference, Alden v. Maine, No. 98-436 (n.d.) (on file with the John Paul Stevens Papers, Library of Congress, Box 745, Folder 6) (“But I cannot see why the federal government could bring a damages case against a State that an individual couldn’t.”).

354. See Lincoln County v. Luning, 133 U.S. 520, 530-31 (1890) (holding that the Eleventh Amendment protections against suit did not extend to Lincoln County); cf. Young, supra note 333 (manuscript at 4-6) (noting how nonobvious and conceptually incoherent students find the distinction between municipalities and state subdivisions in the state sovereign immunity context, given their treatment as arms of the state “for all purposes besides immunity”).


356. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 530-34 (1997) (holding that Congress exceeded its powers under Section 5 when it enacted the Religious Freedom Restoration Act, which, in part, subjected local ordinances to federal regulation); United States v. Morrison, 529 U.S. 598, 617-619, 627 (2000) (holding that Congress could not enact the civil-remedy provision of the Violence Against Women Act under either the Commerce Clause or Section 5 of the Fourteenth Amendment); Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 336, 374 (2001) (holding that Congress could not constitutionally abrogate state sovereign immunity in Title I of the Americans with Disabilities Act under Section 5 of Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding that Congress exceeded its authority under the Commerce Clause by passing the Gun-Free School Zones Act of 1990).
This Section discusses several significant cases that arose during the Rehnquist Revolution, and again emphasizes the importance of disability-related precedents, both to the current state of the doctrine and to where it may yet go.

While the disability cases we have discussed had already chipped away at Congress’s Fourteenth Amendment, Section 5 powers by the early 1990s, it was the Religious Freedom Restoration Act (RFRA) that spurred the Court to more dramatic action. Enacted with the express purpose of repudiating the Supreme Court’s opinion in Employment Division v. Smith, RFRA, like the ADA, posed a clear challenge to the Court’s preeminence in constitutional adjudication. But unlike the ADA, RFRA forced the question: rather than simply signaling to the Justices that Congress disagreed with their previously articulated constitutional reasoning, RFRA affirmatively provided a private cause of action to private litigants under the precise standards that the Court had only recently repudiated.

Perhaps unsurprisingly in view of Heller, the Court was not receptive to this legislative constitutionalism. In the 1997 case City of Boerne v. Flores, a 6–3 majority (including several of the Court’s progressives) reaffirmed that it was the prerogative of the Court—not Congress—“to say what the law is.”358 “When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued,” and when a later case or controversy confronted the Court with such an act, Justice Kennedy explained, the Court would not depart from its original interpretation.359 Adopting a “congruence and proportionality” test for whether Congress was truly enforcing constitutional principles under its Section 5 authority (as opposed to reimagining such principles), Boerne marked the first time that the Court imposed substantial restrictions on the substantive scope of this authority.

In the wake of Boerne, civil rights advocates hoped that Congress would maintain discretion as to what “enforcement” of the Fourteenth Amendment entailed. But, reprising a theme of this Feature, that room diminished substantially after the Court decided the disability case Board of Trustees of the University of Alabama v. Garrett.361

359. Id. (“[T]he Court will treat its precedents with the respect due them under settled principles . . . and contrary expectations must be disappointed.”).
360. Id. at 520, 533–34.
361. For the purposes of this Feature, it is worth observing that the Court need not have reached the Fourteenth Amendment issue in Garrett had cases like Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), which was informed by the Court’s earlier disability precedents, not been decided as they were. Unlike the Religious Freedom Restoration Act, Title I of the ADA was clearly valid legislation under the Commerce Clause. See Garrett, 531 U.S. at 374 n.9 (assuming
Garrett involved complaints by two Alabama employees of disability-based discrimination in violation of Title I of the ADA. Both employees sought money damages. Alabama argued that to the extent the ADA authorized such damages against a state, it exceeded Congress’s authority to abrogate states’ immunity. This argument built on the “congruence and proportionality” test from Boerne as well as on Kimel v. Florida Board of Regents, a post-Boerne case in which the Court found unconstitutional the ADEA’s intended abrogation of states’ immunity.362

Importantly, however, both Boerne and Kimel left a path to victory for the Garrett plaintiffs. Had the legislative record in these earlier cases showed a pattern of unconstitutional discrimination, Boerne and Kimel both suggested, the Court might have treated the statutes at issue as “reasonably prophylactic legislation” under Section 5.363 This was helpful to the Garrett plaintiffs, or so they thought, because of Congress’s extensive documentation of disability-based discrimination in the lead-up to the enactment of the ADA.364

Rather than defer to this extensive legislative record, however, the Garrett majority implicitly rejected the notion that Congress possessed special competence to evaluate the scope of an apparent discrimination problem, or even that Congress’s methods of factfinding could appropriately differ from the Court’s own. A “close review” of the legislative record revealed only “unexamined, anecdotal accounts” of disability-based discrimination by state officials, wrote Chief Justice Rehnquist, and, to the extent there was evidence of a problem, Congress had not done enough to formally declare one via official “findings.”365

---

363. Kimel, 528 U.S. at 88–92; see Boerne, 521 U.S. at 530–32 (emphasizing the lack of a congressional record of constitutional violations); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1, 6 (2003) (describing Boerne as “a transitional case,” which in many ways hewed to prior precedents and expressed deference to Congress, even as it “asserted a new form of control over Section 5 power”).
365. Garrett, 531 U.S. at 370–72. The majority’s treatment of the legislative record helps explain why the Court’s more liberal members dissented on the Fourteenth Amendment, Section 5 issue, see id. at 376 (Breyer, J., dissenting), even though they did not do so in earlier cases. Cf. Boerne, 521 U.S. at 544–49 (O’Connor, J., dissenting) (focusing on the issue of whether Smith was properly decided, not whether the Court properly addressed the scope of Congress’s Fourteenth Amendment Section 5 power); id. at 565–66 (Souter, J., dissenting) (same); Kimel, 528 U.S. at 92–99 (Stevens, J., dissenting) (arguing that the ADEA was valid Commerce Clause
Also central to the Court’s reasoning in Garrett was its explicit skepticism of the constitutional stature of the equality rights of people with disabilities.\(^\text{366}\) Thus, in Garrett, the Court reasoned that the Fourteenth Amendment imposed only limited constraints on disability discrimination and that these limited constraints set the boundaries for the types of congressional action that were permissible under Section 5.\(^\text{367}\) In later Section 5 cases, the Court would further emphasize the significance of this lesser constitutional stature, reasoning that if rational basis review applied (as it does, the Court stressed, in the disability law context), there must be a “widespread pattern of irrational” state discrimination in order for Congress to act.\(^\text{368}\)

While grounded in disability skepticism, Garrett has had consequences far beyond the disability sphere—a broader theme of this Feature.\(^\text{369}\) The effect of legislation and that Seminole Tribe was wrong, but not addressing the Fourteenth Amendment, Section 5 analysis).

\(^{366}\) Interestingly, in its majority opinion in Garrett, the Court did not rely on the congressional findings purporting to overrule Cleburne even though the Justices were certainly aware of their existence. See Garrett, 531 U.S. at 364 (holding that “it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees,” but not relying on the findings as evidence that Congress sought to do so); see also supra Section IV.C (describing findings-based arguments by the parties in Heller as well as their discussion internally); Memorandum from Justice Anthony Kennedy to Justice Sandra Day O’Connor 2, Sutton v. United Airlines, No. 97-1943 (May 27, 1999) (on file with John Paul Stevens Papers, Library of Congress, Box 799, Folder 1) (describing the “discrete and insular minority” language as “import[ing] doctrines with constitutional overtones” and arguing that it should not be cited by the Court in an ADA statutory interpretation case); Memorandum from Justice Sandra Day O’Connor to Justice Ruth Bader Ginsburg 1, Sutton v. United Airlines, No. 97-1943 (June 1, 1999) (on file with John Paul Stevens Papers, Library of Congress, Box 799, Folder 1) (making clear she did not add a discussion of the “discrete and insular minority” finding because “[n]o matter how it is written, such a paragraph would unnecessarily add a constitutional dimension to the case”). See generally Justice John Paul Stevens, Conference Notes, Bd. of Tr. of Univ. of Ala. v. Garrett, No. 99-1240 (n.d.) (on file with John Paul Stevens Papers, Library of Congress, Box 824, Folder 6) (noting comments by Chief Justice Rehnquist and Justice O’Connor that indicated a belief that Congress was changing the constitutional standard and seeking to “redefine[]” Cleburne). It is not clear why the majority omitted this argument, which arguably supported the result it reached.

\(^{367}\) Garrett, 531 U.S. at 366-68 (reasoning that even disability disparate treatment based on “negative attitudes” or “fear” of people with disabilities may not be unconstitutional); cf. Katherine A. Macfarlane, Teaching the Americans with Disabilities Act’s Constitutionality Without Othering People with Disabilities, in INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION & EQUITY BEYOND THE FIRST YEAR (forthcoming 2023) (manuscript at 5) (noting language in Justice Kennedy’s Garrett concurrence that “others” people with disabilities, making clear they are not part of the expected audience for the opinion).


\(^{369}\) Cf. L. Gwin, Our Confederate Court, MOUTH MAG., May-June 2001, at 5 (quoting disability rights litigator Judith Gran describing Garrett as “a blow to all civil rights laws”).
Garrett was to raise the difficulty of meeting the Boerne “congruence and proportionality” test. The Court had never before imposed rigid, judicial-style requirements on congressional factfinding in support of Fourteenth Amendment, Section 5 legislation. Nor had the Court closely scrutinized Congress’s conclusions that, in light of findings of unconstitutional state action, particular prophylactic legislation was necessary. With Garrett, the Court “abandon[ed] any pretense” of deference to Congress, Professors Robert C. Post and Reva B. Siegel observed.

Moreover, the Boerne line of cases continued to bear fruit after Garrett. Note-worthy disability cases include Tennessee v. Lane and United States v. Georgia, which have permitted courts to pull apart statutes enacted under Congress’s Section 5 power and consider the validity of specific provisions “as applied.” This has produced some nominal victories for disabled plaintiffs, but has also led to a stream of statutory challenges that are complex to litigate and difficult to defend. Another development in this vein is Coleman v. Court of Appeals, in which

370. See infra notes 402-404 and accompanying text. The Court famously upheld a Boerne-like challenge to the Family and Medical Leave Act (FMLA) in Hibbs, 538 U.S. at 721, 740, but scholars have characterized this case as unusual, possibly even a result of developments in Chief Justice Rehnquist’s personal life. See Reva B. Siegel, You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs, 58 STAN. L. REV. 1871, 1882-84 (2006) (reviewing various hypotheses as to Chief Justice Rehnquist’s motivations). In any event, Hibbs did not lower the rigor of the “congruence and proportionality” test.

371. Garrett, 531 U.S. at 382-83 (Breyer, J., dissenting).

372. Id. at 385-87.

373. Post & Siegel, supra note 363, at 6, 11.


375. See, e.g., Babcock v. Michigan, 812 F.3d 531, 534-35 (6th Cir. 2016) (deriving from Georgia a “three-part test” under which the courts must “[d]etermine . . . on a claim-by-claim basis, (1) which aspects of the State’s alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid”) (quoting Georgia, 546 U.S. at 159)); Hale v. King, 624 F.3d 178, 182-85 (5th Cir. 2010) (concluding that ADA Title II was not a valid exercise of Congress’s Section 5 authority insofar as it required “equal access for disabled inmates to prison educational and work programs”), superseded by 642 F.3d 492 (5th Cir. 2011) (addressing whether there was an ADA violation in the first instance, and concluding not; granting leave to amend and remanding for further proceedings including on the sovereign-immunity issue); Bowers v. Nat’l Collegiate Athletic Ass’n, 475 F.3d 524, 545-56 (3d Cir. 2007) (concluding that ADA Title II validly abrogates state sovereign immunity as applied to public education, but only after an extensive analysis of whether the defendant was a state entity entitled to Eleventh Amendment immunity, whether the defendant’s conduct was unconstitutional under Fourteenth Amendment Section 1 (thus automatically satisfying
the Court found that the self-care provisions of the Family and Medical Leave Act (FMLA) exceeded Congress’s Section 5 authority, despite previously finding that the family-care provisions were supportable.376

Outside of the disability context, challenges to Congress’s Section 5 authority have also continued, and at times, succeeded. In 2020, the Supreme Court found that the Copyright Remedy Clarification Act was not a proper exercise of Congress’s Section 5 authority.377 And civil rights defendants continue to press challenges in the lower courts to even core federal prohibitions on race discrimination, such as to Section 2 of the Voting Rights Act and federal hate-crimes laws.378 While at present, such challenges remain largely unsuccessful, it is not hard to imagine a future in which the rightward turn of the judiciary, coupled with the nondeferential as-applied approach that the disability cases have adopted, offers troubling possibilities for the retrenchment of other civil rights guarantees.

C. Clear Statement Rules and Death by “Clarity Tax”

As Professor Richard H. Fallon, Jr., observed in 2002, the “new federalism” revolution was not just about constitutional law; its power also derived from a variety of subconstitutional doctrines, including “equitable doctrines, interpretive canons, and other devices of statutory construction.”379 In this Section, we take up the clear statement rules that emerged from the disability federalism cases we have highlighted and we show that these rules have continued to provide ammunition to defendants in cases involving alleged violations of federal rights.

Fourteenth Amendment Section 5), and the ultimate “congruent and proportional” Fourteenth Amendment Section 5 issue); see also Koon v. North Carolina, 50 F.4th 398, 403-04 (5th Cir. 2022) (describing the relevant inquiry as “intricate” and to be avoided if possible).


378. See, e.g., Ala. State Conf. of the NAACP v. Alabama, 949 F.3d 647, 655 & n.7 (11th Cir. 2020) (declining to address the invitation to reassess whether Section 2 of the Voting Rights Act validly abrogates state sovereign immunity), vacated as moot, 141 S. Ct. 2618 (2021); United States v. Diggins, 36 F.4th 302, 306-16 (1st Cir. 2022) (rejecting a challenge to the federal hate-crimes law as exceeding the Thirteenth Amendment authority of Congress as applied to race); see also Franita Tolson, Enforcing the Political Constitution, 74 STAN. L. REV. ONLINE 88, 90-93 (2022) (noting that “[r]ecent cases have failed to clarify whether City of Boerne’s congruence and proportionality standard applies to exercises of congressional authority under Section 2 of the Fifteenth Amendment, . . . or to any other provisions that empower Congress to protect the right to vote and identifying the problems with applying this standard).

The list of clear statement rules to emerge from the Court’s disability federalism cases is long. These rules hold (1) that recipients of federal grants are bound only by terms that Congress has set forth with requisite clarity and specificity (*Pennhurst I*); (2) that Congress cannot abrogate state immunity absent an “unequivocal and textual”380 indication of Congressional intent (*Dellmuth, Atascadero, Employees*); (3) that an unstated congressional intent to rely on its Fourteenth Amendment, Section 5 powers should not be assumed (*Pennhurst I*); and (4) that “if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute’”381 (*Atascadero, Gregory*). Notably, “these doctrines operate as one-way ratchets,” Professor Abbe R. Gluck has explained; “each assumes that the scale should tip in the same direction every time (almost always toward states).”382

In the scholarly literature, these and other clear statement rules are sometimes described as imposing a “clarity tax”—implying that although they require additional effort from Congress, they do not ultimately preclude the enforcement of any rights that Congress has intended to establish.383 But when it comes to measures enacted decades ago, by nonreplicable congressional majorities, the assumptions undergirding this “clarity tax” framing are dubious. As the Supreme Court itself long ago recognized in a different context, “the power to tax involves the power to destroy.”384 Invalidated statutory provisions may face no realistic possibility of repassage, making a no-clear-statement finding the functional equivalent of *Marbury*-style judicial invalidation.385

Understanding this political and institutional reality illuminates the high stakes of contemporary challenges under the disability clear statement rules. Recall Michael McConnell’s 1982 observation about how few federal spending


Following the logic McConnell laid out, savvy state and local defendants have used *Pennhurst I*-derived “clear statement” arguments to contest all sorts of efforts to hold them accountable under such statutes (a phenomenon we elaborate on in Part VI). In a striking recent example, the Eleventh Circuit relied in part on *Pennhurst I* to conclude that a school district could not be held liable under Title IX for failing to allow a transgender student to use a gender-identity-appropriate restroom.

So too, contemporary defendants have continued to rely on *Dellmuth* and *Atascadero*’s clear statement rule (for abrogation of state immunity) to challenge even well-established rights. For example, in a series of recent cases, defendants have attacked Section 2 of the Voting Rights Act, which bans voting mechanisms that have racially disparate effects, for its alleged failure to sufficiently clearly abrogate state immunity.

Under the rule of *Dellmuth* and *Atascadero*, such abrogation must be “unequivocal and textual,” and some district courts and some circuit court judges have concluded that the abrogation of state immunity in Section 2 is not. While most courts continue to find that Section 2 sufficiently clearly abrogates state immunity, there is little in the doctrine to stop a circuit court or the Supreme Court from concluding that no such clear textual abrogation exists. If that happened, would Congress simply pay the “clarity tax”?}

---


387. See, e.g., Tani, supra note 16, at 1199-1203 (discussing cases in which arguments based on *Pennhurst I* resulted in plaintiffs’ inability to enforce the rights they claimed under various federal laws); Sossamon v. Lone Star State of Tex., 560 F.3d 316, 330-31 (5th Cir. 2009) (addressing a defendant’s “clear statement” argument in the context of a Spending Clause statute covering prisoners’ rights).


389. See, e.g., Christian Ministerial All. v. Arkansas, No. 19-CV-402, 2020 WL 12968240, at *4-6 (E.D. Ark. Feb. 21, 2020) (finding that Section 2 of the Voting Rights Act (VRA) did not speak with the clarity required to abrogate state immunity); Ala. State Conf. of the NAACP v. Alabama, 949 F.3d 647, 656-62 (11th Cir. 2020) (Branch, J., dissenting) (arguing that Section 2 of the VRA was not sufficiently clear to abrogate state immunity), vacated as moot, 141 S. Ct. 2618 (2021); see also Simpson v. Hutchinson, 636 F. Supp. 3d 951, 960-61 (E.D. Ark. 2022) (finding that other provisions of the VRA also did not indicate the requisite clarity to abrogate state immunity).

390. See sources cited supra note 389.

391. The Supreme Court’s recent opinion in *Allen v. Milligan*, 599 U.S. 1 (2023), was an important substantive reaffirmation of Section 2, but did not address the question of whether Section 2 is sufficiently clear in its abrogation of state immunity. Given that *Milligan* rejected many of
Although it is likely the prior Congresses that enacted and amended Section 2 believed that this provision abrogated state immunity and desired this effect, it is highly uncertain that today’s Congress would re-legislate that intention.

These are just two examples of the continuing relevance of the clear statement rules that emerged from disability federalism cases. Other recent cases show clear-statement attacks on the availability of disparate-impact claims under Title II of the Civil Rights Act of 1964, on the Government Employee Rights Act of 1991, on the whistleblowing provision of the National Defense Authorization Act, on the Trafficking Victims Protection Reauthorization Act, and more. In some instances, these attacks have succeeded, typically without congressional response. In short, state and local defendants are attentive to the continued power of the disability cases’ clear statement rules and continue to rely on them to retrench the scope of federal rights in the civil rights context and beyond.

Without a comprehensive review of the entire U.S. Code, it is impossible to enumerate all the federal rights that may be susceptible to invalidation in this manner. However, we need not await such a review to make a more general point. Litigants are alert to this avenue, and to the extent federal rights are struck down as insufficiently clear, the prospect of congressional reenactment in today’s environment may be dim. This is yet another way in which the disability-related precedents that helped build the “new federalism” retain great potential for those seeking to constrain federal power vis-à-vis the states.

the substantive challenges that state and local defendants have historically relied on to resist Section 2 litigation, it seems likely that such defendants may turn to increased reliance on the immunity argument.

392. See, e.g., Lewis v. Governor of Ala., 896 F.3d 1282, 1293 (11th Cir. 2018) (“Congress ‘clearly intended’ § 2 to be enforceable by private action and Congress clearly intended § 2 to be enforceable directly against the states.” (citation omitted) (quoting Morse v. Republican Party of Va., 517 U.S. 186, 232 (1996))), rev’d in part on other grounds on reh’g en banc, 944 F.3d 1287 (11th Cir. 2019).

393. See, e.g., Hardie v. Nat’l Collegiate Athletic Ass’n, 876 F.3d 312, 325-38 (9th Cir. 2017) (Faber, J., concurring in part and concurring in the judgment) (relying in part on Dellmuth and Atascadero to argue that such a ‘clear statement’ of congressional intent” is required to construe Title II of the Civil Rights Act of 1968 as “authoriz[ing] disparate-impact liability”); Alaska v. EEOC, 564 F.3d 1062, 1078-79 (9th Cir. 2009) (en banc) (Ikuta, J., dissenting) (arguing in a sex- and race-discrimination case that the Government Employee Rights Act did not have the requisite clarity to abrogate state sovereign immunity); Tex. Educ. Agency v. U.S. Dep’t of Educ., 992 F.3d 350, 359-62 (5th Cir. 2021) (holding that the National Defense Authorization Act’s whistleblowing provision was not clear enough to permit a finding of waiver of state sovereign immunity and that regulations could not supply the requisite clarity); Mojsilovic v. Oklahoma ex rel. Bd. of Regents, 841 F.3d 1129, 1133-34 (10th Cir. 2016) (holding that the Trafficking Victims Protection Reauthorization Act did not abrogate state sovereign immunity with requisite clarity, and that, in any event, the Act was enacted pursuant to Congress’s Commerce Clause authority, which does not empower Congress to abrogate).
VI. THE ONGOING FEDERALISM REVOLUTION: WILL HISTORY REPEAT ITSELF?

To this point, this Feature has used archival and doctrinal research to show how disability cases in the 1970s, 1980s, and early 1990s laid the groundwork for some of the most significant decisions of the Rehnquist Court’s “new federalism” revolution. We also showed how, in the Roberts Court era, state and local litigants have continued to urge parts of this revolution forward through litigation in the lower federal courts. This Part looks to the future, emphasizing litigants’ efforts to use new disability cases to impose restrictions on Congress’s spending power. If successful, these efforts would complete what many have viewed as the unfinished business of the Rehnquist Revolution.

Setting up this argument requires one more brief foray into the past, to show how close the Court came to substantially restricting Congress’s spending power during the Rehnquist Revolution itself. As we describe in Section VI.A, these close calls occurred in several cases involving sex discrimination.\(^\text{394}\) Consistent with our thesis, it appears that the salience of this particular context to Justice O’Connor—the fifth vote for the Rehnquist Revolution’s other doctrinal innovations—is precisely what prevented the Rehnquist coalition from obtaining a majority.\(^\text{395}\)

But as we show in Section VI.B, those sex-discrimination cases were not the only cases—then or now—in which litigants have sought to limit Congress’s Spending Clause powers: disability cases have also been a major site for such arguments in recent years.\(^\text{396}\) And although such disability cases have not yet resulted in dramatic retrenchments in the scope of Congress’s spending powers, they have provided the setting for incremental limitations on the scope and effectiveness of the spending power—limitations which could themselves provide the foundation for far more radical retrenchments.\(^\text{397}\) As in the past, meanwhile, these disability cases have attracted comparatively little attention.\(^\text{398}\) We urge

\(^{394}\) See, e.g., Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005); see also infra Section VI.A (discussing the scholarly view, as well as Davis and Jackson in depth).

\(^{395}\) See infra Section VI.A (describing Justice O’Connor’s departure from her role as the fifth vote for federalism restrictions in Davis and Jackson).

\(^{396}\) See infra Section VI.B (describing the incremental limitation of Congress’s spending power in disability law cases over the course of the last 20 years).

\(^{397}\) See infra Section VI.B.

\(^{398}\) For example, as of July 5, 2023, last Term’s decision in the disability case of Cummings v. Premier Rehab Keller, 142 S. Ct. 1562 (2022), had been cited only 27 times in the law-review literature, whereas the grant of certiorari alone in Students for Fair Admissions, Inc. v. President and
contemporary activists and scholars to recognize the pattern and take seriously what it portends.

A. Spending Power Retrenchment as the Rehnquist Revolution’s Unfinished Business: Sex Discrimination as the Stumbling Block

Scholars have sometimes characterized the Rehnquist Revolution as incomplete, because without greater limits on Congress’s spending power, Congress can achieve through inducement many of the objectives that other Rehnquist Revolution cases rendered unachievable under other congressional powers.\(^{399}\) We have quibbled with this framing by documenting how litigants have continued to make use of Pennhurst I (a spending power case) in the lower courts.\(^{400}\) But it is true that the spending power remains robust, in part because the Rehnquist Court did not accept invitations to more substantially limit it. This apparent contradiction has caused some scholars to hypothesize that perhaps the Rehnquist coalition was most concerned with federal intrusions on areas of traditional state concern, and that because Spending Clause retrenchment


\(^{400}\) See supra Section V.C.
opportunities did not implicate those areas, they did not result in the sort of blockbuster decisions we described in Part V.401

We see a different potential explanation. Notably, several of the Spending Clause cases that arose during the Rehnquist Revolution—those involving Title IX—did arise in a traditional area of state control (education) and also did come extraordinarily close to retrenching the spending power in meaningful ways.402 In Davis ex rel. LaShonda D. v. Monroe County and Jackson v. Birmingham Board of Education, four of the five Justices who formed the backbone of the Rehnquist Revolution voted in favor of limits on congressional spending authority.403 It was the defection of only one Justice—“new federalism” ally Justice O’Connor—that prevented the Rehnquist Revolution from spilling over robustly to Congress’s spending power in these cases.404 In our view, the best explanation for O’Connor’s failure to go along in these cases is that, in contrast to the disability cases that we have discussed, the group at issue (women and girls) was highly salient to the broader public405 and to O’Connor personally.406

401 See, e.g., Baker, Federalism and the Spending Power, supra note 399, at 217-21 (offering this explanation for why the Rehnquist Court may have neglected opportunities to meaningfully retrench Congress’s spending power).

402 See infra notes 407-409 and accompanying text.

403 Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005). There are other cases in which Justice O’Connor joined her conservative colleagues in applying Pennhurst I to partially limit Title IX, but the potential impact of those cases was undercut by cases such as Davis and Jackson. See, e.g., Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) (holding—in part based on Pennhurst I—that schools could not be subject to damages suits exclusively on the basis of respondeat superior liability, with Justice O’Connor joining the conservatives in a 5-4 ruling). In addition, during the same time frame, the Rehnquist pro-federalism majority sidestepped another major opportunity to retrench Congress’s Spending Clause authority in the race case of Alexander v. Sandoval, 532 U.S. 275 (2001), though they did find against the plaintiffs on other grounds. Cf. Brief for Petitioners at 20-36, Alexander, 532 U.S. 275 (No. 99-1908) (grounding their arguments against private enforcement of disparate-impact requirements under Title VI primarily on a stringent application of Pennhurst I’s clear statement rule).

404 See, e.g., cases cited supra note 403.

405 R. Shep Melnick, Sexual Harassment and the Evolving Civil Rights State, in The Rights Revolution Revisited, supra note 207, at 123, 140 (noting that in the wake of Anita Hill’s 1991 sexual harassment allegations against Clarence Thomas, sexual harassment in educational settings received greater study and prominent media coverage).

One need only look to the dissents in *Davis* and *Jackson* to imagine what a slightly different context, such as one involving disability-based education discrimination, might have wrought for Congress’s Spending Clause authority had the same questions arisen there. The four dissenters in *Davis* cast Congress’s use of the spending power as deeply threatening: “[I]f wielded without concern for the federal balance, [that power] has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern.” The context at issue in *Davis*—school responses to student-on-student sexual harassment—struck the dissenters as precisely such an arena. As they put it, “[e]nforcement of the federal right recognized by the majority means that federal influence will permeate everything from curriculum decisions to day-to-day classroom logistics and interactions,” a dramatic and unwarranted incursion on state prerogatives.

The *Davis* dissenters’ proposed solution to this problem was the application of *Pennhurst I*’s clear statement rule to severely restrain the permissible application of Spending Clause enactments. Although peer harassment was well recognized as a form of sex discrimination by the time of the relevant conduct in *Davis*, the dissenters argued that much more was required before a school district could be held accountable under that provision. This was because Title IX was Spending Clause legislation “much in the nature of a contract.” In their view, Congress must have detailed each way in which the statute’s broad proscription on discrimination might be implemented.

---

407. See infra notes 408-410 and accompanying text.
408. *Davis*, 526 U.S. at 654-55 (Kennedy, J., dissenting).
409. Id. at 686.
410. See infra notes 411-413 and accompanying text.
411. *Davis*, 526 U.S. at 655 (Kennedy, J., dissenting) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). On the issue of peer harassment being recognized as a form of discrimination at this time, see, for example, Reply Brief for Petitioner at 8, *Davis*, 526 U.S. 628 (No. 97-843).
412. See, e.g., *Davis*, 526 U.S. at 664 (Kennedy, J., dissenting) (observing that Congress could not have clearly imposed liability for peer-on-peer sexual harassment in Title IX because “[w]hen Title IX was enacted in 1972, the concept of ‘sexual harassment’ as gender discrimination had not been recognized or considered by the courts”).
in *Davis* and even more clearly in the later case of *Jackson v. Birmingham Board of Education*, could regulatory guidance)\(^{413}\). Where a statute lacked this level of specificity, the dissenters urged, the absence must redound to the benefit of the regulated entities (here, educational institutions that received federal funds).

Had the four dissenters in *Davis* and *Jackson* secured O’Connor’s vote and become the majority, they would have dramatically constrained the real-world efficacy of Spending Clause legislation. Virtually no statute, least of all those with broad sweeping language and scope, itemizes with specificity all possible applications. Indeed, the much-decried “major questions doctrine,” which operates on a similar “notice in the statute of the specifics” premise, is in many ways far more limited than the requirements that the dissenters in cases such as *Davis* and *Jackson* would have imposed.\(^{414}\) Thus, more so than many scholars have acknowledged, the Court came *very* close during the Rehnquist era to adopting meaningful constraints on Congress’s Spending Clause authority, consistent with its broader federalism project.\(^{415}\) It was apparently only the context—sex discrimination—that forestalled such an outcome (and, as we describe above in Section V.C, only incompletely). Might a different context produce different results? We address this possibility in Section VI.B.

\(^{413}\) See, e.g., *id.* at 675 (describing analogies to “Title VII hostile environment harassment” as inapposite and inadequate to provide the requisite clear notice “because schools are not workplaces and children are not adults”); *id.* at 669 (“Even assuming that [Department of Education (DOE)] regulations *could* give schools the requisite notice, they did not do so.”) (emphasis added); *cf.* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 192 (2005) (Thomas, *J.*, dissenting) (arguing that the longstanding existence of a DOE regulation prohibiting retaliation in the Title IX context was inadequate to afford funding recipients with the requisite notice of whether Title IX included liability for retaliation).

\(^{414}\) See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (noting that the major questions doctrine applies where, *inter alia*, the agency acts in an area of substantial “economic and political significance”). The specificity requirement that the dissenters in *Jackson* and *Davis* would have adopted would have applied to all applications of Spending Clause law, no matter how trivial. *See generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 U. Va. L. Rev. 1009 (2023) (describing and critiquing the major questions doctrine).

\(^{415}\) In fact, the original vote in *Davis* appears to have been *against* the Plaintiff, although it is not clear that the Justice who switched sides (Justice Souter) would have gone along with the broad Spending Clause rationale that the dissenters ultimately embraced. *See Memorandum from Justice David H. Souter to the Conference 1, Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, No. 97-843 (Jan. 21, 1999) (on file with John Paul Stevens Papers, Library of Congress, Box 788, Folder 3).
B. Disability and the Contemporary Threat to Spending Clause Legislation

Even before Justice Rehnquist’s retirement, many observers had declared the Rehnquist Revolution effectively over. But as we detail in this Section, there is at least one area in which the Revolution has never ended: efforts at the Supreme Court to restrain the scope of Congress’s spending power. As in the earlier history we have traced, disability cases have been and continue to be key. This Section illustrates how recent disability cases (often building on older ones) have provided the site for arguments that narrow the scope of Congress’s spending power—and could provide the basis for even further, more radical retrenchments.

Hints of what was to come were visible in *Barnes v. Gorman*, a little-noticed case decided in 2002. Involving the entitlement of an injured paraplegic arrestee to punitive damages, *Barnes* could have been decided, as the concurring Justices argued, on the basis of longstanding precedents requiring clear congressional intent to subject municipalities to punitive damages. Instead, the majority embraced an argument neither raised nor ruled on below: that *Pennhurst I*’s “in the nature of a contract” language meant that contract law formed the outer limits of the scope of Spending Clause legislation—and that substantive contract law would not permit punitive damages.

As the concurring Justices observed, this argument extended *Pennhurst I* in important and “novel” ways: never before *Barnes* had the Court imported substantive contract law into its interpretation of Spending Clause statutes. Moreover, prior cases had cautioned that *Pennhurst I* did not mean that all ambiguities

---


418. In the year following the decision, *Barnes* was cited 45 times in the law review literature. In contrast, *Davis*, discussed supra Section VI.A, was cited 113 times in the year after it was decided. Search conducted on Westlaw, citing references.

419. *Barnes*, 536 U.S. at 191-93 (Stevens, J., concurring).

420. *Id.; see also id.* at 186-88 (majority opinion) (relying on substantive contract law in rejecting the availability of punitive damages under Section 504 of the Rehabilitation Act).

421. *Id.* at 191-93 (Stevens, J., concurring).

422. See, e.g., Leading Cases, *Spending Clause*, 116 HARV. L. REV. 312, 318 (2002) (“The contract analogy is not, and has never been, a source of substantive contract principles per se.”).
in a law had to be construed against the federal government—a limitation that the majority in *Barnes* appeared to ignore.423 *Barnes* thus offered a significant opening for state and local defendants to argue for greater limitations on Congress’s spending power—at the very same time that the Court was narrowly rejecting retrenchment of Congress’s spending powers in the sex context. In other words, *Barnes* gave defendants a reason to continue this line of attack despite lack of success elsewhere on the docket.

Post-*Barnes*, state and local defendants advanced similar arguments in an ever-wider array of contexts.424 Strikingly, as in the 1970s and 1980s, the overwhelming majority of cases in which these arguments have succeeded at the Supreme Court have been disability related.425 And as in that earlier era, these cases afford a future Supreme Court ample opportunity to reach beyond the disability context.426

Consider, for example, *Arlington Central School District v. Murphy*, which was decided in 2006 under the Individuals with Disabilities in Education Act and which doubled down on the idea that *Pennhurst I*’s “clear notice” principles apply to even trivial details of Spending Clause legislation.427 As we have noted, almost no Spending Clause statutes can or do specify in perfect detail all possible issues covered by the law.428 *Barnes* and *Arlington Central* have buttressed efforts in the lower courts by federal funding recipients to argue that the absence of such specificity amounts to insufficient notice—and thus a lack of any obligation on their part—under a vast array of federal Spending Clause laws.429

Other losses before the Roberts Court are arguably even more troubling from the perspective of the future of Congress’s spending power. Relying significantly on *Pennhurst I* and *Barnes*, the Court held for the first time ever in *National

---


424. *See infra* notes 427–441 and accompanying text.

425. *See id.*

426. *See id.*

427. 548 U.S. 291, 295–98 (2006) (applying the *Pennhurst I* clear-notice requirement to the question of whether the Individuals with Disabilities in Education Act permits recovery of expert fees); *cf. id.* at 317 (Breyer, J., dissenting) (“[N]either *Pennhurst* nor any other case suggests that every spending detail of a Spending Clause statute must be spelled out with unusual clarity.”).

428. *See supra* notes 386–388 and accompanying text.

429. *See supra* Section V.C (discussing funding recipients’ efforts in the lower federal courts to argue that they lacked the requisite notice).
Federation of Independent Business (NFIB) v. Sebelius\textsuperscript{430} that a congressional spending program (the Affordable Care Act’s Medicaid expansion) was unconstitutionally coercive.\textsuperscript{431} While the theoretical constraint on coercion predated NFIB, the case gave it new grounding in notions of a voluntary contractual relationship.\textsuperscript{432} As the Roberts plurality and the Scalia dissent both put it, “[t]he legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.”’”\textsuperscript{433} Coercive offers of conditional funding do not meet this requirement and thus would (as in NFIB itself) be invalidated.\textsuperscript{434}

NFIB was a complicated and fractured case, and scholars have offered differing accounts of how broadly the coercion principle of NFIB sweeps,\textsuperscript{435} but NFIB’s reasoning nonetheless represented a shift toward a theory of coercion that could meaningfully constrain Congress’s spending authority.\textsuperscript{436} Unlike prior precedents (such as South Dakota v. Dole),\textsuperscript{437} which acknowledged the

\begin{itemize}
\item \textsuperscript{430} 567 U.S. 519 (2012). One might characterize NFIB as a disability-related case, although that was not the dominant framing at the time. See Harris, Tani & Wakschlag, supra note 398, at 1710-20 (identifying NFIB as a disability-related case because of the prevalence of disability among the population that stood to benefit from the Affordable Care Act’s Medicaid expansion).
\item \textsuperscript{431} See NFIB, 567 U.S. at 575-88 (plurality opinion) (finding the Medicaid expansion to be impermissibly coercive but allowing it to be offered to states if decoupled from existing Medicaid funding); id. at 672-91 (Scalia, J., dissenting for four Justices) (finding the Medicaid expansion impermissibly coercive but articulating the view that it should be struck down in its entirety).
\item \textsuperscript{432} See id. at 576-77 (plurality opinion); id. at 676-77 (Scalia, J., dissenting).
\item \textsuperscript{433} Id. at 577 (three-Justice plurality opinion) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); id. at 676 (Scalia, J., dissenting for four Justices) (quoting this same language from Pennhurst); see also id. at 637 (Ginsburg, J., concurring in part and dissenting in part) (critiquing the load-bearing role of Pennhurst I in Chief Justice Roberts’s opinion).
\item \textsuperscript{434} See id. at 581-82 (plurality opinion).
\item \textsuperscript{435} See, e.g., Bagenstos, The Anti-Leveraging Principle, supra note 398, at 864-65 (interpreting NFIB as embracing a relatively limited antileveraging principle); Lynn A. Baker, The Spending Power After NFIB v. Sebelius, 37 Harv. J.L. & Pub. Pol’Y 71, 81 (2014) (noting that it is “far from clear” what governing Spending Clause doctrine follows from NFIB); Mitchell N. Berman, Conditional Spending and the Conditional Offer Puzzle, in The Affordable Care Act Decision: Philosophical and Legal Implications 257, 258-61 (Fritz Allhoff & Mark Hall eds., 2014) (treating the Court as having adopted an “anti-compulsion” principle and characterizing that principle as “doubtful and poorly defended” (citation omitted)). In the decade since NFIB, the Court has yet to declare another federal spending program unduly coercive, but litigants have continued to urge lower courts to do so. See Tani, supra note 16, at 1207 (citing examples).
\item \textsuperscript{436} See infra notes 440-443 and accompanying text.
\item \textsuperscript{437} 483 U.S. 203 (1987).
\end{itemize}
possibility of coercion but offered no meaningful basis on which to conclude that Congress had crossed the line, NFIB situated coercion as a necessary corollary of the “contractual” nature of spending legislation. In so doing, it further institutionalized the notions that (1) Spending Clause legislation is in some sense substantively contractual and (2) true (uncoerced) consent is foundational to such legislation’s validity.

In other recent disability cases, the Roberts Court has further legitimized these ideas. The Court’s decision in Cummings v. Premier Rehab Keller, while nominally relying on Pennhurst I notice reasoning, again resorted to substantive contract law to decide what remedies were available under federal spending legislation (there, two Spending Clause civil rights provisions modeled after Title VI of the Civil Rights Act of 1964). So, too, in the disability case Armstrong v. Exceptional Child Center, Inc., a plurality of the Court came within one vote of relying on contract law to hold that third-party beneficiaries should not be permitted to enforce spending legislation rights.

This trend—toward treating Spending Clause legislation as substantively contractual (and limited by substantive contract principles)—could have far-reaching implications for the (un)enforceability of federal law. And yet, aside from NFIB, such cases have attracted comparatively little attention from the

---

438. See NFIB, 567 U.S. at 577 (plurality opinion) (quoting Pennhurst, 451 U.S. at 17); see also id. at 676 (Scalia, J., dissenting) (quoting this same language from Pennhurst).

439. See supra notes 432-434. As Mitch Berman has observed, the Court’s reasoning in NFIB is highly questionable as a matter of contract law, which does not generally afford contracting parties the right to void their contractual obligations due to a lack of meaningful choice whether to accept the offer to contract. See Berman, supra note 435, at 261-62. Nonetheless, even if supported only by the Court’s ipse dixit, the Court’s reasoning in NFIB strongly suggests that Pennhurst I’s contract analogy can (and should) have legs beyond its “clear notice” roots (including substantive limitations on Congress’s spending power), and that a ban on coercion is among those substantive limitations.

440. See Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1571-74 (2022); see also id. at 1570 (articulating the view that the “legitimacy of Congress’s power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on ‘whether the [recipient] voluntarily and knowingly accepts the terms of that “contract”’”); Harris, Tani & Wakschlag, supra note 398, at 1725-28 (explaining Cummings and its implications for the rights protected by other Spending Clause civil rights statutes).


scholarly and advocate community (certainly less than one would imagine were they decided in the comparatively higher salience areas of race, sex, or sexual orientation). 443

Of course, the Court’s most recent disability decision in Talevski v. Health & Hospital Corp. rejected one bold extrapolation of substantive contract-law arguments: that spending-legislation rights are virtually never enforceable under § 1983. 444 But, importantly, Talevski does not overrule cases like Barnes, Cummings, or NFIB. 445 Moreover, as some commentators have observed, decisions such as Talevski may have been in part the product of certain Justices’ desires to moderate their public perception in a Term where they were under intense scrutiny and poised to strike down affirmative action, 446 among other dramatic potential disruptions. If this is true, Talevski may not mark a genuine change in the direction of the Court’s spending jurisprudence, but rather only a temporary reprieve. 447

Taken together, these cases unsettle the notion that the Rehnquist Revolution is a thing of the past and that it left one major source of congressional power unscathed. Rather, these cases show that attacks on Congress’s spending authority have continued into the present and that, in the context of disability-related laws, they are often succeeding. So far, however, these attacks have received

443. See supra note 398 and accompanying text.

444. See Talevski, 143 S. Ct. at 1453-54; Harris, Tani & Wakschlag, supra note 398, at 1733-35 (summarizing the defendant’s arguments in Talevski and elaborating on their significance).

445. Indeed, the majority opinion in Talevski cites neither Barnes nor NFIB, and it cites Cummings only in describing the defendant’s arguments. See Talevski, 143 S. Ct. at 1454; see also Sara Rosenbaum, Timothy Jost, MaryBeth Musumeci & Alexander Somodevilla, A Victory for Medicaid Beneficiaries in Supreme Court’s Talevski Decision, HEALTH AFFS. (June 9, 2023), https://www.healthaffairs.org/content/forefront/hold-6-9-piece-talevski [https://perma.cc/296YTCPK] (noting that nothing in Talevski prevents recipients of Medicaid funds from raising similar arguments in cases where Medicaid beneficiaries allege violations of other statutory rights).


447. Talevski was a real and substantial victory for disabled rights-claimers and for congressional power. Without diminishing this victory, we caution against interpreting Talevski as a clear indicator of the Court’s future direction.
relatively little attention, replicating a pattern that we document from the 1970s, 1980s, and 1990s.

It is a pattern this Feature aims to disrupt. Today, the Spending Clause offers the most practical route for the federal government to address a range of pressing national problems—occurring in the realms of civil rights, education, social welfare, criminal justice, and more.\textsuperscript{448} The spending power’s possible retrenchment thus merits the public’s strictest scrutiny.

CONCLUSION

This Feature has offered a revised history of the “new federalism,” focused on the foundational importance of disability-related cases. Without the disability federalism precedents of the 1970s, 1980s, and early 1990s, we have argued, well-known “new federalism” decisions from the late 1990s and early 2000s could not have been reasoned as they were. To be sure, the Court could have developed the building blocks of important “new federalism” doctrines in non-disability contexts. But the reality is that, in the several significant areas we discuss, it did not.

In our search for an explanation, we have emphasized several interrelated ideas, which we hope that other scholars will join us in exploring: (1) that the American public perceived disabled citizens as having a more tenuous claim on the polity, making it easier for state and local defendants to cast these citizens’ rights claims as unfairly burdensome and costly, especially in an era when subnational governments were under intense fiscal strain; (2) that legal actors who might have been inclined to resist “new federalism” advancements were not alert to the way federalism doctrines might “spill over” from the disability context into other, higher-priority contexts (e.g., racial equality)—perhaps because they

\textsuperscript{448} See, e.g., Eloise Passachoff, \textit{Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off}, 124 YALE L.J. 248, 262-263, 267, 271 (2014) (describing the wide array of contexts in which federal grant making occurs, including antidiscrimination, education, and social welfare provision); Cmty. Oriented Policing Servs., \textit{Community Development Policing (CPD) Microgrants Program}, U.S. Dep’t Just., https://cops.usdoj.gov/cpdmicrogrants [https://perma.cc/83BV-2XE7] (describing federal grants targeted at encouraging policing reform, including novel community violence reduction initiatives and recruitment of officers reflecting the diversity of the community). The Spending Clause is, of course, especially (but not exclusively) important in those areas in which the Supreme Court has constricted other sources of federal authority. See, e.g., Katie Eyer, \textit{Rehabilitation Act Redux}, 23 YALE L. & POL’Y REV. 271, 309-311 (2005) (describing the importance of the Rehabilitation Act as Spending Clause legislation in the aftermath of decisions limiting the enforceability of the ADA); Tani, \textit{supra} note 16, at 1207-08 (“[H]istorically, distributions of federal funds have been a crucial vehicle for protecting civil rights and advancing the general welfare. This vehicle became even more important as the Supreme Court placed greater limits on Congress’s power under . . . the Fourteenth Amendment and the Commerce Clause.” (footnotes omitted)).
saw disability-based exclusion as *sui generis* or, in some sense, rational; and (3) that some of the savviest architects of the “new federalism” seized the opportunities that lower-salience disability cases afforded, articulating federalism principles in the disability context that likely would have generated (and sometimes did generate) greater resistance elsewhere.

We see a similar dynamic today, with troubling implications. Even after the nominal end of the Rehnquist Revolution, disability-related cases have continued to chip away at a broad and robust congressional spending power, raising the possibility that the Roberts Court will finish the Rehnquist Court’s “unfinished business.” In the lower courts, meanwhile, state and local defendants have used the earlier disability-law precedents that we have discussed to attempt to evade liability for alleged violations of federal law. Congress’s intentions vis-à-vis racial justice, immigrants’ rights, sexual harassment, and LGBTQ rights, among other areas, hang in the balance.

For those who are persuaded by our account and share our concerns about where the “new federalism” may yet go, the lessons of this Feature are at once straightforward and complex. The simple takeaway is that cases involving the rights of disabled people implicate the rights of everyone; we should treat these cases accordingly. The complexity arises from our society’s continued ambivalence about disability rights—and, more fundamentally—about disability itself. Efforts to contest the expansion of the “new federalism” may thus have to go beyond the realm of litigation to include all the realms where we attach social meaning to ability and disability. Precedent shapes and constrains constitutional interpretation, this Feature shows, but so, too, do the limits of our social imagination.

---