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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.

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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,¹ 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.² But Rehnquist had left enough of a paper trail—including opposition to local civil rights measures in Arizona³—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.⁴

With concerns mounting, Rehnquist prepared a memo for Nixon advisor Leonard Garment offering “information” that he hoped might inform “press coverage.”⁵ 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.⁶ He even mentioned the handful of Black children on his son’s sports

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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”).
 2. In 1969 and 1970, the Senate rejected two of President Nixon’s nominees, Clement Haynsworth and G. Harrold Carswell. Both were circuit judges from Southern states. Nixon understood Rehnquist as a nominee who had better odds of confirmation but could nonetheless be sold to Southerners as a racial “reactionary.” See Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1023 (2006) (quoting The President Calling, *Richard M. Nixon, Choosing Rehnquist*, AM. RADIOWORKS, <https://americanradioworks.publicradio.org/features/prestapes/f5.html> [https://perma.cc/U3HG-9UBM]); JOHN A. JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 95-130* (2012) (describing Nixon’s “southern strategy” for filling Supreme Court vacancies and explaining why Rehnquist eventually emerged as an appealing choice).
 3. Curt Matthews, *Rehnquist Tried to Block Civil Rights in Arizona*, BOS. GLOBE, Oct. 31, 1971, at 50, 50.
 4. *Celler Predicts OK in Senate for Nominees*, L.A. TIMES, Nov. 1, 1971, at A13. Soon to be discovered, meanwhile, was a 1952 memo in which a young Rehnquist, then clerking for Justice Robert Jackson, appeared to advocate for a separate-but-equal interpretation of the Fourteenth Amendment in *Brown v. Board of Education*. See John P. MacKenzie, *Confirmation of Rehnquist Voted*, 68-26, WASH. POST, Dec. 11, 1971, at A1.
 5. Memorandum from William H. Rehnquist, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to Leonard Garment 1 (Nov. 1, 1971) (on file with Leonard Garment Papers, Library of Congress, Box 39, Folder 4).
 6. *Id.* at 1-2.

teams and the Black “clienteles” that benefited from his wife’s volunteer work.⁷ The exercise veered uncomfortably close to “saying, ‘Some of my best friends . . . etc.,’” Rehnquist admitted.⁸ But he hoped the “fragments” he offered would prove useful in the lead-up to the confirmation hearing.⁹ Ultimately, the Senate voted to confirm Rehnquist, but only after several days of acrimonious proceedings¹⁰ and with a relatively large (for the time) number of “nay” votes.¹¹

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,”¹² plus several decades of significant federal involvement in undoing Jim Crow, the Court articulated a “new federalism.”¹³ 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”).

12. Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 12 (1996) (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 378 (1987)).

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.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 *disability*. In the 1970s and 1980s, 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 disability cases, the Court could not or would not have reoriented its jurisprudence. It is simply to observe that, time and again, disability-related cases¹⁵ were crucial building blocks of what would become the “new federalism.” In this same historical period, meanwhile, the Court declined similar opportunities in non-disability-related cases.

If the pattern is as clear as we suggest, why have other scholars and Court watchers missed it?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 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, disability was a type of difference that, to many people at the time,

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14. In this regard, the “new federalism” was as much about intra-branch dynamics as it was about federal/state divisions of power. See *infra* Section I.B.
 15. In invoking “disability,” we are alert to this concept’s slipperiness and changeability (despite a current tendency to define disability as a documentable medical problem). Who appears “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.” KIM E. NIELSEN, *A DISABILITY HISTORY OF THE UNITED STATES*, at xiv (2012). The cases we treat as “disability-related” are ones that we believe people at the time would have so characterized, based on litigants’ invocation of disability-focused laws or their descriptions of the populations principally involved.
 16. Legal scholars have published extensively on the “new federalism,” see *infra* Section I.B, but have paid scant attention to the role that disability played in key doctrinal developments. To the extent they have discussed the disability-related cases we emphasize, they have tended to treat disability as a background fact rather than a theme that connects foundational cases. We are aware of only a few exceptions. See Karen M. Tani, *The Pennhurst Doctrines and the Lost Disability History of the “New Federalism,”* 110 CALIF. L. REV. 1157, 1157 (2022); cf. Jamelia Morgan, *Disability’s Fourth Amendment*, 122 COLUM. L. REV. 489, 491-92 (2022) (observing that 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. See, e.g., Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1201-11 (2022); Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 81-85 (2020).

had a natural connection to one's degree of civic and social inclusion.¹⁷ There is a deep American history of conflating disability with societal burden¹⁸ – of casting disabled people as unsightly,¹⁹ expensive,²⁰ and a threat to public welfare.²¹ 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.

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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)).
 19. SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 2 (2009).
 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 important²² – 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”).²³ 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.²⁴

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,²⁵ and (2) on the Court’s increasing

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22. Under some definitions a *majority* of Americans are disabled. Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 564–65 (2021).
 23. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1950 (2003); see also Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2212–14 (2023) (using examples from federal Indian law to document legislative constitutionalism).
 24. In offering these observations, we refer to “new federalism” doctrines, not federalism more generally. Judicial understandings of federalism are just one piece of the American federalist system. See Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (offering a theory of U.S. federalism that incorporates a range of institutions at multiple levels of government and thereby moves beyond the “constitutional account” of federalism); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 461 (2012) (focusing on how states operate within a system of cooperative federalism rather than on how judicial opinions “envision” the states); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014) (illustrating how federal statutory design shapes the operation of modern federalism); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079–81 (2014) (exploring the political-institutional workings of U.S. federalism).
 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.²⁶ In contrast, we acknowledge that disability law cases played a lesser role in several other parts of the “new federalism” revolution.²⁷

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

at the time and to point readers to junctures when meanings shifted. Thus, in discussing state-immunity jurisprudence from before the “Rehnquist Revolution,” we sometimes use the phrase “Eleventh Amendment immunity.” When writing in our own authorial voice, we often use the shorthand “state immunity” in place of the longer (and more contested) term “state sovereign immunity.”

26. In noting the restrictions that the Court placed on Congress during this period, we are not suggesting that the Court always pursued a restrictive approach, or that states always asked for one. For instance, states were generally aligned with Congress when it placed restrictions on prisoners' access to federal courts. *See, e.g.,* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566 (2003) (observing that the “critiques of inmate litigation” that led to the Prison Litigation Reform Act did not “originate in the Congress” but rather were orchestrated by organizations of state and local attorneys).
27. We discuss neither the Court's “anti-commandeering” cases, *see, e.g.,* *New York v. United States*, 505 U.S. 144, 175-76 (1992), nor the cases in which the Court articulated new limits on the Commerce Clause power, *see, e.g.,* *United States v. Lopez*, 514 U.S. 549, 567-68 (1995). Nor do we discuss the Court's justiciability doctrines, which narrowed access to federal courts during this period. *See, e.g.,* *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). In the interest of space, we also leave open the possibility that disability mattered to federalism doctrines other than the ones we have emphasized. *See, e.g.,* *Stump v. Sparkman*, 435 U.S. 349, 364 (1978) (recognizing absolute judicial immunity in the context of the judicial authorization of sterilization of a fifteen-year-old girl with intellectual disabilities); *see also* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 610 (2001) (narrowing the circumstances in which attorney's fees may be recovered in private lawsuits to enforce civil rights in a disability-related case); *City of San Francisco v. Sheehan*, 575 U.S. 600, 617 (2015) (deciding a modern qualified-immunity case involving a woman with a mental-health disability).

appointments to the Court and the politics animating those choices.²⁸ Also clearly relevant were the fiscal pressures that state and local governments experienced in the 1970s and 1980s.²⁹ 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.³⁰

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.³¹

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28. See ERIC N. WALTEBURG & 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).
29. See BRENT CEBUL, *ILLUSIONS OF PROGRESS: BUSINESS, POVERTY, AND LIBERALISM IN THE AMERICAN CENTURY* 171-73, 216-20, 274-75 (2023) (describing the financial difficulties confronting state and local governments in the 1970s and early 1980s).
30. See WALTEBURG & 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).³² In accordance with Americans’ longstanding preference for keeping the power of the centralized, national government “out of sight,”³³ 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.³⁴ States, for their part, supplied administrative capacity and sometimes financial support. In this fashion, a paradigm of “dual federalism” gave way to the

the tendency to treat Indian law as *sui generis*); Karen M. Tani, *States’ Rights, Welfare Rights, and the “Indian Problem”: Negotiating Citizenship and Sovereignty, 1935-1954*, 33 L. & HIST. REV. 1, 39 (2015) (noting that throughout U.S. history, new regimes of public regulation were “built on the backs” of populations that troubled government officials, including Native Americans, immigrants, and poor people).

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).
33. BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 3-4 (2009) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 77 (J.P. Mayer ed., George Lawrence trans., Harper Perennial 1989) (1835)).
34. JOHNSON, *supra* note 32, at 15-37.

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

35. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4, 19 (1950).

36. See JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 9-10 (2011) (documenting how “ordinary Americans came to terms with massive structures of national power” by the end of the World War II era).

37. See KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972*, at 3-4, 34-35 (2016) (explaining the appeal of grants-in-aid, with an emphasis on resources, infrastructure, and traditional understandings of American federalism); JOHNSON, *supra* note 32, at 163 (explaining that by the New Deal Era, grants-in-aid were “a familiar tool”).

38. See Edward A. Purcell, Jr., *The Courts, Federalism and the Federal Constitution, 1920-2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 127, 151 (Michael Grossberg & Christopher Tomlins eds., 2008); RICHARD B. CAPPALLI, *RIGHTS AND REMEDIES UNDER FEDERAL GRANTS* 10 (1979) (noting that by 1970, grants-in-aid represented 12.2% of the federal budget).

39. CAPPALLI, *supra* note 38, at 11.

40. *Id.* at 13.

41. See GARY GERSTLE, *LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT FROM THE FOUNDING TO THE PRESENT* 300-01 (2015).

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.⁴³ Decisions offered generous interpretations of constitutional grants of congressional authority and refrained from so vigorously policing incursions on “economic liberty.”⁴⁴ 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.⁴⁵ This trend became discernible in the 1920s,⁴⁶ escalated during World War II,⁴⁷ and defined the post-*Brown* years of the Warren Court.⁴⁸

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

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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).
44. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937); *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942). Over time, expansive interpretations of congressional power supported not just social and economic reforms, but also major civil rights statutes. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 298-99 (1964) (discussing Title II of the Civil Rights Act of 1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247-52 (1964) (same).
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).
46. See, e.g., *Moore v. Dempsey*, 261 U.S. 86, 87, 91 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).
47. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (articulating a standard of heightened judicial scrutiny for assessing governmental actions based on racial classifications).
48. Some decisions in this vein involved upholding major civil rights statutes against allegations of unconstitutionality. See, e.g., *Hannah v. Larche*, 363 U.S. 420, 452-53 (1960) (upholding the Civil Rights Act of 1957); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the Voting Rights Act of 1965). Other decisions involved incorporating guarantees from the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, such that they applied against the states, see, e.g., *Mapp v. Ohio*, 367 U.S. 643, 660 (1961); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), and interpreting those guarantees in new ways, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Still other decisions involved more stringent scrutiny of legislation that allegedly violated constitutional equal protection guarantees. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

ways. These critiques were, in one sense, as old as the New Deal itself,⁴⁹ but they also reflected a sense that “cooperative federalism” had changed—becoming so coercive as to imperil states’ ability to govern themselves.⁵⁰ 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,⁵¹ both of

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49. KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL*, at xi-xii (2010) (documenting determined opposition by members of the business community to the federal economic regulations and social welfare programs at the heart of the New Deal).
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, 719 (2000) [hereinafter Jackson, *Seductions of Coherence*]; Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. 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, 464-471, 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

U. CHI. L. REV. 429, 431, 454-55, 457 (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 374, 378, 385 (2002); Herman Schwartz, *The States’ Rights Assault on Federal Authority*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 155, 157-66 (Herman Schwartz ed., 2002); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1153-54, 1171 (2006). For an important earlier diagnosis of a “new judicial federalism,” see Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

52. Purcell, *supra* note 38, at 172.

53. This is not to say that the “new federalism” represented a coherent theory of federalism. See Mark Tushnet, *William Rehnquist’s Federalism*, in *THE REHNQUIST LEGACY*, *supra* note 25, at 187, 204 (characterizing Justice Rehnquist’s federalism as more like “an intuition” than “a constitutional doctrine”). As various scholars have noted, the Court’s solicitude toward the states was not uniform across its cases, nor was its purported concern with expansive uses of federal power. See, e.g., Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1304 (2002); Fallon, *supra* note 51, at 433-47; Siegel, *supra* note 51, at 1102-03.

54. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851-52 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *New York v. United States*, 505 U.S. 144, 157, 166 (1992); *Printz v. United States*, 521 U.S. 898, 915-18 (1997).

55. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Alden v. Maine*, 527 U.S. 706, 712-15 (1999).

56. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

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

58. See, e.g., *United States v. Lopez*, 514 U.S. 549, 565–68 (1995); *United States v. Morrison*, 529 U.S. 598, 608–09 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). Often these cases appeared to aggrandize the power of the federal judiciary at the expense of Congress, making them as much about separation of powers as they are about federalism. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85, 98–103 (2001) (discussing these decisions in terms of the Rehnquist Court’s “growing disrespect for Congress”).
59. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 523 U.S. 598 (2001); *Saucier v. Katz*, 533 U.S. 194 (2001); see also Siegel, *supra* note 51, at 1109 (detailing the Rehnquist Court’s hostility to litigation in federal court, as evidenced by cases involving private rights of action, immunity doctrines, attorney’s fees, remedies, and alternative-dispute-resolution mechanisms).
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.
61. See *infra* Sections II.B–C; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (referring to the Court’s 1964 decision in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), as the “nadir” of its Eleventh Amendment jurisprudence).
62. *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651, 679 (1974). This Part also discusses *Quern v. Jordan*, 440 U.S. 332 (1979), a subsequent iteration of *Edelman* that was a nominal win for the disabled plaintiffs but also a substantial victory for the “new federalism.”

rejected them outright in closely analogous circumstances that did not involve disability.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.

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 case⁶⁴ in favor of a state defendant since before *Brown*.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 1975.⁶⁶

63. See *infra* Sections II.A-C.

64. Here, we refer to cases that invoked either the Eleventh Amendment or the holding of *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, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 *HASTINGS L.J.* 1123, 1125 (1989) (interpreting *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 *Hans* suggested. See, e.g., *Parden*, 377 U.S. at 187 (taking pains to distinguish the Eleventh Amendment from "the expanded immunity doctrine of the *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 *Hans*. See, e.g., *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 228 (1964); *Employees*, 411 U.S. at 280.

65. See *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-80 (1946).

66. William A. Fletcher, *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, *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,⁶⁷ 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.⁶⁸ 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.⁶⁹ This interpretation did not match the text of the Eleventh Amendment,⁷⁰ but according to the Court, it found support in Founding Era “history and experience and the established order of things.”⁷¹

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.⁷² 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.”).

68. See generally Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and Federal Courts*, 81 N.C. L. REV. 1927 (2003) (discussing the historical context of *Hans*).

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 “atextual . . . interpretation of a precise constitutional text”).

71. 134 U.S. at 14. In the decades after *Hans*, the Court vacillated between embracing *Hans*’s historical account and seemingly rejecting it. Cf. *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904) (relying on arguments inconsistent with *Hans* and describing the *Hans* Court’s treatment of *Chisholm* as not a part of the “judgment of the court”); *Kansas v. Colorado*, 206 U.S. 46, 83 (1907) (relying on arguments inconsistent with *Hans*); *Ex parte New York*, No. 1, 256 U.S. 490, 497 (1921) (relying on *Hans* without distinguishing *South Dakota v. North Carolina* and *Kansas v. Colorado*). But by the 1930s, the holding itself seemed firmly established. See, e.g., *Ex parte New York*, 256 U.S. at 497; *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

72. 209 U.S. 123, 155-56 (1908).

that *Hans* would not prevent courts from enforcing federal protections against states or their officers.⁷³ With *Hans* thus restricted, Eleventh Amendment arguments appeared largely irrelevant to most federal litigation by the 1940s.⁷⁴

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*,⁷⁵ federal district and appellate courts responded with forceful rejections,⁷⁶ which the Supreme Court echoed across a series of summary opinions.⁷⁷ When even these defeats did not appear to settle the matter,⁷⁸ the Court conveyed the message clearly in *Griffin v. County School Board* in 1964.⁷⁹ The Court not only rejected the

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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").
74. In the decade before *Brown*, virtually the only context in which a Supreme Court case depended on an interpretation of the Eleventh Amendment was state taxation disputes. See, e.g., *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944); *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464-68 (1945); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 576-79 (1946); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 302-06 (1952); cf. *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (rejecting summarily the Eleventh Amendment argument in a footnote in the sole Eleventh Amendment case decided outside of the taxation context).
75. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).
76. See, e.g., *Bush v. Orleans Par. Sch. Bd.*, 138 F. Supp. 337, 340 (E.D. La. 1956) (rejecting the defendant school board's argument that the Eleventh Amendment prohibited the plaintiffs' desegregation challenge); *Orleans Par. Sch. Bd. v. Bush*, 242 F.2d 156, 160-61 (5th Cir. 1957) (same); *Sch. Bd. of Charlottesville v. Allen*, 240 F.2d 59, 63 (4th Cir. 1956) (same). The Supreme Court denied petitions for certiorari in both cases. *Orleans Par. Sch. Bd. v. Bush*, 354 U.S. 901, 921 (1957); *Sch. Bd. of Charlottesville v. Allen*, 353 U.S. 901, 910 (1957).
77. *State Athletic Comm'n v. Dorsey*, 359 U.S. 533, 533 (1959) (per curiam), *aff'g* 168 F. Supp. 149 (E.D. La. 1958); *Orleans Par. Sch. Bd. v. Bush*, 365 U.S. 569, 569 (1961) (per curiam), *aff'g* 188 F. Supp. 916 (E.D. La. 1960); *Gremillion v. United States*, 368 U.S. 11, 11 (1961) (per curiam), *aff'g* *Bush v. Orleans Par. Sch. Bd.*, 194 F. Supp. 182 (E.D. La. 1961); see also Jurisdictional Statement at 13-17, *Orleans Par. Sch. Bd.*, 365 U.S. 569 (No. 613) (raising an Eleventh Amendment defense); Jurisdictional Statement at 6-7, *Gremillion*, 368 U.S. 11 (No. 200) (same).
78. See *Shuttlesworth v. Birmingham Bd. Of Educ.*, 162 F. Supp. 372, 375 (N.D. Ala. 1958); *James v. Almond*, 170 F. Supp. 331, 340-41 (E.D. Va. 1959); *James v. Duckworth*, 170 F. Supp. 342, 351-52 (E.D. Va. 1959), *aff'd*, 267 F.2d 224 (4th Cir. 1959); see also *La. State Bd. of Educ. v. Baker*, 339 F.2d 911, 911 (5th Cir. 1964) (counting "[s]ix times in recent years" in which Louisiana's Attorney General raised Eleventh Amendment arguments in a school desegregation case).
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 argument⁸⁰ but also endorsed the district court's authority to essentially force local funding of a nondiscriminatory public school system.⁸¹

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*.⁸² 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.⁸³ 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.⁸⁴

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.⁸⁵ But as we detail in the next Section, the Court would soon change course.

and from funding racially exclusionary private schools). Litigation seeking to desegregate the school district at issue in *Griffin* was initiated three years before *Brown* and was one of the consolidated cases decided in *Brown*. See *id.* at 220-21.

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.
82. With the exception of *Maryland v. Wirtz*, 392 U.S. 183, 200 (1968), where the Court reserved the Eleventh Amendment issue, the Supreme Court rejected Eleventh Amendment arguments outright in every case to come before it during the 1950s and 1960s. See *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 344 n.4 (1951); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-05 (1952); *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 278-80, 283 (1959) (refusing to reach the Eleventh Amendment constitutional question); *Dorsey*, 359 U.S. at 533; *Orleans Par. Sch. Bd.*, 365 U.S. at 569; *Gremillion*, 368 U.S. at 11; *Martin v. Bush*, 376 U.S. 222, 222 (1964) (per curiam); *Parden v. Terminal Ry.*, 377 U.S. 184, 192, 196 (1964); *Griffin*, 377 U.S. at 228; *United States v. Mississippi*, 380 U.S. 128, 138-41 (1965).
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.⁸⁶ 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*⁸⁷ and *Edelman v. Jordan*.⁸⁸ 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).⁸⁹ Missouri characterized the case as a suit against an unconsenting 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; *Sagers*, 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 199-200, 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 REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 121 (1987); Schwartz, *supra* note 51, at 156-57.

87. 411 U.S. 279 (1973).

88. 415 U.S. 651 (1974).

89. 411 U.S. at 280-83.

dismiss.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 *Parden*, where the Warren Court found an implied waiver of state immunity as soon as the defendant entered the regulated arena.⁹¹ But changes to the Court's composition made it possible to limit and thereby evade *Parden*⁹²—and that is precisely what happened in *Employees*.

Writing for himself and the Court's more conservative members, Justice Douglas emphasized the distinction between the “for profit” operations in *Parden* (railway transportation) and the “[s]tate mental hospitals, state cancer hospitals, and training schools for delinquent girls” at issue in *Employees*.⁹³ A former “cripple” himself, according to his autobiography, Douglas had pondered the harsh fate of disabled people in society.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.⁹⁵ To be sure, Congress *could* regulate this arena and thereby “place new or even enormous fiscal burdens on the States,” Douglas noted,⁹⁶ showing the deference to federal power for which he was better known.⁹⁷ But he insisted that (in this context, at least) the

90. *Id.* at 280.

91. See J. Harvie Wilkinson III, Clerk, U.S. Sup. Ct., Certiorari Memorandum 2, *Emps. 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 *Employees* was “incredibly similar” to the one adjudicated in *Parden*). Congressional intent to reach states was even clearer in *Employees* than in *Parden*. As the Court observed in *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).

92. The four Justices who had joined Justice Brennan to form the *Parden* majority were now gone. Justice William J. Brennan, Jr., Case Notes, at LII, *Emps. 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).

93. *Employees*, 411 U.S. at 283-85.

94. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 34-35 (1974).

95. See *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 DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 130 (1971))).

96. *Id.* at 284-85.

97. See WALTENBURG & SWINFORD, *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.

99. *Parden* found it sufficient that Congress had included “every” interstate railway common carrier in the statute’s scope. *Parden v. Terminal Ry.*, 377 U.S. 184, 187-90 (1964).

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).

102. Amended Complaint at 1-2, 4, *Bryant ex rel. Jordan v. Swank*, No. 71 C 70 (N.D. Ill. Feb. 4, 1972) (available in the Joint Appendix to *Edelman*, 415 U.S. 651 app. at 37).

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.¹⁰⁴ The Seventh Circuit affirmed,¹⁰⁵ and the defendants petitioned the Supreme Court for review, arguing that the case presented an urgently important Eleventh Amendment question.¹⁰⁶

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).¹⁰⁷ 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.¹⁰⁸ 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]idn’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).

108. Memorandum from Justice Lewis F. Powell, Jr. to Chief Justice Warren Burger, *Edelman v. Jordan*, No. 72-1410 (Dec. 17, 1973) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 399, Folders 1-3). Here we see the relevance of *Employees*. In narrowing *Parden*, it offered Justice Powell grounds to find “no waiver here.” *Id.*

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

109. Memorandum from Justice Lewis F. Powell, Jr. to Justice William H. Rehnquist, *Edelman v. Jordan*, No. 72-1410 (Feb. 19, 1974) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 399, Folders 1-3). The quoted language appears to have been added to the “blind copy” that he sent to law clerk John Buckley.

110. Justice William Rehnquist, Third Draft Opinion 13, *Edelman v. Jordan*, No. 72-1410 (Jan. 17, 1974) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 399, Folders 1-3) (quoting *Rothstein v. Wyman*, 467 F.2d 226, 236-37 (2d Cir. 1972)).

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.”).

112. Rehnquist, *supra* note 110, at 21 (emphasis added). The same language appears in the published opinion. *Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

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 nontextual 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

114. *Edelman*, 415 U.S. at 673.

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

116. During the decades before *Edelman*, the Court decided multiple Eleventh Amendment cases without relying on this history in any meaningful way. See, e.g., *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459 (1945); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964). The few cases that did mention this history typically did so in a way that suggested either skepticism of the states’ motives in seeking immunity or a more tempered, pro-plaintiff historical understanding. See, e.g., *Parden v. Terminal Ry.*, 377 U.S. 184, 191-93, 193 n.11 (1964); *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 276 n.1 (1959).

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*.¹²¹ 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.¹²² The district court found for the plaintiffs but further found, per *Edelman*, that the Eleventh Amendment barred a federal court order of back pay/benefits.¹²³ The Second Circuit affirmed,¹²⁴ and the Supreme Court granted certiorari.¹²⁵

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.¹²⁶ For the Court's more federalism-protective Justices, we suspect that this reluctance stemmed from the high

121. 427 U.S. 445 (1976).

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*).

124. *Fitzpatrick v. Bitzer*, 519 F.2d 559, 563-71 (2d Cir. 1975).

125. *Fitzpatrick v. Bitzer*, 423 U.S. 1031 (1975) (mem.).

126. Justice Lewis F. Powell, Jr., Conference Notes, *Fitzpatrick v. Bitzer*, Nos. 75-251, 75-283 (Apr. 23, 1976) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 440, Folders 12-14) [hereinafter *Fitzpatrick* Powell Notes]; Justice William J. Brennan, Jr., Docket Sheet, *Fitzpatrick v. Bitzer*, Nos. 75-251, 75-283 (n.d.) (on file with William J. Brennan Papers, Library of Congress, Box I:369).

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

127. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (framing the question presented in terms of congressional authority to allow damages against a state for discrimination on the basis of “race, color, religion, sex, or national origin” (quoting the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703(a), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)))). See generally SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2014) (describing the substantial borrowing by sex-discrimination litigators of the successful legal arguments of the civil rights movement).

128. *Fitzpatrick*, 427 U.S. at 456; see also Justice William H. Rehnquist, Draft Opinion 5-11, *Fitzpatrick v. Bitzer*, Nos. 75-251, 75-283 (June 1, 1976) (on file with Lewis F. Powell, Jr. Papers, 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 (1965) (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

Clause. See *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting) (indicating that Justice Rehnquist rejected the argument that sex-based differentiation in benefits was unconstitutional).

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).
131. See, e.g., Brief of the Commonwealth of Pennsylvania et al. as Amici Curiae Supporting Petitioners at 15-18, *Fitzpatrick*, 427 U.S. 445 (Nos. 75-251, 75-283).
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.
133. 433 U.S. 267 (1977).
134. See, e.g., Brief of Petitioners at 4-14, *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267 (No. 76-477) (describing the proceedings on remand from *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717 (1974), including the \$5.8 million award).
135. See, e.g., Justice Lewis F. Powell, Jr., Conference Notes, *Milliken v. Bradley*, No. 76-477 (Mar. 25, 1977) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Boxes 404-05, Folders 1-8, 25-28) (noting Justice Rehnquist’s view that the fact of “damages for past action” presented a “serious 11[th Amendment] Q[uestion]”); William J. Brennan, Jr., Docket Sheet, *Milliken v. Bradley*, No. 76-477 (n.d.) (on file with William J. Brennan Papers, Library of Congress, Box 1:403) (recording Chief Justice Burger as stating that the “real problem for me is [the] Eleventh Amend[ment]”).

historical (not ongoing), and the order made no pretense about its intent to order funds directly from the state treasury.¹³⁶

But, as in *Fitzpatrick*, this desegregation case was apparently not the right context for extending the Court's recent Eleventh Amendment precedents. In a tortured passage, Chief Justice Burger's majority opinion characterized the relief in *Milliken II* as falling under the "prospective-compliance exception reaffirmed by *Edelman*," rather than *Edelman*'s bar on retrospective relief.¹³⁷ This reasoning allowed for a unanimous decision in favor of the plaintiff schoolchildren in a highly salient racial-equality case while also preserving *Edelman*. And as we will show, *Edelman* was filled with untapped potential for the "new federalism."

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*.¹³⁸ 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 § 1983.¹³⁹ 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").

137. *Milliken II*, 433 U.S. at 289-90.

138. 440 U.S. 332 (1979).

139. See Reply Brief for the State Petitioner at 14, *Quern*, 440 U.S. 332 (No. 77-841); Justice Lewis F. Powell, Jr., Conference Notes, *Quern v. Jordan*, No. 77-841 (Nov. 10, 1978) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 493, Folders 6-10) [hereinafter *Quern* Powell Notes]; Justice William J. Brennan, Jr., Case Notes, *Quern v. Jordan*, No. 77-841 (1978) at LXXXIV-XC (on file with the William J. Brennan, Jr. Papers, Library of Congress, Box II:7, Folder 7) [hereinafter *Quern* Brennan Summary].

than retroactive benefits).¹⁴⁰ But rather than focus on this narrow issue,¹⁴¹ 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:¹⁴² 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,”¹⁴³ 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 § 1983.¹⁴⁴ In holding that local governments did, in fact, fall within the ambit of § 1983,¹⁴⁵ 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”).

144. 436 U.S. 658, 661-63 (1978).

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,¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ 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*,¹⁴⁹ Justice Stevens’s majority opinion skillfully avoided the § 1983 question,¹⁵⁰ 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.

150. 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) (showing that Stevens drafted his opinion for the Court “so as to not decide [the § 1983/state liability] question prematurely”); see also Justice John Paul Stevens, Draft Opinion 10-22, *Hutto v. Finney*, No. 76-1660 (June 7, 1978) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 480, Folder 7-13) (avoiding the § 1983 issue).

debated it fiercely in separate writings.¹⁵¹ Subsequently, in *Alabama v. Pugh*,¹⁵² Justice White drafted a per curiam opinion implying that, as a matter of settled law, § 1983 did *not* abrogate states' immunity.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 *Hutto*," Justice Stevens chided in dissent.¹⁵⁴

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

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151. *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 *Edelman* and its expressed view that § 1983 did not reach states as critical to the Court's ability to award attorney's fees. *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 *Hutto* had been brought under § 1983, which under *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. *Id.* at 708-10. Justice Brennan, by contrast, contended that because of the Court's then-forthcoming opinion in *Monell*, there was no longer a presumption that § 1983's reference to "persons" did *not* reach states. *Id.* at 703 (Brennan, J., concurring). Full resolution of the issue should "await consideration in an appropriate case." *Id.* at 704.
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. *Id.*
153. The opinion did so by citing *Edelman*, which implied the continued validity of what Justice Rehnquist wrote in that case regarding the reach of § 1983. *See id.* at 781-82; *see also* Justice Byron R. White, Draft Dissent from Denial of Certiorari, *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 *Pugh* was initially drafted as a dissent from denial of certiorari by Justice White).
154. *Pugh*, 438 U.S. at 783 n.* (Stevens, J., dissenting). This issue was neither briefed nor argued by the parties in *Pugh*. Indeed, the *Pugh* briefs were filed before *Monell* (i.e., before there was even a reason to raise the issue). *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, *Pugh*, 438 U.S. 781 (No. 77-1107) (Apr. 6, 1978); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (decided on June 6, 1978).
155. *See* Justice William H. Rehnquist, Draft Opinion 5-7, *Quern v. Jordan*, No. 77-841 (Dec. 1, 1978) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 493, Folders 6-10); *Quern v. Jordan*, 440 U.S. 332, 339-40 (1979).
156. Justices Stevens and Powell urged Justice Rehnquist to rely on the principle of stare decisis rather than suggesting that, via *Pugh*, the Court had already done a post-*Monell* reevaluation of the language from *Edelman*. *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.¹⁵⁷ The published opinion shows that Rehnquist was unmoved.¹⁵⁸ 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 revitalize 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*),¹⁵⁹ *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

[reaffirming the correctness of *Edelman*]” was not “appropriate without a fresh review of the legislative history”); *id.* (including a handwritten note by Justice Powell indicating his agreement with Stevens but his disinclination to “argue further,” given that “this is WHR’s opinion & P.S. & BRW have approved”).

157. In a memo to the Court, Justice Brennan characterized the included language as dicta and contended that “[s]urely” this important § 1983 question “ought not be decided without plenary briefing and focused oral argument.” *Quern* Brennan Summary, *supra* note 139, at LXXXV. After additional colleagues joined Rehnquist’s opinion, Brennan shared his “distress” at the “off-hand manner” in which the majority planned to decide such an important question, but he was unable to secure a reargument. *Id.* at LXXXVI-IX.

158. See *Quern*, 440 U.S. at 341 (“We therefore conclude that neither the reasoning of *Monell* or of our Eleventh Amendment cases subsequent to *Edelman*, nor the additional legislative history or arguments set forth in Mr. Justice Brennan’s [concurring] opinion, justify a conclusion different from that which we reached in *Edelman*.”).

159. 426 U.S. 833 (1976).

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.”¹⁶⁰ 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).¹⁶¹ As Justice Blackmun’s clerk observed, Blackmun “had no interest at all” in *Quern*.¹⁶² 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.¹⁶³ 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).

162. Memorandum from Albert G. Lauber, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 2, *Quern v. Jordan*, No. 77-841 (Dec. 1, 1978) (on file with Harry A. Blackmun Papers, Library of Congress, Box 281, Folder 6); see also Memorandum from Albert G. Lauber, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 2, *Quern v. Jordan*, No. 77-841 (Dec. 6, 1978) (on file with Harry A. Blackmun Papers, Library of Congress, Box 281, Folder 6) (noting again Justice Blackmun’s lack of interest).

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*.”).

III. THE 1980S: DISABILITY CIVIL RIGHTS LEGISLATION AS A SEEDBED FOR “NEW FEDERALISM” ADVANCES

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.¹⁶⁴ 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.¹⁶⁵

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;¹⁶⁶ (2) the Education for All Handicapped Children Act of 1975, which

164. See, e.g., H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 639 (1993) (observing that Justice O’Connor’s “voting patterns reflected her agreement with” the Burger Court’s greater solicitude for “state autonomy” but also describing her approach to federalism issues as “distinctive”); JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 243-44 (2005) (noting that, because of O’Connor’s upbringing in an “anti-New Deal home” and her experience “as a state assistant attorney general, state legislator, [and] state-court judge,” she could empathize with state officials).

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.

166. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a)) (“No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”). This followed the model of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 881 n.87 (1984) (observing that

addressed the exclusion of children with disabilities from the benefits of public education and articulated a right to a “free appropriate public education”;¹⁶⁷ 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.¹⁶⁸ 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*.¹⁶⁹

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 immunity¹⁷⁰ and that some of the most important guarantees of the third law were not enforceable.¹⁷¹ 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.¹⁷²

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),¹⁷³ 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”).

167. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975). The Education for All Handicapped Children Act (EAHCA) is known today as the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §§ 1400-1482 (2018).

168. Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486 (codified as amended at 42 U.S.C. §§ 15001-15083 (2018)).

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

170. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985); *Dellmuth v. Muth*, 491 U.S. 223, 231-32 (1989).

171. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 31-32 (1981).

172. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 106 (1984).

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.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.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.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.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.¹⁷⁸ Eight members of the Court voted to grant the petition, for reasons that appeared to cluster around cost and federalism.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

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 *Pennhurst* litigation).

175. *Pennhurst*, 446 F. Supp. at 1318, 1325.

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).

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

178. See Petition for Writ of Certiorari at 2, *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. *Id.* at 7.

179. See, e.g., Memorandum from Peter D. Isakoff, Clerk, U.S. Sup. Ct., to Justice John Paul Stevens 5, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (May 29, 1980) (on file with John Paul Stevens Papers, Library of Congress, Box 178, Folder 1) (finding the case cert worthy because of the "very expensive" remedy that the appellate court approved for the violation of a relatively new and modestly funded statute); Memorandum from Justice Byron R. White to the Conference 2-3, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (June 4, 1980) [hereinafter *Pennhurst I* White Memorandum] (on file with Harry A. Blackmun Papers, Library of Congress, Box 327, Folder 3) (noting "far-reaching policy implications for states" and a "federalism issue" in the "scope of federal judicial authority" that the lower courts asserted); Memorandum from Justice Lewis F. Powell to File 3, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (Dec. 4, 1980) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 536, Folders 16-21) (emphasizing federalism concerns in his pre-argument notes).

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.¹⁸⁰ In the absence of such express invocation, Rehnquist reasoned, the Court “should not quickly attribute to Congress an unstated intent” to do so.¹⁸¹ *Pennhurst I* thus joined *Employees* in establishing another new “clear statement” rule, requiring explicit congressional invocation of the Fourteenth Amendment.¹⁸²

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.’”¹⁸³ 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.”¹⁸⁴ 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).¹⁸⁵ Applying these principles and finding the DD Act wanting, the Court reversed the Third Circuit’s decision and remanded the case for reconsideration.¹⁸⁶

This course of action mattered greatly for beneficiaries of the DD Act,¹⁸⁷ but it had even more powerful implications for the Court’s federalism jurisprudence.

180. *Pennhurst I*, 451 U.S. at 16.

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 legislating”).

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.”).

184. *Pennhurst I*, 451 U.S. at 17.

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.¹⁸⁸ Thus, the majority opinion in *Pennhurst I* drew dissent but not meaningful debate over its most momentous statements extending the "new federalism."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.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."¹⁹¹

less direct and arguably less forceful options available to people like the *Pennhurst* plaintiffs in the aftermath of *Pennhurst I*).

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).
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).
190. Michael W. McConnell, *The Politics of Returning Power to the States*, 6 HARV. J.L. & PUB. POL'Y 103, 103-08 (1982); see also Stewart A. Baker, *Making the Most of Pennhurst's "Clear Statement" Rule*, 31 CATH. U. L. REV. 439, 439 (1982) (characterizing *Pennhurst I* as "open[ing] a major new line of analysis in federal grants cases" and suggesting extensions of *Pennhurst I* that "may be of great value to lawyers representing state and local governments").
191. McConnell, *supra* note 190, at 109.

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.¹⁹² 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.¹⁹³

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.¹⁹⁴ 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.¹⁹⁵ The Court granted certiorari, and the case was docketed for the 1982 Term.

192. See *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647, 656–61 (3d Cir. 1982) (en banc), *rev’d*, 465 U.S. 89 (1984).

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

194. The Burger clerk who wrote the cert memo for the pool simply assumed that the Court could review the state-law holding, exercising pendent jurisdiction. See Certiorari Memorandum from Paul L. Shechtman, Clerk, U.S. Sup. Ct., to the Justices 10, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (May 19, 1980) (on file with Harry A. Blackmun Papers, Library of Congress, Box 327, Folder 4). So did Justice White. See *Pennhurst I* White Memorandum, *supra* note 179, at 3. Justice Stevens, in joining the majority opinion, articulated “reservations” about issuing a decision that did not reach the state law question. Memorandum from Justice John Paul Stevens to Justice William H. Rehnquist 1, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 79-1404 (Feb. 18, 1981) (on file with Harry A. Blackmun Papers, Library of Congress, Box 327, Folder 3).

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,¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

196. More salient cases from the 1982 Term include *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); and *I.N.S. v. Chadha*, 462 U.S. 919 (1983). See Fred Barbash, *Supreme Court Reconvenes: Cases Cast Divided Justices as Public Policy Arbiters*, WASH. POST, Oct. 4, 1982, at A1 (referencing *Bob Jones*, *Chadha*, "five major abortion cases," and various other cases on the Court's docket, but not mentioning *Pennhurst II*).

197. Handwritten Notation of Chief Justice Warren E. Burger on Memorandum from Chief Justice Warren E. Burger to Justice Lewis F. Powell 1, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 81-2101 (June 20, 1983) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Boxes 599-600, Folders 6-24, 1-19); see also Memorandum from Chief Justice Warren E. Burger to Justice Lewis F. Powell 1, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 81-2101 (June 23, 1983) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Boxes 599-600, Folders 6-24, 1-19) (sending Justice Powell his proposed concurring opinion).

198. Memorandum from Justice Lewis F. Powell to Chief Justice Warren E. Burger 2, *Pennhurst State Sch. & Hosp. v. Halderman*, No. 81-2101 (June 25, 1983) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Boxes 599-600, Folders 6-24, 1-19).

199. See *supra* Section II.A.

200. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 279-81 (1977); *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977); *Hutto v. Finney*, 437 U.S. 678, 689-98 (1978); *Lake*

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 account²⁰¹ 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.²⁰²

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* "bond[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.²⁰³ 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

Country Ests. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 400-02 (1979); *Maher v. Gagne*, 448 U.S. 122, 130-33 (1980); *Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n.19 (1982). To the extent that Justices invoked *Hans's* reasoning, it was more often in nonmajority opinions. See, e.g., *Patsy*, 457 U.S. at 526-29 (Powell, J., dissenting); *Nevada v. Hall*, 440 U.S. 410, 435-42 (1979) (Rehnquist, J., dissenting); *Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 291-93 (1973) (Marshall, J., concurring).

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").
203. David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 67 (1984) (devoting twenty-five pages to the opinion's "wrong turns"); see also George D. Brown, *Beyond Pennhurst: Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 351 (1985) (describing the hostile critiques that greeted this decision); Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 658-59 (1985) (lamenting the likely practical consequence of *Pennhurst II*, which would be to encourage plaintiffs with federal- and state-law claims to give up the federal forum).

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*,²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

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.²⁰⁷ Meanwhile, public discourse reflected continued skepticism toward disability civil rights, especially in the realms of public transportation and education, where inclusion appeared especially costly.²⁰⁸ (These

204. 473 U.S. 234 (1985).

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).

207. Stephen B. Burbank & Sean Farhang, *Retrenching Civil Rights Litigation: Why the Court Succeeded Where Congress Failed*, in *THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S. 197*, 201-05 (Lynda G. Dodd ed., 2018) [hereinafter *THE RIGHTS REVOLUTION REVISITED*].

208. See Karen M. Tani, *Liberalism's Last Rights: Disability Inclusion and the Rise of the Cost-Benefit State 16-22* (unpublished manuscript) (on file with authors) (drawing on news articles, court cases, and the writings of disability rights advocates to document cost concerns); *State and Local Government Cost Estimate Act: Hearing on H.R. 3697 Before the Task Force on Budget Process & Task Force on State & Loc. Gov't of the H. Comm. on the Budget*, 96th Cong. 1 (1979) [hereinafter *Hearing on H.R. 3697*] (documenting concerns about "the unanticipated and unexpected fiscal hardships resulting from Federal legislation"); *Hearing on H.R. 3697, supra*, at 18 (statement of Jack L. McRay, Council of State Gov'ts) (noting particular concern about the costs of complying with disability rights laws, especially regarding infrastructure);

concerns also existed in earlier years, to be sure, but economic recession and a politics of austerity had raised the stakes).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.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.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.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 *Alexander v. Choate*.²¹³ Because that was so, Section 504's equality

Hearing on H.R. 3697, supra, at 94 (statement of Bernard F. Hillenbrand, Exec. Dir., Nat'l Ass'n of Cnty.s.) (same); *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); *Hearing on H.R. 3697, supra*, at 70 (study prepared by Congressional Budget Office discussing the estimated cost of compliance for educational institutions).

209. See 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).
210. STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* 88 (1989). The Reagan Administration was also attuned to the spiraling cost of disability-based income support and, in the same years, tried to dramatically trim the rolls. MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* 35-37 (1990).
211. See *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983); *Smith v. Robinson*, 468 U.S. 992 (1984); *Alexander v. Choate*, 469 U.S. 287 (1985). Notably, both “wins” for disability advocates came in cases raising narrow, discrete issues and/or where the result was overdetermined under existing law. See *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632 & n.13 (1984) (resulting in the first win for disability rights in a Section 504 case, but in a case in which the textual argument was virtually unavoidable and prior precedent from the Title IX context also arguably dictated the outcome); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892-93 (1984) (resulting in the first win for a disability plaintiff in an IDEA case but requiring only that the school provide basic services that could easily be provided by a school nurse).
212. See, e.g., *Davis*, 442 U.S. at 406 (adopting a narrow understanding of what it means to be “otherwise qualified” for an educational program or job); *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”).
213. 469 U.S. at 298.

guarantee had to be kept “within manageable bounds.”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.²¹⁵

It was against this general backdrop that federalism and disability civil rights, packaged together, arrived at the Court’s doorstep in 1984. *Atascadero State Hospital v. Scanlon*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.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.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*,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., *Fitzpatrick*) that appeared not to follow any sort of plain statement rule in cases that implicated Congress’s Fourteenth Amendment, Section 5 powers.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

214. *Id.* at 299.

215. *Id.* at 308.

216. 473 U.S. 234 (1985).

217. *Id.* at 236.

218. *Id.* at 237.

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 *Atascadero*. See Brief for the United States as Amicus Curiae, *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. See *id.* at 2.

220. These latter cases were arguably the most relevant because the *Atascadero* defendants had conceded below that Section 504 was Fourteenth Amendment, Section 5 legislation. *Atascadero*, 473 U.S. at 244 n.4.

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

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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*.”²²⁶ Language that referred to states by implication (Section 504 covered “any recipient of Federal assistance”)²²⁷ was, by itself, not enough. Practically speaking, lamented one legal-aid lawyer, this meant that “waiver or abrogation arguments will rarely succeed.”²²⁸

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,²²⁹ 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.²³⁰ 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.²³¹ And, as numerous legal scholars had by then argued, both history and text were in tension with *Hans*’s ruling.²³²

226. 473 U.S. at 243 (emphasis added).

227. *Id.* at 245 (quoting Section 504).

228. Robert E. Lehrer, *Expanding the States’ Eleventh Amendment Immunity (Again): A Comment on Atascadero State Hospital v. Scanlon and Green v. Mansour*, 20 CLEARINGHOUSE REV. 3, 6 (1986).

229. See *Green v. Mansour*, 474 U.S. 64, 78 (1985) (Brennan, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 293 (1986) (Brennan, J., concurring in part and dissenting in part).

230. See, e.g., Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL’Y 19, 22 (1982) (arguing that conservatives should not reflexively oppose federal regulation but should instead consider implementing conservative goals via federal intervention).

231. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-66 (1990) (describing Scalia’s evolution as a textualist); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (arguing against nonoriginalism).

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*.²³³ While Scalia signaled a potential willingness to vote in favor of the state defendant,²³⁴ his take on *Hans* – that it was “wrong”²³⁵ – alarmed the Court’s “new federalism” proponents and made opinion drafting a high-stakes endeavor. Justice Powell drafted an opinion holding for the defendant,²³⁶ while Justice Brennan drafted a dissent reiterating his views on *Hans* and attempting to lure Scalia into his camp.²³⁷

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.²³⁸ Powell’s chambers responded with a lengthy revised draft, crafted “to impress[] Justice Scalia with the seriousness of his responsibility.”²³⁹ 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”).

234. Justice Lewis F. Powell, Conference Notes 3, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (Mar. 6, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16).

235. Justice William J. Brennan, Docket Sheet 2, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (n.d.) (on file with William J. Brennan Papers, Library of Congress, Box I:722, Folder 1).

236. Justice Lewis F. Powell, Draft Opinion 13-14, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (Mar. 13, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16).

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*”).

238. *Id.*; see also Memorandum from Justice Sandra Day O’Connor to Justice Lewis F. Powell 1, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (Mar. 19, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16) (indicating that she would join Justice Powell’s opinion); Memorandum from Chief Justice William H. Rehnquist to Justice Lewis F. Powell 1, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (Mar. 26, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16) (same); Memorandum from Justice Lewis F. Powell to Chief Justice William H. Rehnquist and Justice Sandra Day O’Connor 1, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (Apr. 1, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 671, Folders 1-16) (noting the changes to be made to the draft which would “enable Byron to join us”).

239. Memorandum from Justice Lewis F. Powell to Robert A. Long Jr., Clerk, U.S. Sup. Ct. 1, *Welch v. Tex. Dep’t of Highways & Publ. Transp.*, No. 85-1716 (June 3, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16).

thoroughgoing defense of *Hans*, both on the merits and – crucially – as a matter of stare decisis.²⁴⁰ Conceding “ambigu[ity]” as to “the intentions of the Framers and Ratifiers,”²⁴¹ 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*.²⁴² Notably for our thesis, *all* of the post-1945 cases that Powell cited were either disability-related²⁴³ or relied directly on the authority of recent disability-related precedents.²⁴⁴

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.²⁴⁵ 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.²⁴⁶

In the final analysis, then, *Welch* left intact and even expanded the Court’s recent Eleventh Amendment jurisprudence.²⁴⁷ 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

240. Justice Lewis F. Powell, Draft Opinion 9-24, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (June 11, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16).

241. *Id.* at 13.

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

243. *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 n.27 (1987) (citing, *inter alia*, *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Quern v. Jordan*, 440 U.S. 332 (1979); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984)).

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*).

245. Justice Antonin Scalia, Draft Concurrence 1-2, *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, No. 85-1716 (June 19, 1987) (on file with Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law, Box 673, Folders 1-16). Notably, for our purposes, this concurrence flagged questions about the “feasibility” of correcting a wrongly decided *Hans* “without distorting what we have done in tacit reliance upon it.” *Id.* at 1.

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.²⁴⁸ 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 vengeance [sic]” the Court’s “plain statement” rule for abrogating Eleventh Amendment immunity.²⁴⁹ 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.²⁵⁰

Understanding the significance of *Dellmuth* requires a momentary foray into the infamously messy case *Pennsylvania v. Union Gas Co.*²⁵¹ 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.²⁵² Ultimately, a five-Justice majority found that Congress had sufficiently clearly abrogated state immunity when enacting the statute at issue,²⁵³ 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.²⁵⁴ It was an odd, fractured

248. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976); *Hutto v. Finney*, 437 U.S. 678, 689–98 (1978); *Milliken v. Bradley*, 433 U.S. 267, 288–90 (1977).

249. See Memorandum from Edward B. Foley, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 2, *Hoffman v. Conn. Dep’t of Income Maint.*, No. 88-412 (Apr. 20, 1989) [hereinafter *Hoffman* Foley Memorandum to Blackmun] (on file with Harry A. Blackmun Papers, Library of Congress, Box 534, Folder 9).

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.

251. 491 U.S. 1 (1989).

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

255. See, e.g., Victoria L. Calkins, Note, *State Sovereign Immunity After Pennsylvania v. Union Gas Co.: The Demise of the Eleventh Amendment*, 32 WM. & MARY L. REV. 439, 439 (1991) (characterizing *Union Gas* as “[t]he [d]emise of the Eleventh Amendment”).

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 “suff[icient] reliance on it t[o] 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 legislating 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 *unobvious* 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

260. North Carolina's amicus brief, in support of Pennsylvania's position, underscored the fiscal stakes for states. Brief for the State of North Carolina as Amicus Curiae Supporting Petitioner at *3, *Dellmuth*, 491 U.S. 223 (No. 87-1855), 1988 WL 1025568.

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: Part One*, 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, rspt 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).”).

262. Bench Memorandum from Edward B. Foley, Clerk, U.S. Sup. Ct., to Justice Harry A. Blackmun 9, *Dellmuth v. Muth*, No. 87-1855 (Feb. 25, 1989) (on file with Harry A. Blackmun Papers, Library of Congress, Box 526, Folder 5).

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.”²⁶⁴ 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.²⁶⁵ 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*),²⁶⁶ 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.²⁶⁷ Congress would promptly do so, overruling *Dellmuth* as part of the Education of the Handicapped Act Amendments of 1990.²⁶⁸ 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*.”²⁶⁹ 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.²⁷⁰

* * *

264. Brief of Respondent, *Dellmuth*, 491 U.S. 223 (No. 87-1855), 1988 WL 1025571, at *30 (quoting Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807, 1845).

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.

266. See *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96, 105 (1989) (Scalia, J., concurring in the judgment).

267. Justice Harry A. Blackmun, Conference Notes 2, *Dellmuth v. Muth*, No. 87-1855 (Mar. 3, 1989) (on file with Harry A. Blackmun Papers, Library of Congress, Box 526, Folder 5).

268. Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106 (1990).

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 I: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).²⁷¹ 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.²⁷²

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.²⁷³ Via *Pennhurst II*, the Court revived the quasi-historical and textually unbounded account of state sovereign immunity.²⁷⁴ 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.²⁷⁵

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”

271. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

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.

273. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 17 (1981).

274. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 97-99 (1984).

275. See, e.g., *Pennhurst I*, 451 U.S. at 15-17 (requiring a clear statement of intent to invoke the Fourteenth Amendment, Section 5); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (requiring a clear statement to abrogate state immunity); *Dellmuth v. Muth*, 491 U.S. 223, 227-29 (1989) (same, making standards of clarity more difficult to satisfy).

outcomes.²⁷⁶ 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*),²⁷⁷ 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).²⁷⁸

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.²⁷⁹ 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).

(ADEA).²⁸⁰ Moreover, Congress continued to legislate in this area, most notably via the Americans with Disabilities Act (ADA),²⁸¹ 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*²⁸² 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

280. Pub. L. No. 90-202, 81 Stat. 602 (1967). Although the ADEA was facially focused on age, the role of disability – real and assumed – in depressing older workers’ employment was a central part of the problem that Congress sought to solve in enacting the ADEA. See, e.g., *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 30, 1965), <https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment> [<https://perma.cc/ULY7-CLMX>].

281. Pub. L. No. 101-336, 104 Stat. 327 (1990). In the early 1990s, Congress also passed the Family and Medical Leave Act (FMLA), which recognizes workers’ need to attend to disabling conditions. Pub. L. No. 103-3, 107 Stat. 6 (1993).

282. 501 U.S. 452, 455 (1991).

withstood constitutional challenge.²⁸³ In affirming this decision, the Court of Appeals for the Eighth Circuit referenced the same concerns.²⁸⁴ And after the Supreme Court granted the plaintiffs' petition for certiorari,²⁸⁵ disability-related arguments remained a prominent facet of the briefs.²⁸⁶

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.²⁸⁷ Numerous states and various state- and local-government associations filed or joined amicus briefs in support of Missouri's position,²⁸⁸ as did the conservative Washington Legal Foundation.²⁸⁹

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,²⁹⁰ and Chief Justice Rehnquist's

283. *Gregory v. Ashcroft*, No. 88-0221C (3), 1989 WL 208396, at *4 (E.D. Mo. July 14, 1989) (connecting a mandatory retirement age to citizens' entitlement to judges with the necessary caliber of mental and physical fitness and noting the correlation between disability and advanced age).

284. *Gregory v. Ashcroft*, 898 F.2d 598, 605-06 (8th Cir. 1990).

285. *Gregory v. Ashcroft*, 498 U.S. 979 (1990).

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.

287. Brief for Respondent, *supra* note 286, at *27, *34-35.

288. Brief of Colorado et al. as Amici Curiae Supporting Respondent, *Gregory*, 501 U.S. 452 (No. 90-50), 1991 WL 11007916, at *6; Brief of Vermont Office of the Court Administrator as Amicus Curiae, *Gregory*, 501 U.S. 452 (No. 90-50), 1991 WL 11007915, at *5; Brief of State of Connecticut as Amicus Curiae Supporting Respondent, *Gregory*, 501 U.S. 452 (No. 90-50), 1991 WL 11007912, at *3; Brief of the National Governors' Association et al. as Amici Curiae Supporting Respondent, *Gregory*, 501 U.S. 452 (No. 90-50), 1991 WL 11007913, at *11. Although a number of these states did not have a mandatory retirement age for judges, they recognized "the importance of the decision . . . to the constitutional principles protecting the authority of the States to govern themselves independently." Brief of Colorado et al. as Amici Curiae, *supra*, at *3.

289. Brief of the Washington Legal Foundation as Amici Curiae Supporting Respondent, *Gregory*, 501 U.S. 452 (No. 90-50), 1991 WL 11007914, at *19.

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.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.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 *Atascadero* and *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.”²⁹³ Certainty, O’Connor continued, could come only through “unmistakably clear” statutory language.²⁹⁴ Finding no clear statement of an intent to *include* state-court judges within the category of “employees,” the majority sided with Missouri.²⁹⁵

The upshot of *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.²⁹⁶ *Gregory* also

291. Rehnquist’s chronic back pain and related painkiller dependency are well documented. *See, e.g.,* Irvin Molotsky, *Doctor Says Pain Drug Caused Rehnquist to Slur His Speech*, N.Y. TIMES (Jan. 2, 1982), <https://www.nytimes.com/1982/01/02/us/doctor-says-pain-drug-caused-justice-rehnquist-to-slur-his-speech.html> [<https://perma.cc/JYM2-PXN7>]; Jack Shafer, *Rehnquist’s Drug Habit*, SLATE (Sept. 9, 2005, 5:28 PM), <https://slate.com/news-and-politics/2005/09/chief-justice-rehnquist-s-drug-habit.html> [<https://perma.cc/N3QG-XW4N>]. Because of his back pain, Rehnquist sometimes struggled to sit for extended periods. *See, e.g.,* Ellen Gamerman, *Trial Is Back-Breaking for Rehnquist; Chief Justice Suffers Pain from 1977 Spine Injury*; *Trial in the Senate*, BALTIMORE SUN (Jan. 15, 1999, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1999-01-15-9901150206-story.html> [<https://perma.cc/YFN3-VUDM>]; Zoom Interview with Richard Weishaupt, Senior Att’y for Health & Hum. Servs., Cmty. Legal Servs. (Jan. 17, 2022) (recounting that, during the oral argument for *Sullivan v. Zebley*, 493 U.S. 521 (1990), in which Weishaupt argued, Rehnquist was in such apparent agony that he went behind a curtain to stretch his back).

292. *See* Reply Brief for Petitioners, *Gregory*, 501 U.S. 452 (No. 90-50), 1991 WL 11007917, at *14-15 (citing *EEOC v. Wyoming*, 460 U.S. 226, 237, 239 (1983)).

293. *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).

294. *Id.* (quoting *Atascadero*, 473 U.S. at 242).

295. *Id.* at 470.

296. This is, of course, not the only possible reading of *Gregory*: some courts have limited the key language in *Gregory* to situations where the argued-for change would affect a fundamental aspect of state sovereignty. *See, e.g.,* *United States v. Lot 5*, 23 F.3d 359, 362 (11th Cir. 1994)

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

(“[T]he *Gregory* plain statement preemption rule is limited to federal laws impacting a state’s self-identification as a sovereignty.”); cf. *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 208–09 (1998) (assuming without deciding that *Gregory*’s plain statement rule applied to a suit alleging disability discrimination by a state prison but concluding that Title II of the Americans with Disabilities Act (ADA) was explicit in its coverage of state prisons).

297. See, e.g., Colker & Brudney, *supra* note 58, at 83 n.11 (noting, with the distance of eleven years, that “[a]lthough the Court crafted [*Gregory*’s clear statement] rule in federalism terms, its approach is consistent with the ‘disrespecting Congress’ theme” of the Rehnquist Court’s jurisprudence).

298. 498 U.S. 979 (1990).

299. See DAVIS, *supra* note 206, at 19–35 (chronicling the history of the ADA, emphasizing the well-positioned political insiders most responsible for the timing and content of the law).

300. Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331–32 (1990) (codified as amended at 42 U.S.C. § 12112) (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”).

301. See *id.* § 2(b)(4), 104 Stat. at 329 (codified as amended at 42 U.S.C. § 12101) (emphasis added).

[A]mendment . . . from an action in Federal or State court . . . for a violation of this Act.”³⁰²

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*.³⁰³ 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.³⁰⁴

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.”³⁰⁵ Moreover, those “stereotypic assumptions” did not reflect valid judgments about disabled people’s “ability . . . to participate in, and contribute to, society.”³⁰⁶ 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).

305. Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327, 329 (1990) (codified as amended at 42 U.S.C. § 12101).

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.”³⁰⁷

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.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ At the time of the ADA’s drafting, *Morgan* was a canonical case.³¹¹

In retrospect, however, this seemingly settled understanding of Congress’s Section 5 power was vulnerable. Via a discussion of *Heller v. Doe*,³¹² 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*).

311. See John H. Buchanan & Arthur J. Kropp, Letter to the Editor, *A Very Small Poll Tax*, N.Y. TIMES, Oct. 23, 1987, at A38 (citing Robert Bork’s views on *Morgan*—that it represented “very bad, indeed pernicious, constitutional law”—as a reason for viewing Bork as a dangerous, extreme Supreme Court nominee).

312. 509 U.S. 312 (1993).

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.³¹³ 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.³¹⁴ While the Court would not grant certiorari in that case, two years later, the issue would arise again in *Heller v. Doe*.³¹⁵

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.³¹⁶ 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.³¹⁷ 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).

314. Petition for Writ of Certiorari at ii, *Cal. Ass'n of the Physically Handicapped v. FCC*, 499 U.S. 975 (1991) (No. 90-1086), 1991 WL 11176536.

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.³¹⁸

Internal Court documents and the oral argument transcript show that the Justices recognized and understood the ADA-based argument.³¹⁹ 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.³²⁰ But she was "extremely doubtful . . . that a majority of this Court" would embrace that position.³²¹ 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 *Heller*.³²²

Ultimately, the Court would apply rational basis review and uphold the Kentucky law.³²³ 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."³²⁴ Even the dissent—while noting the ADA

318. Brief for Respondents, *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. See *Heller*, 509 U.S. at 319.

319. See Transcript of Oral Argument, *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, *Heller v. Doe*, No. 92-351 (Mar. 19, 1993) (on file with Harry A. Blackmun Papers, Library of Congress, Box 624, Folder 2).

320. Memorandum from Radhika Rao, *supra* note 319, at 27 n.6.

321. *Id.*

322. 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).

323. 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. 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, *Heller v. Doe*, No. 92-351 (June 15, 1993) (on file with Byron R. White Papers, Library of Congress, Box 202, Folder 10).

324. *Heller*, 509 U.S. at 319. "It would be imprudent and unfair," Justice Kennedy explained, "to inject a new standard at this stage." *Id.*

argument—premiered 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).

326. See Petition for Writ of Certiorari at 14-32, *More v. Farrier*, 510 U.S. 819 (1993) (No. 92-1901), 1993 WL 13075893; Petition for Writ of Certiorari at 7-12, *Spragens v. Shalala*, 514 U.S. 1035 (1995) (No. 94-1102), 1994 WL 16042778; Petition for Writ of Certiorari at 13-14, *Barry v. Burdines and the Travelers*, 519 U.S. 966 (1996) (No. 96-380), 1996 WL 33438404; Brief for American Disabled Attendant Programs Today et al. as Amici Curiae Supporting Petition for Writ of Certiorari at 11, *Lee v. Harclerod*, 522 U.S. 927 (1997) (No. 96-1824), 1997 WL 33549586. For lower court cases, see, for example, *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990, 1001 (3d Cir. 1993); *Martin v. Voinovich*, 840 F. Supp. 1175, 1208-10 (S.D. Ohio 1993); *Crowder v. Kitagawa*, 842 F. Supp. 1257, 1264-65 (D. Haw. 1994), *rev'd on other grounds*, 81 F.3d 1480 (9th Cir. 1996); *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1132-35 (S.D.N.Y. 1997); and *United States v. Harris*, 197 F.3d 870, 875-76 (7th Cir. 1999). For § 1985(3) conspiracy cases relying in part on the findings to find people with disabilities could bring a claim, see, for example, *Trautz v. Weisman*, 819 F. Supp. 282, 293-95 (S.D.N.Y. 1993); *Musko v. McClandless*, No. 94-3938, 1995 WL 262520, at *8 (E.D. Pa. May 1, 1995); and *Lake v. Arnold*, 112 F.3d 682, 687-88 (3d Cir. 1997).

327. 521 U.S. 507 (1997).

‘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.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 sanitation or relegitimation — such that these doctrines could now be enforced even in the context of (at least disability and age) civil rights.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.³³⁰ *Heller* did, however, expose the Court to the existence of such efforts, setting the stage for confrontations to come.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.³³²

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

328. *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

329. *Id.*

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).

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”).

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. Florida*³³⁴ and *Alden v. Maine*³³⁵ – 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 demoor[ed] from its text.").

334. 517 U.S. 44 (1996).

335. 527 U.S. 706 (1999).

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 . . .”).

341. Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 500 (1997).

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.³⁴³

Three years later, in *Alden v. Maine*,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).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.³⁴⁶ Once again, the Court justified this holding by invoking the principles and history at the core of *Hans*—that is, the

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 “suff[icient] 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*).

344. 527 U.S. 706 (1999).

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).

346. Before *Alden*, there were dozens of cases in which the Court had held or assumed that the Eleventh Amendment posed no bar to litigation in *state court*. See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 274-75 (1997); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 204-05 (1991); *Hafer v. Melo*, 502 U.S. 21, 30 (1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979), *overruled by Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019). The dissenters also vigorously contested *Hans*'s version of history. See *Alden*, 527 U.S. at 798 (Souter, J., dissenting) (finding a “lack of any substantial support” for the historical interpretation at the core of the majority's opinion). By then, however, the *Hans* version of history had been repeated so many times that it was difficult to dislodge.

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/crfundo2/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, 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

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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) (marking 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. 529, 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”).
355. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Hutto v. Finney*, 437 U.S. 678, 693 (1978).
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. 356, 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*,³⁵⁷ 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),³⁶⁰ *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

357. 494 U.S. 872 (1990).

358. 521 U.S. 507, 536 (1997).

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

that Title I is valid legislation even if it could not abrogate state sovereign immunity). Thus, absent *Seminole Tribe's* holding that a broad nontextual state sovereign immunity existed, and that the (Indian) Commerce Clause could not validly abrogate state sovereign immunity, there would have been no reason for the Court to reach the issue of the scope of Congress's Fourteenth Amendment, Section 5 authority in *Garrett*.

362. *Garrett*, 531 U.S. at 364; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000).

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").

364. Brief for Respondents, *Garrett*, 531 U.S. 356 (No. 99-1240), 2000 WL 1593420, at *17-38.

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.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 5.³⁶⁷ 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.³⁶⁸

While grounded in disability skepticism, *Garrett* has had consequences far beyond the disability sphere—a broader theme of this Feature.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).
368. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 735-36 (2003) (internal quotation marks omitted) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90 (2000)).
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.³⁷⁰ The Court had never before imposed rigid, judicial-style requirements on congressional factfinding in support of Fourteenth Amendment, Section 5 legislation.³⁷¹ Nor had the Court closely scrutinized Congress’s conclusions that, in light of findings of unconstitutional state action, particular prophylactic legislation was necessary.³⁷² With *Garrett*, the Court “abandon[ed] any pretense” of deference to Congress, Professors Robert C. Post and Reva B. Siegel observed.³⁷³

Moreover, the *Boerne* line of cases continued to bear fruit after *Garrett*. Noteworthy 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.”³⁷⁴ 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.³⁷⁵ 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.

374. See *Tennessee v. Lane*, 541 U.S. 509, 530-34 (2004); *United States v. Georgia*, 546 U.S. 151, 159 (2006).

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).

376. 566 U.S. 30, 38-44 (2012); *cf.* *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 737-39 (2003) (finding the family-care provisions of the FMLA to be valid Section 5 legislation).

377. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

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).

379. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 433, 437 (2002).

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

380. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989).

381. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

382. Gluck, *supra* note 24, at 2040.

383. See, e.g., John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010) (describing clear statement rules as exacting a "clarity tax" on Congress).

384. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

385. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 639-40 (1992) (explaining how difficult it can be to override a Supreme Court statutory decision); cf. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (striking down the preclearance provisions of the Voting Rights Act in a way that, in theory, left Congress free to attempt to reenact them); Luis Fuentes-Rohwer & Guy-Uriel Charles, *State's Rights, Last Rites, and Voting Rights*, 47 U. CONN. L. REV. 481, 524-47 (2014) (arguing that the Court's lack of deference to congressional findings imposes significant obstacles to any kind of legislative "fix" to *Shelby County* and noting the constraining effects of "the highly partisan legislative process in Congress").

statutes “phrase their conditions in anything close to precise language.”³⁸⁶ 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).³⁸⁷ 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.³⁸⁸

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.³⁸⁹ 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.³⁹⁰ 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.³⁹¹ If that happened, would Congress simply pay the “clarity tax”?

386. McConnell, *supra* note 190, at 109.

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).

388. *Adams v. Sch. Bd.*, 57 F.4th 791, 815-17 (11th Cir. 2022) (en banc); cf. *Soule v. Conn. Ass’n of Schs.*, 57 F.4th 43, 50-56 (2d Cir. 2022), *vacated on reh’g en banc*, No. 21-1375, 2023 WL 8656832 (2d Cir. Dec. 15, 2023) (dismissing *anti-trans-rights* claims under Title IX based on *Pennhurst I* and a lack of sufficient clarity in the statute).

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,³⁹² 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.³⁹³ 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.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.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.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.³⁹⁷ As in the past, meanwhile, these disability cases have attracted comparatively little attention.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

Fellows of Harvard Coll., 600 U.S. 181 (2022), had been cited 55 times (this count reflects the number of citing references listed on Westlaw for each source). Of course, the issues in *Students for Fair Admissions* (striking down affirmative action) and *Cummings* (the availability of compensatory damages under Spending Clause civil rights laws) are not commensurate, but the comparison does provide some perspective on the limited attentiveness of scholars to recent disability Spending Clause developments. Notably, the progressive scholar who has afforded the cases we describe herein with most sustained and serious attention is also a disability-law scholar. See Samuel Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 399-401 (2008) [hereinafter Bagenstos, *Spending Clause Litigation*] (discussing cases like *Davis* and *Jackson*); Samuel Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 887-88 (2013) [hereinafter Bagenstos, *The Anti-Leveraging Principle*] (discussing cases like *Pennhurst I*); see also Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1709, 1725-28, 1733-35, 1766-69 (urging scholars outside of disability law to note the potentially far-reaching effects of *Cummings* and of the Court's then-pending decision in *Talevski*).

399. See, e.g., Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 499-500 (2003); Lynn A. Baker, *Federalism and the Spending Power from Dole to Birmingham Board of Education*, in THE REHNQUIST LEGACY, *supra* note 25, at 205, 205 [hereinafter Baker, *Federalism and the Spending Power*]; Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 (2003) ("In particular, the Rehnquist Revolution thesis is weakened considerably by the fact that the Court has done nothing, and seems little inclined to do anything, to revise or even revisit its Spending Power and conditional-spending doctrines.").

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).

406. See, e.g., Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 *YALE J.L. & FEMINISM* 297, 301–08 (2010) (describing Justice O’Connor’s divergent voting patterns from her conservative male colleagues in many sex-discrimination cases and attributing this in part to direct experiences of sex discrimination); Paul Bender & Chelsea Sage Durkin, *Justice O’Connor’s Race and Gender Jurisprudence*, 39 *ARIZ. ST. L.J.* 829, 831–33 (2007) (documenting Justice O’Connor’s tendency to vote for the “women’s rights

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.⁴⁰⁷ 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."⁴⁰⁸ 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.⁴⁰⁹

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.⁴¹⁰ 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."⁴¹¹ In their view, Congress must have detailed each way in which the statute's broad proscription on discrimination might be implemented.⁴¹² Case law in the analogous Title VII context could not provide the clear notice required (nor, the dissenters suggested

position" in gender-discrimination cases and contrasting this with her record in race-discrimination cases); Linda Greenhouse, *From the High Court, A Voice Quite Distinctly a Woman's*, N.Y. TIMES (May 26, 1999), <https://www.nytimes.com/1999/05/26/us/from-the-high-court-a-voice-quietly-distinctly-a-woman-s.html> [<https://perma.cc/K32J-QF5T>] (making note of Justice O'Connor's decision in *Davis* to deprioritize federalism and connecting this decision to her broader record in sex-discrimination cases).

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.⁴¹⁶ 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.⁴¹⁷ 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 2002.⁴¹⁸ 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.⁴¹⁹ 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.⁴²⁰

As the concurring Justices observed, this argument extended *Pennhurst I* in important and “novel” ways⁴²¹: never before *Barnes* had the Court imported *substantive contract law* into its interpretation of Spending Clause statutes.⁴²² Moreover, prior cases had cautioned that *Pennhurst I* did not mean that *all* ambiguities

416. See, e.g., Linda Greenhouse, *The Rehnquist Court and Its Imperiled States' Rights Legacy*, N.Y. TIMES (June 12, 2005), <https://www.nytimes.com/2005/06/12/weekinreview/the-rehnquist-court-and-its-imperiled-states-rights-legacy.html> [<https://perma.cc/4QPS-NM2L>].

417. See, e.g., *Barnes v. Gorman*, 536 U.S. 181 (2002); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519 (2012); *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320 (2015); *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562 (2022); cf. *Health & Hosp. Corp. of Marion Cnty. v. Talevski ex rel. Est. of Talevski*, 143 S. Ct. 1444, 1454-57 (2023) (rejecting defendants' arguments for interpreting Section 1983 as disallowing the enforcement of Spending Clause legislation rights).

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*

423. See, e.g., *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985); cf. *Barnes*, 536 U.S. at 187 (evaluating the metric of damages available under Spending Clause legislation under the *Pennhurst I* clear-notice standard).

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*⁴³⁰ that a congressional spending program (the Affordable Care Act's Medicaid expansion) was unconstitutionally coercive.⁴³¹ While the theoretical constraint on coercion predated *NFIB*, the case gave it new grounding in notions of a voluntary contractual relationship.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.”’”⁴³³ Coercive offers of conditional funding do not meet this requirement and thus would (as in *NFIB* itself) be invalidated.⁴³⁴

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

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 1719-20 (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).

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).

432. See *id.* at 576-77 (plurality opinion); *id.* at 676-77 (Scalia, J., dissenting).

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).

434. See *id.* at 581-82 (plurality opinion).

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).

436. See *infra* notes 440-443 and accompanying text.

437. 483 U.S. 203 (1987).

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.⁴³⁸ 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.⁴³⁹

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).⁴⁴⁰ 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.⁴⁴¹

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.⁴⁴² 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 th[at] “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).

441. 575 U.S. 320, 332 (2015) (plurality opinion) (“[T]he [contract law] jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government . . . much less to contracts between two governments.” (citations omitted)). But cf. *Health & Hosp. Corp. of Marion Cnty. v. Talevski ex rel. Estate of Talevski*, 143 S. Ct. 1444, 1453-55 (2023) (rejecting a very similar argument in the context of Section 1983).

442. See, e.g., David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 104-108 (1994) (articulating a theory of Spending Clause legislation as contracts); Bagenstos, *Spending Clause Litigation*, *supra* note 398, at 387 (2008) (describing the consequences of the full adoption of what he terms the “strong” contract theory of Spending Clause legislation).

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/296Y-TCPK>] (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).

446. Cf. Isaac Chotiner, *Why the Supreme Court Declined an Opportunity to Diminish the Voting Rights Act*, NEW YORKER (June 10, 2023), <https://www.newyorker.com/news/q-and-a/why-the-supreme-court-declined-an-opportunity-to-diminish-the-voting-rights-act> [<https://perma.cc/G2JK-Q823>] (quoting Ruth Greenwood's speculation that the Court's pro-VRA opinion may have been influenced by Chief Justice Roberts's search for "some cover to completely eviscerate affirmative action"); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023) (holding that race-conscious admissions programs at Harvard College and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment).

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.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 sub-national 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

448. See, e.g., Eloise Passachoff, *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., *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, *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, *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.⁴⁴⁹ Precedent shapes and constrains constitutional interpretation, this Feature shows, but so, too, do the limits of our social imagination.

449. See, e.g., Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 580-87 (2021) (describing the potential impact of a greater number of individuals claiming a disability identity); Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1738-42 (2021) (describing the importance of publicity from the perspective of social-movement change).