RACE AND THE CONSTITUTION

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I.

It is an honor and pleasure to be able to participate in this commemoration of Dean Harry Wellington’s outstanding contributions to constitutional scholarship and legal education in America. On a very personal note, I have Harry to thank for inviting me (and persuading his colleagues to agree with that invitation) to join the Yale Law School faculty almost twenty years ago. In the intervening period, Harry’s warm friendship and wise mentoring have helped my development as a legal academic and lawyer in many significant ways.

I also want to thank him for the valuable and lasting impact he had upon the shape and substance of Yale Law School as a wonderful place to teach and learn, a feat he has clearly repeated as Dean here at New York Law School.

II.

When asked by the staff of the Law Review for a working title for my talk, I volunteered “Race and the Constitution,” one that suggests that I have come prepared to rehearse the history of racial discrimination from the arrival of African slaves at Jamestown, Virginia in 1619 to the current national debate over the issue of racial profiling. That, I want to assure you, is not what I plan to do this afternoon given the limited time I have available. Rather, I want to talk about race in particular and civil rights in general, and how we find some of us, in the year 2000, fearful that the Supreme Court is on the brink of destroying much of what Congress has contributed to the cause of civil rights over the past fifty years.

Last month, the United States Supreme Court heard oral arguments in the case of Board of Trustees v. Garrett,1 one that presents the

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question of Congress’s constitutional authority to enact the Americans with Disabilities Act (the ADA). That Act, among other things, grants individuals the right to sue state governments for employment discrimination on grounds of disability. The plaintiff, Patricia Garrett, had worked for the University of Alabama for a number of years before she was diagnosed with breast cancer. She received therapy while continuing work, during which, she alleged, she was repeatedly threatened with a transfer to a less demanding job, told that she was being replaced by a subordinate and actually demoted with lower salary upon returning from a short medical leave. Some commentators have expressed the view that the Court’s resolution of Garrett may well spell the imminent demise of other modern federal civil rights laws that have, heretofore, withstood constitutional attack. The question I want to address is how this state of affairs has come about.

2. 42 U.S.C. § 12202 (1994) (abrogating a state’s immunity under the Eleventh Amendment in suits for a violation of the Act). The Act prohibits the states (and other employers) from “discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” Id. § 12112(a).

3. See Garrett v. University of Alabama at Birmingham Bd. of Tr., 193 F.3d 1214, 1219 (1999); see also a more brief—and more sanitized—description of facts in Garrett, 121 S. Ct. at 961.

4. See, e.g., Joseph C. Beckham, State Universities and the Americans with Disabilities Act: Will the Eleventh Amendment Limit the Reach of Federal Civil Rights Law?, 150 ED. LAW REV. 15, ___ (2001) (“If the Supreme Court, pursuant to its recent decisions, moves unerringly toward further limits upon Congressional authority over states through the application of Eleventh Amendment immunity, these decisions will heighten uncertainty as to the scope of federal legislative authority to protect the civil rights of citizens against encroachments by the states. Further extension of the reasoning in Boerne, Florida Prepaid, and Kimel will lead states to challenge their obligations under virtually the entire structure of federal civil rights protection, reaching the prohibitions on sex discrimination under Title IX and the sweeping prohibitions on disparate impact discrimination embodied in Title VI and VII of the Civil Rights Act of 1964.”); James Leonard, The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act, 52 ALA. L. REV. 91, 92-96 (2000) (noting a “great uncertainty about the effects of the Court’s renewed federalism on the power of Congress to impose the ADA’s non-discrimination mandate on state and local governments” and remarking that the federalism decisions pose a “potential for disrupting the effectiveness of the federal civil rights laws, including the ADA, as they apply to state and local governments”).

In its Garrett decision—which was handed down a few months after this talk was delivered—the Court (speaking through Chief Justice Rehnquist) applied the City of Boerne “congruence and proportionality” test, see City of Boerne v. Flores, 521 U.S. 507, 520 (1997) and held, five-to-four, that Title I of the ADA did not validly abrogate the states'
Since 1960, Congress has been at the forefront of federal government civil rights efforts, enacting a host of laws directed initially to problems of racial discrimination in access to places of public accommodation, voting, employment, housing and in federally-funded programs. These laws have been subsequently broadened to protect groups other than racial and ethnic minorities.

Eleventh Amendment immunity against suit for money damages using Congress's enforcement power under Section 5 of the Eleventh Amendment. *Garrett*, 121 S. Ct. at 962-63, 967-68. To withstand *City of Boerne*, a plaintiff must show both a pattern of unconstitutional state discrimination (or other constitutional violation) and that the solution was congruent to the harm. In the majority's view, the legislative record of the ADA failed to show that Congress had identified a history and pattern of irrational employment discrimination by the states against the disabled. *Id.* at 965. The Court eliminated much of the evidence in the record as committed by local governmental units, rather than states. Although localities are "state actors" for the purposes of the Fourteenth Amendment, the Court said that they are not covered by the Eleventh Amendment immunity, and therefore individuals can bring suits against them without the aid of Congress's Section 5 enforcement authority. *Id.* The remaining record then fell "far short of even suggesting" the requisite pattern of unconstitutional discrimination, especially given the large number of disabled individuals in the U.S. *Id.* at 965-66. Rather than making an explicit finding of unconstitutional state discrimination, Congress, in the majority's view, only demonstrated discrimination in employment in the private sector and accommodation. Even if Congress had found a pattern of unconstitutional disability discrimination by the states, the Court held that the rights and remedies created by the ADA against the states were not narrowly tailored to address alleged violations. The Act's duty to accommodate the disabled "far exceeds what is constitutionally required," since it made unlawful responses that were reasonable but fell short of imposing an "undue burden" on the employer. The Act also made unlawful standards that would have a "disparate impact," although disparate impact is insufficient to establish a violation even under strict scrutiny. Compared to the Voting Rights Act—which involved a serious pattern of discrimination and narrowly tailored remedies—the ADA fell short of passing Section 5 muster. *Id.* at 967. (Chief Justice Rehnquist noted—albeit in a footnote—that individuals with disabilities still have federal recourse against discrimination by the states, either via injunctive or money damages actions brought by the United States, or via private actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). *Garrett*, 121 S. Ct. at 968 n.9.).


The response of the Supreme Court, where these enactments were challenged on legal or constitutional grounds, has been largely favorable for many years and where it was not, its resistance has been primarily in the form of narrow statutory construction rather than outright constitutional objection. For example, in the 1980's the Court gave a very restrictive reading to Section 2 of the 1965 Voting Rights Act and attempted to cut back on the reach of Title VII of the 1964 Civil Rights Act prohibiting racial and various other forms of discrimination in employment. Congress' response was to amend both acts extensively to require broader and more generous application of both federal laws.

Since 1995, however, a five-vote majority, headed by Chief Justice Rehnquist, has announced a set of doctrines that, acting in tandem, have posed formidable obstacles to Congress' exercise of its powers to enact civil rights legislation, in particular, and to legislate more generally with respect to matters it regards as requiring federal attention. The three doctrines I have in mind are:

First, the _Lopez_ doctrine—announced in the case of _United States v. Lopez_ in 1995, where the Court held unconstitutional the Gun-Free School Zones Act of 1990. The Court held that Congress had exceeded its authority to legislate pursuant to the Commerce Clause,

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7. See City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding, in response to a class action by black citizens of Mobile, Alabama challenging the city's at-large electoral system as unfairly diluting the voting strength of the city's black voters in violation of Section 2 of the Voting Rights Act, that the provision prohibited only intentional discrimination, and not practices that, although not instituted with invidious intent, had the practical effect of diluting minority votes).

8. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding, in response to a class action suit by former salmon cannery workers alleging employment discrimination on the basis of race, that statistical evidence showing high percentage of nonwhite workers in employer's cannery jobs and low percentage of such workers in noncannery positions was insufficient to establish a prima facie case of disparate impact in violation of Title VII).


11. 18 U.S.C. § 922(q)(1)(A) (1988) (making it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone").
striking down federal legislation on that basis for the first time in over 60 years. The majority’s decision rested on two factors. First, the Court stated that the possession of a gun in a local school zone did not constitute an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. The Act, therefore, was “a criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise. . . .” Second, the Court found that the Act did not contain a jurisdictional element that would ensure, through case-by-case inquiry, that firearms possession maintains the requisite nexus with interstate commerce. The application of the Act would therefore present a danger of converting congressional Commerce Clause authority to a general police power of the sort held only by the states.

Second, the Seminole Tribe doctrine, which was announced in the 1996 case of Seminole Tribe of Florida v. Florida. In that case, the Court held that the Commerce Clause power could not be used to abrogate a state’s immunity under the Eleventh Amendment and, thereby, to allow suits by private parties in federal courts. The statute in question was the Indian Gaming Regulatory Act, passed by Congress pursuant to the Indian Commerce Clause. That act required an Indian tribe to obtain the agreement of the relevant state in order to conduct gaming activities, but imposed on the state a duty to negotiate in good faith with the tribe. The tribe, in turn, was allowed to sue the state in federal court in order to compel performance of that duty. In reaching its decision, the Court overruled its 1989 holding in Pennsylvania v. Union Gas Company, where a plurality of the justices found that Congress received the power to abrogate the states’ ceding of their sovereignty when they gave Congress plenary power to regulate commerce. Characterizing Union Gas as a sharp deviation from the established fed-

13.  *Id.* at 561.
14.  *Id.* at 561-67.
15.  *Id.* at 567-68.
17.  Although the precise constitutional provision in question was the Indian Commerce Clause, the Seminole Tribe Court found “no principled distinction” to be drawn between that power and the Interstate Commerce Clause. *Id.* at 63 (relying on the rationale of Pennsylvania v. Union Gas Co., 491 U.S. 1, 17-20 (1989)).
eralism jurisprudence, Chief Justice Rehnquist declared that it had im-
permissibly allowed Congress to use its Article I power to expand the
scope of the federal courts's Article III jurisdiction, thereby violating
the constitutional limitations that the Eleventh Amendment places
upon the federal courts's jurisdiction.20 The Court found, conse-
quently, that the provision of the Indian Gaming Regulatory Act au-
thorizing a suit against the state was unconstitutional on that basis.21

Third, the City of Boerne doctrine, announced in the 1997 case of
City of Boerne v. Flores,22 in which the Court held unconstitutional pro-
visions of the Religious Freedom Restoration Act of 1993 that allowed
suits against states to challenge certain restrictions on the exercise of
religious practices.23 The Court found it beyond Congress's power
under Section 5 of the Fourteenth Amendment to enact such provi-
sions. Although conceding that Section 5 vested Congress with the
power to enact legislation enforcing the constitutional right to free ex-
ercise of religion, such power could be only preventive or "remedial."24
Contrasting this remedial power with a power to "decree the substance

21. Id. at 72-73 (invalidating 25 U.S.C. § 2710(d)(7)). The Court also held un-
availing the doctrine of Ex parte Young, 209 U.S. 123 (1908), which allows a suit against a
state official for prospective injunctive relief from a continuing federal-law violation
notwithstanding the Eleventh Amendment's jurisdictional bar. In the Court's view, the
intricate remedial provisions of the Indian Gaming Regulatory Act, set forth in Subsec-
tion 2710(d)(7), indicated that Congress did not intend to expose states to a full pan-
opoly of a federal court's remedial powers available under the Ex parte Young. Seminole
Tribe, 517 U.S. at 73-76.

As could be expected, scholarly response to Seminole Tribe has been extensive and
diverse. Many scholars drew a connection between Seminole Tribe and Lopez, viewing
both cases as reestablishing limits on congressional power under the Commerce Clause.
See, e.g., Herbert Hovenkamp, Judicial Restraint and Constitutional Federalism: The Supreme
Court's Lopez and Seminole Tribe Decisions, 96 COLUM. L. REV. 2213 (1996); Henry Paul
ent approach was adopted by Carlos Manuel Vazquez in What Is Eleventh Amendment
Immunity?, 106 YALE L.J. 1683 (1997). Vazquez focused on the implications that Semi-
nole Tribe had for two competing conceptions of the Eleventh Amendment: one consti-
tutionalizing some version of state sovereign immunity, and the other merely requiring
suits against states to proceed in state courts.

§ 2000bb et seq. (1994). The provision authorizing suits for violation of the Act was id.
§ 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of
this section may assert that violation as a claim or defense in a judicial proceeding and
obtain appropriate relief against a government.").
of the Fourteenth Amendment's restrictions on the states,” the Boerne Court articulated a “congruence and proportionality” test as a way of distinguishing between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law.25 This test—which, so far, no congressional statute has passed—requires that the measures adopted by Congress to prevent or remedy a constitutional injury must be congruent and proportionate to the injury itself.26 The City of Boerne doctrine packs an especially big “whallop” because it imposes restrictions on what the Court now permits as the only basis for congressional legislation authorizing private suits against states, Section 5.27

Armed with these three doctrines, the Court has declared unconstitutional a number of congressional statutes authorizing private suits against both states and private individuals. The following five statutes authorizing such suits against states have been struck down by the Court:

1. The Fair Labor Standard Act of 1938,28 invalidated in Alden v. Maine.29 In this case, a group of probation officers filed a suit in federal district court against their employer, the State of Maine, claiming that the state had violated the overtime provisions of the

25. Id. at 519-20.

26. Applying this test to the provisions of the Religious Freedom and Restoration Act itself, the Court found that Congress exceeded its Section 5 enforcement power in enacting this statute and contradicted principles of separation of powers and of the federal-state balance. In the Court’s opinion, the Act was so out of proportion to its remedial object that it could not be understood as responsive to unconstitutional behavior, but was instead an attempt at a substantive change in constitutional protection, proscribing state conduct not prohibited by the Fourteenth Amendment itself. Id. at 532-36.

27. In addition to this restriction, the Court announced another limitation on Congress’ power to enact antidiscrimination laws under Section 5 in United States v. Morrison, 529 U.S. 598 (2000). This case—which I discuss in more detail below—announced a rule forbidding the use of Section 5 power to regulated private parties. Id. at 755-59. Some commentators have subsequently argued that this rule is better read as requiring a case-by-case determination of whether Section 5 legislation is congruent and proportional to the constitutional violation it seeks to remedy. See Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel, 110 Yale L.J. 441, 502-09 (2000).

28. 29 U.S.C. § 201 et seq. (1994). The provisions of the Act authorizing private actions against states in their own courts irrespective of a state’s consent are sections 216(b) and 203(x).

Act, and seeking compensatory and liquidated damages. When, in the aftermath of the Seminole Tribe decision, the suit was dismissed, the plaintiffs refiled in state court. Maine obtained dismissal on the basis of sovereign immunity, absent its express consent to its abrogation. The Court affirmed. In holding that Congress lacked the power to abrogate a state’s immunity from a private suit in its own courts, the Court relied extensively on three sources: a historical analysis of the original understanding of the Eleventh Amendment, the early congressional practice that accompanied the Amendment’s adoption, and the overall constitutional structure of federalism. All of these sources suggested to the majority that the Constitution did not envision a derogation from the states’ sovereign immunity from suits in their own courts. Examining the debates at the time of the adoption of both the Constitution and the Eleventh Amendment, the Court found them to be characterized by a silence regarding the states’ immunity from suits in their own courts. This silence of the Founders, especially when contrasted with the controversy regarding the states’ sovereign immunity in federal court, indicated that a state’s sovereign right to be immune from suit in its own courts was well-established and not intended to be changed. The Court found that early congressional practice reflected this original understanding, visible in the absence of any statutes purporting to authorize suits against nonconsenting states in state court. Most important, argued the majority, the fundamental principles of the constitutional scheme of federalism and the role of state courts in the constitutional design suggested that a state’s sovereign immunity from a private suit is one of the underlying mechanisms ensuring the states’ function as residuary sovereigns and joint participants in

30.  Id. at 711-12.
31.  Id. at 712.
32.  Id. at 741-43. In addition to the practice of early Congresses, the Court also cited the decisions (and reasoning) of the Court’s early cases, as suggesting that states retained constitutional immunity from suit in their own courts. Id. at 745-48 (citing, among others, Briscoe v. Bank of Kentucky, 11 Pet. 257, 321-22 (1837); Beers v. Arkansas, 20 How. 527, 529 (1857); Hans v. Louisiana, 134 U.S. 1, 10 (1890)).
33.  Id. at 743-45. The Court contrasted this situation with the prevalence of early Congressional statutes authorizing federal suits in state court, but on the condition that the state gives its consent. The "‘numerousness of these statutes, contrasted with the utter lack of statutes' subjecting States to suit, 'suggests an assumed absence of such power.'" Id. at 744 (quoting Printz v. United States, 521 U.S. 898, 907-08 (1997)).
the nation's governance alongside Congress.\textsuperscript{34} Relying heavily on the *Seminole Tribe* leg of its federalism jurisprudence, the Court emphasized that since Congress may not abrogate states' sovereign immunity in federal courts, considerations of symmetry and reciprocity suggest that Congress lacks the power to deprive states of immunity in their own courts. A contrary decision, the majority argued, would confer upon Congress a constitutionally unprecedented power to require state courts, through Article I legislation, to entertain federal suits that are not within the Article III judicial power of the federal courts.\textsuperscript{35}

2. The Patent and Plant Variety Protection Remedy Clarification Act,\textsuperscript{36} struck down in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*\textsuperscript{37} College Savings Bank filed a patent infringement suit against Florida Prepaid, a state entity, under the Act. When the Court decided *Seminole Tribe*, Florida Prepaid moved to dismiss the action, claiming that the Act was an unconstitutional abrogation of sovereign immunity by Congress via its Article I power. College Savings countered that Congress has acted properly, pursuant to its Section 5 power, in order to enforce the Due Process guarantees of the Fourteenth Amendment.\textsuperscript{38} The district court and the Federal Circuit agreed with this argument, but

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\textsuperscript{34} Id. at 748-54.

\textsuperscript{35} Id. at 751-54. The *Alden* decision provoked substantial scholarly commentary, most of it unfavorable. See, e.g., Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 Notre Dame L. Rev. 1133 (2000) (examining *Alden* as reflecting a “new federalism” credo of state sovereignty); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011 (2000) (criticizing the Court’s efforts to promote federalism by limiting the enforcement of valid federal laws against states, rather than by restricting the reach of federal legislative authority, as failing to “promote any coherent conception of states’ rights or state autonomy while harming legitimate national objectives”); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 Notre Dame L. Rev. 1091 (2000) (comparing the Court’s recent decisions to those that dismantled or curtailed Reconstruction-era legislation); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859 (2000) (exploring the Court’s “schizophrenia” of saying that state sovereign immunity from private suits is constitutionally fundamental and beyond Congress’s control, while allowing unlimited federal enforcement actions against states, as well as private suits against state officers).


\textsuperscript{37} 527 U.S. 627 (1999).

\textsuperscript{38} Id. at 630-33.
the Supreme Court reversed.\textsuperscript{39} The Court rejected the claim that
the Act was a valid abrogation of states' sovereign immunity under
Section 5, finding that it did not pass the \textit{City of Boerne} test of "con-
gruence and proportionality." The five-to-four majority held that
Congress failed both to identify conduct transgressing the Four-
teenth Amendment and to tailor its legislative scheme to remedy
such conduct. The Act's legislative record did not demonstrate
that unremedied patent infringement by states had become a
problem of national dimension;\textsuperscript{40} nor did it contain evidence that
Congress had considered the sufficiency (or insufficiency) of avail-
able state remedies for patent infringement.\textsuperscript{41} Since, under this
interpretation, the Act was not responding to a history of wide-
spread and persisting deprivation of constitutional rights that Con-
gress is allowed to remedy by prophylactic Section 5 legislation, the
Court consequently described the Act's provisions as dispropor-
tionate to the permissible congressional goal of providing a Sec-
tion 5 remedy to prevent unconstitutional behavior.\textsuperscript{42} Instead, the
Court interpreted the Act's purpose as one of providing "a uni-
form remedy for patent infringement" and placing states "on the
same footing as private parties under that regime."\textsuperscript{43} Since these
were properly Article I, rather than Section 5, concerns, the \textit{Semi-
nole Tribe} holding barred Congress from abrogating states' immu-
nity via that route.\textsuperscript{44}

3. The Trademark Remedy Clarification Act,\textsuperscript{45} declared void in \textit{Col-
lege Savings Bank v. Florida Prepaid Postsecondary Education Expense
Board}.\textsuperscript{46} Our already-familiar plaintiff, College Savings Bank, mar-
tested certificates of deposit designed to finance college costs.
When Florida Prepaid began its own tuition prepayment program,
College Savings filed suit, claiming that Florida Prepaid violated
the Act by misrepresenting its program. The district court and the

\textsuperscript{39} \textit{Id.} at 633-34.
\textsuperscript{40} \textit{Id.} at 639-41.
\textsuperscript{41} \textit{Id.} at 642-45.
\textsuperscript{42} \textit{Id.} at 645-47.
\textsuperscript{43} \textit{Id.} at 647-48.
\textsuperscript{44} \textit{Id.} at 648.
\textsuperscript{45} The Trademark Remedy Clarification Act, 106 Stat. 3567, subjected the states
to suits brought under Section 43(a) of the Trademark Act of 1946 (Lanham Act) for
false and misleading advertising. See The Trademark Act of 1946 §§ 40, 43(a), \textit{codified
\textsuperscript{46} 527 U.S. 666 (1999).
Third Circuit granted Florida Prepaid’s request for dismissal, rejecting the arguments that the Act’s abrogation of Florida’s sovereign immunity was a valid exercise of Congress’s Section 5 power and that Florida Prepaid implicitly waived its immunity by engaging in an interstate commercial activity that Congress had specifically targeted by the Act. The same five-justice majority held that the Act was not a permissible abrogation of a state’s sovereign immunity under the City of Boerne test, since the object of the legislation was not the remediation or prevention of constitutional violations. The Court decided that the interests involved—a right to be free from a business competitor’s false advertising about its own product and a right to be secure in one’s business interest—did not qualify as protected property rights within the meaning of the Due Process Clause of the Fourteenth Amendment. Stressing that “the hallmark of a protected property interest is the right to exclude others,” the Court concluded that the first right—to be free from false advertising—lacked that element. With respect to the second asserted property right—that of one’s business interests—the Court distinguished the “assets of a business (including its good will)” from “the activity of doing business, or the activity of making a profit.” The state’s false advertising impinged only upon the latter, activity which the Court said, was “not property in the ordinary sense.” Finding that no deprivation of property took place, the Court did not address the follow-up question mandated by City of Boerne: whether the remedial measures adopted by Congress were proportionate to the need to remedy the constitutional violation.

47. Id. at 670-72.
48. Id. at 673-74 (emphasis removed).
49. Id. at 675.
50. Id.
51. Id. The Court also rejected the plaintiff’s contention that Florida’s sovereign immunity was implicitly waived by the state’s participation in interstate commerce. Overruling its prior suggestion to the contrary, Parden v. Terminal R. of Ala. Docks Dept., 377 U.S. 184 (1964), the Court held that the principle of state sovereignty mandated against the notion of a constructive (or implied) waiver of such immunity in cases where Congress provides unambiguously that a state will be subject to a private suit if it engages in certain federally regulated conduct and the state voluntary elects to engage in such a conduct. Id. at 675-87.
4. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1). The Act’s enforcement provisions are in reality the enforcement provisions of the Fair Labor Standards Amendments of 1974, incorporated by reference into the Age Discrimination in Employment Act, 88 Stat. 61. In validated in Kimel v. Florida Board of Regents. In this consolidated case, three sets of plaintiffs filed suit in federal court against their state employers, seeking money damages and other relief for discrimination on the basis of age. The states of Alabama and Florida moved to dismiss on the ground of the Eleventh Amendment. The district courts divided on these motions, but the Eleventh Circuit held that the suits were barred by the states’ sovereign immunity. So did the Supreme Court. Applying the “congruence and proportionality” test of Boerne, the Court, in a somewhat fractured opinion, held that the Act was not “appropriate legislation” under Section 5 of the Fourteenth Amendment and, accordingly, invalidated the Act’s abrogation of the states’ sovereign immunity. The Court considered the substantive requirements that the Act imposed on state and local governments to be disproportionate to any unconstitutional conduct that the Act could conceivably target. Since age was not considered a suspect classification for the purposes of the Equal Protection Clause, states were therefore allowed to discriminate on the basis of age, provided that such classification was rationally related to a legitimate state interest. Moreover, states were allowed to use age as a proxy for other characteristics that were relevant to the state’s legitimate interests, even

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52. 29 U.S.C. § 621 et seq. (1994). The Act made it unlawful for an employer, including a state, "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual . . . because of such individual's age."

53. Id. § 623(a)(1). The enforcement scheme of the Act includes the permission to an aggrieved individual to bring a civil action against any employer (including a state) in "any Federal or State court of competent jurisdiction."


56. Id. at 69-71.

57. Id. at 69-72.

58. Id. at 82-83.

59. Id. at 83.

60. Id. at 83-84.
if age proved to be an inaccurate proxy in an individual case.\textsuperscript{61} Viewing the Act against this background principle of its Equal Protection jurisprudence, the Court held that the Act's remedies were disproportionate: "The Act[']s broad restriction on the use of age as a discriminating factor, prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable rational . . . basis standard."\textsuperscript{62} Turning to Congress' reasons for enacting the Act, the Court also found them to be inadequate to pass the \textit{City of Boerne} test. The Act's legislative record revealed that Congress had failed to identify any pattern of age-based discrimination by the states that rose to a level of constitutional violation.\textsuperscript{63} This evidentiary failure confirmed the Court's supposition that Congress had no reason to believe that broad prophylactic legislation was necessary in this instance.

5. Lastly, the Americans with Disabilities Act,\textsuperscript{64} invalidated in \textit{Garrett}\textsuperscript{65} under the same "congruence and proportionality" test of \textit{City of Boerne}.\textsuperscript{66}

The Court also held unconstitutional, in \textit{United States v. Morrison},\textsuperscript{67} the provision of the Violence Against Women Act of 1994 (the VAWA) that allowed suits against private individuals.\textsuperscript{68} The plaintiff, Christy Bronzkala, a former student at Virginia Tech, filed a suit in federal court against two male students, who had allegedly raped her, seeking, among other things, a remedy that the Act provided for victims of gender-motivated violence.\textsuperscript{69} The district court eventually dismissed the complaint, concluding that Congress did not have the constitutional authority to enact the statutory provision in question. A divided panel of the Fourth Circuit reversed, only to have the decision vacated by the \textit{en banc} court, which affirmed the district court decision.\textsuperscript{70} The Court,

\begin{itemize}
\item \textsuperscript{61} \textit{Id.} at 84.
\item \textsuperscript{62} \textit{Id.} at 86.
\item \textsuperscript{63} \textit{Id.} at 89-91.
\item \textsuperscript{64} 42 U.S.C. § 12201, et seq. (1994).
\item \textsuperscript{65} 121 S. Ct. 955, 963 (2001).
\item \textsuperscript{66} \textit{See} note 5, supra.
\item \textsuperscript{67} 529 U.S. 598 (2000).
\item \textsuperscript{68} The invalidated provision was 42 U.S.C. § 13981 (1994), "which provide[d] a federal civil remedy for . . . victims of gender-motivated violence." \textit{Id.} at 601.
\item \textsuperscript{69} \textit{Morrison}, 529 U.S. at 601-03.
\item \textsuperscript{70} \textit{Id.} at 604.
\end{itemize}
in turn, affirmed the Fourth Circuit. The Court rejected both justifications for the congressional authority to enact the impugned section of the Act: the Commerce Clause power and the Section 5 power. With respect to the Commerce Clause, the Court followed its holding in *Lopez*. First, it held that, similarly to the crime of possessing a firearm in a school zone that was at issue in *Lopez*, the gender-motivated crimes of violence targeted by Congress in the VAWA did not constitute an economic activity as defined in *Lopez*. Second, like the Gun-Free School Zones Act, Section 13981 of the VAWA contained no jurisdictional element establishing that the federal cause of action was in pursuance of Congress's regulation of interstate commerce. Third, although Section 13981, unlike the statute invalidated in *Lopez*, was supported by legislative findings regarding the serious impact of gender-motivated violence on victims and their families, these findings were “substantially weakened” by the fact that they relied on a reasoning (rejected in *Lopez*) of a “but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce.” Such reasoning, in the Court's view, “would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption.” By permitting Congress to regulate noneconomic, violent criminal conduct based solely on the conduct’s aggregate effect on interstate commerce, so the Court argued, the Act would create a danger of transforming the Commerce Clause into a general police power and eviscerating the distinction between “what is truly national and what is truly local” that the Court has extolled in *Lopez*. With respect to the second support leg of the Act—Section 5 of the Fourteenth Amendment—the Court accepted that Congress had adequately demonstrated the existence of a pervasive bias in various state justice systems against victims of gender-motivated violence. The Court, however, refused to affirm the Act under the Section 5 power, arguing that the Fourteenth Amendment prohibited only state action, and not private conduct, whereas Section 13981 was directed not at a state or state actor, but at individuals who have committed criminal acts motivated

71. *Id.* at 609-611.
72. *Id.* at 611-613.
73. *Id.* at 615.
74. *Id.* at 615.
75. *Id.* at 617-618 (citing *Lopez*, 514 U.S. at 568).
76. *Id.* at 619-620.
by gender bias.\textsuperscript{77} Moreover, the Court concluded that Section 13981 would be invalid as not a narrowly-tailored remedy, for it applied uniformly across the country, including those states where the problem of biased judicial systems was not documented.\textsuperscript{78}

III.

What has brought about this dramatic turn of events? Put crudely, in \textit{realpolitik} terms, it has resulted from the coming together on the Court of five Justices with very strongly held views on questions of state sovereignty and freedom from excessive federal regulation or intrusion.

Strategically, that majority has seized upon several targets of opportunity provided by Congress to expand upon state-protective doctrines. In the \textit{Lopez} case, the Court reacted negatively to a growing highly politicized congressional penchant for the “federalization” of crime that would convert criminal offenses traditionally dealt with by the states into federal crimes, often carrying significantly heavier penalties. With respect to \textit{Seminole Tribe}, congressional efforts to address the politically volatile issue of casino-style gambling on Indian reservations also represented a flashpoint in federal state relations. In \textit{City of Boerne}, the Court responded to what it perceived as a threat to its own authority as the final word on constitutional interpretation, in this instance, the Free Exercise Clause of the First Amendment. Lastly, in the Religious Freedom Restoration Act, Congress sought to revive a standard for determining when religious free exercise was unduly burdened by government action that the Court had rejected several years earlier, in \textit{Department of Human Resources of Oregon v. Smith}.\textsuperscript{79}

IV.

What about these doctrines? I am hardly impartial, I have to admit in the spirit of full disclosure, since I argued and \textit{lost} while serving as Solicitor General both the \textit{Lopez} and \textit{Seminole Tribe} cases, two legs of

\textsuperscript{77} \textit{Id.} at 620-621. For a criticism of the Court’s Section 5 argument, see Post & Siegel, \textit{supra} note 28, at 474-509.

\textsuperscript{78} \textit{Morrison}, 529 U.S. at 626-627. The Court contrasted this approach with the Section 5 remedy that it upheld in the 1966 case involving the Voting Rights Act of 1965, \textit{South Carolina v. Katzenbach}, 383 U.S. 301 (1966), which was directed only at those states where Congress had found voting rights discrimination. \textit{Morrison}, 529 U.S. at 627.

\textsuperscript{79} \textit{494 U.S. 872} (1990).
the Supreme Court's "new federalism" stool. Put bluntly, these three doctrines are unstable, ahistorical and threatening to separation of powers principles.

**Unstable.** The line that the Court seeks to draw between matters properly within Congress's powers under the Commerce Clause and those left to the states will prove impossible to maintain, will prove difficult, if not impossible, for lower federal courts to apply, and will prove futile in the long run.\(^8\) It is very reminiscent of the Court's failed attempt to carve out similar spheres of power under the Tenth Amendment,\(^8\) finally admitting failure in that respect in *Garcia v. San Antonio Metropolitan Transit Authority*\(^8\) in 1985.

**Ahistorical.** For a group of Justices that lays claim to a philosophy of faithful interpretation of constitutional text, its deployment of the Eleventh Amendment in the cause of "new federalism" reflects an approach that it has acknowledged is divorced from text in favor of a principle allegedly found "in the Constitution's structure and history."\(^8\)

**A Threat to Separation of Powers Principles.** The Court has seen fit to substitute itself as the final arbiter of what constitutes appropriate exercise of congressional power pursuant to Section 5 of the Fourteenth Amendment. It has done so pursuant to its newly articulated standard

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81. See National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that the Commerce Clause did not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act against the states "in areas of traditional government functions") and its progeny.

82. 469 U.S. 528 (1985) (rejecting, as both practically unworkable and inconsistent with constitutional principles of federalism, the National League of Cities rule of state immunity from federal regulation, which turned on a judicial appraisal of whether a particular state governmental function was "integral" or "traditional"). Consider, however, the Court's recent attempt to use the Tenth Amendment to define a proper role of the federal government vis-à-vis state executive officers in *Prints v. United States*, 521 U.S. 898 (1997).

83. See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 ("[A]s the Constitution's structure, and its history, and the authoritative interpretations of this Court make clear, the States' immunity from suit is a fundamental aspect of the[ir] sovereignty. . . ."). See also the extensive criticism of the "pro-federalist" majority's historical analysis of the doctrine of sovereign immunity offered by Justice Souter in both *Seminole Tribe v. Florida*, 517 U.S. 44, 102-68 (1996) (Souter, J., dissenting), and *Alden*, 527 U.S. at 769-98 (1999) (Souter, J., dissenting).
of "congruence and proportionality," in the face of an explicit constitutional grant to Congress by Section 5 to "enforce by appropriate legislation" Section 1 of the Fourteenth Amendment, as well as Congress's Article I "Necessary and Proper" Clause powers. The Court appears to be suggesting that it, rather than Congress, has superior insight in that regard.

V.

Where does this analysis leave us with respect to the future of federal civil rights legislation?

Where the classes protected by existing legislation are characterized by the Court as enjoying only minimum scrutiny or rational relationship review of government classifications under the Equal Protection Clause, its decision in *Kimel*, makes the chances of surviving a "new federalism" attack difficult. This suggests that the outcome in the *Garrett* case having to do with a classification, disability, that like age is subject to only minimum scrutiny is somewhat problematic. I might say that the Court's recent tendency to equate levels of judicial scrutiny under the Fourteenth Amendment with congressional power to legislate pursuant to the Fourteenth Amendment strikes me as nonsensical.

Since racial classification, however, must satisfy a compelling interest/strict scrutiny standard, and the history of racial discrimination in America is an off-told tale, I would think that existing laws addressing racial discrimination such as Title VII, the Fair Housing Act and the Voting Rights Act of 1965 would satisfy the Court's "congruence and proportionality" test.

Finally, where federal law authorizes federal antidiscrimination suits on the basis of race against private parties, the Commerce Clause precedents in the public accommodations cases and the economic character of, for example, employment and the housing market should also satisfy the *Lopez* criteria.84

84. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (holding that the provisions of the Civil Rights Act prohibiting discrimination in public accommodations are a valid exercise of Congressional authority under the Commerce Clause); Griggs v. Duke Power, 401 U.S. 424 (1971) (holding that an employer was prohibited by the employment provisions of the Civil Rights Act from requiring a high school education or a standardized intelligence test as a condition of employment or promotion, where neither standard was significantly related to successful job performance, but operated to discriminate against black applicants); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) (holding that tenants alleging that because
Of course, these are educated (I would like to think) guesses (I hope), since the decisions from the group of five, headed by Chief Justice Rehnquist, lead me to fear deep down: first, that its members are convinced that racial discrimination requiring federal remedial action is a thing of the past;85 second, that the same justices believe that the Civil War Amendments were not meant to achieve a fundamental reordering of the ante-bellum relationship (1) between citizen and state, (2) citizen and federal government, and (3) state and federal governments,86 but rather were an historical "hiccup" in an otherwise basic constitutional scheme in which the Tenth and Eleventh Amendments play a critical role in protecting state sovereignty; and finally, that if my suspicions are correct, then this group will proceed to concoct one new doctrine after another to make its constitutional vision a reality. Those of us who find it wrong-headed and unacceptable, as do I, will have to await a more balanced and thoughtful Court to set things aright.


86. The belief that the Civil War Amendments did intend to effect such a rearrangement of the pre-war constitutional order was expressed eloquently by Justice Stewart in Mitchum v. Foster, 407 U.S. 225 (1972), as a conclusion to his historical analysis of the legislative debates that accompanied the adoption of the Civil Rights Act of 1871, which sought to implement the guarantees of the Fourteenth and the Fifteenth Amendments:

Those who opposed the Act of 1871 clearly recognized that the proponent were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. [The] legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to state courts.

Section 1883 [of the Act] was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . . The very purposes of § 1883 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights. . .

Id. at 241-42.