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THE IMPERIAL SOVEREIGN: SOVEREIGN IMMUNITY & THE ADA

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Professors Brown and Parmet examine the impact of the Supreme Court's resurrection of state sovereign immunity on the rights of individuals protected by the Americans with Disabilities Act *in light of the recent decision,* Board of Trustees of the University of Alabama v. Garrett. *Placing* Garrett *within the context of the Rehnquist Court's evolving reallocation of state and federal authority, they argue that the Court has relied upon a mythic and dangerous notion of sovereignty that is foreign to the Framers' understanding. Brown and Parmet go on to show that, by determining that federalism compels constraining congressional power to abrogate sovereign immunity, the Court limits the ability of individuals with disabilities to obtain federal recourse. They also contend that the Court's restriction of fora for individuals with disabilities raises significant separation of powers problems.*

Judges, like most of us, embrace ideas that make sense of their world. They also adopt ideas that promise to provide consistent guidance for future cases. Unfortunately, judges sometimes forget that an idea is only an ideal: instead of treating it as an aspiration, they act as if it were a commandment, supreme and inflexible. Eventually they begin to feel powerless to control the tumult they themselves have (unwittingly) unleashed.[1]

So it has been with the idea of sovereignty.[2] This Article explores the destructive power of this idea: an idea that, although initially benign, has wreaked havoc in its wake. On February 21, 2001, loyalty to this idea significantly weakened the Americans with Disabilities Act (ADA).[3] On that day, in *Board of Trustees of the*

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1. Idea(l)s of this sort are myths, reductive/seductive simplifications of complex phenomena that often create an aura of universality and invincibility. In that sense myths legitimate particular constructions of reality. For a fuller discussion of the nature, power and theories of mythic thinking, see Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 457–62 (1996).

2. Professor Prince suggests that the Supreme Court is trapped "because of its romance with the abstraction of state sovereignty." John Randolph Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 BUFF. L. REV. 411, 412 (2000).

3. 42 U.S.C. § 12101–12213 (1994).

University of Alabama v. Garrett,[4] the Supreme Court held that Congress acted unconstitutionally when it abrogated the sovereign immunity of the states by permitting back pay as a remedy for state violations of Title I of the ADA.

In this Article we consider the origins and implications of the Court's decision. In so doing, we take a perspective external to the extant doctrine.[5] The critical issues, in our view, do not relate to whether the Court was correct given recent case law, but rather how that precedent came to be the Frankensteinian monster it is now, and what that means for people with disabilities.

We begin in Part I by tracing the development of the Supreme Court's newfound concern for state sovereignty and discuss its culmination in *Garrett*. In Part II we look more closely at the idea of sovereignty and show how it has always been more of a myth than an actuality. In Part III we discuss why a monolithic vision of sovereignty is foreign to American constitutional thought. In Part IV we explain why divided sovereignty is critical for the protection of minority groups, including people with disabilities. In Part V we extend the discussion of divided sovereignty beyond federalism to separation of powers and argue that the Supreme Court's new sovereignty doctrine is as much about the assertion of judicial sovereignty as it is about the protection of states' rights. Once again, we contend, this demand for monolithic sovereignty threatens the interests of vulnerable people, including those who were to be protected by the Americans with Disabilities Act.

I. THE ROAD TO *GARRETT*

Patricia Garrett was the director of nursing for the obstetric-gynecological services at the University of Alabama.[6] In 1994 she was diagnosed with breast cancer and treated with lumpectomy, radiation and chemotherapy.[7] After she was diagnosed, her employer threatened to transfer her to a less demanding job.[8] She then took family and medical leave. When she returned she was

4. 531 U.S. 356 (2001).

5. For a discussion of the existing doctrine, see *infra* text accompanying notes 25–92.

6. *Garrett*, 531 U.S. at 362. The Court also considered a companion case brought by Milton Ash, security officer with the Alabama Department of Youth Services. Ash had chronic asthma and sleep apnea. After being denied his request to be reassigned to day shifts, he filed an ADA claim. *Id.*

7. *Id.*

8. *Id.*

demoted because of her condition, allegedly in violation of the ADA.[9]

Garrett sued the University under Title I of the ADA. The University's defense was sovereign immunity. Even though the ADA explicitly provides for a cause of action against the states,[10] the University claimed that Congress lacked the power to hold it, as a state actor, accountable against its will.[11]

The specific question before the Supreme Court was whether Congress had the authority to abrogate Alabama's sovereign immunity to protect the rights of state workers with disabilities.[12] Writing for a now familiar 5–4 majority,[13] Chief Justice Rehnquist recognized that Congress, in enacting Title I of the ADA, sought to make states amenable to back pay claims.[14] Relying on several recent cases,[15] however, the Chief Justice stated that Congress could only abrogate state sovereign immunity when it acted pursuant to its powers under Section 5 of the Fourteenth Amendment.[16] The majority then concluded that in enacting Title I of the ADA, Congress exceeded that authority.[17] Concurring for himself and Justice O'Connor, Justice Kennedy took pains to note the laudable goals of the ADA, while nevertheless agreeing that the Court's precedent demanded that Title I's abrogation of sovereign immunity be found unconstitutional.[18] Justice Breyer in dissent focused on the record that Congress amassed in enacting the ADA.[19] According to Justice Breyer, the majority "through its evidentiary demands, its non-deferential review, and its failure to

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9. *Id.*

10. 42 U.S.C. § 12202 (1994).

11. The Eleventh Circuit held that the ADA was a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment and that the University was therefore not immune from suit under the ADA. *See* Garrett v. Univ. of Ala., 193 F.3d 1214, 1218 (11th Cir. 1999), *rev'd*, 531 U.S. 356 (2001).

12. *Garrett*, 531 U.S. at 363.

13. The Court's recent federalism cases have been remarkable for the consistency of the five to four alignment of Justices. In almost every case, the majority has consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas. The dissent invariably comprises Justices Stevens, Souter, Ginsburg and Breyer. For further analysis of these coalitions see Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 48–53 (2000).

14. *Garrett*, 531 U.S. 356, 364 n.3 (citing 42 U.S.C. § 12101(b)(4)).

15. *See infra* text accompanying notes 57–88.

16. *Garrett*, 531 U.S. at 364.

17. *Id.* at 374.

18. *Id.* (Kennedy, J., concurring). Elsewhere we have analyzed Justice O'Connor's attitudes toward people with disabilities. *See* Judith Olans Brown et al., *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219, 1237–40 (1999).

19. *Garrett*, 531 U.S. at 377–82 (Breyer, J., dissenting).

distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress."[20]

To appreciate the Justices' arguments and the implications of the majority's decision, one must look beyond the narrow technicalities of sovereign immunity doctrines to a recent series of separate but related cases pertaining to federalism and separation of powers.[21] In the last two decades, the Rehnquist Court has realigned the relationship between the states and the federal government, dramatically curtailing congressional power[22] while expanding the Court's responsibility to enforce the new limitations it has set.[23] Each discrete doctrinal piece of this strategy initially emerged as a relatively limited holding in the context of relatively narrow, indeed rather trivial, facts. Today, however, it appears that trivial facts, like hard cases, have made bad law.[24]

The first doctrine pertains to congressional power under Article I of the Constitution.[25] In the last several years, the Court has re-

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20. *Id.* at 388–89.

21. *See infra* text accompanying notes 27–36; 71–88.

22. This Article was in press on September 11, 2001 when the World Trade Center and the Pentagon were attacked by terrorists. It is too early to know whether these horrific events will alter the course of the Court's federalism doctrine, but they might. In the past, wars and national crises have served as centrifugal forces, elevating federal supremacy over concerns for states' rights. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1558 (1994) ("Yet battle has almost always excited an outburst of nationalism that (together with the nationwide mobilization of resources required to fight) has increased the prominence of the federal government in daily life.").

23. Indeed, the Supreme Court's recent intervention in the 2000 Presidential election, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000), and Bush v. Gore, 531 U.S. 98 (2000), suggests that the assertion of judicial supremacy (or of the Court's own sovereignty) may be a more powerful ideal to the current majority than is the protection of state sovereignty, the issue in *Garrett*. *See infra* text accompanying notes 207–230; *see also* Herman Schwartz, *The Supreme Court's Federalism: A Fig Leaf for Conservatives*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 129 (2001) (arguing that *Bush v. Gore* demonstrates that conservatives have used the idea of states' rights for material interests). A less charitable explanation of *Bush v. Gore* is that the majority's own ideals, or "higher order politics" have given way to the lower order politics of partisanship. *See* Linda Greenhouse, *Another Kind of Bitter Split: When Jurisprudence is Pulled into Politics*, N.Y. TIMES, Dec. 14, 2000, at A-1. In any event, after *Garrett*, it is clear that *Bush v. Gore* does not signal a significant shift in the majority's approach to federalism, and that the majority seems willing to hold to its view that *Bush v. Gore* is "limited to the present circumstances." 531 U.S. at 109.

24. *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1903) (Holmes, J. dissenting) ("Great cases like hard cases make bad law.").

25. The doctrine of sovereign immunity is often associated with the Eleventh Amendment. The current doctrine, however, has clearly departed from the text (read either narrowly or broadly) of that amendment. *See Garrett*, 531 U.S. at 363–64. Instead the Court now sees sovereign immunity as a fundamental principle of federalism unanchored to any particular clause of the Constitution. *See* Alden v. Maine, 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.").

treated significantly from more than a half-century of settled understanding of the broad scope of Congress' commerce power, which enabled the development of the modern regulatory state.[26] Most directly, in *United States v. Lopez*[27] the Court rejected Congress's attempt to regulate non-commercial transactions on the theory that they have a substantial impact on interstate commerce.[28] In effect the Court determined that it was its job to ensure that Congress did not overstep the bounds of its Article I powers.[29] Likewise in *United States v. Morrison*,[30] the Court struck down the Violence Against Women Act,[31] in part, on the grounds that the conduct being regulated did not have sufficient economic impact to justify use of the commerce power.[32]

Simultaneously, in cases such as *New York v. United States*[33] and *Printz v. United States*,[34] the Court cabined federal legislative authority more indirectly by resurrecting the long dormant Tenth Amendment as a major barrier against federal "commandeering" of state officials in the service of national goals.[35] Read together, these two lines of cases not only realigned federalism in a more state-centered way but also tipped the separation of powers balance

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26. U.S. CONST. art. I, § 8, cl. 3; *see* Brown and Enrich, *supra* note 13, at 11–18, 25–34.

27. 514 U.S. 549 (1995).

28. *See id.* at 551. Respondent in *Lopez* was a twelfth-grade student at Edison High School in San Antonio, Texas who was arrested for carrying a concealed weapon and charged under Texas law with firearm possession on school grounds. *Id.* The state charges were dropped the following day, but Lopez was charged by federal officials for violating the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1) (1994), which prohibited the presence of guns in the immediate area of schools. 514 U.S. at 551.

29. *See id.* at 581 (O'Connor, J. concurring) ("[W]e have a particular duty to ensure that the federal-state balance is not destroyed.").

30. 529 U.S. 598 (2000).

31. 42 U.S.C. § 13981 (1994).

32. 529 U.S. at 617–19.

33. 505 U.S. 144 (1992).

34. 521 U.S. 898 (1997).

35. *See* New York v. United States, 505 U.S. at 155–57, 161. *New York v. United States* arose out of the Low-Level Radioactive Waste Policy Amendments Act of 1985 whereby Congress, at the behest of the National Governors Association, developed a plan to establish regional low-level radioactive waste sites. The Act (and its successor) "authorized States to enter into regional compacts that, once ratified by Congress, would have the authority . . . to restrict the use of their disposal facilities to waste generated within member States." *Id.* at 150–52. The Court upheld those provisions of the Act, which provided incentives for state compliance but struck the sections that compelled the states to act in particular ways. *Id.* at 188. *Printz* involved the validity of the Brady Handgun Violence Prevention Act, which sought to establish a "national instant background check system," but provided as an interim measure that state and local law enforcement officers would conduct the background check until the national system was in place. 521 U.S. at 902. The Court held that this provision impressed state officials into federal service in violation of the Tenth Amendment. *Id.* at 933–35.

away from the legislature and toward the courts. All of these restrictions on congressional power seem impelled by identical concerns—that states matter in our constitutional regime and that courts must ensure that federal power is exercised in a way that respects the constitutional role of states.[36]

A similar theme animates the Court's rejuvenation of sovereign immunity. Thirty years ago state sovereign immunity to federal claims was an arcane and esoteric subject, beloved by federal jurisdiction aficionados but without significant practical import. The doctrine was academic in part because it was readily avoidable under the doctrine of *Ex parte Young*,[37] which held that sovereign immunity did not apply to actions seeking to enjoin a state official from violating federal law.[38] Therefore, plaintiffs seeking prospective relief for federal claims did not have to worry much about sovereign immunity.[39] All they had to do was be careful to name a state official rather than the state as the defendant. As a result, sovereign immunity was little more than a technical, narrow limitation upon the ability of federal courts to redress constitutional or civil rights grievances.[40]

In addition, for many decades the Supreme Court signaled that Congress could readily abrogate state sovereign immunity. For example, in *Parden v. Terminal Railway*[41] the Court found that the State of Alabama could be sued under the Federal Employer's Liability Act (FELA)[42] when it operated an interstate railroad. The Court reasoned that "the States necessarily surrendered any portion of their sovereignty [when they granted Congress the power

36. Thus in *United States v. Morrison*, 529 U.S. 598 (2000), the Court rejected the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Court stated that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617–18.

37. 209 U.S. 123 (1908).

38. The doctrine of *Ex parte Young* is premised on the view that a state cannot authorize an official to violate federal law. *Id.* at 159. Actions committed in violation of federal law are, therefore, ultra vires and not the actions of the state. *Id.* As a result, they cannot be shielded by the sovereign's immunity. For the Supreme Court's latest detailed discussion of the doctrine, see Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), a plurality opinion holding that *Ex parte Young* does not override sovereign immunity defense in an action to determine title to submerged lands.

39. Sovereign immunity did prevent plaintiffs from obtaining retrospective relief from states unless the states waived their immunity or it was abrogated by Congress. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

40. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 237 (1974) (holding that under *Ex parte Young* state officials cannot avoid liability under a properly pleaded complaint).

41. 377 U.S. 184 (1964).

42. 45 U.S.C. §§ 51–60 (1994) (providing cause of action for injured railroad workers).

to regulate commerce]. . . . Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity."[43]

A decade later, the Supreme Court announced that Congress' enforcement power under Section 5 of the Fourteenth Amendment supported abrogation of sovereign immunity.[44] Finding that the Fourteenth Amendment was designed to limit the authority of the states, the Court held that Congress can override any state claim to sovereign immunity when it acts pursuant to Section 5.[45] Importantly, in concluding that Title VII of the Civil Rights Act of 1964[46] abrogated sovereign immunity, the Court paid little attention to whether Title VII was actually authorized by Section 5 of the Fourteenth Amendment. Instead, the mere fact that Title VII was designed to redress discrimination in employment seemed sufficient to convince the Court that Title VII fell within the purview of Section 5.[47]

Finally in 1989, in *Pennsylvania v. Union Gas Co.*, the Court appeared to announce the virtual death of state sovereign immunity.[48] In an opinion written by Justice Brennan, a plurality held that the Commerce Clause generally empowers Congress to abrogate sovereign immunity. Arguing that states surrendered their immunity when they consented to Article I, the plurality[49] held that the Constitution itself viewed sovereign immunity as a common law doctrine that could be overridden when Congress acted pursuant to its Constitutional powers.[50]

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43. *Parden*, 377 U.S. at 192.

44. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

45. *Id.*

46. 42 U.S.C. § 2000e-2 (1994).

47. *Fitzpatrick*, 427 U.S. at 452. When Congress deliberated the 1964 Civil Rights Act, there was a debate among scholars and senators whether Congress' authority was vested in the Commerce Clause or Section 5 of the Fourteenth Amendment. Professor Gerald Gunther argued that civil rights issues had little to do with economic concerns and were more appropriately regulated by Congress' Section 5 power. The opposite position was taken by Professor Herbert Wechsler and Attorney General Robert F. Kennedy, who argued that discrimination had adverse economic consequences. The bill, as passed, placed primary emphasis on the Commerce Clause, and the Fourteenth Amendment rationale was an "afterthought." HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 90–93 (1990); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 201–03 (13th ed. 1997).

48. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

49. *Id.* at 13–23 (Brennan, J., joined by Justices Marshall, Blackmun, and Stevens).

50. Justice White agreed separately with the plurality's views of abrogation, creating a majority on that issue. *Id.* at 45, 57 (White, J., concurring in part and dissenting in part). He provided no hint, however, to his reasoning other than noting that he disagreed with Justice Brennan's. Justice Scalia wrote a dissenting opinion joined by Chief Justice Rehnquist,

A few years later, however, the Court abruptly reversed direction, transforming the doctrine of sovereign immunity from a technical exception into a fundamental principle.[51] In so doing, the Court seemed driven by a view of federalism that sees the states not simply as alternative or separate spheres of political power,[52] or laboratories of democracy,[53] but rather as fully autonomous, even almost regal, sovereign entities. As such, states, almost like other independent nations, are considered broadly immune from federal directives.[54]

In retrospect, we can see the first inklings of this sea change in 1984 when the Supreme Court decided *Pennhurst State School & Hospital v. Halderman.*[55] In a case that after *Garrett* seems chillingly prophetic for people with disabilities, the *Pennhurst* Court held that federal courts could not provide relief under state law to residents of Pennsylvania's infamous institution for the mentally retarded.[56] In reaching that decision, the Court went beyond the text of the Eleventh Amendment and began the process of turning a technicality into a fetish. Concern for the purported sovereignty and sanctity of the Commonwealth of Pennsylvania, as if it were an animate entity removed from its people and independent from this nation, appeared to trump any regard for the people of Pennsylvania who were the victims of state institutional neglect.

For the ADA, however, the critical case was *Seminole Tribe v. Florida.*[57] *Seminole Tribe* was truly a case that raised quite a narrow

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Justice O'Connor and Justice Kennedy. *Id.* at 29 (Scalia, J., concurring in part and dissenting in part). With the addition of Justice Thomas, in 1991, that group of dissenters became a majority.

51. *See* Daan Braveman, *Enforcement of Federal Rights Against States:* Alden *and Federalism Non-Sense,* 49 AM. U. L. REV. 611 (2000); Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States,* 68 GEO. WASH. L. REV. 44 (1999); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism,* 1999 SUP. CT. REV. 1.

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

53. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

54. *See* Alden v. Maine, 527 U.S. 706, 715 (1999) (Under the federal system established by the Constitution, "[T]he States thus retain a residuary and inviolable sovereignty. . . . [and] the dignity . . . of sovereignty.") (internal citation omitted); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) ("[E]ach State is a sovereign entity in our federal system.").

55. 465 U.S. 89 (1984).

56. The school was the subject of substantial litigation, including three opinions by the United States Supreme Court. *See id.*; Youngberg v. Romeo, 457 U.S. 307 (1981) and Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981). For a discussion of the *Pennhurst* litigation and the dilemmas it reveals for the disability rights movement, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 140–45 (1990).

57. 517 U.S. 44 (1996). *See* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans With Disabilities Act After* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651 (1999).

question—namely, whether the Indian Commerce Clause gave Congress the power to abrogate state sovereign immunity.[58] In deciding that it did not, Justice Rehnquist wrote broadly, reaching beyond the Indian Commerce Clause and overruling *Pennsylvania v. Union Gas Co.*[59] Once again the Court reified the sovereignty of the states. In so doing, however, the Court ignored its own often-expressed concerns for a "strict" reading of the Constitution's words.[60] Indeed, the Court acknowledged that its ruling went beyond the text of the Eleventh Amendment but justified this *expansion* of sovereign immunity to prevent "'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"[61] Once again the dignity of an inanimate entity had become more constitutionally crucial than the rights of living citizens.

Even more ominously, the Court refused to apply the doctrine of *Ex parte Young* to permit the plaintiffs to obtain prospective relief against the Governor.[62] As the Court saw it, the doctrine of *Ex parte Young* was a fiction to be applied sparingly.[63] Somewhat illogically, the Court held that since Congress had attempted to abrogate sovereign immunity, it must not have meant or presumed that sovereign immunity could be circumvented by the ready availability of *Ex parte Young*.[64] The majority reasoned that *Ex parte Young*

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58. The Indian Commerce Clause grants Congress the power to "regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

59. *Seminole Tribe*, 517 U.S. at 66–73.

60. *See id.* at 69 ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" (citations omitted)).

61. *Id.* at 58 (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)). The Court's departure from the text of the Eleventh Amendment was even more startling in *Alden*, which held that Congress could not create a cause of action against the states enforceable in state courts. Because the Eleventh Amendment explicitly pertains to the judicial power of the United States, there was no question that the Eleventh Amendment applied to the case on its own terms. Nevertheless, seeing the Eleventh Amendment as a mere reflection of a broader constitutional mandate for protecting state sovereignty, the majority found that Article I did not give Congress the authority to hold states accountable, even in their own courts, to federal laws. Alden v. Maine, 527 U.S. 706, 712 (1999).

62. *Seminole Tribe*, 517 U.S. at 47 (citing *Ex parte* Young, 209 U.S. 123 (1908)).

63. *Id.* at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.").

64. *Id.* at 76 ("Nevertheless, the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3).").

should not be read as compatible with the statutory scheme, even though that scheme had just been declared unconstitutional, and even though Congress had undeniably sought to permit plaintiffs to enforce their rights. Thus the sovereign's dignity was now seen as so sacrosanct that a doctrine, which had made possible such critical civil rights cases as *Reynolds v. Simms*[65] and *Roe v. Wade*,[66] would be treated as a fiction that could and would be readily discarded even when Congress plainly wanted the plaintiffs to be able to enforce their rights.

On its face, however, *Seminole Tribe* did not imperil federal civil rights laws, because the Court reaffirmed that Congress could indeed abrogate sovereign immunity when it acted pursuant to Section 5 of the Fourteenth Amendment.[67] As a result, a major impact of *Seminole Tribe* was to lend great effect to the pinpointing of a particular constitutional source of authority for each piece of legislation.[68] Although such niceties are of little consequence when there is agreement about the wide-ranging nature of federal power,[69] judicial antipathy to such power necessitates a more searching and technical focus. And at the center of this new focus was Section 5 of the Fourteenth Amendment, hitherto a relatively obscure and imprecise source of lawmaking authority.[70]

City of Boerne v. Flores[71] ensured that Section 5 would no longer remain obscure. The issue in *Boerne* was whether Congress had the power under Section 5 to enact the Religious Freedom Restoration Act.[72] Holding that it did not, the Court chastised Congress for attempting to usurp the judicial authority to determine the meaning of the constitution and demanded that there be congruence and proportionality between legislation enacted under Section 5 and

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65. 377 U.S. 533 (1964).

66. 410 U.S. 113 (1973).

67. 517 U.S. at 59; *see* S. Elizabeth Wilborn Malloy, *Symposium: Whose Federalism?*, 32 IND. L. REV. 45, 52 (1998); Laurie A. McCann, *The ADEA and the Eleventh Amendment*, 2 EMPLOYEE RTS. & EMP. POLICY J. 241, 242 (1998); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1688 (1996); Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 122–23 (1999–2000).

68. *See infra* text accompanying notes 81–90; n.103.

69. *See, e.g.*, Susan M. Bauerle, *Congress' Commerce Clause Authority: Is the Pendulum Finally Swinging Back?*, 1997 DET. C.L. REV. 49, 115–17; Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 727–34 (1996); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 686 (1999).

70. Brown and Enrich, *supra* note 13, at 19–23 (reviewing pre-*Boerne* analysis of Section 5); *Id.* at 34.

71. 521 U.S. 507 (1997).

72. 42 U.S.C. § 2000bb (1994). Congress' disagreement with the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), was the impetus behind the legislation. *See* Sara Anderson Frey, *Religion Behind Bars*, 101 DICK. L. REV. 753, 762–66 (1997).

rights protected by Section 1 of the Fourteenth Amendment.[73] The notion that the Court is the ultimate arbiter of constitutional text is, in itself, an unremarkable proposition.[74] But the *Boerne* Court went beyond reaffirming judicial review to impose a significant limitation on federal lawmaking power. Under *Boerne* it appears that all Congress may do is proscribe remedies for judicially predetermined violations of the Fourteenth Amendment.[75] The clear import of that constraint is that Congress' affirmative authority under Section 5 cannot readily provide an alternative source of legislative power to enact regulatory aims that are not sufficiently commercial to satisfy *Lopez*.[76]

To be sure, *Boerne*'s language was ambiguous. The Supreme Court reaffirmed earlier cases that demanded deference to congressional actions under Section 5.[77] It is, therefore, possible to read *Boerne* as a simple statement that there are some limits to congressional action under Section 5. Indeed, lower courts initially read *Boerne* as a fairly narrow and unexceptional ruling.[78]

But once it was unleashed, *Boerne* was bound to collide with *Seminole Tribe*, and, once they fused, to unleash a chain reaction.[79] Because *Seminole Tribe* held that Congress could not abrogate sovereign immunity except when it was acting under Section 5, and because *Boerne* circumscribed congressional authority under Section 5, all federal civil rights laws that provided for remedies against the states inevitably became constitutionally suspect under the combined weight of *Seminole Tribe* and *Boerne*. And that was precisely what happened in *Kimel v. Florida*.[80]

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73. *Boerne*, 521 U.S. at 530.

74. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

75. Brown and Enrich, *supra* note 13, at 21–23, 34–40 (discussing how *Boerne* limits Congress' power under Section 5).

76. *Id.* at 34.

77. *Boerne*, 521 U.S. at 530 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

78. There are several possible broader readings of *Boerne*. If, for example, Congress may only remedy judicially determined violations, Congress may no longer act prophylactically. Moreover, it remains unclear whether *Boerne* sets rules for Section 5 authority generally or simply curbs that authority vis-à-vis states. *See* Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 511 n.299 (2000) (citing Kazmier v. Widman, 225 F.3d 519, 523–24, 529–30 (5th Cir. 2000)).

79. The Court said as much in *Garrett*, suggesting that even if Congress had established that states had engaged in a "pattern of unconstitutional discrimination," the ADA would still fail because "the rights and remedies" it created would "raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*." 531 U.S. 356, 372 (2001).

80. 528 U.S. 62 (2000).

Kimel held that the Age Discrimination in Employment Act (ADEA)[81] could not be enforced against the states. The same five to four majority that had initiated the sovereign immunity revolution in *Seminole Tribe* held that since the Court had not previously declared that age was a suspect classification the ADEA, in effect, prohibited more state conduct "than would likely be held unconstitutional."[82] *Kimel* thus made the majority's mission abundantly clear: to limit federal power whenever it comes close to infringing on the sovereign rights of states to decide whether their citizens have the right to be free from age-based discrimination.[83]

In *United States v. Morrison*[84] the Court again determined that Congress had exceeded its authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment in enacting the Violence Against Women Act.[85] According to the Court, Congress could not create a federal judicial forum for claims pertaining to gender-motivated violence even if states had provided inadequate remedies of their own.[86] Private acts of violence are simply outside the purview of Section 1 of the Fourteenth Amendment, and thus beyond Congress' reach under Section 5.[87] In effect, the Court reasoned that so-called private acts of gender-based violence are matters to be left solely to the discretion of the sovereign states.[88] Ironically, the Court seemed to turn a blind eye to *Kimel*'s admonition against federal laws permitting direct suits against states. In any event, once again the Court sacrificed federal lawmaking authority on the altar of federalism.

The combustible quartet of *Lopez*, *Boerne*, *Kimel*, and *Morrison* proved cataclysmic for the ADA. Although in enacting the ADA Congress explicitly stated that it was acting under both its commerce powers and Section 5,[89] in the year following *Kimel* and *Morrison*, five courts of appeals held that Congress could not use

81. 29 U.S.C. §§ 621–33 (1994).

82. 528 U.S. at 86.

83. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court similarly found that Congress lacked the authority under Section 5 to abrogate sovereign immunity under the Patent and Plant Variety Remedy Clarification Act. Likewise, the Court held in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), that Congress did not have authority under Section 5 to abrogate sovereign immunity for actions brought against states under the Lanham Act. The Court found that acts disparaging a trademark did not involve Fourteenth Amendment property rights justifying congressional actions under Section 5.

84. 529 U.S. 598 (2000).

85. 42 U.S.C. § 13981 (1994).

86. 529 U.S. at 623–24.

87. *Id.*

88. *Id.* at 619–24.

89. 42 U.S.C. § 12101(b)(4) (1994).

Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity for various ADA claims.[90] Given that trend, the result in *Garrett* was not surprising.

Still, significant distinctions between the statutes previously found unconstitutional and the ADA should have given the Court pause.[91] Most notable was the extensive record of state discrimination against people with disabilities, documented by Justice Breyer in a lengthy appendix to his dissent.[92] If the problem in cases such as *Lopez*, *Boerne* and *Kimel* was the lack of legislative findings, no such impediment should have been relied upon in *Garrett*.

But this distinction proved insufficient to save Title I of the ADA. Following *Boerne*,[93] Chief Justice Rehnquist began by noting that congressional power under Section 5 is only remedial: "[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[94] Relying upon its decision in *Cleburne v. Cleburne Living Center*,[95] the majority then held that Section 1 of the Fourteenth Amendment did not prohibit "rational" discrimination against people with disabilities.[96] Congress' actions,

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90. *See* Lavia v. Pennsylvania Dep't of Corrections, 224 F.3d 190 (3d Cir. 2000); Neinast v. Texas, 217 F.3d 275 (5th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001); Popovich v. Cuyhoga County Ct. Com. Pl., 227 F.3d 627 (6th Cir. 2000); Erickson v. Bd. of Governors, 207 F.3d 945 (7th Cir. 2000); Fisher v. Iowa Comm'n of Veterans Affairs, 230 F.3d 1362 (8th Cir. 2000). *But see* Becker v. Armenakis, 229 F.3d 1156 (9th Cir. 2000) (unpublished); Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000). Illustrative is Judge Easterbrook's decision for the Seventh Circuit in *Erickson*. In the case, which was brought by a state employee, the court held that because the ADA prohibited certain forms of "rational" discrimination against individuals with disabilities, *Erickson*, 207 F.3d at 948, it condemns activities that do not themselves violate the Equal Protection Clause, *id.* at 948–49 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)). Under *Boerne*, Judge Easterbrook reasoned, Congress lacks such authority under Section 5 unless the prohibition can be sustained as "reasonable prophylactic legislation." *Id.* at 951. Because Congress did not find that states engaged in the type of irrational, intentional discrimination that the Court believes Section 1 proscribes, the ADA is not as sufficiently connected as *Kimel* demands to the prevention of constitutional wrongs, and is therefore outside the scope of Section 5. *Id.* at 951. As a result, the Court found that the plaintiff could not enforce her employment discrimination claims against the state.

91. For a pre-*Garrett* scholarly attempt to distinguish and save the ADA, see Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000). Professor Colker relies not so much on the extensive record of congressional findings to save the ADA but on the argument that the ADA, in contrast to other laws found to exceed Section 5, did not itself violate Section 1 of the Fourteenth Amendment. *See id.* at 698–01.

92. Univ. of Ala. v. Garrett, 581 U.S. 356, 389–424 (2001) (Breyer, J., dissenting).

93. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

94. *Garrett*, 531 U.S. at 365.

95. 473 U.S. 432 (1985).

96. 531 U.S. at 366–68. The Court stated that "the result of *Cleburne* is that states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which

therefore, had to be "congruent and proportional" to the remediation of irrational discrimination.[97]

Justice Rehnquist easily concluded that Title I of the ADA did not pass the Court's test and dismissed the legislative record that the dissent pointed to as establishing that, in the case of the ADA, Congress had done its homework and had substantiated a pattern of discrimination justifying the exercise of Section 5 remedial power. Justice Rehnquist stated: "[the record] consists not of legislative findings, but of unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials.' "[98]

Demanding that Congress demonstrate a persuasive pattern of irrational discrimination by states,[99] and finding that Title I extended beyond the scope of the specific and particular violations set forth in the legislative record,[100] the majority found that Section 5 could not support Title I.

To be sure, the majority's decision did not completely foreclose all ADA claims against the states. First, the majority specifically limited its opinion to Title I, finding that Title II was not before the Court.[101] Given the Court's reasoning, however, it is difficult to imagine why Title II will not suffer a similar fate,[102] especially when

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do not make allowance for the disabled." *Id.* at 367–68. For a critique of the Court's use of *Cleburne*, see *infra* text accompanying notes 205–06.

97. 531 U.S. at 374.

98. *Id.* at 370 (citation omitted).

99. The Court stated that evidence of discrimination by cities should not count to support congressional authority under Section 5. According to the Court, since Section 5 was being considered only because of sovereign immunity, and cities lack sovereign immunity, municipal violations of the Equal Protection Clause no longer justified congressional remediation under Section 5. *Id.* at 368–69. This reasoning is extremely surprising, as the Court has long held, and did not deny, cities are "state actors" for purposes of Section 1 of the Fourteenth Amendment. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). Why the fact that Congress' Section 5 authority happened to be questioned in a case concerning sovereign immunity (a defense that is not available to cities) should serve to remove Congress' ability to cite and rely upon violations of Section 1 by municipal state actors as a basis for congressional action under Section 5 was left unexplained by the Court. In essence, the Court suggests that sovereign immunity doctrines directly limit the scope of congressional action under Section 5, even though the Court maintains that it is the Fourteenth Amendment that overrides sovereign immunity. *Garrett*, 531 U.S. at 363–65.

100. The Court's insistence on specificity echoes much of its discrimination jurisprudence. *See, e.g., Croson*, 488 U.S. 469 (holding that those entitled to participate in affirmative action plans must have been specifically discriminated against by the state actor); Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (concluding that only specific victims of discriminatory acts may participate in remedy).

101. *Garrett*, 531 U.S. at 360 n.1.

102. Several courts have found that the reasoning in *Garrett* applies to Title II. *See, e.g.*, Neiberger v. Hawkins, 150 F. Supp. 2d 1118 (D. Colo. 2001); Mincewicz v. Parker, No. 3:00CV1433 (CFD), 2001 U.S. Dist. LEXIS 3373 (D. Conn. Feb. 26, 2001); Lieberman v. Delaware, Civ. No. 96-523GMS, 2001 U.S. Dist. LEXIS 13624 (D. Del. Aug. 30, 2001); Koslow

Title II is used to require the state to make reasonable accommodations.[103] Perhaps more interestingly, the majority in a footnote left open the possibility that plaintiffs could use the doctrine of *Ex parte Young* to obtain prospective relief against state officials.[104] Since *Garrett*, several courts have permitted plaintiffs to do so.[105] Prior to *Garrett*, however, several courts noted that the ADA creates no cause of action against state officials.[106] Finally, the Court's decision did not touch upon the Rehabilitation Act, which also abrogates sovereign immunity and is substantively quite similar to the ADA.[107] Several lower courts, however, have read the Supreme Court's sovereign immunity doctrine to go as far as to preclude

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v. Pennsylvania, 158 F. Supp. 2d 539 (E.D. Pa. 2001); Frederick v. Dep't of Pub. Welfare, 157 F. Supp. 2d 509 (E.D. Pa. 2001). *But see* Shaboon v. Duncan, 252 F.3d 722 (5th Cir. 2001) (providing no analysis); Wroncy v. Or. Dep't of Transp., No. 00-35356, 2001 U.S. App. LEXIS 8761 (9th Cir. May 4, 2001) (arguing that *Garrett* does not compel its application to Title II); Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001) (arguing that *Garrett* did not apply to Title II and does not apply to claims for injunctive relief); Project Life, Inc. v. Glendening, 139 F. Supp. 2d 703 (D. Md. 2001) (relying on pre-*Garrett* law to determine sovereign immunity under Title II).

103. *See, e.g.*, 28 C.F.R. 35.130(b)(1)(7) (requiring public entities to make reasonable modifications "when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"). There are other problems that may affect Title II. For example, while it seems likely that Congress had authority under the Commerce Clause to enact Title I (even if that authority did not permit abrogation of sovereign immunity), Congress' authority to regulate under Title II state activities that do not fall within *Lopez*' narrow view of commerce may be more questionable. *Cf.* New York v. United States, 505 U.S. 144, 157 (1994) (suggesting that considerations of federalism should be used to construe, and narrow, the Commerce Clause).

104. *Garrett*, 531 U.S. at 374 n.9 ("[ADA] standards can be enforced . . . by private individuals in actions for injunctive relief under *Ex parte Young* . . . .").

105. *E.g.*, Gibson v. Ark. Dep't of Corr., 265 F.3d 718 (8th Cir. 2001) (arguing that *Garrett* contains clear language permitting *Ex parte Young* actions); Frazier v. Simmon, 254 F.3d 1247 (10th Cir. 2001) (relying on *Garrett* footnote); Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001) (allowing prospective relief using *Ex parte Young*); Frederick v. Dep't of Pub. Welfare, 157 F. Supp. 2d 509 (E.D. Pa. 2001) (reading *Garrett* as permitting *Ex parte Young* actions); State Police for Automatic Retirement Assoc. v. Difava, 138 F. Supp. 2d 142 (D. Mass. 2001) (same); Rizzato-Reines v. Kane County Sheriff, 149 F. Supp. 2d 482 (N.D. Ill. 2001) (holding that injunctive relief may be available, but not for employment claims).

106. Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000); *see also* Shariff v. Artuz, 99 Civ. 0321, 2000 U.S. Dist. LEXIS 12248 (S.D.N.Y. Aug. 28, 2000); Miller v. Hogeland, No. 00-516, 2000 U.S. Dist. LEXIS 9927 (E.D. Pa. July 18, 2000); Nucifora v. Bridgeport Bd. of Educ., 3:00-CV-00079 (EBB), 2000 U.S. Dist. LEXIS 9127 (D. Conn. May 23, 2000). *But see* Henrietta D. v. Giuliani, 81 F. Supp. 2d 425 (E.D.N.Y. 2000).

107. 29 U.S.C. § 701 (1994). The Rehabilitation Act prohibits discrimination against a qualified individual with a disability by recipients of federal financial assistance. 29 U.S.C. § 794 (1994).

bringing Rehabilitation Act claims against the state, even though that statute is based upon Congress' spending power.[108]

The question thus must be asked: What is this idea of sovereignty which so imperils the rights of people with disabilities?

II. THE MYTH OF SOVEREIGNTY

Underlying the *Garrett* decision is the assumption that sovereignty is a natural phenomenon. The reality, of course, is that the sovereignty the Court envisions is as mythic as the "fiction" of *Ex parte Young* which the Court continuously derides.[109] Indeed, in a series of powerful dissents, Justice Souter has laid bare the majority's ahistoric and false reading of the framers' understanding of sovereign immunity.[110] In particular, Justice Souter has reminded us that "[t]here is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable."[111] In a preface to his exhaustive and painstakingly careful review of the history of sovereign immunity in his dissent in *Alden v. Maine*, Justice Souter noted:

> Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common law power defeasible, like other common law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common law conception, that immunity was inherent in a sovereign because the body that made a law could not logi-

108. *See* Jim C. v. United States, 235 F.3d 1079, 1080–81 (8th Cir. 2001) (en banc) (upholding congressional authority to condition federal money on waiver of sovereign immunity but "only with regard to the individual agency that receives" the federal funds); *Id.* at 1082 (Bowman, J., dissenting) (arguing that Congress cannot use the Spending Clause to achieve regulatory aims outside the scope of its other regulatory authority); Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 757 (8th Cir. 1999) (finding the Rehabilitation Act excessively coercive to pass muster under the Spending Clause); Litman v. George Mason Univ., 186 F.3d 544, 556–57 (4th Cir. 1999) (inviting Supreme Court to revisit and narrow its interpretation of the Spending Clause); *see also* Va. Dep't of Educ. v. Riley, 106 F.3d 559, 569–70 (4th Cir. 1997) (questioning whether threat to withhold all federal funding for special education for states' failure to comply with the IDEA constitutes impermissible coercion of states).

109. *E.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 73–76 (1996).

110. Alden v. Maine, 527 U.S. 706, 760–814 (1999) (Souter, J., dissenting); 517 U.S. at 100–85 (Souter, J., dissenting).

111. 527 U.S. at 764 (Souter, J., dissenting).

cally be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.[112]

Like Justice Brennan before him,[113] Justice Souter has also raised grave questions about the majority's retelling of the enactment of the Eleventh Amendment and *Hans v. Louisiana*'s[114] interpretation of it. In contrast to the majority's assertion that the Eleventh Amendment was meant to reassert a fundamental principle of state immunity,[115] Justice Souter has demonstrated that the amendment "reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses,"[116] and was meant to be far less expansive than the majority presumes.[117]

But the majority's inflexible interpretation of sovereign immunity, and the constraints it imposes on congressional authority, is not misguided simply because it ignores the text of the Constitution,[118] decades of Supreme Court precedent,[119] and the history of the Eleventh Amendment.[120] It is also wrong and dangerous because it relies upon a false and perilous vision of the nature of sovereignty, its relationship to federalism and separation of powers, and its impact on minority groups.

Throughout the world and across the ages, sovereignty has always been more of an ideal, a metaphor, or a political rallying cry than an impermeable reality. The history of Western nations, for example, demonstrates that political power has always been both diffused and contingent. In Britain, the divisibility of sovereignty was recognized as far back as the Magna Carta.[121] The Tudor Kings

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112. *Id.* at 764; *see also* 517 U.S. at 100 (Souter, J., dissenting).

113. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 18–19 (1989); *see also* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 504 (1987) (Brennan, J., dissenting).

114. 134 U.S. 1 (1890).

115. *See, e.g.*, *Alden*, 527 U.S. at 712–17; *Seminole Tribe*, 517 U.S. at 53–54.

116. 517 U.S. at 110 (Souter, J., dissenting).

117. *Id.* at 111 n.8. Many scholars agree. *See, e.g.*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1467–68 (1987) (giving examples where state sovereign immunity does not deny jurisdiction); 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); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2238–45 (1996); Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1, 4–6 (1988).

118. 517 U.S. at 114–16 nn.12–13.

119. *See supra* text accompanying notes 41–56.

120. *Alden*, 527 U.S. at 762–82 (Souter, J., dissenting).

121. *See* WINSTON S. CHURCHILL, 1 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES, THE BIRTH OF BRITAIN 252–54 (1966) (noting that "custom and the law must stand even above the King").

may have called themselves "sovereigns"[122] but when the Stuarts took that label literally, one lost his head and another was dethroned.[123] Indeed, by the time of the American Revolution, the idea that the British "sovereign" was sovereign was plainly false, as political power increasingly resided in Parliament.[124]

Scholars who studied the idea of sovereignty recognized its evanescence. Neither an actual nor a necessary component of governments, sovereignty is merely a label, with a variety of connotations and political permutations.[125] As E.H. Carr has noted, "[sovereignty] was never more than a convenient label; and when distinctions began to be made between political, legal and economic sovereignty or between internal and external sovereignty, it was clear that the label had ceased to perform its proper function . . . ."[126] As a label, sovereignty serves a variety of purposes. According to Professor Hunnum, the idea of sovereignty serves to legitimize the exercise of political power, enable a state to defend itself from encroachment by other states, and identify the locus of political power within a state.[127] What sovereignty does not do is define a singular, concrete, essential characteristic of political life—not to mention an animate entity whose dignitary interests must be respected.[128]

Today, more than ever, the contingency and hazards of sovereignty are apparent. Increasingly, the world has recognized that the idea of monolithic sovereignty stands in the way of both peace

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122. Queen Elizabeth I is said to have acknowledged to her Parliament that she knew "what it is to be a subject, what to be a Sovereign . . . ." SIR JOHN E. NEALE, ELIZABETH I AND HER PARLIAMENTS 1584–1601 118 (1957).

123. For an exhaustive analysis, see CHRISTOPHER HILL, THE CENTURY OF REVOLUTION 1603–1714 (1961).

124. *See generally* CHRISTOPHER HIBBERT, GEORGE III (1998); C. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1916); Lionel Marks Lavenue, *Patent Infringement Against the United States and Government Contractors Under 28 U.S.C. § 1498 in the United States Court of Federal Claims*, 2 J. INTELL. PROP. L. 389, 399 n.30 (1995) (noting that in early common law the king would waive his immunity pursuant to a "Petition of Right," but as far back as 1305 the King designed the concept of the "King in Parliament" to address these petitions) (citations omitted).

125. *See* JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY 239 (1995).

126. *Id.* at 13.

127. Hurst Hunnum, *Sovereignty and Its Relevance to Native Americans in the Twenty-first Century*, 23 AM. INDIAN L. REV. 487, 487–88 (1998).

128. In recent years the Justices have repeatedly referred to the "dignity" of the states. *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997) (Kennedy, J.) (plurality) ("[T]he dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal-question jurisdiction of Article III courts may also be barred by the Amendment.").

and prosperity.[129] As a result, European states renounce their sovereign right to issue currency;[130] sovereignty is violated as heads of state are indicted by extraterritorial war crimes tribunals,[131] and NATO limits Serbia's sovereignty over Kosovo.[132] In sharp contrast is the Middle East, where both sides to the conflict have demanded sovereignty over Jerusalem, leaving them no recourse but the sword.[133]

This is not to say that the myth of state sovereignty will lead here to conflagration even though it did in 1861.[134] Rather, it is to suggest that when sovereignty is regarded too literally, and followed too rigidly, it undermines the ability of groups to resolve their disputes in political, as opposed to violent ways. Viewed as an absolute, as the Court sees it, sovereignty assumes the authoritarian role played by Hobbes' *Leviathan.*[135] To Hobbes, sovereignty as a concept was ineluctably absolute. Ultimate power had to reside somewhere, and that somewhere was the sovereign.[136] Dispersion of that power undermined security and order,

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129. Louis W. Goodman, *Democracy, Sovereignty and Intervention*, 9 AM. U. J. INT'L. L. & POL'Y 27, 28–30 (1993) (the United States and other nations have ignored the concept of absolute sovereignty in order to further the collective welfare).

130. *See* Treaty Establishing the European Community, March 25, 1957, art 4 (ex art. 3a), 1997 O.J. (C 340) 173–308, *available at* http://europa.eu.int/eur-lex/en/treaties/index.html (last visited Mar. 20, 2002).

131. *See* Clifford Krauss, *Judge Reinstates Pinochet Case with New Order for House Arrest*, N.Y. TIMES, Jan. 29, 2001, at A3.

132. Carlotta Gall, *NATO and U.N. in Kosovo Agree on K.L.A. Role in Civilian Force*, N.Y. TIMES, Sept. 3, 1999, at A1 (relaying that NATO and the U.N. agree to allow Kosovo Liberation Army to function as a lightly armed force despite its violation of Serbian sovereignty).

133. Marshall Berger, *The Future of Jerusalem: A Symposium: Introduction*, 45 CATH. U. L. REV. 653, 660 (1996) ("It will take such creative expressions of the concept of sovereignty to proffer solace to those who seek the 'peace of Jerusalem.'"); *Contesting Jerusalem's Holy Sites*, N.Y. TIMES, Sept. 30, 2000, at A16 (noting after peace talks for the Middle East broke down over questions of sovereignty, violence erupted and that "[f]inding a creative formula for international sovereignty over the Temple Mount is the key to a final settlement"). To be sure, these examples seem rather dated after the earth-shattering events of September 11, 2001. It appears clear that the responses to those events may well change the meaning of traditional notions of political sovereignty, which the examples in the text were designed to illustrate. Professor Huntington presciently posited a few years ago that in a post-Cold War world, conflicts will no longer reflect purely the political goals of nation states but instead will be reconfigured along cultural lines. SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

134. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 872 (1986) (remarking that the fundamental constitutional question of the Civil War was which government possessed sovereignty).

135. THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Oxford 1947) (1651).

136. *Id.* chs. XVII–XVIII at 109–20.

precluding the possibility of peace or justice.[137] To the Hobbesian, the only alternative to sovereignty is the state of nature, where life is nasty, brutish and short.[138] Absolute power, at least as an ideal, therefore, was required to assure political and civil stability. That vision of uncompromising total control, derived from the chaos of the English Civil Wars, leaves no recourse for the recognition of minority claims or the democratic evolution of norms.

III. SOVEREIGNTY AND OUR FEDERAL CONSTITUTION

Our Framers, of course, rejected the myth of absolute sovereignty. They understood the dangers of an indivisible and total sovereignty, which emanated from the top down, and the need to "split [that] atom."[139] Rather than create a single, hegemonic government, they crafted a complex union, with multiple—indeed infinite—centers of power, which we refer to in shorthand when we speak of federalism and separation of powers.

The history of the framing period and the debates about sovereignty which took place at that time is rich and complex, and an exhaustive study of it is beyond the purview of this Article. It is, however, important to emphasize the primary themes. Although the idea of sovereignty "was the single most important abstraction of politics in the entire Revolutionary era,"[140] the critical concept of divided sovereignty, which underlies our Constitutional structure, was entirely original and "contrary to the prevailing maxims of political science."[141] Equally radical was the Federalist idea that ultimate sovereignty resided neither in the executive nor in the legislature but rather in the people.[142] The theory was that sover-

137. *Id.* ch. XIII at 82, ch. XVIII at 120. The Eighteenth Century view was that sovereignty within any political system was indivisible and emanated from the top down. MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY 17 (1988).

138. HOBBES, *supra* note 135, ch. XIII at 82. The notion was that "[a] state with more than one independent sovereign power within its boundaries was a violation of the unity of nature; it would be like a monster with more than one head, continually at war with itself, an absurd chaotic condition that could result only in the dissolution of the state." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 345–46 (1969).

139. Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999) (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (Kennedy, J., concurring)).

140. WOOD, *supra* note 138, at 345.

141. *Id.* at 350.

142. Amar, *supra* note 117, at 1425–26. According to Professor Wood: "[I]f sovereignty had to reside somewhere in the state—and the best political science of the eighteenth century said it did—then many Americans concluded that it must reside only in the people-at-large." Wood, *supra* note 138, at 382. This is the notion that Chief Justice Marshall so famously emphasized in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–05 (1819).

eignty was vested in the people and that the people would limit the authority of the national government by delegating certain powers to (and reserving them for) the states.[143] Government power was to be shared vertically (between the states and the federal government) and horizontally (between the legislature and the executive).

Under our Constitution, the federal government may be supreme under the Supremacy Clause, but it is not an indivisible sovereign, for states have their own jurisdiction, as well as the ability to influence and affect federal decisions.[144] Moreover, while the Supreme Court may proclaim its own unilateral sovereignty over constitutional questions,[145] the Framers were careful to ensure that both the composition and jurisdiction of the Court would remain under the influence of the elected branches.[146] As Chief Justice Marshall understood so well in *McCulloch v. Maryland*, the Court's power of judicial review does not forbid deference to congressional determinations of the means necessary to achieve constitutional goals.[147] Thus under our constitutional regime neither the Supreme Court, nor Congress, nor the federal government, nor the states can be said to be truly sovereign in the sense used by today's Court.[148] According to Madison, the new

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143. Justice Kennedy expressed a very different view in *Garrett*, stating: "States can, and do, stand apart from the citizenry." 531 U.S. at 375 (Kennedy, J., concurring). To Justice Kennedy, the state is a sovereign entity, an almost corporeal being, apart from its people. *See id.*

144. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 (1985):

> When we look for the States' residuary and inviolable sovereignty in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself .... The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent.

(citations and internal quotations omitted).

145. "[I]t is this Court's precedent ... which must control." City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

146. *See* U.S. CONST., art. III.

147. 17 U.S. (4 Wheat.) at 424.

148.

> 'Our Federalism' ... does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National

system was "made up 'of many coequal sovereignties.' "[149] As Justice Souter summarized in *Seminole Tribe*: "the adoption of the Constitution made . . . [the states] members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy."[150]

Beyond distrust of the tyranny resulting from excessive concentrations of power, the motivation for sharing and dividing power was to provide the people with multiple ways to protect their rights.[151] In the words of Federalist 51:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.[152]

The theory was that no single group would gain enough power to oppress minorities. The Framers understood Hume's warning

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> Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44–45 (1971).

149. WOOD, *supra* note 138, at 529.

150. Seminole Tribe v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., dissenting).

151. Jack N. Rakove, *The Origins of Judicial Review: A Plea For New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997).

152. THE FEDERALIST No. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999). Professor Amar also cites Federalist 28 as supporting this notion:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.*

Amar, *supra* note 117, at 1494 (emphasis in original) (quoting THE FEDERALIST No. 28, at 180–81 (Alexander Hamilton)).

that factions were inevitable.[153] Moreover, Madison was particularly concerned that state legislators would not only ignore larger national issues but would also respond to the political passions of their constituents.[154] To this end, he believed that a national government had to be able to overturn state "legislation inimical to the essential rights of individuals and minorities."[155]

The relationship between the division of sovereignty and group rights was most famously expounded by Madison in Federalist 10. In that essay, Madison explained the threat to minority rights that inheres when governance is concentrated in a singular, small state. Speaking of a "pure democracy"[156] he stated: "A common passion or interest will in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."[157]

The same could be said of inviolate sovereigns.

IV. SOVEREIGNTY AND MINORITY CLAIMS

Victims of discrimination, be it invidious or paternalistic, have less reason than others to expect a single sovereign to be responsive to their claims. To overcome the prejudice they face in one arena, they need multiple fora in which to plead their claims. At least until recently, the history of discrimination law validates the Framers' insight as to the danger of undivided government.

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153. Several constitutional historians have noted that Madison's inspiration for Federalist Nos. 10 and 51 was David Hume's idea that factions were evil but inevitable and that larger republics were better able to maintain social order than smaller ones. *See, e.g.*, STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 86–87 (Oxford University Press 1993); Richard A. Beeman, *Self-Evident Fictions: Divine Right, Popular Sovereignty, And The Myth Of The Constituent Power In The Anglo-American World*, 67 TEX. L. REV. 1569, 1577–78 (1989) (reviewing EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (W.W. Norton & Co., 1988)).

154. Rakove, *supra* note 151, at 1044–45; *see also*, Jack Rakove, Editorial, *A Nation Still Learning What Madison Knew*, N.Y. TIMES, March 11, 2001, § 4, at 15.

155. Rakove, *supra* note 151, at 1045. Professor Rakove suggests that judicial review and the Supremacy Clause were the devices for maintaining the superiority of national laws. *Id.* at 1047.

156. THE FEDERALIST No. 10, *supra* note 152, at 49 (James Madison). While Madison does not speak of monolithic sovereigns, he conceptualizes pure democracies as such, for in them, all power is vested in the majority. He contrasts these democracies with a federated republic where power is disbursed. *Id.*

157. *Id.* Of course the minority parties that Madison was especially concerned with were the propertied classes. *Id.* at 45.

The struggle to protect the rights of African Americans most clearly illustrates the critical importance of having multiple avenues for the recognition and vindication of rights.[158] Indeed, in large part the purpose of the Fourteenth Amendment was to authorize Congress to enact legislation to protect the rights of African Americans from state infringement.[159]

In the twentieth century, belated federal action was required to break the grip of state Jim Crow laws. Thus, before the federal government enacted a crucial series of civil rights laws in midcentury, in many states African Americans were disenfranchised and otherwise deprived of their most basic civil liberties.[160] Bereft of the ballot and systematically excluded from economic opportunity, African Americans had little ability to influence state legislatures. Only by appealing to a broader polity could their voices be heard and their rights slowly vindicated.[161] Other disempowered groups have similarly had to rely upon federal authority to overcome resistance at the state level of their rights, further illustrating the necessity for multiple fora. For example, it took federal legislation to dismantle state laws that restricted women's economic opportunities.[162]

This is not to say that the federal government has always been more solicitous of the powerless. Notably, many states and cities have enacted prohibitions against discrimination on the basis of sexual orientation,[163] despite the repeated failure of Congress to do

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158. Indeed the abolition of slavery by the Thirteenth Amendment required the assertion of federal supremacy.

159. ERIC FONER, RECONSTRUCTION 239–61 (1988). In fact, in vetoing the Civil Rights Act of 1866, which had been enacted pursuant to the Thirteenth Amendment, President Johnson asked: "[w]here can we find a Federal prohibition against the power of any state to discriminate[?]" GUNTHER & SULLIVAN, *supra* note 47, at 919.

160. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 6-10 (3d rev. ed. 1974). *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1976) (describing the history of the civil rights struggle leading up to *Brown v. Board of Education*, 347 U.S. 483 (1954)).

161. The legislative history of the Civil Rights Act of 1964 is illustrative:

> [N]ational legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated.

H.R. REP. No 914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.

162. *See, e.g.*, Civil Rights Act of 1964, tit. VII, § 708, 42 U.S.C. § 2000e-7 (1994) (providing that Title VII preempts contradictory state laws).

163. *See, e.g.*, CAL. CIV. CODE § 51.7 (West Supp. 2002); CONN. GEN. STAT. ANN. §§ 46a–81a–46a–81r (West Supp. 1995); D.C. CODE ANN. §§ 1-2501, 2502, 2512 (1998); HAW. REV. STAT. ANN. § 378–2 (Michie Supp. 1993); MASS. GEN. LAWS ch. 151B, § 4 (1990); MINN. STAT. ANN. § 363.03 (West Supp. 2002); N.J. STAT. ANN. § 10:5–12 (West 2001); VT. STAT.

so.[164] Moreover, the existence of multiple fora may also at times benefit the powerful. For example, the federal courts have limited the ability of previously disempowered groups to institute affirmative action policies.[165] The point here is not that particular groups are more apt to prevail in a particular forum, but rather that those who are disempowered especially need the opportunity to take their claims to other venues, and to utilize multiple opportunities to have their voices heard. If the first forum is the final forum those who have traditionally been excluded from or neglected by that forum have little chance for a peaceful resolution of their claims.

Initially, the Rehnquist Court's resurrection of state sovereignty was animated by these very concerns. In an early "new federalism"[166] case, *Gregory v. Ashcroft*,[167] Justice O'Connor wrote for the plurality:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more

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ANN. tit. 3, § 963 (1995); WISC. STAT. ANN. § 16.765 (West 1996); *see also* BERKLEY, CAL., MUN. CODE ch. 13.28 (2002), City of Berkeley, *available at* http://www.ci.Berkeley.ca.us/bmc; DENVER, COLO., MUN. CODE § 28-91 (2002); ATLANTA, GA., CITY CHARTER, 1996 GA. LAWS 4469 (2002), Mun. Code Corp., *available at* http://wwww.municode.com; CHICAGO, ILL., MUN. CODE. chs. 2-120, 2-160, & 5-8 (2002); BALTIMORE, MD., CITY CODE art. 4 (2000); BOSTON, MASS., MUN. CODE §§ 12-9.1–12-915 (2001), Am. Legal Publishing Corp., *available at* http://www.amlegal.com/boston_ma/; MINNEAPOLIS, MINN., CODE chs. 139 & 141 (2002); AUSTIN, TEX., CODE § 7-1-1 (2001), Am.Legal Publishing Corp., *available at* http://www.amlegal.com/austin_tx/; SEATTLE, WASH., MUN. CODE chs. 14.04 & 14.08 (2002), City of Seattle, *available at* http://clerk.ci.seattle.wa.us/~public/code1.htm; MILWAUKEE, WIS., CODE §§ 109–5 & 109-9 (2002).

164. *See* Employment Non-Discrimination Act, S. 2056, 104th Cong. (1996) (would have prohibited discrimination on the basis of sexual orientation in employment) (reintroduced as H.R. 1858, 105th Cong. (1997) and S. 869, 105th Cong. (1997), and reintroduced again as H.R. 2355, 106th Cong. (1999) and S. 1276, 106th Cong. (1999)) [hereinafter ENDA]; 142 CONG. REC. S10129, S10139 (1996) (explaining that ENDA fell one vote short of passage); *see also* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 249 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738c (1994)) (passed by 104th Congress at same time it declined to pass ENDA) (exempting states from any obligation to recognize same-sex unions recognized by the laws of other states, and defining the terms "marriage" and "spouse" under federal law as referring to only opposite-sex relationships).

165. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

166. By "new federalism," we refer to the doctrines developed by the Rehnquist Court, which limit the authority of the federal government and assert the sovereignty of the states. *See supra* text accompanying notes 27–92.

167. 501 U.S. 451 (1990).

> innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[168]

The belief that dual sovereignty is critical to the preservation of the rights of vulnerable people has been a central theme in the Court's recent cases. In *New York v. United States*,[169] for example, a majority joined Justice O'Connor in holding that Congress lacked authority to require States to enact legislation implementing federal environmental mandates, noting that:

> [T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derives from the diffusion of sovereign power."[170]

Numerous subsequent cases, deciding different doctrinal points, echo this principle.[171]

For individuals with disabilities, the opportunity to bypass the discrimination in one arena by rearguing their claims in another has proven particularly important. At the time of the *Pennhurst* case, for example, state laws appeared to respect the rights of institutionalized persons.[172] But advocates for people with disabilities

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168. *Id.* at 458 (citations omitted).

169. 505 U.S. 144 (1992).

170. *Id.* at 181 (citation omitted).

171. *E.g.*, Printz v. United States, 521 U.S. 898 (1997) (explaining why the Tenth Amendment limits Congress from commandeering state executive officials); Lopez v. United States, 514 U.S. 549, 568–83 (1995) (Kennedy & O'Connor, JJ., concurring) (explaining limitations of congressional power under the Commerce Clause).

172. The district court had considered the plaintiff's state law claim under the Mental Health and Mental Retardation Act and found the defendant liable. Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1323 (E.D. Pa. 1977). The applicable provision of the act stated, "[t]he department [of public welfare] shall have power, and its duty shall be: (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them. . . ." *Id.* at 1322 (quoting 50 P.S. § 4201). A state court had previously held that the act gave the subject of a commitment proceeding "a right to treatment" and gave the court the power to order the course of her treatment. *Id.* (quoting *In re* Joyce Z., No. 2035–69 (C.P., Allegheny County, filed March 31, 1975)). As a result, the district court held:

> It is abundantly clear that the Mental Health and Mental Retardation Act . . . grants to the retarded in Pennsylvania the statutory right to minimally adequate habilitation. Furthermore, it is equally clear that the Commonwealth and the counties have been charged under the Act with the responsibility of providing such minimally adequate habilitation to the retarded. The Act envisions a comprehensive cooperative State-county (or multi-county) program for the care, treatment and rehabilitation of

understood that it would take the leverage of a different forum to convince the state legislator to disgorge the money necessary to recognize the state's own professed goals.[173]

Resort to a federal forum was also required to ensure that children with disabilities receive an adequate education. Indeed, the history of the Individuals with Disabilities Education Act[174] shows how the existence of multiple fora can serve, in Brandeis' term, as "laboratories of democracy,"[175] paving the way for increasing protection of the disempowered. Thus, the experiments of a few states[176] in educating children with disabilities refracted to the national level, leading to federal legislation mandating such rights even in those states that had failed to provide them. Without federal lawsuits, federal legislation and the federal money that came with it, however, it is doubtful that all states would have routinely educated the severely disabled children.

Likewise, as Justice Breyer demonstrates so thoroughly in *Garrett*, the ADA was, in large part, a response to the failure of many states to protect the rights of people with disabilities.[177] Indeed, many of the key provisions of the Title II regulations,[178] which apply generally to the programs and laws of states and local governments, relate to areas in which states were especially

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> persons who are . . . mentally retarded. . . . The State, through the Department of Welfare, is responsible for the overall supervision and control of the program to assure the availability of and equitable provision for adequate . . . mental retardation facilities, and the counties, separately or in concert, are assigned responsibilities as to particular programs. On the basis of this record, we find that both the Commonwealth and the counties have violated their statutory obligation to provide minimally adequate habilitation to the retarded residents at Pennhurst.

Id. at 1322–23 (citations omitted).

173. For a discussion of the case, see MINOW, *supra* note 56, at 140 n.144.

174. Federal protections for children with disabilities are provided by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401–1485 (1994 & Supp. IV 1998). For a discussion of how the Act's predecessor was a result of federal litigation, see *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982) ("Both the House and Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments . . . ."). The future of the IDEA is now uncertain in light of *Garrett*'s construction of Congress' power under Section 5 to protect people with disabilities and lower courts' questioning of Congress' power to use the Spending Clause to achieve regulatory aims. *See* cases cited, *supra* note 108.

175. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

176. *See* Rebecca Weber Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 249 n.60 (1994).

177. Univ. of Ala. v. Garrett, 531 U.S. 356, 377–82 (2001).

178. 28 C.F.R. §§ 35.101–107 (2001).

deficient. A recent Supreme Court decision (which did not consider the constitutional issues) illustrates the type of situation in which states have overlooked the interests of people with disabilities. In *Olmstead v. L.C.*,[179] the Court reviewed the history of state-imposed institutionalization of individuals with disabilities and found that the ADA was designed to prohibit "unjustified isolation" of people with developmental disabilities.[180] Such isolation can only be undertaken by the state (private parties cannot mandate that individuals be isolated), and its continuing existence suggests the inadequacy of state protections for people with disabilities.[181]

Unfortunately, their access to multiple fora is now diminished. Despite the Court's consistent language proclaiming the importance of dispersing political power,[182] *Garrett* closes political doors. In restraining congressional power under Section 5, the Court has lost sight of its reasons for resurrecting state sovereignty. Once having determined that federalism compels limiting congressional power to abrogate sovereign immunity,[183] the Court then seemed to rely upon a very constrained reading of Section 1 of the Fourteenth Amendment,[184] thereby narrowing the very individual rights that the Court claims underlie its federalism jurisprudence.[185] Thus, in *Kimel* the Court took pains to affirm the Constitution's disregard of age-based discrimination,[186] and in *Garrett*[187] the Court went out of its way to ensure that *Cleburne* be understood as providing the lowest level of scrutiny possible for people with disabilities.[188] Completely overlooked (except in the concurring opinion's sentimental invocation of concern for the damaging ef-

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179. 527 U.S. 581 (1999).

180. *Id.* at 597.

181. *E.g.*, Helen L. v. DiDario, 46 F.3d 325 (1995). For a discussion of the history of institutionalization as well as the inadequacy of pre-ADA laws to redress the problem, see Joanne Karger, Note, *"Don't Tread on the ADA":* Olmstead v. L.C. *ex rel* Zimring *and the Future of Community Integration for Individuals With Disabilities*, 40 B.C. L. REV. 1221, 1224–38 (1999).

182. *See supra* text accompanying notes 167–71.

183. *See* Seminole Tribe v. Florida, 517 U.S. 44, 65–73 (1996).

184. *See* Kimel v. Florida, 528 U.S. 62, 80–91 (2000); City of Boerne v. Flores, 521 U.S. 507, 519–24 (1997).

185. In effect, the Court sacrificed Section 1's explicit protections of individual rights on the altar of the extra-textual protections the Court finds inchoate in the structure of the Constitution.

186. *See* 528 U.S. at 83–84.

187. 531 U.S. at 366 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435, 446 (1985)).

188. This reading of *Cleburne* was hardly inevitable. Indeed, standard constitutional law texts often read *Cleburne* more broadly, as hinting at a more elevated level of scrutiny. *See* GUNTHER & SULLIVAN, *supra* note 47, at 728; GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 583, 780–84 (3d ed. 1996).

fects of "prejudice")[189] was the individual rights rationale that supposedly justified protection of states' rights in the first place.[190]

To be sure, the notion that federalism serves as a bulwark against tyranny seems relatively non-controversial, albeit somewhat nostalgic.[191] This benign idea, however, has evolved into the considerably more problematic notion that states are inviolate sovereigns unaccountable even when they breach critical federal rights. A doctrine that originally developed to preserve dual sovereignty and individual freedom has become so concerned about state sovereignty that it has lost sight of the fact that sovereignty is split in our federal system and that *dual* sovereignty requires *two* sovereigns: state and federal. Disempowered groups are no more protected in a regime in which the federal government is powerless against the sovereignty of the states than they were in a world in which the states were weakened by an aggrandizement of federal sovereignty.

V. SEPARATION OF POWERS

For individuals with disabilities, as well as other disempowered groups, the need for multiple fora extends beyond vertical federalism. Many of the reasons that explain why it is especially important for the less powerful to be able to make claims before both state and national government apply with equal force to the need to access both the federal legislature and the federal judiciary.

The import of judicial protection of minorities is well understood. Indeed, the general proposition was first articulated by Justice Stone in his famous footnote 4 in *Carolene Products.*[192] In an opinion the text of which argues that courts in general should be deferential to Congress, Justice Stone's footnote charges the judiciary with the responsibility of protecting the interests of "discrete and insular minorities"[193] because their lack of meaningful access

189. *Garrett*, 531 U.S. at 374–75.

190. In essence, in the name of protecting individual liberty by empowering the states, the Court is willing to sacrifice individual liberty to the states. The same phenomena are evident in *Morrison*, where the Court appears willing to place the interests of raped and battered women beneath a concern for the states, no matter their ability (or inability) to protect individuals. *See* United States v. Morrison, 529 U.S. 598, 617–19 (2000).

191. Brown and Enrich, *supra* note 13, at 3–4.

192. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

193. *Id.* at 153 n.4.

to the political process "may call for a correspondingly more searching judicial inquiry."[194]

This vision of the judicial role animated approximately fifty years of individual rights and equal protection jurisprudence.[195] Throughout this era the Court's "special role" in protecting the rights of minorities and other less politically powerful groups was widely appreciated as justifying the practice of giving "strict scrutiny" to legislation that adversely singled out such groups.[196]

Less appreciated is the fact that the interests of minority groups have seldom advanced on the basis of judicial protection alone. While scholars disagree about the degree to which *Brown v. Board of Education* actually influenced the desegregation of America,[197] there is a clear scholarly consensus that the dismantling of Jim Crow required legislative as well as judicial actions.[198] Thus, there is no doubt that the Civil Rights Act of 1964[199] and the Voting Rights Act of 1965[200] were as critical to the eradication of segregation as any judicial opinion.

The deleterious role that courts may play with respect to minority interests has received less attention. While the judiciary's part in protecting slavery is not debatable,[201] the contemporary Court's perpetuation of inequality is less frequently discussed. Space precludes a full cataloging of the Rehnquist Court's actions that have affirmatively disadvantaged the disempowered, but examples abound.[202] Suffice it to point to the Court's dismantling of legisla-

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194. *Id.*

195. We refer to the period from the New Deal Court to the Rehnquist Court, during which time the Court engaged in heightened scrutiny of state actions detrimental to the interests of the politically vulnerable. The most notable examples are *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Reynolds v. Sims*, 377 U.S. 533 (1964). *See also* Sugarman v. Dougall, 413 U.S. 634 (1973) (illegitimacy); Frontiero v. Richardson, 411 U.S. 671 (1973) (gender).

196. The most influential academic articulation of this view is JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

197. 347 U.S. 483 (1954). The impact of the Court's decision in *Brown*, as well as the scholarship over the same, has recently been reexamined in JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001). For a powerful critique of *Brown*'s impact, see GERALD ROSENBERG, HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

198. *See* PATTERSON, *supra* note 197, at 136–37.

199. 42 U.S.C. § 2000e (1994).

200. 42 U.S.C. § 1971 (1994).

201. The most infamous example is, of course, *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

202. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (finding federal affirmative action program unconstitutional); Reno v. Flores, 507 U.S. 292 (1993) (upholding right of INS to detain children); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (state has no obligation under the Fourteenth Amendment to protect a child from severe abuse); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (school system does not violate constitution by charging for transportation to school).

tively enacted affirmative action plans[203] as well as its renunciation of the clear legislative history demanding a broad reading of the ADA.[204] Clearly this Supreme Court is no special friend of the politically vulnerable.

This reality underscores the importance of multiple federal fora for the articulation of minority claims. Indeed, this was part of the Court's reasoning for rejecting suspect classification status for people with disabilities in *Cleburne*.[205] The *Cleburne* Court upheld the plaintiff's claim but refused to apply strict scrutiny because it felt that the legislature was better suited (and had more ably served) to advance the interests of those with disabilities.[206]

This model of deference to the legislative role was soundly rejected in *Boerne*.[207] Writing for the majority in that case, Justice Kennedy severely chastised Congress for overreaching its authority, essentially holding that Congress is constitutionally impotent to remediate violations not previously identified by the Court.[208]

This insistence upon judicial primacy—dare we say sovereignty—was reiterated in both *Kimel*[209] and *Morrison*.[210] *Garrett* was even more emphatic. As a statute, the ADA was notable for its extensive, published legislative history.[211] There was an extraordinary legislative record including numerous hearings and multiple committee reports.[212] Had the Court followed the promise the majority made in *Lopez* to defer to congressional findings,[213] or had the Court recalled Chief Justice Marshall's reminder that legislation "plainly adapted" to a constitutional end is constitutional,[214] the ADA surely would have been affirmed as a

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203. *See Adarand*, 515 U.S. 200; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). A more subtle example of the Court's changing attitude toward civil rights claims is the motivation-driven definition of discrimination first developed by the Burger Court in *Washington v. Davis*, 426 U.S. 229 (1976), which made it virtually impossible for civil rights plaintiffs to prevail.

204. Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 76–78 (2000) (discussing fact that in interpreting the ADA's definition of disability, the Court chose to disregard the statute's legislative history).

205. 473 U.S. 432 (1985).

206. *Id.* at 443–45.

207. 521 U.S. 507 (1997).

208. *Id.* at 519–29; Brown & Enrich, *supra* note 13, at 36 n.197.

209. 528 U.S. at 81–84.

210. 529 U.S. at 619–22.

211. Parmet, *supra* note 204, at 64–66.

212. *See id.*

213. 514 U.S. at 562–63; Brown and Enrich, *supra* note 13, at 40 (requirement of congressional findings equally relevant to Commerce Clause and Section 5).

214. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

proper exercise of Congress' power to remediate irrational discrimination against people with disabilities.

But in *Garrett* the Court made it clear that Congress will receive absolutely no deference when it acts pursuant to Section 5.[215] To the contrary, the *Garrett* majority, while trumpeting its constitutional duty, engaged in a remarkably skeptical and searching review of the legislative record. While acknowledging that the "record assembled by Congress includes many instances to support"[216] the preamble's finding that there has been a history of discrimination against people with disabilities, the Court quickly dismissed that record as not sufficiently tied to the problems as defined by the Court. First, the Court noted that the record included examples of discrimination by cities[217] and other actors not properly considered to be the state. In effect, then, the Court required that Congress prepare a special set of findings limited to actions undertaken exclusively by states and not their subdivisions. Second, the Court found that the legislative history included acts of discrimination that may not have been "irrational under our decision in *Cleburne*."[218] These findings, in effect, were discarded as not worthy of supporting congressional action.

Finally, the Court found that Congress had failed to demonstrate a sufficiently pervasive pattern of discrimination.[219] Pointing to *South Carolina v. Katzenbach*[220] as an example of congressional legislation narrowly tailored to apply to those specific states in which there was a long and documented history of constitutional violations, the *Garrett* Court suggested that the ADA was infirm because of its overbreadth.[221] In effectively demanding that Congress

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215. This outcome is true despite Justice Rehnquist's statement that "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. 356 at 365. That statement in the opinion is quickly undermined by the Court's reiteration that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." *Id.* (citing City of Boerne v. Flores, 521 U.S. 507, 519–24 (1997)).

216. *Id.* at 369.

217. *Id.*; note 99, *supra.*

218. *Garrett*, 531 U.S. at 370. This suggests that contrary to *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and even to *Boerne*, 521 U.S. 507 (1997), Congress may never prohibit acts that are not in themselves unconstitutional under the Court's definition. In the part of *Morgan* cited with approval in *Boerne*, the Court suggested that in order to prevent unconstitutional acts by states, Congress could prohibit other acts that were not themselves unconstitutional. *Boerne*, 521 U.S. at 518. That possibility was simply never considered by the *Garrett* Court. The *Garrett* majority did not ask how rational discrimination may lead to irrational discrimination. Instead *Garrett* demanded that Congress rest exclusively upon findings of irrational discrimination. *Garrett*, 531 U.S. 368–73.

219. *Id.* at 370–74.

220. 383 U.S. 301 (1965).

221. *Garrett*, 531 U.S. at 373.

narrowly tailor its legislation to the specific states and circumstances in which there were documented violations of the Constitution, the Court treated the legislative branch like a lower court who imposed an overly broad injunction.[222] As Justice Breyer noted in dissent, the Court essentially imposed a standard of strict scrutiny upon the ADA, even though the ADA did not violate any of the rights that traditionally trigger heightened review. The irony is that the only legislation that may survive this elevated review (which demands a close if not perfect correlation between acts of Congress and judicially determined violations of the Fourteenth Amendment) may be laws that apply to those classifications that the Court has termed "suspect."[223] Yet when Congress legislates with respect to those groups, the suspect status of the classification triggers strict scrutiny under the Fifth Amendment, resulting in a different demand for "congruence"[224] which has all too often been "fatal in fact."[225] One is left wondering what Congress can do under Section 5, other than to pass a law enforcing a judicial decree. In effect, the legislature has been left a very junior partner in the task of protecting the powerless. As a result, only one forum remains to protect the vulnerable: the Court.

That the Court views itself as the truly inviolate sovereign became especially apparent in *Bush v. Gore*.[226] This Article is not the place to fully critique the logical and doctrinal aberrations of that case.[227] Suffice it to say that the decision by the same five justices who constituted the *Garrett* majority to abruptly halt Florida's presidential vote recount casts grave doubt upon that majority's professed commitment to the sovereign power of the states to administer and interpret their own laws.[228] For a majority that had

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222. As Justice Breyer aptly noted: "the Congress of the United States is not a lower court." *Id.* at 383 (Breyer, J., dissenting).

223. *Kimel* specifically singled out race and gender classifications for this treatment. 528 U.S. at 83. For further discussion of this point see Brown and Enrich, *supra* note 13, at 53.

224. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (requiring that federal regulations giving a preference to a racial minority must meet a test of congruence).

225. *Id.* at 237.

226. 531 U.S. 98 (2000).

227. Many scholars have debated *Bush v. Gore*. For an example of their arguments, see *Symposium:* Bush v. Gore, 68 U. CHI. L. REV. 613 (2001).

228. Throughout much of English history, the "sovereign" picked the prime minister. It is in this sense that Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), asserted that the people would be sovereign for they selected the Constitution and its government. In *Bush* we discover that the Court picks the government. While sovereignty has no singular meaning, *see supra* text accompanying notes 125–28, the power to select those who administer the state comes as close to a defining attribute of sovereignty as we know.

repeatedly proclaimed the sovereignty of states, and that was about to expand state sovereignty in *Garrett*, to stay a state court's ordered recount of a vote, and then to determine on its own, at the eleventh hour, that there was no time to remedy any constitutional violations[229] raises enormous questions about the import and significance of the Court's federalism agenda.

After *Bush v. Gore*, the Court's commitment to state sovereignty must be re-examined. It is difficult to reconcile the Court that so directly and disruptively involved itself in a state election, with the Court that a few weeks later relied on state sovereignty to overturn a major civil rights law.[230] Does the Court's willingness to sacrifice civil rights claims on the altar of state sovereignty reflect respect for the sovereignty of the states, or does it more truly impose the sovereignty of the Court itself?

Taken together, *Garrett* and *Bush v. Gore* make inescapable the possibility that the Court's sovereign immunity doctrine is more about the Court's assertion of its own sovereignty than about concern for the states. After these cases, the only remaining forum for people with disabilities, as well as other disadvantaged groups, is the Court, and that body evidences substantial hostility to their claims.

CONCLUSION

There is no doubt that structural concerns lie at the heart of constitutionalism. Respect for the states, as well as acceptance of judicial review, are critical to the protection of individuals and vulnerable groups. But like any set of norms, carried to excess, they threaten to eviscerate the very values they were meant to serve.

So has been the fate of the myth of sovereignty: both judicial and state. Unleashed from their textual and historic moorings, the Court has permitted these myths to destroy critical political safeguards. In *Garrett*, the victims were state workers with disabilities. Tomorrow the same result is likely to befall all individuals with dis-

229. *Bush*, 531 U.S. at 111.

230. Notably, the *Bush* Court found an equal protection violation without any finding of discrimination, irrational or otherwise. *Id.* at 104–08. Clearly, the Court gave itself far greater latitude to depart from precedent and interpret the Equal Protection Clause creatively, than it was willing to give Congress in *Garrett*. Remarkable, too, is the absence of any citation or consideration of *Bush* in *Garrett*.

abilities affected by state action.[231] Thereafter, other civil rights laws may crumble[232] as the Court proclaims *l'état, c'est moi.*

231. *See supra* text accompanying notes 101–08.

232. *See* cases cited, *supra* note 108. Other federal statutes vulnerable to the analysis in *Garrett* include the Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (1994), which was found unconstitutional to the extent that it applies to states by the Fifth Circuit in its opinion in *Garrett*, 193 F.3d at 1219, and the Equal Pay Act, 29 U.S.C. § 206 (1994), the constitutionality of which was questioned in *Holman v. Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 1999).