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THE ELEVENTH AMENDMENT CASES:
GOING "TOO FAR"
WITH JUDICIAL NEOFEDERALISM

James G. Wilson*

I. INTRODUCTION

Beginning with Seminole Tribe v. Florida, the Supreme Court's recent Eleventh Amendment decisions are some of its worst in decades. The Court has diluted the constitutional and federal statutory rights of millions of people. This Article uses several techniques to support this bitter proposition. It first compares the Court's

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2. Professor Mark Tushnet develops the contrary argument that the new Eleventh Amendment cases can be read as part of the Court's reduced constitutional aspirations. According to Tushnet, the cases do not completely preclude federal power by still permitting individuals to seek injunctive relief. See Mark Tushnet, Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 Harv. L. Rev. 29, 72-76 (1998). But, he also explores the alternative argument that the cases signify continued judicial activism and a shift, not a reduction, in constitutional aspirations. See id. at 77-82. John Jeffries argues that the impact of the Eleventh Amendment is minimal because individuals can still use section 1983 to sue individual state officials for damages. See John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 49 (1999). Certainly there is enough chaos left in the doctrine to enable future justices to protect individual rights to a significant degree.

On the other hand, the Court is becoming ever more skeptical of the "official capacity" concept. In Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), the Court explicitly rejected Congress's attempt to use that alternative fiction to grant individuals full statutory protection. See id. at 637. This Article fears the Court is no less ambitious than its predecessors and that its reformulation of federalism is far from over. This Court's vision of progress is the supremacy of private power to be achieved through the weakening of the federal government and individual rights. The majority knows that multinational corporations face no serious threats from somewhat "sovereign" states.

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“neofederalism” in the Eleventh Amendment context with two other of the Court’s states’ rights inventions—constraints on Congress through broader constructions of the Tenth Amendment and narrower interpretations of the Commerce Clause—to demonstrate why their Eleventh Amendment approach threatens basic democratic and constitutional norms, including a humane form of federalism. The Court’s recent, unanimous validation in Reno v. Condon\(^3\) of congressional regulation of state distribution of personal information obtained from drivers license applications may offer the best we can hope for from these neofederalist doctrines: numerous, complex, result-oriented outcomes that do not profoundly alter the political culture or economy. The Article then briefly considers Akhil Amar’s scintillating book, *The Bill of Rights*,\(^4\) to make an “intratextual” argument against the Court’s Eleventh Amendment interpretation.\(^5\) This provides a Fourteenth Amendment textual/historical argument to be added to the obvious claim that neither the Eleventh Amendment’s text nor history warrant a broad construction of state sovereign immunity. Next, the Article explores some foreseeable consequences of the *Seminole Tribe* doctrine, particularly its effects on private power. Finally, this piece considers the doctrine’s affinities with the following: Richard Rorty’s repudiation of “rights talk”; the tendency of academic multiculturalists to reduce their analysis to race and gender; some intellectual leftists’ diminishment of the importance of the “individual”; and the racist John C. Calhoun’s nullification doctrine from the 1830s. Oddly enough, the more conservative wing of the Court is commingling extreme Southern Constitutional theory from the Antebellum era with some of the trendiest theories of contemporary left-wing intelligentsia. At long last, this portion of the left is seeing some of its concepts being turned into power.

Because Eleventh Amendment doctrine contains so many fictions, arbitrary distinctions, peculiar textual interpretations, and

\(^3\) 120 S. Ct. 666 (2000).
\(^5\) See Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747, 749 (1999) (discussing how, using an intratextual analysis, words used in one part of the Constitution can be interpreted by looking to their usage elsewhere in the document).
incoherent outcomes—confusing outcomes that are even less comprehensible now that the doctrine has become so broad and dynamic—it is worth stating at the outset how simple and fundamental the basic issues are. Five members of the Court are determining how far their judicially fabricated doctrine of "state sovereign immunity" precludes private parties—including state employees, private citizens, aliens, and private corporations—from suing states for alleged violations of the United States Constitution and federal statutory laws and, therefore, how much it prevents Congress from protecting those rights. In other words, the doctrine elevates an implied state power above numerous individual statutory rights, constitutional rights, congressional authority, and vast amounts of constitutional text.

In *Kimel v. Florida Board of Regents,* the Court began the new millenium by depriving state employees of their federal statutory right to sue their employers for damages for flagrant violations of the Age Discrimination Act (ADA). Under the sweeping reasoning of these recent opinions, no constitutionally permissible justifications exist for the nation to provide individuals with adequate legal rights—rights which deter states from viciously discriminating against their citizens because of physical handicap or by creating unsafe working conditions. The doctrine is not confined to stripping away rights of state employees—a group that has little political popularity. The Court’s remand of an ADA case against a state in

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7. It is possible that the explosion in Eleventh Amendment jurisprudence will eventually force the Court to simplify the overall doctrine, creating vast areas of state action in which the individual will only have the choices of going to state court (which may have its own version of sovereign immunity preventing any form of relief) or begging the federal government to intervene on his or her behalf.

8. 120 S. Ct. 631 (2000).

light of emerging Eleventh Amendment law will probably generate a holding precluding both state employees and private persons from suing states for damages even when the states treat them brutally. Having already held that a private individual or corporation cannot sue a state in federal court for violations of patent rights, even though the Constitution authorizes congressional protection of patents, the majority will soon prevent private parties from suing states for substantially impairing contracts or for violating the Dormant Commerce Clause by penalizing out-of-state corporations. While individuals still theoretically retain the right to seek injunctive relief, the Court's broad reasoning threatens all prior rights, including the remedy of injunctive relief.


In recent years, the Supreme Court Justices have predictably divided along partisan lines over federalism issues. All five hard-line conservatives raise state power over individual rights and federal power. The four more moderate members of the court label the victors as "judicial activists" for imposing their own ideology on congressional laws that were passed by the national electorate through a system that structurally represents and protects state interests. This repetitiveness of voting lineup, argument, and outcome can obscure important distinctions between the different doctrinal approaches the conservatives have taken. These distinctions reveal the particularly vile nature of the Seminole Tribe line of decisions.


11. There is some historical authority supporting the claim that states did not need to compensate individuals for Contract Clause violations. See Vicki C. Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity, 98 YALE L.J. 1, 124 n.494 (1988). Chief Justice Marshall made it clear in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), that states would not have such power to interfere with the national economy when he struck down a state law attempting to rescind state land grants corruptly granted to private investors. See id. at 137.

12. *Kimel*, 120 S. Ct. at 653-54 (Stevens, J., dissenting).

13. See *id.* at 651-52 (Stevens, J., dissenting).
A. The Good: New York v. United States

Whether one ultimately agrees with Justice O'Connor's opinion in *New York v. United States* or not, she effectively refuted Justice Blackmun's earlier argument in *Garcia v. San Antonio Metropolitan Transit Authority* that the Supreme Court could not create reasonably coherent, judicially enforceable Tenth Amendment doctrine. Blackmun's judicial competence argument played a major role in overruling *National League of Cities v. Usery*, which held that Congress could not mandate states to pay their employees a minimum wage or time-and-a-half for overtime. According to the *Usery* majority, Congress had invaded an "aspect of state sovereignty" and "traditional governmental functions," particularly the power to structure internal employer-employee relationships. Blackmun described how randomly lower courts had applied *Usery*'s vague "governmental function" balancing test. According to Blackmun, such vagaries were inevitable. Indeed, it remains hard to imagine how courts could apply such amorphous standards to a myriad of state governmental operations, particularly now that so many governmental functions have been privatized. By combining the inability of the Court to create "judicially manageable standards" with Professor Wechsler's famous claim that the states already had adequate representation through the "political safeguards of federalism," Blackmun all but formally relegated Tenth Amendment issues to the nonjusticiable political question doctrine.

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20. *Id.* at 550-51 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954)).
21. Dean Choper proposed that federalism and separation of powers issues should be nonjusticiable, saving the Court's judicial capital to protect individ-
O’Connor’s *New York* opinion did not revive *Usery’s* ambiguous terms, holding instead that the federal government could not pass coercive laws that facially discriminate against states by forcing them to assume the costs of regulating segments of the private economy. Congress had “commandeered” the state legislative branches, telling them how they had to spend state money to control their own citizenry. By conceding that Congress could pass “generally applicable” laws that equally coerce both individuals and states, she avoided a direct confrontation with *Garcia*, which had upheld the application of federal minimum wage and overtime requirements to a municipal public transportation system.

This condemnation of congressional facial coercion of state regulatory action is internally coherent, relatively easy for courts to apply, consistent with a long string of Supreme Court precedent, and justifiable under the reasoning that supports those precedents. First of all, the judicial branch has long been wary of governmental “coercion.” Two of the primary ends of the Constitution are to eliminate private coercion through violence and slavery, and to constrain public coercion, thereby achieving the ultimate goal of ordered liberty. Although the term “coercion,” like all major legal terms, has its peculiar set of interpretive difficulties, it is far easier to diagnose than the *Usery* concepts. Coerced parties are forced to act because they have no sanction-free options.

In *New York*, Congress required the state of New York either to take title to all privately held nuclear waste or continue its prior cooperation with several fellow states in developing a regional compact.
to store that dangerous material. Either way, the state of New York must follow Congress's orders. The statute was facially discriminatory because it penalized only the states for their unique actions and inactions, not states and private parties for common illegal activities. In fact, the law relieved the relevant private parties of prior legal obligations.

The Court's hostility to facial discrimination in federalism cases first arose in *McCulloch v. Maryland*. In *McCulloch*, Chief Justice Marshall held that states could not tax the "operations" of a national bank but could equally tax bank property, such as real estate, which the bank held in common with the rest of Maryland's inhabitants. Marshall explained that there was no internal constraint on the states' will to tax federal operations. Even if Maryland and their citizens did not destroy the hated corporation through taxation, they would profit from such taxes because they would receive the full amount of the tax while previously paying a small portion of this amount in federal taxes. Quite simply, there would be taxation without representation. Widespread, facially neutral taxes on land, however, are constitutional. Marshall apparently assumed that generally applicable laws, by their very nature, are less likely to be tools of oppression. Local citizens are unlikely to raise their own property taxes to obtain a tiny bit more income from federal properties. Ever since *McCulloch*, the Court has been skeptical of many types of facial discrimination, be it against religious minorities, political parties, or racial groups.

Under the condemned statute in *New York*, private utility corporations had convinced Congress to transfer their expenses to the states. Congress should have passed a law equally coercing all existing owners of nuclear waste, including any state facilities. To achieve such an egalitarian goal, it would have needed to overcome the combined resistance of state and private power, a political hurdle that reduces the likelihood of oppression. Given the amount of control private power has over Congress (as well as the states and the presidency), such temptations are overwhelming. Thus, the states not only were without the structural protection of generally

26. See id. at 436.
applicable laws, but they also faced a system that encouraged the private sector and the federal government to avoid their moral, financial, and legal responsibilities by shifting those burdens and accountability to another entity.

Ultimately, the decision in New York is not very troubling because it concerns the direct allocation of state and federal power, not the rights of individuals. No person will be immediately injured or unjustly discriminated against because the Commerce Clause does not permit Congress to directly coerce the states into regulating the private sector. After New York, Congress could still pressure the states by passing generally applicable laws that either the United States Attorney General or private individuals could enforce through the federal courts. Congress also can regulate the private sector itself, preempting the states from any responsibilities.

B. The Bad: Term Limits v. Thornton

+ Term Limits v. Thornton is one of those cases that presents analytical difficulties because it contains equally powerful majority and dissenting opinions. Relying on a variety of textual sources as well as the earlier case of Powell v. McCormack, the Thornton majority fashioned a bright-line rule striking down all state term limits on those running for federal office. The dissent responded by noting that the Constitution’s age and residency requirements were aimed at Congress, not the states. After the Constitution’s ratification, many states had imposed property requirements upon those seeking elective office, including federal office. The dissent could have added that all states prevented women from voting or running for federal office.

In light of this rhetorical stalemate, the best opinion was Justice Kennedy’s concurrence that tipped the five-four decision against the states. Rather than continue these fierce battles over the original Framers’ intentions and parse competing original text, Kennedy

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28. 395 U.S. 486 (1969) (holding that the House of Representatives could not prevent Adam Clayton Powell from assuming his seat in the House once he satisfied the Constitution’s textual requirements concerning age and residency).
29. See Term Limits, 514 U.S. at 874-84 (Thomas, J., dissenting).
concluded that the Fourteenth Amendment’s textual protection of national citizenship prevented states from determining who could run for federal office. By relying on the Civil War Amendments, which textually confirmed the profound shift in the balance of power between the states and the national government, Kennedy derived from President Lincoln’s more egalitarian, individual-rights focused Constitution the national right to run for office without satisfying such state conditions as term limits or property qualifications.

Justice Thomas’s dissenting opinion becomes far more troubling when one looks beyond his outcome and technical arguments to the premises underlying those arguments. Thomas used the case to revisit the basic structure of the federal government. Instead of endorsing Chief Justice Marshall’s Hamiltonian vision that enthusiastically implied any appropriate means to achieve the national government’s broad ends, Thomas created a strong presumption against federal power:

The federal government and the states thus face different default rules: where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak expressly or by necessary implication—the federal government lacks that power and the states enjoy it. These basic principles have been enshrined in the Tenth Amendment.32

Whether he knew it or not, Thomas’s default rule has an interesting judicial pedigree. In *Dred Scott v. Sandford*,33 Chief Justice Taney held the Missouri Compromise was unconstitutional because, “[t]his [federal] government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish . . . .”34

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30. See id. at 821 (quoting Abraham Lincoln, The Gettysburg Address (1863)).
32. *Term Limits*, 514 U.S. at 848.
33. 60 U.S. (19 How.) 393 (1857).
34. Id. at 435 (emphasis added).
Taney's construction appears to be broader than Thomas's default rule; at least the federal government can turn to its purposes to justify its use of power. It seems not just odd, but even irresponsible to revive a cluster of arguments that helped cause the Civil War and its Reconstruction Amendments, all of which emerged long after the Tenth and Eleventh Amendments. Of course, we will not know the meaning of Thomas's grandiose default rule until we see how it is applied (or not applied) over a series of cases. *Reno v. Condon*\(^3\) indicates that the rule may be more rhetoric than reality. Nevertheless, this default rule creates a principle that states and individuals can invariably rely upon to narrow federal power. Whenever the state and individual interests are similar, they can use Thomas's premises to protect themselves.

**C. The Ugly: United States v. Lopez\(^3\)**

In 1995, for the first time in decades, the Supreme Court held that Congress had exceeded its authority under the Commerce Clause in *United States v. Lopez*. Just as the conservatives had jettisoned text and history to interpret the Eleventh Amendment, they ignored any alleged preference for "bright-line rules"\(^3\) to create an elaborate, multi-factor balancing test which concluded, in the words of Justice O'Connor's concurrence, that the federal government had gone "too

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35. 120 S. Ct. 666 (2000).
37. See generally Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (exploring the dichotomy between general rules of law and judicial discretion). Justice Scalia maintains that formal rules are particularly important in cases involving such "structural safeguards" as separation of powers:

[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.


Justice Scalia has been remarkably silent while consistently joining the neofederalists' use of balancing tests.
In fact, they destroyed the existing bright-line rule of almost complete deference in such cases. As in the earlier constitutional cases of *National League of Cities v. Usery* and *Morrison v. Olson*, Chief Justice Rehnquist provided numerous reasons in his plurality decision for invalidating the legislation—reasons that immediately become contestable factors in subsequent litigation. Among these, Congress had exceeded its powers under the Commerce Clause by not making any findings, not permitting courts to make an independent determination of jurisdiction in particular cases, criminalizing noneconomic activity, not showing any "substantial effect" of guns in schools on interstate commerce, and regulating the inherently local issue of public education. Concurrences by Justices Kennedy and Thomas added even more variables of uncertain significance.

This is an ugly can of worms. However the Court resolves these issues in later cases, it will be forced to second-guess Congressional supervision of the national economy by determining which activities "cause" "substantial effects" on interstate commerce.

Whenever the Court enters a new area, be it sexual reproduction or separation of church and state, it invariably must make awkward distinctions, distinctions that reflect the Justices' underlying political preferences. Perhaps some Justices will see federal regulation of hospitals differently than protection of schools. Other Justices will find Congressional "findings" to be adequate in some situations but not others. One or two Justices may be satisfied with individualized hearings, an approach that would reduce the doctrine to empty formality.

Just as the separation of church and state cases can swing on the existence of a clown figure or a teddy bear next to a crèche, so

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42. *See id.* at 568-603 (Kennedy & Thomas, JJ., concurring).
43. In *Reno*, the Court pointed out that the states had sold the information to private parties for millions of dollars. *See Reno v. Condon*, 120 S. Ct. 666, 668 (2000).
Congress's power to regulate commerce will become an arcane specialty that will delight litigators and doctrinal technicians who attempt to reconcile the surreal. Most importantly, this confusion undercuts one of the goals of our constitutional system: to make simple, clear allocations of power so the citizenry can know whom to blame or praise. In the future, the Court will be in the middle of yet more finger pointing.

*Reno*’s validation of congressional supervision over the state control of information more than satisfies this Article’s prediction of continuing confusion. The unanimous Court did not reach the malleable “substantial effects” doctrine because it held that such private information was a valuable “instrument of commerce.” This holding raises the obvious question of why the sale and potential resale of that valuable commodity called information is “interstate commerce” while firearms are not. After all, the defendant Lopez may have brought the gun to school to sell it to one of his classmates. The major distinction appears to be the merits: All nine Justices like their personal privacy enough to overcome the *Thornton* “default rule” against federal power, while only four are worried enough about hand gun control and violence in schools to defer to the democratically elected Congress.

*Reno* also limited the potential scope of *Lopez* by concluding that Congress could prohibit not just the “sale,” but also the “transfer” of the information provided by individuals seeking a driver’s license. *Lopez* could have been expanded to preclude any congressional action concerning activities in which there had been no commercial transaction. That broader doctrine would have limited congressional power to prohibition of state sales, not mere possession or free transfers.

Whenever new Justices join the Court, they will impose their own idiosyncratic constructions upon the doctrine. Assuming these doctrines survive, there is little reason to believe that more centrist and liberal Justices will not eventually use them. If I were a Justice, I would be tempted to manipulate the doctrines to invalidate

45. See *Reno*, 120 S. Ct. at 671.
46. See *id*.
47. See *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).
whatever federal laws I really disliked. It would rarely be difficult for me to find a lack of "substantial effects," "instruments of commerce," or inadequate congressional findings of "widespread violations." Why should the other side have all the fun? Constitutional jurisprudence concerning congressional power will look like it did a century ago. Fluctuating majorities will ban federal actions they dislike, such as regulation of child labor (then) or worker’s hours (now and then), and validate actions they want, such as the banning of lottery tickets (then) and the protection of privacy (now). Within twenty years, we will have a hodge-podge of caselaw, with a phalanx of cases on both sides that will rival substantive due process and the First Amendment in its complexity.

All this clumsiness is not completely cataclysmic, particularly if subsequent majorities confine Lopez’s scope to criminal law. After all, the judicially validated power of the states and the federal government to bring separate criminal trials against a defendant for the same episode is contrary to the spirit, if not the technical meaning, of the Double Jeopardy Clause. It will merely mean that the federal government will have no jurisdiction to investigate many kidnappings and terrorist bombings.

For those who wish to impose their libertarianism upon the rest of us through constitutional law, the case has great potential. Assuming that O’Connor and Kennedy remain as committed to congressional power to regulate the national economy as they stated in their Lopez concurrence, the Justices may eventually permit Congress to only regulate the economy and never use criminal law to control social issues. For instance, Congress may not be able to pass a law penalizing homosexuality. Such a constriction of federal power simultaneously enhances some individual rights and state power. On the other hand, the doctrine severely limits Congress’s ability to protect human rights from more local abuses. The conservatives probably would hold that Congress does not have the power to prevent the states from criminalizing homosexual behavior. Such progressive legislation would not be warranted under the Commerce

48. See U.S. Const. amend. IV, § 2 ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").
49. See Lopez, 514 U.S. at 568 (O’Connor, J., concurring).
Clause because consensual sex (with the exception of prostitution) probably would not be an "instrument of commerce."

D. The Vile: Seminole Tribe v. Florida\textsuperscript{50}

Consistent with their purported "textualist" commitments, the existing bloc of the five most conservative Justices of the Supreme Court like to start\textsuperscript{51} their enthusiastic reading of state sovereign immunity by quoting the text of the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign state."\textsuperscript{52} The text of that amendment, passed in response to a Supreme Court opinion that authorized an out-of-state private party to sue a state, only precludes diversity jurisdiction lawsuits by outsiders against states.\textsuperscript{53} Nevertheless, one hundred years ago in \textit{Hans v. Louisiana},\textsuperscript{54} the Supreme Court extended that immunity to causes of actions that citizens brought against their own states.\textsuperscript{55} The Court subsequently dampened the potential effects of that doctrine by creating the legal fiction that individuals could still sue state officials, acting in their official capacity, whenever those officials transgressed federal constitutional or statutory law.\textsuperscript{56} In addition, Congress could always pass a statute abrogating state sovereign immunity to effectively protect a particular federal right.\textsuperscript{57}

\textsuperscript{50} 517 U.S. 44 (1966)
\textsuperscript{52} U.S. CONST. amend. XI.
\textsuperscript{54} 134 U.S. 1 (1890).
\textsuperscript{56} See \textit{Ex parte Young}, 209 U.S. 123, 160 (1908).
\textsuperscript{57} For arguments in favor of giving Congress the "last word" on the scope of Eleventh Amendment immunities, see John E. Nowak, \textit{The Scope of Congressional Power to Create Causes of Action Against State Governments and
Nevertheless, *Hans* periodically inflicted brutal harm. The Supreme Court held in *Edelman v. Jordan* that the Eleventh Amendment prevented welfare recipients from obtaining retroactive benefits that a state had unlawfully withheld. The plaintiffs were only allowed to seek injunctive relief guaranteeing future payments. Welfare recipients might have some “property” rights to those benefits, at least enough to justify a pretermination hearing under *Goldberg v. Kelly*, but those rights did not extend to any of that property which the state had illegally withheld. Quite simply, this form of constitutionally protected property could be illegally “taken” for any reason without any compensation. As bad as decisions like *Jordan* were, they provided an ultimately democratic solution. Congress could pass a law eliminating that immunity by “clearly stating” that the states had to provide retroactive payments to those welfare recipients they had treated illegally. At least the last word on such a contentious political issue would remain within the electoral system. Sadly, both Democratic and Republican Congresses confirmed the heartlessness of the Court by never providing the recipients with a statutory right to seek back benefits.

In *Seminole Tribe*, five Justices began eliminating the portions of Eleventh Amendment doctrine that limited the scope of *Hans*. The Court determined that Congress could not abrogate state’s sovereign immunity rights when the abrogation involved Congress’s plenary power over Native Americans under the “Indian Commerce

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59. See id. at 658-59.
60. See id. at 677.
Congress previously gave Native American tribes the right to sue states if the states did not make a “good faith” effort to enter into a compact over the establishment of gambling on reservations. Probably sensing that their ideology could not be wholly derived from the narrow, explicit terms of the Eleventh Amendment, the neofederalists also based their novel stance upon a sweeping doctrine of state sovereign immunity that they “implied” from the overall constitutional structure. Their definition of sovereign immunity was very broad: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” So much for the notion that every human and every institution in America is legally accountable for their illegal acts.

The thin majority created two important exceptions. First, it held that the federal government could bring suits against the states for violations of federal law even if individuals could not. Inherent in their definition of state “sovereignty” is a profound denigration of individual sovereignty, with only a partial reduction of federal sovereignty. Individuals had become constitutional guinea pigs; they did not have any rights in many areas until either the executive branch felt pressured to act on their behalf or until enough of them were so badly injured that Congress could make findings that the Court would then find satisfactory. In other words, those who were earlier injured or had no access to executive power would be left without remedy.

The Court had created a constitutional double standard: The Executive Branch could sue states for flagrant violations of the Constitution and federal law based upon the Constitution, but individuals could not. The nature of state sovereignty thereby indirectly reduced federal sovereignty by eliminating one of its most effective remedial weapons—giving individuals the right to sue to protect their own federal and constitutional rights.

Second, Congress could enable individuals to protect their rights under the Fourteenth Amendment simply because it was passed after the Eleventh Amendment. The Court thereby created two

63. See Seminole Tribe, 517 U.S. at 72-73.
64. See id. at 49 (quoting 25 U.S.C. § 2710(d)(3) (overturned 1996)).
Constitutions where there had been one; individuals could no longer directly turn to any of the text prior to the Fourteenth Amendment—a holding that apparently permits the states to use slaves since the Thirteenth Amendment also predated the Fourteenth. The five Justices also overruled a case, decided seven years earlier, upholding Congress’s power to protect individual rights under the Commerce Clause. Finally, the Court narrowly construed the “fiction” that the plaintiffs were only suing “state officials,” not the state itself. Distraught by the majority’s holding, the dissent presciently warned that other constitutional rights, such as patent rights, would be threatened.66

Three years later, the Court dramatically expanded its new state sovereign immunity doctrine beyond the technical area of Native American rights in the holdings of three cases. In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank67 and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,68 the Court held that private corporations could not sue a state for either false advertising or patent violations, even though the original Constitution explicitly protects patent rights. While conceding that patents were “property” that might warrant some Fourteenth Amendment protection, the Court created a variety of legalistic, technical hurdles to preclude this particular litigation. First, Congress had to show a pattern of state violations before acting. Congress should also determine that existing state remedies were inadequate. In addition, individuals could no longer bring these lawsuits, only the federal government could bring suit since the federal government is not a lowly individual that would offend the state’s inherent sovereignty. Finally, the Court did not accept Congress’s authorizing plaintiffs to bring their suits against state officials “acting in their official capacity,” thereby cutting back on that useful fiction which limited Hans. Individuals no longer have a vast array of legal rights providing them with legal remedies; all they retain is the opportunity to request the federal government to intervene on

66. See Kimel, 120 S. Ct. at 120 (holding the Age Discrimination in Employment Act’s creation of a private cause of action against state employers an invalid abrogation of the state’s Eleventh Amendment immunity).
their behalf. Of course, they can also ask the state to pass laws waiving sovereign immunity. The Court handled the “false advertising” claim even more cavalierly, finding no “property” interest under the Fourteenth Amendment.

In *Alden v. Maine*, the Court held that Congress could not permit Maine probation officers to sue their employer for violating the overtime provisions of the Fair Labor Standards Act. It offered yet another variation of its aggressive jurisprudence: “although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and the history of the Constitution make clear that the immunity exists today by constitutional design.” The very passivity and awkwardness of the sentence reveals the Court’s ambition. First of all, *Hans’s* judicial activism fades into the generality, hedged by the word “although,” of “the common law tradition,” a polite euphemism for judicial creativity. In addition, the Court fails to tell us whose “constitutional design” is “today” so “clear” and why it is so “clear” when nobody had ever thought of it before. Nor does the Court tell us what “history” they are relying on that makes the issue so “clear.” Certainly Alexander Hamilton never envisioned the possibility of widespread state immunity from most of the Constitution. The Supremacy Clause, which includes federal statutes and constitutional rights, more than implies that the states are subordinate to all legitimate federal power. It is hard to imagine Chief Justice Marshall endorsing this statist definition of sovereignty at either the state or federal level; apparently Marbury should not have brought his suit against Madison because that individual cause of action is an insult to federal sovereignty. The word “structure” is also problematic. When Charles Black analyzed that method of constitutional reasoning, he observed that it was a type of policy argument, not some special mode of constitutional rhetoric that miraculously transcends political considerations. It is absurd to design

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71. *See generally* CHARLES BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (discussing the foundations and processes un-
structures without considering the systems' purposes and foreseeable outcomes that will frustrate or fulfill those goals. But the *Seminole Tribe* majority never explores purposes and outcomes, and never explains why it is such a good thing for individuals to have fewer rights. Perhaps the Court is simply saying that it is designing the Constitution based upon its particular conception of the Constitution's structure along with its skewed reading of history. This history seems to primarily consist of a "common law case" that the Court tries to downplay, while still complaining about the dissent's refusal to accept *Hans* as the pivotal case in this area of contemporary constitutional Law.\(^\text{72}\)

Leaving aside for the moment the question of who should conduct a federalist revival, what are some good reasons for resuscitating federalism? Federalists claim that state and local governments are more accessible, accountable, and responsive than the massive federal bureaucracy concentrated in Washington, D.C. These generalities are partially true; however, the national government is sometimes more willing to adapt to felt necessities than local governments captured by various factions. Furthermore, one of the ways that state and local governments remain responsive is through the threat of litigation. Most individuals are unlikely to have much power at the state level, just as they have even less influence at the national level. The real beneficiaries of increased state power will be organized institutions, particularly private corporations and localized special interest groups. One of the glories of having meaningful rights is that a single person can call an entire government to account, search its records, force it to justify its actions, and gain significant relief if a court finds the government acted illegally. That power, which remains quite unpredictable so long as individuals control it, has been one of the central aspects of American citizenship, at both the state and federal level, and one of the sources of our unique form of democracy as tempered by judicial review.

One can still be an enthusiastic states' right advocate and not endorse the Court's judicial activism. The proper venue for resolving most federalism issues (perhaps excluding such egregious insults underlying constitutional analysis).

\(^{72}\) See *Kimel*, 120 S. Ct. at 643.
as the coercion in *New York v. United States*\(^{73}\) is the polling booth. The people can use their electoral power to reallocate authority between the state and federal governments to create the most efficient and accountable governmental system. Who is more likely to accurately feel the effects of any particular mix of state and federal power: the populace or nine successful, upper-middle class lawyers with lifetime appointments to a job which makes almost everyone fawn over them? The Constitution should primarily be organic and democratic, not abstract and elitist.

Overall, the five Justices have created a series of hurdles to prevent elected members of the federal government from protecting individuals against state oppression. For at least four of the Justices, the federal government must first overcome *Thornton*'s default presumption against federal power. Second, the federal government must show that the state’s activity fits within the Court’s complicated definition of the Commerce Clause. Even when the federal government has satisfied these amorphous requirements, it usually cannot create any individual rights. All it can do is give the executive branch the power to enforce these laws and the Constitution against the states. Thus, one possible outcome of this doctrine will be a huge increase in federal litigation against the states—not a consequence very conducive to comity.

Guided by the penumbras and emanations of the Tenth and Eleventh Amendments, which are less than clear to me, the majority can fashion and apply this doctrine however they wish. Furthermore, all these novelties will interact in unforeseeable ways. Because the Eleventh Amendment now prevents Congress from creating a statute permitting individuals to protect their privacy rights concerning driver’s license applications, the Court is under additional pressure to permit the federal government to expand its direct coercive powers over the states, as it did in *Reno v. Condon*.\(^ {74}\) We will soon have an elaborate doctrine of federal coercion: the federal courts can coerce the states whenever the Supreme Court feels such power is appropriate; Congress can coerce the states through authorizing executive enforcement of generally applicable laws; Congress can coerce the

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\(^{73}\) 505 U.S. 144, 149-54 (1992).
\(^{74}\) See 120 S. Ct. 666, 672 (2000).
states whenever five Justices like the underlying legislation; and all the while the individual becomes ever more powerless.

It is no longer "clear" why individuals should have any right to injunctive relief against the states and its agents under Ex parte Young since injunctions also permit an individual to "insult" sovereignty by forcing states to reallocate their income, thereby creating an "unfunded mandate." Nothing in the text of the Eleventh Amendment requires the Court to maintain its distinction between injunctions and damages because the text is silent about all of these issues.

Because the Justices will be under great pressure to allow the federal government to directly coerce the states some of the time, now that it can no longer use the indirect technique of giving individuals the power to coerce the states through damage actions, the doctrine of coercion will get more complex. In Reno, Chief Justice Rehnquist explained that Congress was not requiring the states to do anything within the private economy; Congress was merely limiting state action. Distinguishing between coerced action and coercion to prevent action will be no easy task. Indeed, it may well turn out that New York's coercion doctrine will not be judicially manageable over the long run, undermined by the Court's other more dubious federalism doctrines.

Congress can still occasionally create individual rights when it follows the Court's invariably unpredictable, fluid, and idiosyncratic definitions of the Fourteenth Amendment. If a group of Borkians ever gained control of the Court, their decision that gender discrimination does not violate the Fourteenth Amendment's text and history would lead to a subsequent decision outlawing all Congressional laws against state sexual discrimination. The Court has also closed off the possibility of Congress generously expanding the definitions of "privileges," "equality," or "due process of law" in City of Boerne v. Flores. The Court will closely scrutinize any Congressional legislation made under Section 5 of the Fourteenth Amendment to

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76. See Reno, 120 S. Ct. at 672.
make sure it is "remedial," consistent with the Court's current Fourteenth Amendment doctrine, which could change tomorrow, and "proportional" to widespread violations. Notice how even this exception creating a limited set of individual federal rights reduces constitutional rights to systemic considerations at the expense of individual sovereignty. Congress can only authorize individuals to sue states after states have already violated many individuals' rights. Thus, the individual as an individual has few, if any, clear rights against the states. The individual must be part of a victimized group that generates enough power and sympathy to persuade Congress to attempt to provide statutory protection. And then, of course, this group must convince the Court that Congress has made appropriate findings and fashioned appropriate remedies. In other words, many people must suffer flagrant injustices before the Court will even consider permitting Congress to act. This approach puts even more weight on the already overloaded Fourteenth Amendment. In the future, the Court and its various interpretations of the Fourteenth Amendment will be the center of the Constitution, perhaps the only source of limited individual rights. It is also worth remembering that the Court may create additional neofederalist hurdles in the future, such as closing off such openings as suing state officials in "their official capacity," or preventing anyone from getting monetary damages against the state without its permission. By definition, all damages are coercive sanctions that interfere with the state's financial ordering of priorities. The text does not prevent the Court from implying ever more state powers and continually limiting federal powers and individual rights. After all, "today" it is all part of the "constitutional design."

The Court is creating a Constitution upon the political premises that there are only two problems really worth remedying—the government's use of racial and sexual categories—and there is little reason to fear new modes of state tyranny in the future. So if somebody has a disease such as AIDS, or some fiendish group finds a new arbitrary category to split the populace into warring factions, Congress can do nothing until the Court deigns to act under the Fourteenth Amendment.

78. See id. at 519.
79. See id. at 520.
Amendment. To the degree that the Court adheres to its existing Fourteenth Amendment analysis, which primarily studies history to determine which forms of oppressions are unconstitutional, new forms of injustice will, by definition, remain beyond any federal remedy. In the past, the Court and Congress could grope along in an awkward partnership when they combated local tyranny. The Civil Rights movement is a compelling story of different branches of the federal government leading at different times. In fact, the Court often justified its activism by referring to similar actions by the elected branches. But in the future, the Court must first act on its own before Congress can begin to combat injustice. Even then, Congress must proceed carefully lest it exceed its limited remedial powers under Section 5 of the Fourteenth Amendment.

III. A Brief “Intratextualist” Response

Clearly, the best thing is to eliminate this “clear” Eleventh Amendment doctrine, whether by using judicial overrulings or even a constitutional amendment explicitly limiting state sovereign immunity to diversity cases in federal court. The next best thing is to subvert the Court’s approach through its own terms. Akhil Reed Amar’s recent book, The Bill of Rights, provides ample textual, historical, and doctrinal support to permit future courts to construe into oblivion the Court’s constitutional numerology that divides our Constitution in four parts: the original document, the incorporated parts of the Bill of Rights, the Eleventh Amendment, and the Fourteenth Amendment. Of course, Amar’s careful documentation and nuanced interpretations need to be read to appreciate the power of his vision. Amar makes particularly effective use of the longstanding argument he has identified as “intrapetualism.” From the very beginning, the Court has sought to interpret the Constitution by not just focusing on a single clause, but by comparing that clause with other constitutional clauses containing similar text or purposes. One of the virtues of Amar’s book is that it generates a few easily understood arguments and legal principles that many Americans—hopefully most—still find important and legitimate. Historically, the

80. See generally AMAR, supra note 4 (arguing that the Constitution and its Amendments should be construed as one unit).
Fourteenth Amendment reflected not just the defeat of slavery and southern imperialism; its Framers designed it to protect all American citizens from systemic state injustices, particularly the deprivation of federal constitutional and statutory rights. In particular, the Radical Republicans never wanted to see states viciously violate citizens’ First Amendment right to free speech as southern slave states had relentlessly done to abolitionists before the Civil War. Nor did they want the southern states to interfere with the citizens’ federal right to receive mail.

Amar concludes that the Framers intended the Privileges and Immunities Clause of the Fourteenth Amendment to protect all federal constitutional and statutory rights. The first sentence of the Fourteenth Amendment effectively overrules that part of Dred Scott depriving all African Americans of their national citizenship. From this point forward, all Americans would possess the complete rights afforded by state and national citizenship. The next Clause of the Amendment sets forth those rights in the most generous terms available: “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.” At the time of the Fourteenth Amendment, “privileges” was a synonym for “rights.” The Clause does not distinguish between federal statutory and federal constitutional rights. It does not limit itself to the Bill of Rights, but includes the entire original Constitution. It is an integrative document both politically and structurally. It maintains one Constitution where the Seminole Tribe majority has created two. Thus, all preexisting individual federal rights are incorporated into the Fourteenth Amendment, leapfrogging the Eleventh’s alleged obstacles.

This Article will not develop and document this doctrinal argument fully. Amar will hopefully provide his own Eleventh Amendment analysis. Perhaps he will also argue that the state’s ability to...
violate federal constitutional and statutory rights violates “due process” and “equal protection.” After all, there is a basic assumption that all Americans have equal rights of national citizenship and cannot have those rights taken away without “due process of law,” a phrase that seems to waive state sovereign immunity across the board. It seems wrong that citizens of one state will have far more constitutional and statutory rights than citizens of another state, depending upon the scope of their state’s sovereign immunity. Even in its baldest form, Amar’s approach indicates that the *Seminole Tribe* line of decisions violates the text, history, and purposes of not just the original Constitution and the Eleventh Amendment, but also the Fourteenth Amendment. All the Court really has to legitimize itself is a judicially active “common law tradition”; one vague amendment, the Tenth; one overly precise amendment, the Eleventh; and a set of vicious axioms that it has no desire or ability to apply consistently.

IV. THE ELEVENTH AMENDMENT AND PRIVATE POWER

Most contemporary constitutional analysis breaks the system down into three or four components: the federal government, the states, the individual, and perhaps the People as a background source of sovereignty. At this stage in history, such a perspective obscures the real nature of our Constitution. If one believes that Aristotle’s definition of a “constitution” as the allocation of wealth and power is still relevant, and reflected in constitutional understanding through such sources as Madison’s *Federalist Number Ten*, then one needs to subdivide the private part of the Constitution just as one needs to subdivide the federal and state governments to understand how power flows. One needs to pay close attention to the struggle between “the few” and “the many” and the distribution and regulation of private power. This inquiry quickly reveals the crucial constitutional distinction between the individual and such organized entities as private corporations, unions, and other institutions. Indeed, the Fourteenth Amendment contains this very distinction, providing “privileges” and “immunities” only to real human beings, but offering “equal protection” and “due process of law” to all

85. See *The Federalist* No. 10 (James Madison).
“persons”—which a previously judicially active Supreme Court quickly extended to private corporations. This textual distinction could be combined with the Seminole Tribe’s approach to create constitutional doctrine which is, in some ways, attractive—although the value of imposing such views through clever legalisms is questionable. Individual American citizens would have full federal and constitutional rights under the Privileges and Immunities Clause. Corporations must turn to states, which grant their charters, for any rights. Nor could they enforce their rights against the states unless the states waive their Eleventh Amendment immunity.

Of course, reality is far more depressing than such fantasy doctrine. When one studies the history of federalism in the United States, states’ rights advocates usually favored federalism to protect something else. Initially, the slave owners relied on federalism because they knew the federal government was the greatest threat to their peculiar institution. Later, racists relied upon states’ rights to protect the continued subordination of African Americans through segregation and violence. So what are the five Justices interested in protecting now, or are they merely disinterested spectators committed to a particular structure because they think it will generally protect “tyranny”? 

The major beneficiary of increasing some states’ rights at the expense of federal powers will be private corporations. Like the slavocracy before it, private power instinctively recognizes that national government poses the greatest threat to its control of American society. Neofederalism is one of several doctrines the Court has designed to divide and conquer democratic public power and cripple the labor movement so private power can continue turning this country into a more economically polarized society, no longer encumbered by “pampered” private and public employees.

Defenders of the Supreme Court can reply that the recent federalism cases refute such vulgar marxism. In the Florida Prepaid cases, private corporations lost the right to protect their patents and copyrights through damage actions.


Indeed, it is easy to refute
marxist analysis if one requires that every single case benefit the stronger, richer party. Counter examples are inevitable because some cases involve competition between two powerful entities and other cases favor weaker interests. The real question is who benefits in the long run. Imagine that a state starts selling its own copies of Windows 2000. Microsoft would immediately get an injunction in federal court. It would join other powerful interests to lobby the state legislature to waive its sovereign immunity to patent cases. It could threaten to withdraw business and capital from that state. The real losers will be the weak, the disorganized, the disabled, and the single individual who does not have the power and wealth to hire lobbyists and lawyers to fight these cases, particularly now that lawyers know they can no longer get a fee through any damages. Edelman v. Jordan already demonstrates how hard it is for the poor to overcome sovereign immunity barriers.

The other real loser will be the states. To the degree that the national government cannot regulate the private sector because of federalism concerns, the states have less power to implement reforms. Unlike governments and labor, capital is very mobile. One of the real powers of states is to experiment, to create more humane ways to regulate capitalism. They are already under huge pressure to provide tax cuts and subsidies to corporations who play one state off against another (not to mention Mexico and Haiti). States will be less likely to consider progressive legislation because they know there is less chance that one day Congress may make their law a national baseline that can be effectively enforced by individual litigation. Thus, on a very fundamental level, states do not have sufficient power to protect either their citizens or their own power if they cannot constrain capital mobility by slowly raising the playing field inside and outside their boundaries. With less possibility of raising the ethical standards of capitalism, the states will be more likely to race to the bottom in terms of regulatory influence.

Simultaneously, the Court’s decisions may give the states more power than they should have. Probably the most important

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remaining substantive Eleventh Amendment issue is whether private parties will be able to sue states and their agents for violations of international treaties. After all, there is no obvious reason why the treaty rights protected by Article I Section 10 of the Constitution should be immune to the Eleventh Amendment when basic constitutional and federal rights under that Article have already been crippled. The Court may soon have to decide if states can ignore GATT, NAFTA, and, perhaps one day, the WTO. Although I find these international institutions to be nefarious and perhaps even unconstitutional on other grounds, I do not think that the states should have the power to turn our foreign policy into chaos. In 1785, James Madison wrote a letter to James Monroe setting forth the need for federal supremacy over international trade:

Viewing in the abstract the question whether the power of regulating trade, to a certain degree at least, ought to be vested in Congress, it appears to me not to admit of a doubt, but that it should be decided in the affirmative. If it be necessary to regulate trade at all, it surely is necessary to lodge the power, where trade can be regulated with effect, and experience has confirmed what reason foresaw, that it can never be so regulated by the States acting in their separate capacities. They can no more exercise this power separately, than they could separately carry on war, or separately form treaties of alliance or Commerce.88

Although predicting outcomes is a risky business, my hunch is that five of the Justices will somehow discover a way to protect the American economic empire from state interference. And if they don’t, we may see the World Trade Organization telling all of us what to do.

V. THE MAJORITY'S INTELLECTUAL FELLOW TRAVELERS—THE DEMISE OF "RIGHTS TALK"

On a basic level, the Supreme Court has eviscerated the very concept of "rights." In the foundation case Marbury v. Madison,89

89. 5 U.S. (1 Cranch) 137 (1803).
Chief Justice Marshall stated:

If [the plaintiff] has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.90

The Seminole Tribe Court is not the first to believe that many Americans rely excessively on their alleged "rights" to solve their problems. The left-leaning philosopher Richard Rorty has deplored the culture's emphasis on "rights talk."91 Some members of the Critical Legal Studies Movement concluded that legal rights generate false consciousness by convincing citizens that they had something of value while continuing to be oppressed.

Admittedly, there is and should be much more to a political society than legality. Legal rights alone will not make a decent society; at some point too much law creates too many criminals. But a core of legal rights remains a necessary, if insufficient, part of any just system. Allow me to personalize the issue. I am a fifty-two-year-old law professor teaching at a state university. In a few years, the Ohio Board of Regents may fire me because they have concluded, perhaps with empirical support, that teachers over the age of sixty are less "productive" than their younger peers. Before Seminole Tribe, I

90. Id. at 162-63.
91. Richard Rorty, What's Wrong with Rights, HARPER'S MAG., June 1996, at 15; see also RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH 31 (1991) (repudiating the claim that "membership in our biological species carries with it certain 'rights'"). Mark Tushnet sees a bright future beyond the world of rights: "The liberal theory of rights forms a major part of the cultural capital that capitalism’s culture has given us. The radical critique of rights is a Schumpeterian act of creative destruction that may help us build societies that transcend the failures of capitalism." Mark Tushnet, An Essay on Rights, 62 TEx. L. REV. 1363, 1363 (1984) (footnotes omitted). Note how Tushnet begins by condemning the "liberal theory of rights," which may well be warranted, but immediately eliminates that qualifier by offering a critique of "rights" in general. See also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (giving a more Communitarian critique of "rights talk"). Other progressives see the continuing value of rights. See PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 153 (1991).
could engage in a very serious "rights talk" discussion with the Regents by suing them for a violation of the ADA, a conversation that would have begun with a legal presumption that I had been treated illegally. Although I may still be able to sue in state court and Ohio may waive its sovereign immunity, I no longer have as much power to trigger that particular discussion—a discussion that used to end not with words but action in the form of my reinstatement and damages for lost wages. These progressive thinkers, who want to throw out the babies with the bath water because they believe America's political culture remains profoundly immoral, will never convince me that I am better off without that right.

The wariness of "rights talk" is an emanation of deeper radicalism. Many modern theorists condemn the Enlightenment for making the "individual" the locus of analysis, the recipient of rights. They prefer to elevate group and community rights above individual rights. Although this generality is sometimes valid (to be effective, unions must be able to limit some of the rights of their worker-members), it is far too broad. Admittedly, many evil deeds have been performed using such Enlightenment rhetoric as equality, liberty, fraternity, and property. But that does not mean that those concepts, any more than the sovereignty of the individual, should be tossed aside as illegitimate obfuscations. By repudiating virtually all humane thought that preceded them, many leftists seem to be saying: "The prior culture was so evil that it can provide us with no guidance. Because I have pointed this fact out to you and because I care for you, you should follow my path (even though I really won't explain what I will do until I get into power)." By stripping individuals of many of their ancient constitutional and federal statutory rights while permitting powerful interest groups to protect selected rights, the Seminole Tribe Court has moved toward this position.

Another tendency of the left is to reduce issues to race and gender. One need only skim the titles of major law review articles over the past fifteen years to see the importance to the legal academy of eradicating racism and sexism. In some ways, the war against racism and sexism, as noble as it is, is profoundly conservative at this

92. The critiques of "rights talk" and "individualism" tend to go hand in hand. See GLENDON, supra note 91, at 47-75.
moment in our history. Upper-middle-class Americans across the political spectrum can smugly claim that they and their Court have repudiated those evil beliefs, cleansing our constitutional order of its most egregious sins. Indeed, more progressive members are now advocating the rights of gays and lesbians, demonstrating once again that America is at the cutting edge of diversity and tolerance. The Seminole Tribe Court has constitutionalized this vision by holding that individuals are limited to Fourteenth Amendment rights as determined by the Court, rights the Court has limited to the Bill of Rights, race, and gender. Thus, continuing problems of other forms of invidious discrimination such as age discrimination, class war, the concentration of private power, and imperial aggression disappear from the constitutional radar screen.

Finally, the Seminole Tribe Court has created a variation of South Carolina’s Senator John C. Calhoun’s “nullification doctrine” that was a precursor to the Civil War. In response to facially neutral tariffs that in actuality transferred huge amounts of wealth from the southern agricultural states to the north and the west, Calhoun argued that the states needed a veto power similar to the other sovereign branches. He concluded that a single state legislature could “veto” any federal law it thought unconstitutional. This “veto” would remain in effect until enough other states ratified the federal Constitution to more expressly give the federal government the contested power. In particular, Calhoun rejected the asserted federal power to raise tariffs not just for income, but also to protect emerging industries. The modern Eleventh Amendment doctrine creates a similar veto over the original Constitution as it applies to individual sovereignty. Any state legislature can cripple any federal law and any pre-Fourteenth Amendment part of the Constitution by enacting a statute asserting state sovereign immunity. Admittedly, the veto will not be absolute. The federal government can still sue and individuals can still seek injunctive relief (so long as Ex parte Young remains good law under this neofederalist revival), but the basic structure remains quite similar.

94. See id.
VI. CONCLUSION

Sometimes, a formal conclusion hardly seems necessary. The beauty of the Tenth Amendment anticoercion doctrine, the *Lopez* commerce case, and the *Thornton* dicta was their relative insignificance. Quite simply, the Supreme Court went "too far" when it began taking federalism seriously in the Eleventh Amendment cases by stripping all Americans of numerous constitutional and statutory rights. At the least, the Court should repudiate the *Seminole Tribe* line of decisions. Moreover, Congress should not appoint any Justices who will continue this systemic degradation of individuality as manifested through rights. It may even be necessary to amend the Constitution.