CHAPTER FOUR

Federalism

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

—JUSTICE ANTHONY M. KENNEDY (1995)

Although many consider judicial review to be America's unique contribution to political science, federalism may continue to be of equal influence on other nations and of unending importance at home. Unfortunately for those who look upon federalism as the key to world or regional order under law, our history—unless one takes the long view—is not reassuring.

A distinguishing characteristic of American government is **federalism**—a dual system in which governmental powers are constitutionally distributed between central (national) and local (state) authorities. The reasons for the adoption of such an arrangement are both historical and rational. During the revolutionary period the states regarded themselves as independent sovereignties. Under the Articles of Confederation, little of their power over internal affairs was surrendered to the Continental Congress. In the face of proved inability of the Confederation to cope with the problems confronting it, local patriotism had to yield.

When the Constitutional Convention met, compromise between the advocates of a strong central government and supporters of states' rights was necessary. Federalism fitted into James Madison's basic requirement, reflecting his purpose, as stated in *The Federalist,* No. 51, to so contrive "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means

of keeping each other in their proper places." Alexander Hamilton, in *The Federalist*, No. 23, listed four chief purposes to be served by union: common defense, public peace, regulation of commerce, and foreign relations. General agreement that these objectives required unified government drew together representatives of small and large states alike.

SOURCES OF CONTENTION

One point on which the nationalists at the Philadelphia Convention remained firm was their determination that no precise line should be drawn dividing national power from state power. The powers of the national government were enumerated but not defined. Alert to possible inroads on the states, Hugh Williamson of North Carolina objected that the effect might be to "restrain the States from regulating their internal affairs." Elbridge Gerry of Massachusetts objected that indefinite power in the central authority might "enslave the States." Hamilton, Madison, and James Wilson would not budge, contending that a line dividing state and national power would unduly weaken national authority. "When we come near the line," Wilson explained, "it cannot be found. . . . A discretion must be left on one side or the other. . . . Will it not be most safely lodged on the side of the National Government? . . . What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?" This avowal of national supremacy evoked from opponents of the Constitution an expected query: "[W]here is the bill of rights which shall check the power of this congress, which shall say, *thus far shall ye come and no farther?* The safety of the people depends on a bill of rights."

ORIGINS OF THE TENTH AMENDMENT. In the First Congress, Madison and others made good on the promise they had made during the debates over ratification to make the addition of a bill of rights a priority for the new government. (Documents relating to the development of a bill of rights are reprinted in Chapter Nine.) **Antifederalists** (those who had opposed ratification in 1787–1788) had conjured up the image of the central government as a colossus, determined to swallow defenseless states. To quiet their fears, Madison included among the amendments submitted on June 8, 1789, the one that became the Tenth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Madison was on record shortly before the Convention as having said that the states should be retained insofar as they could be "subordinately useful." Equally well-known was his early aversion to including a bill of rights. "It was obviously and self-evidently the case," he had insisted, "that every thing not granted is reserved." Now with an amendment on the floor, he resisted efforts to convert it into a substantive check on national power. "While I approve of these amendments [the Ninth and Tenth]," Madison tersely stated on August 15, "I should oppose the consideration at this time of such as are likely to change the principles of the government." And when, three days later, Thomas Tucker proposed to add the word *expressly* to the proposed Tenth Amendment, making it read, "the powers not expressly delegated to the United States by the Constitution," Madison objected. "It was impossible," he explained, "to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication." Tucker's motion was defeated. Gerry's effort of August 21, to get the word *expressly* inserted, suffered the

same fate, the vote being 32–17. Madison's position on the floor of Congress about the Tenth Amendment bears out Chief Justice Marshall's later observation in ***McCulloch* v. *Maryland.*** It was designed "for the purpose of quieting excessive jealousy which had been excited."

The unavailing struggle to give meaning to the Tenth Amendment underscores the conclusion that for many Antifederalists, states' rights weighed more heavily than their concern for personal rights. This would explain why so many Antifederalists were disappointed with the amendments as they emerged from Congress. To William Grayson, the amendments were "so mutilated and gutted that in fact they are good for nothing. . . ." Richard Henry Lee still saw "the most essential danger" arising from the Constitution's "tendency to a consolidated government, instead of a union of Confederated States. . . ." Instead of "substantial amendments," complained South Carolina's Pierce Butler, here were a "few milk-and-water amendments . . . such as liberty of conscience, a free press, and one or two general things already well secured." Georgia's Congressman James Jackson agreed: The amendments were not worth "a pinch of salt." Antifederalists had failed to make the Tenth Amendment a limit on national power.

Truism or Independent Check? The distribution of powers agreed on in the Convention, and the reassurance given the states by the Tenth Amendment, did not preclude conflict. The struggle continued in politics and in the courts, and when prolonged debate and bitter controversy failed to yield a conclusive verdict, the contestants carried this baffling issue of political and constitutional theory to the battlefield in 1861 for settlement by the arbitrament of the sword. Even this holocaust was not conclusive.

The problem of determining the extent of national and state power and of resolving the conflicts between the two centers of authority was ultimately left to the Supreme Court, which has alternated between two ways of thinking about the Tenth Amendment. The one more favorable to national power envisions the Tenth as a "truism," as Justice Stone declared in 1941, meaning that what the states have not surrendered has been retained (*United States* v. *Darby*). Accordingly, states (and those interests dominant in state governments) are to look not to the Constitution but to the political process for protection against Congress. The other regards the amendment as a discrete barrier to national power, in addition to other limits that the Constitution imposes, that is judicially enforceable against Congress on behalf of the states.

NATURE OF NATIONAL AUTHORITY

The authority of the central government in relation to state governments can be classified in several ways.

Dimensions of National Power. Of all the things governments in the United States may do, the powers of the national government are theoretically limited to those assigned to it by the Constitution, expressly or by implication, and are therefore **delegated powers.** This is the premise of the Tenth Amendment. From a national perspective, states therefore possess what remains. These **reserved powers** in turn are a function of state law and may vary from state to state. As a second dimension, the national government may use any and all means to give effect to any power specifically granted. This doctrine of **implied powers** finds its textual basis in Congress's authority to make all laws "necessary and proper" for carrying into

execution what are called **express powers,** those powers specifically delegated to it (Art. 1, Sec. 8, Cl. 18). No new or additional powers are granted by the **necessary and proper clause** (also called the "elastic clause"); it merely gives the federal government a choice of means as it operates within the limited sphere of its activity. As an extension of implied powers, **resulting powers** derive from the mass of delegated powers or from a group of them. Such powers include taking of property by eminent domain for a purpose not specified in the Constitution, carrying into effect treaties entered into by the United States, and making paper money legal tender in payment of public and private debts (*Juilliard* v. *Greenman,* 1884). The **supremacy clause** (Art. VI, Para. 2), the keystone of the federal system, supplies a third dimension of national power. It indicates that if the legitimate powers of state and nation conflict, those of the national government shall prevail.

Thus national power is of three dimensions: (1) the enumeration in which the grant of power is couched, (2) the discretionary choice of means that Congress has for carrying its enumerated powers into execution, and (3) the fact of supremacy. Under this three-dimensional theory of national authority, no subject matter whatever is withdrawn from control or regulation by the United States simply because it also lies within the usual domain of state power.

Concurrent and Exclusive Powers. The powers of the national government may also be classified as **concurrent** or **exclusive.** A concurrent power refers to an authority shared by both state and national governments, such as taxation or operating a court system. States may legislate in such instances provided they do not conflict with valid national laws or purposes. In contrast, under the following conditions, powers delegated to Congress by the Constitution are exclusive and therefore are denied to the states:

1. Where the right to exercise the power is made exclusive by express provision of the Constitution. Article I, for example, gives Congress exclusive power over the District of Columbia and over property purchased from a state with the consent of the legislature.
2. Where one section of the Constitution grants an express power to Congress and another section prohibits the states from exercising a similar power. For example, Congress is given the power to coin money (Art. I, Sec. 8, Cl. 5), and the states are expressly prohibited from exercising such power (Art. I, Sec. 10, Cl. 1).
3. Where the power granted to Congress, though not in terms exclusive, is such that the exercise of a similar power by the states would be utterly incompatible with national power. In ***Cooley* v. *Board of Wardens*** (1851) (see Chapter Six), the Court admitted the existence of a concurrent power to control interstate commerce but limited state power to matters of local concern. Where the subject matter is national in scope and requires uniform legislative treatment, such as the federal government alone can provide, the power of Congress is exclusive. "Exclusive" is here used in a special sense, since the disability of the states arises not from the Constitution but from the nature of the subject matter to which the power is applied. Such power has been termed "latent concurrent power" since Congress may consent to its exercise by the state.

Preemption. Concurrent powers are fruitful sources of friction between national and state authority. The supremacy clause in Article VI means that state statutes and constitutional provisions must give way when they conflict with the Constitution, treaties, and valid laws of the United States. The latter preempt or supersede the former. What is the outcome when state and national governments choose to legislate on the same topic without enacting conflicting laws? Sometimes

Congress explicitly recognizes a concurrent state interest and so approves complementary state statutes. At other times, Congress explicitly rules out a role for the states. A more difficult issue arises when state policies do not conflict and there is no expressed congressional intent to welcome or to displace action by the states.

In *Pennsylvania* v. *Nelson* (1956), for example, the Court confronted a state statute criminalizing sedition against the United States. In the Smith Act of 1940 (see Chapter Eleven) Congress had prohibited the same thing. In holding that the Smith Act preempted the Pennsylvania law, Chief Justice Warren noted three conditions that suggest supersession: First, the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. . . ." Second, the national interest is so dominant on a subject that the federal system must "be assumed to preclude enforcement of state laws on the same subject." Third, there is a danger of conflict between state and federal enforcement efforts. The presence of the three conditions in *Nelson* meant that Congress had chosen to "occupy the field."

Foreign policy and concern for human rights may pose a **preemption** question too. In 1996 Massachusetts passed a law effectively barring American or foreign companies operating in Myanmar from doing business with state agencies. Myanmar was then ruled by a military dictatorship. Three months later Congress banned new investment by American firms in Myanmar and gave the president discretion to lift the sanctions, to suspend them, or to impose new ones as circumstances required. Even though Congress did not expressly rule out sanctions imposed by state governments, the Supreme Court held unanimously that national policy preempted the more stringent state law because the latter undermined the president's role in foreign relations. Congress had implicitly chosen to occupy the field. "It is implausible to think," declared Justice Souter, "that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary presidential action" (*Crosby* v. *National Foreign Trade Council,* 2000).

JUDICIAL FEDERALISM. The fact that much of the Supreme Court's docket each term consists of cases from state courts is another reason why the justices are active players in the game of federalism. Interaction between state and federal courts is called **judicial federalism.** One of its dimensions involves Supreme Court review of state court decisions, which arguably rest on a state, not on the national, constitution.

As explained in Chapter One, the Court may sit in judgment on the decisions of the highest court of each state when federal questions are involved. A case raises a **federal question** when a provision of the U.S. Constitution, a treaty, or a national statute is at issue. Once a federal question is present, the Supreme Court becomes the ultimate arbiter of its resolution. This rule encourages uniformity among the states. In contrast, the absence of a federal question encourages diverse policies because there is no judicial mechanism for imposing uniform rules of law on the states. In such situations resolution of an issue rests with the individual states.

What happens when a state court gives greater protection to a right found in both state and federal constitutions and rests its decision on the former? Noninterference by the Supreme Court in such situations allows states to expand liberties that have parallel protections in both constitutions. The Supreme Court, however, will not accept a state court's interpretation of the federal Constitution at variance with its own, even if the state's decision is more protective of individual liberty.

In *Michigan* v. *Long* (1983), the Supreme Court of Michigan decided that police had infringed Long's rights when making a search of his car. But which rights? Those protected by the Fourth Amendment in the United States Constitution, or those in parallel provisions in the Michigan constitution? Prior to this case, the Supreme Court presumed that state court decisions rested on an "adequate and independent state ground" unless the party bringing the case could persuade the justices to the contrary. But in *Long,* the Court changed its mind. According to Justice O'Connor, when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept . . . that the state court decided the case the way it did because it believed that federal law required it to do so.

To be served, O'Connor said, were the twin goals of allowing states to develop their own jurisprudence "unimpeded by federal interference" and preserving "the integrity of federal law." Accordingly, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Her statement means that state courts not only must provide a rationale that disavows reliance on federal law but also must satisfy a majority of the Court that this reliance is "bona fide." Adding "separate" to "adequate" and "independent" makes it much easier for the Court to review any state court decision that makes so much as a passing reference to federal law or the Constitution.

CONCEPTS OF FEDERALISM

As was inevitable, the formal distribution of powers between the national government and the states proved to be a subject of diverse interpretations. The fault line along which supporters and opponents of the Constitution had divided in 1787–1788 carried over into debates within the new government over how national authority would be construed. On one side were advocates of national supremacy; on the other were advocates of dual federalism. Echoes of this nineteenth-century verbal combat reverberate today.

National Supremacy: Legacy of Chief Justice John Marshall. As John Adams left the presidency in early 1801, he installed John Marshall, an ardent nationalist and a Virginian, as chief justice. Marshall read into our constitutional law a concept of federalism that magnified national at the expense of state power. Important precedents existed to aid his labors. Besides the House of Representatives debates out of which the Tenth Amendment emerged, there was the 1793 case of ***Chisholm* v. *Georgia*** in which state sovereignty pretensions were denied by a vote of 4–1.

The Court's decision holding the state of Georgia amenable to the jurisdiction of the national judiciary and suable by a citizen of another state in the federal courts was one of the first instances in which the Court gave meaning to the text of the Constitution. However, the ruling provoked speedy and largely unfavorable reaction and prompted immediate steps toward constitutional amendment. On January 8, 1798, three years before Marshall was appointed chief justice, the Eleventh Amendment

became a part of the Constitution, overturning *Chisholm*. Yet one element of this case should not be overlooked: Nearly a decade before Chief Justice Marshall's assertion of judicial review in ***Marbury* v. *Madison*** (reprinted in Chapter Two), the Court's interpretation of the Constitution was apparently equated with the document itself.

Marshall's tenure (1801–1835), covering a period in which his political enemies dominated the political branches of the government, made his fervent nationalism stand out even more dramatically than if he had represented merely the judicial element in a broad nationalist movement. It was not until 1819, however, that the chief justice found himself face-to-face with the dreaded issue of "clashing sovereignties" in ***McCulloch* v. *Maryland.*** The state of Maryland levied a tax on the Second Bank of the United States, raising questions not only about the powers of Congress to charter a bank but also about the place of the states in the federal system. For Marshall, the necessary and proper clause gave Congress a discretionary choice of means in implementing granted powers, and the Tenth Amendment in no way limited this freedom of selection. As a result Congress possessed not only those powers expressly granted by the Constitution but an indefinite number of others as well, unless prohibited by the Constitution. Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide. Thus, Marshall established not only the proposition that national powers must be liberally construed but also the equally decisive principle that the Tenth Amendment does not create in the states an independent limitation on such authority. In reply to the argument that the taxing power was reserved to the states by the Tenth Amendment, and hence could operate even against a legitimate national instrumentality, Marshall went out of his way to deny state power to tax national instrumentalities. A part of the union could not be allowed to cripple the whole.

Two years later, in ***Cohens* v. *Virginia*** (1821), the chief justice refuted the argument that in all cases "arising" in their courts, state judges had final authority to interpret the Constitution and the U.S. laws and treaties made under its authority. "The American States," he said, "as well as the American People, have believed a close and firm Union to be essential to their liberty, and to their happiness." As a consequence the people had surrendered portions of state sovereignty to the national government. The supremacy clause and the principle of judicial review required that final decisions on constitutional issues "arising" in state courts be made only by the Supreme Court. Otherwise the Constitution would have different meanings from state to state.

Marshall biographer Albert J. Beveridge described the chief justice's opinion as "one of the strongest and most enduring strands of that mighty cable woven to hold the American people together as a united and imperishable nation." Thomas Jefferson condemned it as indicating judicial determination "to undermine the foundations of our confederated fabric." Denouncing the justices as a "subtle corps of sappers and miners constantly working underground," Jefferson charged that they had transformed the federal system into "a general and supreme one alone."

Marshall's doctrine of **national supremacy** built on the proposition that the central government and states confront each other in the relationship of superior and subordinate. If the exercise of Congress's enumerated powers be legitimate, the fact that their exercise encroaches on the states' traditional authority is of no significance. Moreover, the Court's duty is not to preserve state sovereignty but to protect national power against state encroachments. The Court functions not as an umpire

but as an agency of national authority. For Marshall, as for Madison in 1788, the principal danger of the federal system lay in erosive state action. Effective political limitations, such as a Senate elected by state legislators, existed against national efforts to impinge on state power, but only the Supreme Court could peacefully restrain state action from infringing on the authority of the national government.

Dual Federalism: Legacy of Chief Justice Roger B. Taney. Marshall's doctrine of federalism did not go unchallenged. His successor, Roger B. Taney of Maryland, strove valiantly during his long tenure (1836–1864) to redefine federalism in terms more favorable to state power.

The concept of federalism common to Marshall's critics insisted that the Constitution was a compact of sovereign states, not an ordinance of the people. The national government and the states faced each other as equals across a precise constitutional line defining their respective jurisdictions. This concept of nation-state equality had been the basis of Virginia's anarchical arguments in *Cohens* v. *Virginia*.

Accepting the basic creed of nation-state equality, the Taney Court stripped it of its anarchic implications. Within the powers reserved by the Tenth Amendment, the states were sovereign, but final authority to determine the scope of state powers rested with the national judiciary, an arbitrator standing aloof from the sovereign pretensions of both nation and states. "This judicial power," Taney wrote in *Ableman* v. *Booth* (1859), "was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the general government. . . . So long . . . as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forum of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force." For Marshall's concept of national supremacy, the Taney Court substituted a theory of federal equilibrium, later called "dual sovereignty" or **dual federalism.** Yet Marshall and Taney were agreed on one essential point: The Supreme Court provided a forum for keeping conflict within peaceful bounds.

Consequences for Public Policy. Marshall headed the Court for 34 years, Taney for 28, leaving two theories of federalism succeeding justices were free to apply as their inclinations or needs of the time dictated. Particularly in the period from the end of the Civil War to 1937, Taney's dual federalism had considerable impact on national policy. In ***Texas* v. *White*** (1869), as the Court acknowledged national power and congressional discretion in setting Reconstruction policy in the states of the late Confederacy, Chief Justice Chase observed that the Constitution "in all its provisions, looks to an indestructible Union, composed of indestructible states." The sentence was not mere rhetoric. Initially, it was said that the powers of the national government were "enumerated," those of the states "reserved." In the hands of others, Taney's federalism allowed this order of things to change, turning the Tenth Amendment upside down and denying Congress a discretionary choice of means for carrying its enumerated powers into execution. As Chapters Six and Seven will show, the justices ruled on occasion that there were certain subject matters especially regarding economic and social regulation that were "expressly" reserved to the states, and, therefore, beyond national control. Thus, the states enjoyed their own enumerated powers in certain areas, not by the Constitution but by judicial mandate. The effect was to eliminate the second dimension of national power. Since 1937 the Supreme Court has adhered generally to a national supremacy view of federalism. But as explained below, dual federalism has reappeared in a few contexts in recent years.

Taney's passionate concern for states' rights should not, however, obscure the fact that in his day the state **police power** (see Chapter Eight) was the only practical tool at hand to cope with the pressing problems of the day. Taney called it "the power to govern men and things. . . ." It consisted of that mass of regulatory authority that the states had not surrendered to the central government under the Constitution. In a period in which the national government was not yet prepared to deal realistically with economic and social problems, the theory of national supremacy had the effect of posing the unexercised commerce power of Congress or the contract clause as barriers to any government action. Taney's dual federalism in the years before the Civil War enabled states to deal experimentally with problems that the national government would not begin to face until another half century had elapsed.

Intergovernmental Immunity. In addition to the express limitations and prohibitions on national and state power contained in the Constitution, the Court has developed other limitations stemming from federalism itself. Maintenance of a political system in which two sovereignties must operate side by side led to the adoption of the doctrine that neither government may interfere with the government functions of the other, nor with the agencies and officials through which those functions are executed.

This doctrine of **governmental immunity** had its inception in *McCulloch* v. *Maryland*. On the premise that "the power to tax involves the power to destroy," Chief Justice Marshall declared, "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Marshall's immunity doctrine was based on his theory of national supremacy. Regarded in this light, it is consistent with his attitude toward the role of the central government in a federal system. Accordingly, he denied emphatically the proposition that "every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the state to tax banks chartered by the general government." "The difference," he explained, "is that which always exists, and always must exist, between the action of the whole on the part, and the part on the whole—between the laws of a government declared to be supreme, and those of a government, which, when in opposition to those laws, is not supreme."

In *Collector* v. *Day* (1871), ruling that the salaries of state court judges were immune from a national income tax, the justices established the doctrine of **reciprocal immunity,** based on the theory of the equality of national and state authority under the federal system. If states could not tax the national government, the national government could not tax the states. In time, both governments were denied fruitful sources of taxation. *Graves* v. *New York* (1939) overruled *Day* so far as it recognized "an implied constitutional immunity from income taxation of salaries of officers or employees of the national or state government or their instrumentalities." The immunity doctrine as to the states had been qualified even earlier in *South Carolina* v. *United States* (1905), which upheld a federal tax on South Carolina's liquor-dispensing business. In *New York* v. *United States* (1946), the Court refused to distinguish South Carolina's traffic in liquor from New York's traffic in mineral water.

The Court made further inroads on the reciprocal immunity doctrine in *South Carolina* v. *Baker* (1988), which expressly overruled *Pollock* v. *Farmers' Loan & Trust Co.* (first hearing, 1895). *Pollock* held that interest earned from municipal bonds was immune from federal taxation. In upholding a 1982 tax which removed

the federal income tax exemption from interest earned on bearer (as opposed to registered) municipal bonds, the Court explained in *Baker* that the sources of state and federal immunity were different: "the state immunity arises from the constitutional structure and a concern for protecting state sovereignty, whereas the federal immunity arises from the Supremacy Clause." The states, therefore, "can never tax the United States directly, but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. . . . The rule with respect to state tax immunity is essentially the same . . . except that at least some nondiscriminatory federal taxes can be collected directly from the States even though a parallel state tax could not be collected directly from the Federal Government." So the issue whether a nondiscriminatory federal tax might violate state tax immunity does not even arise today, unless the federal government seeks to collect the tax directly from a state.

COOPERATIVE FEDERALISM. Cooperation—not courtroom combat—more often characterizes the many manifestations of federalism today. Federalism not only shapes American politics but dictates the way many national policies are both developed and implemented. The national government may appropriate funds for such state activities as education, road building, and unemployment relief. It may grant such funds to the states on condition that a like amount or a specified proportion be raised by them for similar purposes, or on condition that the funds be spent in ways specified by federal law. Changing views on the proper roles of nation and states amply demonstrate that federalism is now, as always, in flux. What presidents, governors, and members of Congress and state legislatures have to say about their respective responsibilities remains as important as are judicial decisions in deciding what federalism, American-style, means.

THE RETURN OF DUAL FEDERALISM

As Chapter Six explains, the Constitutional Revolution of 1937 reestablished Marshall's doctrine of national supremacy as the guiding principle of American federalism. The view that the Tenth Amendment no longer served as an independent limit on national power marked the end of an era. It also seemed to mark the demise of dual federalism. The Supreme Court seemed unimpressed by arguments that an act of Congress could be invalid because it intruded into matters ordinarily of concern to state governments.

Recently, however, the federalism wars have resumed in earnest, with a series of victories for dual federalism since 1992 in two types of cases, usually by votes of 5 to 4. First, a statute might be found unconstitutional either because Congress exceeded the scope of one of its powers or because the exercise of a legitimate power unduly infringed on matters traditionally belonging to state governments. Second, an act might be unconstitutional because it allowed individuals to sue unconsenting state governments to assert rights that Congress had created. The first involves the Tenth Amendment, and the other involves the Eleventh. With both, some justices believe that political checks alone are inadequate safeguards of federalism and need to be supplemented with judicial checks.

THE TENTH AMENDMENT REVIVED. Led by Rehnquist, five justices declared in *National League of Cities* v. *Usery* (1976) that Congress could not extend the minimum wage and maximum hours provisions of the Fair Labor Standards Act to

employees of states and their political subdivisions. To do so was to regulate "the States as states." The majority recognized

> limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce. . . . [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

In a series of cases testing *National League of Cities,* the Court upheld the challenged statute each time. Still, the 1976 decision meant that virtually every congressional statute when applied to states was a candidate for constitutional attack before the Supreme Court. By 1985, the Court remained sharply divided between those whose fealty lay with Marshall's national supremacy and those who would breathe new life into the Tenth Amendment as a substantive check on congressional power.

In ***Garcia* v. *San Antonio Metropolitan Transit Authority*** (1985), the *National League of Cities* dissenters prevailed. At issue was whether Congress could subject SAMTA to the minimum wage and overtime requirements of the Fair Labor Standards Act. Justice Blackmun, himself a reluctant member of the *National League of Cities* majority, announced for a majority of five that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is inconsistent with established principles of federalism. . . . That case, accordingly, is overruled." Reaffirmed was a view of the Tenth Amendment in which constitutional limits on Congress are structural, not substantive—that states must find their protection from congressional regulation through the national political process, "not through judicially defined spheres of unregulable state activity."

Only three members of the Garcia majority remained on the bench in 1992. The shift in personnel partly explains *New York* v. *United States,* in which six justices invalidated a key provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985—a congressional device to persuade states to provide for disposal of certain radioactive wastes generated within their borders. The act contained three categories of incentives: monetary, access, and ownership. The first stipulated that noncomplying states would have to take title to the waste or forfeit incentive payments they had already received from the Department of Energy. The second imposed escalating surcharges for noncompliance leading to a denial of access to established disposal facilities. The third required states unable or unwilling to provide for disposal of all low-level waste by January 1, 1996, to "take title to the waste," to take possession of it, and to assume liability for all damages incurred by producers of the waste.

The Court unanimously upheld the first two sets of incentives. Six justices, however, concluded that the take-title provision was defective. Justice O'Connor explained that the Tenth Amendment requires the Court to determine whether an aspect of state sovereignty is protected by a constitutional limitation on congressional authority. While Congress could encourage states to regulate in certain ways through, for example, the granting and withholding of funds, Congress could not give states a "choice" between accepting ownership of the waste or following Congress's dictates for its disposal. Standing alone, the directive to take title and the order to regulate were beyond Congress's lawmaking powers.

In contrast, when faced with the constitutionality of state-imposed limits on the number of terms that a member of the U.S. House of Representatives might serve—that is, a state policy altering the nationally prescribed requirements for public office—the Court voted 5 to 4 against the state position (***U.S. Term Limits, Inc.* v. *Thornton,*** 1995). "[W]e conclude," wrote Justice Stevens, "that the power to add qualifications is not within the 'original powers' of the States by the Tenth Amendment." Moreover, "even if States possessed some original power in this area, . . . the Framers intended the Constitution to be the exclusive source of qualifications for members. . . ." Advocates of term limits would have to resort to constitutional amendment.

Dual federalist thinking reemerged in *Printz* v. *United States* (1997), which struck down, 5 to 4, a section of the 1993 Brady gun control law that required state officials to conduct background checks of prospective purchasers of handguns. This was an interim arrangement, pending operation of a national database that would allow gun dealers to conduct instant background checks on their own. Although Congress possesses authority under the commerce clause to regulate the firearms trade, the Court reasoned that the Tenth Amendment stands as an independent check on the manner in which that regulation may proceed. Opposing opinions echoed visions of federalism reminiscent of debates from the nineteenth and early twentieth centuries. National and state governments are coequal sovereigns. State officers can no more be required to administer federal laws than national officers could "be impressed into service for the execution of state laws," maintained Justice Scalia. There "is not a clause, sentence, or paragraph in the entire text of the Constitution," retorted Justice Stevens, "that supports the proposition that a local police officer can ignore a command by Congress" under one of its constitutional powers.

If laws challenged in *National League of Cities* and the take-title and Brady gun law cases were defective because of their impact on state government, the civil remedy provision of the Violence Against Women Act would seem at first glance to have raised few constitutional eyebrows. Enacted by Congress in 1994, this law allowed victims of gender-motivated violence to sue their attackers for damages in federal court. The collective view from the states seemed to be that the law was needed. Attorneys general from 38 states had urged its enactment. When challenged in the Supreme Court, the governments of 36 states joined a brief urging that the law be sustained, with only Alabama asking that the law be struck down. But five justices voted to strike it down, finding it constitutionally sustainable neither as an exercise of Congress's power to regulate interstate commerce nor as an exercise of Congress's power to enforce the provisions of the Fourteenth Amendment (***United States* v. *Morrison,*** 2000). The "irony of these cases," declared Justice Souter in dissent, is "that the States will be forced to enjoy the new federalism whether they want it or not."

At one level, the decision seemed to be a replay of ***United States* v. *Lopez*** (1995) (reprinted in Chapter Six), when, for the first time since 1936, the Court invalidated an act of Congress—the Gun-Free School Zones Act—as being beyond the scope of the power to regulate interstate commerce. But there is an important distinction between *Lopez* and *Morrison*. In the former, Congress had not demonstrated a clear nexus or connection between firearms in or near schools and interstate commerce, and the Court majority was unwilling to defer to Congress absent such substantiation. But in *Morrison,* the record contained ample congressional documentation describing the impact of gender-motivated violence on its victims and their

families and its effects on interstate commerce. "If accepted," maintained Chief Justice Rehnquist in an attempt to distinguish the national commerce power from a national and nearly boundless police power, "petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." Because most violence has traditionally been within the jurisdiction of the states, it was the Court's duty to draw the line between what could properly be the subject of national regulation and what could not. "The Constitution requires a distinction between what is truly national and what is truly local."

ELEVENTH AMENDMENT LIMITATIONS. "The judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States," declares the Eleventh Amendment. As noted, this amendment was the nation's response to *Chisholm* v. *Georgia* (1793), which allowed a citizen of South Carolina to sue the state of Georgia in the federal courts. Much interpretation of this amendment deals with technicalities of federal jurisdiction and so lies outside the scope of this book. But some recent rulings illustrate that the amendment has also been a battleground in the federalism wars, shielding state governments from congressional authority.

A background summary should demonstrate why the amendment is important in understanding federalism today. In 1890 *Hans* v. *Louisiana* went beyond the actual language of the amendment by barring a suit in federal court by a citizen of Louisiana against the state of Louisiana after the latter failed to pay interest on its bonds. The Court concluded that the principle of **sovereign immunity**—that a state cannot be sued without its consent—was an implied limitation on the jurisdiction of the federal courts outlined in Article III. As a result the federal courts were off-limits to suits against states by citizens and noncitizens alike. Later cases, however, greatly diminished this immunity. Ex parte *Young* (1908) held that state officials, as distinguished from the state itself, were subject to suits brought in federal court. *Fitzpatrick* v. *Bitzer* (1976) allowed Congress to negate or abrogate a state's Eleventh Amendment immunity in a suit for damages because of Congress's authority under section 5 of the Fourteenth Amendment (ratified 70 years after the Eleventh Amendment) "to enforce, by appropriate legislation, the provisions of the" amendment. Similarly, *Pennsylvania* v. *Union Gas Co.* (1989) allowed suits against states for monetary damages on the basis of Congress's powers under Article I. Viewing the political process as the primary safeguard of federalism, as in *Garcia,* the Court reasoned that a clear statement in a statute of an intention to abrogate state immunity was an adequate check on congressional overreaching.

This theory was abruptly rejected seven years later in *Seminole Tribe* v. *Florida* (1996). The Court overruled *Union Gas* and denied that Congress could abrogate a state's immunity from suit in federal court under its Article I powers, with or without a clear intention to do so. "The majority's opinion," explained Justice Stevens in dissent, ". . . prevents Congress from providing a federal forum for a broad range of actions against States, from . . . copyright and patent law to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."

The Court's interest in augmenting political safeguards with judicial checks continued in *Alden* v. *Maine* (1999). The Fair Labor Standards Act allowed aggrieved state workers to sue their employer in state court for violating the law's

overtime provisions. Because Maine had not consented to the suit, the Court reasoned that Congress could not compel the state courts to accept the suit. "[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment," declared Justice Kennedy. Rather, the immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." Because the Eleventh Amendment confirmed but did not establish state immunity, "it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." Just as *Seminole Tribe* closed the federal courts to suits against states when Congress acted on its Article I powers, *Alden* blocked them from the courts of unconsenting states.

One term later, the same five justices comprising the majority in *Seminole Tribe* and *Alden* restricted Congress's authority under the Fourteenth Amendment to abrogate state immunity. ***Kimel* v. *Florida Board of Regents*** held that Congress could not force states to submit to suits for monetary damages in federal courts brought by employees under the Age Discrimination in Employment Act. In reasoning similar to that followed in ***City of Bourne* v. *Flores*** (reprinted in Chapter Two), the Court found that the ADEA was not "appropriate legislation" under section 5 of the amendment because its protections against age discrimination went far beyond what the Court had held the amendment required. Similarly, *Board of Trustees* v. *Garrett* (2001) barred lawsuits against the state by Alabama state employees under the Americans with Disabilities Act. When Congress protects a class of people beyond the precise scope of the rights enshrined in section one of the Fourteenth Amendment, there must be both "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," a condition Congress failed to satisfy. The ADA's legislative record failed "to show that Congress identified a history and pattern of irrational employment discrimination by the States against the disabled."

In holding that state employees may recover money damages in federal court because of a state's failure to comply with the Family and Medical Leave Act of 1993, *Nevada Dept. of Human Resources* v. *Hibbs* (2003) is the principal exception to this line of recent decisions. Because of evidence of a long history of gender discrimination by the states in their administration of leave benefits, six justices agreed that application of the FMLA to the states was appropriately prophylactic under section 5, rather than a substantive redefinition by Congress of a state's constitutional obligations.

Cumulatively, decisions to date invoking dual federalism have not tied the hands of the national government to such a degree as to provoke a confrontation between the Congress and the president on one side, and the Court on the other, as happened in 1937. Moreover, the current trend may be reversed when one or two new justices are appointed. Yet these recent cases are symbolic warning shots, even if they have been fired by slender majorities. As it gives renewed emphasis to dual federalism, the bench seems less willing than at any time since 1937 to defer to Congress on matters of national versus state power. This judicial insistence that Congress be more mindful of the place of the states in the constitutional order may prove to be one of those quiet developments that has long-range effects on American government.

KEY TERMS

federalism
Antifederalists
delegated powers
reserved powers
implied powers
express powers
necessary and proper clause
resulting powers
supremacy clause
concurrent powers
exclusive powers
preemption
judicial federalism
federal question
national supremacy
dual federalism
police power
governmental immunity
reciprocal immunity
sovereign immunity

QUERIES

1. The Supreme Court's decisions in both *McCulloch* and *Cohens* were highly controversial in their day. Yet, in the first, the Court agreed only to accept an institution that Congress had already established; in the second, Virginia actually won on the merits. Why then would certain political groups have found Marshall's opinions in these cases unsettling?

2. "Whatever the judicial role," wrote Justice Kennedy in his concurring opinion in *United States* v. *Lopez* (see Chapter Six), "it is axiomatic that Congress does have substantial discretion and control over the federal balance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure. At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role." Does this passage offer insight into the reasons why some members of the Court believe that political checks to safeguard federalism must be augmented with judicial checks?

3. What is the significance of the Seventeenth Amendment (1913) for the debate over political versus judicial checks on Congress? Does its presence in the Constitution support or undercut Justice Kennedy's statement in question 2?

4. Review Robert Yates's "Letters of Brutus" in Chapter Two. Does *Chisholm* v. *Georgia* confirm or refute his forebodings about the Supreme Court?

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I. DEFINING THE NATURE OF THE UNION

Chisholm v. *Georgia*
2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793)

http://supct.law.cornell.edu/supct/cases/name.htm#Case_Name-C

On October 31, 1777, the Executive Council of Georgia authorized State Commissioners Thomas Stone and Edward Davies to purchase much-needed supplies from Robert Farquhar, a Charleston, South Carolina, merchant. For his merchandise, Stone and Davies agreed to pay Farquhar $169,613.33 in Continental Currency or in indigo at Carolina prices, if currency was not available. Farquhar never received payment. His claims were still unsatisfied when he was hit by the boom of a pilot boat headed for Savannah. A short time after his death, Alexander Chisholm, a Charleston merchant, was qualified as Farquhar's executor and began to press for payment of Farquhar's claim. When Georgia refused to pay, the executor-brought suit against the state in the U.S. Circuit Court for the District of Georgia. Alleging its sovereign and independent status under the federal Constitution, Georgia answered that it could not be made a party to any suit by a South Carolina citizen. Judges James Iredell and Nathaniel Pendleton upheld, for different reasons, Georgia's objections.

In 1792, Chisholm filed suit in the Supreme Court, but Georgia failed to respond. "Any person having authority to speak for the State of Georgia is required to come forth and appear accordingly," the Court directed. When Georgia persisted in its refusal, the case again was postponed until February 4, 1793. No one appeared, and the justices issued another invitation. Still nothing happened, and the decision came down February 19, 1793. In the face of assurances made by Hamilton, Madison, and Marshall during the ratification debates that a state could not, without its consent, be made a defendant in the federal courts by a citizen of another state, the Court took jurisdiction and decided against the state.

The negative reaction was strong and prompt. A House resolution calling for amendment to the Constitution was filed the day of the decision, followed the next day by a supportive Senate resolution. The Eleventh Amendment was proposed by Congress on March 4, 1794, and ratification was completed in 11 months. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress declared that it "may now be deemed to be a part of the Constitution." Majority: Wilson, Blair, Cushing, Jay. Dissenting: Iredell.

WILSON, JUSTICE:

This is a case of uncommon magnitude. One of the parties to it is a state; certainly respectable, claiming to be sovereign. The question to be determined is whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this—"do the people of the United States form a nation?". . .

To the Constitution of the United States the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established

that constitution. They might have announced themselves "sovereign" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration. . . .

With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present. "The people of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. . . .

The question now opens fairly to our view, could the people of those states, among whom were those of Georgia, bind those states, and Georgia, among the others, by the legislative, executive, and judicial power so vested? If the principles on which I have founded myself are just and true, this question must, unavoidably, receive an affirmative answer. . . .

The next question under this head is—Has the constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the United States intended to bind those states by the judicial power vested by the national constitution, a previous inquiry will naturally be: Did those people intend to bind those states by the legislative power vested by that constitution? The articles of confederation, it is well known, did not operate upon individual citizens, but operated only upon states. This defect was remedied by the national constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced on the other: for they seem to think, that the present constitution operates only on individual citizens, and not on states. This opinion, however, appears to be altogether unfounded. When certain laws of the states are declared to be "subject to the revision and control of the congress"; it cannot, surely be contended, that the legislative power of the national government was meant to have no operation on the several states. The fact, uncontrovertibly established in one instance, proves the principle in all other instances, to which the facts will be found to apply. We may then infer, that the people of the United States intended to bind the several states, by the legislative power of the national government. . . .

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the constitution; it is confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself. "The judicial power of the United States shall extend to controversies between two States." Two States are supposed to have a controversy between them; this controversy is supposed to be brought before those vested with the judicial power of the United States; can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a court of law, and yet neither of those States be a defendant? "The judicial power of the United States shall extend to controversies between a State and citizens of another State." Could the strictest legal language; could even that language which is peculiarly appropriated to an art, deemed by a great master to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriate language describe with more precise accuracy the cause now pending before the tribunal? Causes, and not parties to causes, are weighed by justice in her equal scales; on the former, solely, her attention is fixed; to the latter she is, as she is painted, blind. . . .

JAY, CHIEF JUSTICE . . . [omitted]

CUSHING, JUSTICE . . . [omitted]

BLAIR, JUSTICE . . . [omitted]

IREDELL, JUSTICE: [Dissenting]

A general question of great importance here occurs. What controversy of a civil nature can be maintained against a state by an individual? The framers of the constitution, I presume, must have meant one of two things—Either, 1. In the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general

government . . . to refer to antecedent laws for the construction of the general words they use: or, 2. To enable congress in all such cases to pass all such laws as they might deem necessary and proper to carry the purposes of this constitution into full effect, either absolutely at their discretion, or, at least, in cases where prior laws were deficient for such purposes, if any such deficiency existed.

The attorney-general has indeed suggested another construction, a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation, though it appeared to me to be the basis of the attorney-general's argument. His construction I take to be this: "That the moment a supreme court is formed, it is to exercise all the judicial power vested in it by the constitution, by its own authority, whether the legislature has prescribed methods of doing so, or not." My conception of the constitution is entirely different. I conceive, that all the courts of the United States must receive, not merely their organization as to the number of judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the legislature only. . . .

McCulloch v. *Maryland*
17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819)
http://laws.findlaw.com/us/17/316.html

This famous case resulted from the attempt of the Maryland legislature in 1818 to tax banks and bank branches not chartered by the state legislature. James McCulloch, cashier of the Baltimore branch of the Second Bank of the United States, against which the law was directed, failed to pay the $15,000 annual fee or comply with the alternative requirement by affixing tax stamps to the bank notes issued. McCulloch brought a writ of error against the Court of Appeals of the State of Maryland, which had upheld a lower court judgment against him. Majority: Marshall, Duvall, Johnson, Livingston, Story, Todd, Washington.

MARSHALL, CHIEF JUSTICE, delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. . . . No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the case is, has congress power to incorporate a bank?. . .

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to

sustain this proposition. The convention which framed the constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation. . . . It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty, to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. . . .

This government is acknowledged by all to be one of enumerated powers. . . . [T]hat principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect that it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had

experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a *constitution* we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?. . .

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.". . .

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but only such as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that

other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. . . .

This provision is made in a constitution, intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future times, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. . . .

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. . . . That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind, another, they would rather have disguised the grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers and all others," &c., "no laws shall be passed but such as are necessary and proper.". . .

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. . . .

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire—

Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is . . . retained by the states; . . . that it is to be concurrently exercised by the two governments are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. . . .

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution . . . as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st: That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is a legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnancy in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one

state trust those of another with a power to control the most significant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, all are represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. . . .

The question is, in truth, a question of supremacy, and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. . . .

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the rights of the states to tax banks chartered by the general government. But the two cases are not the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. . . . The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

Cohens v. *Virginia*
19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821)

http://laws.findlaw.com/us/19/264.html

In 1802 Congress authorized the District of Columbia to conduct a lottery. P. J. and M. J. Cohen, agents of the Jacob I. Cohen and Brother Lottery Office in Baltimore, Maryland, sold District lottery tickets in Norfolk, Virginia, but were arrested and convicted under a state law of 1819 that banned the sale of all lottery tickets not approved by the state legislature. Virginia legislators justified the restriction as a means of discouraging the export of capital to finance public improvements elsewhere at a time of financial exigencies at home. According to W. Ray Luce's book *Cohens* v. *Virginia (1821),* the case may have been arranged. The Supreme Court docketed the Cohens' appeal before their case came to trial in Norfolk's borough court, as if the case had already been decided and any possible appeal in the Virginia courts rejected. The portion of the opinion that follows pertains solely to the question of jurisdiction. Majority: Marshall, Duvall, Johnson, Livingston, Story, Todd. Not participating: Washington.

Mr. Chief Justice Marshall delivered the opinion of the Court. . . .

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the state in which the cause was cognizable, the record has been brought into this court by a writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are—

1st. That a state is a defendant.

2nd. That no writ of error lies from this court to a state court. [Point 3 has been omitted.]

The questions presented to the court by the two first points made at the bar are of great magnitude, and may truly be said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining, peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state of the Union. That the constitution, laws and treaties may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief is irremediable. . . .

1st. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state?. . .

The American states, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under

the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties of that case. . . .

One of the express objects, then, for which the judicial department was established, is the decision of controversies between states, and between a state and individuals. The mere circumstance, that a state is a party, gives jurisdiction to the court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated?. . .

The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals

acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be . . . arrested by the will of one of its members. Each member will possess a veto on the will of the whole. . . .

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the states was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. . . .

If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. . . .

It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. . . .

This leads to a consideration of the 11th amendment. It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the

adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states. . . .

Under the Judiciary Act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to reexamination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court for the sole purpose of inquiring whether the judgment violates the constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far reexamined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. . . .

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of reexamining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state. . . .

2d. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court. . . .

America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable, that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable, that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? . . .

The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

. . . [T]he words of the constitution . . . give to the supreme court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. . . .

Let the nature and objects of our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require the words which import this power should be restricted by a forced construction. . . .

[On the merits of the case, the Supreme Court upheld the convictions, declaring that the federal lottery law afforded no immunity to prosecution outside the District of Columbia.—ED.]

Judgment affirmed.

Texas v. *White*
74 U.S. (7 Wall.) 700, 19 L.Ed. 227 (1869)
http://laws.findlaw.com/us/74/700.html

In 1851 Congress provided that $10 million in U.S. bonds should be transferred to the state of Texas, payable to the state or bearer and redeemable in 1864. In receiving the bonds, the Texas legislature stipulated that endorsement by the governor of the state was necessary to make any of the bonds valid in the hands of individual holders. After Texas became part of the Confederate States of America, the Texas legislature repealed this act in 1862 and authorized use of the bonds for war supplies. In 1866 the Reconstruction government in Texas sought to block payment to George White and others out of state who now held the bonds. The defense interposed was that the Supreme Court lacked jurisdiction to entertain this original action because the plaintiff (Texas) was not a state of the Union—that it had seceded in 1861 and had not been restored as a full-fledged member of the Union. In response Chief Justice Chase simultaneously espoused Lincoln's theory (that secession was illegal, that the Union was perpetual, and that the rebellion had temporarily suspended Texas's rights as a member of the Union) and, without passing on the validity of any particular Reconstruction statute, acknowledged Congress's authority to maintain provisional governments in the southern states. Majority: Chase, Clifford, Davis, Field, Nelson. Dissenting: Grier, Miller, Swayne.

THE CHIEF JUSTICE [CHASE] delivered the opinion of the Court. . . .

Texas took part, with the other Confederate States, in the war of the rebellion. . . . During the whole of that war there was no governor, or judge, or any other State official in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the

National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. . . . Not only therefore can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war of conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations, since the first outbreak of rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned. . . .

All admit that, during this condition of civil war, the rights of the State as a member, and her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government. . . .

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution. . . .

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance. . . .

[The right of Texas to bring suit was affirmed and a decree issued enjoining White and others from setting up any claim to the bonds.—ED.]

MR. JUSTICE GRIER, dissenting. . . .

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time the bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. . . .

[Justices Swayne and Miller joined Justice Grier "as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court."—ED.]

II. NATIONAL SUPREMACY V. DUAL FEDERALISM IN THE MODERN ERA

Garcia v. *San Antonio Metropolitan Transit Authority* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985)

http://laws.findlaw.com/us/469/528.html

San Antonio Metropolitan Transit Authority (SAMTA) operates a public mass-transit system in San Antonio, Texas, and the surrounding area. In 1976 the Supreme Court in *National League of Cities* v. *Usery* invalidated the extension of the maximum hours and minimum wage provisions of the Fair Labor Standards Act (FLSA) to most state and municipal employees. The transit authority informed its employees that this decision relieved it of overtime pay obligations. In 1979, the Wage and Hour Administration of the Department of Labor informed SAMTA that its operations were nonetheless covered by the FLSA. The authority then asked the U.S. District Court for the Western District of Texas for a declaratory judgment that the 1976 decision precluded application of the FLSA's overtime requirements to its operations. At the same time, Joe Garcia and several other SAMTA employees filed suit against SAMTA in district court for overtime pay under the FLSA. In 1981, the district court ruled that, under *National League of Cities,* SAMTA was immune from the requirements of the FLSA. The Secretary of Labor and Garcia appealed directly to the Supreme Court. While the San Antonio case was in progress, the Supreme Court held in *Transportation Union* v. *Long Island Rail Road Co.* (1982) that commuter rail service provided by a state-owned entity did not constitute a "traditional governmental function" and so did not qualify for immunity under *National League of Cities.* The Court vacated the district court's judgment in the SAMTA case for further consideration in light of *Long Island Rail Road.* On remand, the district court maintained its original view and decided in favor of SAMTA. Majority: Blackmun, Brennan, Marshall, Stevens, White. Dissenting: Powell, Burger, O'Connor, Rehnquist.

JUSTICE BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in *National League of Cities* v. *Usery*. . . . In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions.". . . Although National League of Cities supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause. . . .

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled. . . .

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or

"traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them. We accordingly return to the underlying issue that confronted this Court in *National League of Cities*—the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause.

The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. . . .

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. . . .

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. . . . By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. . . .

As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of that role. . . . With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. . . . [A]nd the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. . . . [W]e have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause. . . .

In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet. . . .

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended. . . .

Though the separate concurrence [by Justice Blackmun—ED.] providing the fifth vote

in *National League of Cities* was "not untroubled by certain possible implications" of the decision . . . the Court in that case attempted to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty. But the model of democratic decisionmaking the Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in *National League of Cities* the Court tried to repair what did not need repair.

We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. . . . Due respect for the reach of congressional power within the federal system mandates that we do so now.

. . . The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting. . . .

Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.

. . . [T]he extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the federal government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that it—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court. . . .

Far from being "unsound in principle" . . . judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution. . . .

Thus, the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. . . . Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the federal government, a balance designed to protect our fundamental liberties. . . .

JUSTICE REHNQUIST, dissenting . . . [omitted].

JUSTICE O'CONNOR, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting. . . .

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breath-taking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems. But the Framers were not single-minded. The Constitution is animated by an array of intentions. . . . Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. . . . In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national one. A conflict

has now emerged, and the Court today retreats rather than reconciles the Constitution's dual concerns for federalism and an effective commerce power. . . .

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups . . . become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic. . . .

It is worth recalling the cited passage in *McCulloch* v. *Maryland* . . . that lies at the source of the recent expansion of the commerce power. "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall said, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional" (emphasis added [by Justice O'Connor]). The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. . . .

This . . . requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power. . . .

U.S. Term Limits, Inc. v. *Thornton*
514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed. 2d 881 (1995)

http://laws.findlaw.com/us/514/779.html

Joining 21 other states, voters in Arkansas in 1992 amended the state constitution to impose term limits on their legislators. Section 3 of Amendment 73 prohibited the name of an otherwise eligible candidate from appearing on the general election ballot: (1) for the U.S. House of Representatives if the candidate had been elected to the House to three or more terms; and (2) for the U.S. Senate if the candidate had been elected to the Senate to two or more terms. Two legal challenges to the amendment emerged. One involved a national advocacy group and Ray Thornton (by 1995 a six-term member of the U.S. House of Representatives from Arkansas); the other involved Bobbie Hill (past president of the League of Women Voters of Arkansas, on behalf of herself and other voters) and Arkansas attorney general Winston Bryant. In both cases, the state supreme court held that Section 3 violated Article I of the U. S. Constitution. Docketed first at the U.S. Supreme Court, Thornton's case became the name by which this landmark decision is known. While states remain free to impose term limits on state officials, and while candidates and officials at any level of government may informally "term-limit" themselves, the Supreme Court's decision soon squelched the movement to impose term limits on national legislators. The excerpts that follow are greatly compressed; Justice Thomas's dissent alone reached 88 pages. Majority: Stevens, Breyer, Ginsburg, Kennedy, Souter. Dissenting: Thomas, O'Connor, Rehnquist, Scalia.

JUSTICE STEVENS delivered the opinion of the Court. . . .

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Today's cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Arkansas Supreme Court held that the amendment violates the Federal Constitution. We agree with that holding. Such a state-imposed restriction is contrary to the "fundamental principle of our representative democracy," embodied in the Constitution, that "the people should choose whom they please to govern them." Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended. . . .

[T]he constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States from adding to or altering the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance. Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members.

Twenty-six years ago, in *Powell* v. *McCormack* (1969), we reviewed the history and text of the Qualifications Clauses in a case involving an attempted exclusion of a duly elected Member of Congress. The principal issue was whether the power granted to each House in Art. I, § 5, to judge the "Qualifications of its own Members" includes the power to impose qualifications other than those set forth in the text of the Constitution. In an opinion by Chief Justice Warren for eight Members of the Court, we held that it does not. . . . [The Court reviews *Powell* at length and reaffirms its holding.]

Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power to add qualifications is not within the "original powers" of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress, and that the Framers thereby "divested" States of any power to add qualifications. . . .

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. . . .

With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified. The contrary argument overlooks the revolutionary character of the government that the Framers conceived. Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation. In that system, "the States retained most of their sovereignty, like independent nations bound together only by treaties." After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, "a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature." In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the

people of the United States. . . . In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. . . .

In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution. Instead, any state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.

Even if we believed that States possessed as part of their original powers some control over congressional qualifications, the text and structure of the Constitution, the relevant historical materials, and, most importantly, the "basic principles of our democratic system" all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution. . . .

[S]tate-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell,* violate a . . . basic principle: that the right to choose representatives belongs not to the States, but to the people. . . . Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people. The Framers implemented this ideal most clearly in the provision, extant from the beginning of the Republic, that calls for the Members of the House of Representatives to be "chosen every second Year by the People of the several States." Following the adoption of the 17th Amendment in 1913, this ideal was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people. . . .

Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. . . . Such a patchwork would also sever the direct link that the Framers found so critical between the National Government and the people of the United States. . . .

Petitioners argue that, even if States may not add qualifications, Amendment 73 is constitutional because it is not such a qualification, and because Amendment 73 is a permissible exercise of state power to regulate the "Times, Places and Manner of Holding Elections." We reject these contentions. . . .

In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. . . . There is no hint that § 3 was intended to have any other purpose. . . .

The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today. Over half the States have adopted measures that impose such limits on some offices either directly or indirectly, and the Nation as a whole, notably by constitutional amendment, has imposed a limit on the number of terms that the President may serve. Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this longstanding debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional

framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the Amendment procedures set forth in Article V. . . .

The judgment is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring . . . [omitted].

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to "choose whom they please to govern them" by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

I dissent. Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

Because the majority fundamentally misunderstands the notion of "reserved" powers, I start with some first principles. Contrary to the majority's suggestion, the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so.

Our system of government rests on one overriding principle: all power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of "reserved" powers. The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole. . . .

When they adopted the Federal Constitution, of course, the people of each State surrendered some of their authority to the United States (and hence to entities accountable to the people of other States as well as to themselves). They affirmatively deprived their States of certain powers, and they affirmatively conferred certain powers upon the Federal Government. Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers: the Federal Government's powers are limited and enumerated. . . .

In each State, the remainder of the people's powers . . . are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government. As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. 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 either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.

These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States "are reserved to the States respectively, or to the people." With this careful last phrase, the Amendment avoids taking any position on the division of power between the state

governments and the people of the States: it is up to the people of each State to determine which "reserved" powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State. . . .

The majority's essential logic is that the state governments could not "reserve" any powers that they did not control at the time the Constitution was drafted. But it was not the state governments that were doing the reserving. The Constitution derives its authority instead from the consent of the people of the States. Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled.

The Tenth Amendment's use of the word "reserved" does not help the majority's position. If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar: the people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved "to the States respectively, or to the people."...

The majority settles on "the Qualifications Clauses" as the constitutional provisions that Amendment 73 violates. Because I do not read those provisions to impose any unstated prohibitions on the States, it is unnecessary for me to decide whether the majority is correct to identify Arkansas' ballot-access restriction with laws fixing true term limits or otherwise prescribing "qualifications" for congressional office. . . . [T]he Qualifications Clauses are merely straightforward recitations of the minimum eligibility requirements that the Framers thought it essential for every Member of Congress to meet. They restrict state power only in that they prevent the States from abolishing all eligibility requirements for membership in Congress. . . .

It is radical enough for the majority to hold that the Constitution implicitly precludes the people of the States from prescribing any eligibility requirements for the congressional candidates who seek their votes. This holding, after all, does not stop with negating the term limits that many States have seen fit to impose on their Senators and Representatives. Today's decision also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent, who are currently in prison, or who have past vote-fraud convictions. Likewise, after today's decision, the people of each State must leave open the possibility that they will trust someone with their vote in Congress even though they do not trust him with a vote in the election for Congress. . . .

United States v. *Morrison*
529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed. 2d 658 (2000)

http://laws.findlaw.com/us/529/598.html

Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994 where she met respondents Antonio Morrison and James Crawford, who were also students and members of the varsity football team. In a complaint filed under Virginia Tech's sexual assault policy, Brzonkala alleged that, within 30 minutes of

meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly told her, "You better not have any . . . diseases." In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "like[d] to get girls drunk and. . . ." "[T]he omitted portions, quoted verbatim in the briefs on file with this Court," explained Chief Justice Rehnquist, "consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend." After a complex series of proceedings at the university failed to result in punishment for Morrison and Crawford, and after learning from a newspaper that Morrison would be returning to campus in the fall of 1995, Brzonkala withdrew from school and filed suit under 42 U.S.C. § 13981 (*Brzonkala* v. *Morrison*). This provision of the Violence Against Women Act of 1994 provided a federal civil remedy for victims of gender-motivated violence, including situations where alleged acts did not result in criminal charges, prosecution, or conviction. The United States District Court for the Western District of Virginia held that Congress lacked authority to enact § 13981 under either the commerce clause or section 5 of the Fourteenth Amendment. A divided panel of the Court of Appeals for the Fourth Circuit reversed the District Court, but on rehearing en banc, a majority of the appeals court upheld the district court. Majority: Rehnquist, O'Connor, Scalia, Kennedy, Thomas. Dissenting: Souter, Stevens, Ginsburg, Breyer.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court. . . .

Section 13981 was part of the Violence Against Women Act of 1994. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." To enforce that right, subsection (c) declares: "A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." We address Congress' authority to enact this remedy under each of these constitutional provisions in turn. . . .

As we observed in [*United States* v.] *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power." "First, Congress may regulate the use of the channels of interstate commerce." "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. . . .

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez*, we held that the Gun-Free School Zones Act of 1990, § 922(q), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority

under the Commerce Clause. Several significant considerations contributed to our decision.

First, we observed that § 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."... [A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case....

The second consideration that we found important in analyzing § 922(q) was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."...

Third, we noted that neither § 922(q) "'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'"...

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated....

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce....

In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation....

Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption....

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context....

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local....

Because we conclude that the Commerce Clause does not provide Congress with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise

of Congress' remedial power under § 5 of the Fourteenth Amendment. . . .

The principles governing an analysis of congressional legislation under § 5 are well settled. Section 5 states that Congress may "'enforce,' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty or property, without due process of law,' nor deny any person 'equal protection of the laws.'" Section 5 is "a positive grant of legislative power" that includes authority to "prohibit conduct which is not itself unconstitutional and [to] intrud[e] into 'legislative spheres of autonomy previously reserved to the States.'" . . .

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. . . . Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts. . . .

However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. . . . Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. . . .

[P]rophylactic legislation under § 5 must have a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias. . . .

For these reasons, we conclude that Congress' power under § 5 does not extend to the enactment of § 13981.

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

JUSTICE THOMAS, concurring . . . [omitted].

JUSTICE SOUTER, with whom JUSTICES STEVENS, GINSBURG, and BREYER, join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994 exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Any explicit findings that Congress

chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *Lopez* is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment. . . .

Congress found that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. . . ." [T]he sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. . . .

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. . . .

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. . . . It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation.

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. . . .

[F]or significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history. . . .

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of

1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB* v. *Jones & Laughlin Steel Corp.*, which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. . . .

Why is the majority tempted to reject the lesson so painfully learned in 1937? . . .

[T]he answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. . . .

The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy. Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard*. . . .

Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power. . . .

The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

JUSTICE BREYER, with whom JUSTICE STEVENS joins and with whom JUSTICES GINSBURG and BREYER join in part, dissenting . . . [omitted].

Kimel v. *Florida Board of Regents*
528 U.S. 62, 120 S.Ct. 631, 145 L.Ed. 2d 522 (2000)

http://laws.findlaw.com/us/528/62.html

The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual [over 40 years of age] . . . because of such individual's age." In 1974 Congress extended the ADEA to include state and local governments.

In 1995 J. Daniel Kimel, Jr., and other current and former faculty and librarians of Florida State University sued the Florida Board of Regents in the United States District Court for the Northern District of Florida, alleging that a failure to allocate funds to provide for previously agreed-upon adjustments to salaries had a disparate impact on the salaries of older employees. Rejecting a motion by the Regents that the Eleventh Amendment shielded them from the suit, the District Court held that Congress in the ADEA had expressed its intent to abrogate the states' Eleventh Amendment immunity and that the ADEA was appropriate legislation under the Fourteenth Amendment. Consolidating Kimel's case with a similar case from Alabama and another one from Florida, the Eleventh Circuit Court of Appeals reversed the district court, 2–1. One judge found no congressional intention in the ADEA to abrogate state immunity, and the other believed that Congress lacked authority under the Fourteenth Amendment to do so. Majority: O'Connor, Rehnquist, Scalia, Kennedy, Thomas. Dissenting: Stevens, Souter, Ginsburg, and Breyer.

JUSTICE O'CONNOR delivered the opinion of the Court. . . .

Although today's cases concern suits brought by citizens against their own States, this Court has long "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" Accordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. Petitioners nevertheless contend that the States of Alabama and Florida must defend the present suits on the merits because Congress abrogated their Eleventh Amendment immunity in the ADEA. To determine whether petitioners are correct, we must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority. . . .

[Justice O'Connor concludes that] Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity. . . .

This is not the first time we have considered the constitutional validity of the 1974 extension of the ADEA to state and local governments. In *EEOC* v. *Wyoming* (1983), we held that the ADEA constitutes a valid exercise of Congress' power "[t]o regulate Commerce . . . among the several States," and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment. Because we found the ADEA valid under Congress' Commerce Clause power, we concluded that it was unnecessary to determine whether the Act also could be supported by Congress' power under § 5 of the Fourteenth Amendment. Resolution of today's cases requires us to decide that question.

In *Seminole Tribe* [*of Florida* v. *Florida* (1996)], we held that Congress lacks power under Article I to abrogate the States' sovereign immunity. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.". . . Under our firmly established precedent then, if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.

Justice Stevens disputes that well-established precedent again. In *Alden* [v. *Maine* (1999)], we explained that, "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." . . . Indeed, the present dissenters' refusal to accept the validity and natural import of decisions like *Hans* [v. *Louisiana*, (1890)],

rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution. Today we adhere to our holding in *Seminole Tribe:* Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals.

Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity. In *Fitzpatrick* v. *Bitzer* (1976), we recognized that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." . . . Accordingly, the private petitioners in these cases may maintain their ADEA suits against the States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under § 5. . . .

As we recognized most recently in *City of Boerne* v. *Flores* (1997), . . . "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.

Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power. For example, Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. In *City of Boerne,* we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Applying the . . . test in these cases, we conclude that the ADEA is not "appropriate legislation" under § 5. . . . Initially, the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act. . . .

States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision. . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. . . . Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." . . .

Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held

unconstitutional under the applicable equal protection, rational basis standard. The ADEA makes unlawful, in the employment context, all "discriminat[ion] against any individual . . . because of such individual's age." . . .

That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. . . . [W]e have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. . . .

Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. . . .

A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. . . . [W]e hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.

Because the ADEA does not validly abrogate the States' sovereign immunity, however, the present suits must be dismissed. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting in part and concurring in part.

Congress' power to regulate the American economy includes the power to regulate both the public and the private sectors of the labor market. Federal rules outlawing discrimination in the workplace, like the regulation of wages and hours or health and safety standards, may be enforced against public as well as private employers. In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power.

The application of the ancient judge-made doctrine of sovereign immunity in cases like these is supposedly justified as a freestanding limit on congressional authority, a limit necessary to protect States' "dignity and respect" from impairment by the National Government. The Framers did not, however, select the Judicial Branch as the constitutional guardian of those state interests. Rather, the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement.

It is the Framers' compromise giving each State equal representation in the Senate that provides the principal structural protection for the sovereignty of the several States. The

composition of the Senate was originally determined by the legislatures of the States, which would guarantee that their interests could not be ignored by Congress. The Framers also directed that the House be composed of Representatives selected by voters in the several States, the consequence of which is that "the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."

Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant. The persuasiveness of any justification for overcoming legislative inertia and taking national action, either creating new federal obligations or providing for their enforcement, must necessarily be judged in reference to state interests, as expressed in existing state laws. The precise scope of federal laws, of course, can be shaped with nuanced attention to state interests. The Congress also has the authority to grant or withhold jurisdiction in lower federal courts. The burden of being haled into a federal forum for the enforcement of federal law, thus, can be expanded or contracted as Congress deems proper, which decision, like all other legislative acts, necessarily contemplates state interests. Thus, Congress can use its broad range of flexible legislative tools to approach the delicate issue of how to balance local and national interests in the most responsive and careful manner. It is quite evident, therefore, that the Framers did not view this Court as the ultimate guardian of the States' interest in protecting their own sovereignty from impairment by "burdensome" federal laws.

Federalism concerns do make it appropriate for Congress to speak clearly when it regulates state action. But when it does so, as it has in these cases, we can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account during the deliberative process leading to the enactment of the measure. Those burdens necessarily include the cost of defending against enforcement proceedings and paying whatever penalties might be incurred for violating the statute. In my judgment, the question whether those enforcement proceedings should be conducted exclusively by federal agencies, or may be brought by private parties as well, is a matter of policy for Congress to decide. In either event, once Congress has made its policy choice, the sovereignty concerns of the several States are satisfied, and the federal interest in evenhanded enforcement of federal law, explicitly endorsed in Article VI of the Constitution, does not countenance further limitations. There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States. The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.

The Eleventh Amendment simply does not support the Court's view. As has been stated before, the Amendment only places a textual limitation on the diversity jurisdiction of the federal courts. Because the Amendment is a part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" by an Act of Congress. Here, however, private petitioners did not invoke the federal courts' diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that arise under federal law. Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, which the Court treats as though it were a constitutional precept. It is nevertheless clear to me that if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal

courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. That is the essence of the Court's holding in *Pennsylvania* v. *Union Gas Co.* (1989).

I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for stare decisis, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. Stare decisis, furthermore, has less force in the area of constitutional law. And in this instance, it is but a hollow pretense for any State to seek refuge in stare decisis' protection of reliance interests. It cannot be credibly maintained that a State's ordering of its affairs with respect to potential liability under federal law requires adherence to *Seminole Tribe,* as that decision leaves open a State's liability upon enforcement of federal law by federal agencies. . . . Further, *Seminole Tribe* is a case that will unquestionably have serious ramifications in future cases; indeed, it has already had such an effect, as in the Court's decision today and in the equally misguided opinion of *Alden* v. *Maine.* Further still, the Seminole Tribe decision unnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress' § 5 authority. Finally, by its own repeated overruling of earlier precedent, the majority has itself discounted the importance of stare decisis in this area of the law. Th[is] kind of judicial activism . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises. . . .

[Justice Stevens concurred with the majority's conclusion that Congress intended to subject states to suits by private parties under the ADEA.—ED.]

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, concurring in part and dissenting in part . . . [omitted].