

4-1-2000

Caught in a Trap: The Romantic Reading of the Eleventh Amendment

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Recommended Citation

John R. Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 Buff. L. Rev. 411 (2000).

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Caught in a Trap: The Romantic Reading of the Eleventh Amendment

JOHN RANDOLPH PRINCE†

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"We're caught in a trap; I can't walk out
because I love you too much, baby."¹

INTRODUCTION

In three decisions announced the same day at the end of the 1998-99 term, the United States Supreme Court completed a remarkable transformation in the balance of power between states and the rights of individuals.² More specifically, each of the decisions further limited the already truncated power of federal law to protect individuals against states. The court, one suspects, would characterize the decisions as defining state and federal power, and the relative extent of their sovereignty. As will be seen below, however, these cases were not about states "rights" against overbearing federal power but, rather, about the power people have to protect themselves against an overbearing state. In each of these decisions, the Court shows that it is caught in the trap of ignoring constitutional text and refusing to acknowledge the effects of its decisions on individual rights, all because of its romance with the abstraction of state sovereignty.³

1. MARK JAMES, *SUSPICIOUS MINDS* (Press Music, Inc. 1969) (sung by Elvis Presley).

2. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Patent Act)*, 527 U.S. 627 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Lanham Act)*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999).

3. This Article does not mean to suggest that the federal government always

In the first decision, the Court held that even when Congress purports to be enforcing the Fourteenth Amendment, it cannot abrogate state immunity from suit in a federal court without Congress first proving such abrogation was needed to enforce the Fourteenth Amendment.⁴ In the second decision, the Court held that there can be no constructive waiver of state immunity.⁵ In the last decision, it held that state sovereign immunity need not be based on the Eleventh Amendment at all, and states cannot be forced to hear claims against themselves even in their own home courts.⁶ All three of these decisions build on a series of other recent Eleventh Amendment cases that arose out of disputes between tribes and states, all of which barred the tribes from adjudicating their intergovernmental disputes with the surrounding states.⁷

It is apparent from the Court's Eleventh Amendment decisions of the last decade that the Court is engaged in writing a romance with the Eleventh Amendment as its subject and an idealized state as its object. Like most romantic literature, it exalts an idealized version of history and values feeling over logic. Because of this romance, state power is ascendant. Federal power to protect the rights of individuals and to create a uniform set of expectations about the nature of those rights is fragmenting. That means that the power of individuals to protect their rights and to hold governments accountable also has begun to fragment. The rule of law in general is weakened. Indeed, we are caught in not one but two traps, all because of the Court's infatuation with state sovereignty. It is time, now, not only to recognize the nature of the traps we are in but to ask what is the source of that infatuation.

The first trap in which all the rest of us are caught is the decrease not only of federal power but of individual

acts in the best interest of private persons, nor that the states always fail to do so, nor that private persons do not need protection against federal power. All the author intends to suggest is that we, the people, need all the protection we can get, and as the true source of all "sovereignty," (to the extent that concept has any legitimate use) we need to keep other claims of sovereignty from interfering with such protection.

4. See *College Sav. Bank* (Patent Act), 527 U.S. 627.

5. See *College Sav. Bank* (Lanham Act), 527 U.S. 666.

6. See *Alden*, 527 U.S. at 706.

7. See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

rights. Earlier Eleventh Amendment decisions from the past few years already have brought severe blows to the First Nations trying to assert their rights against the often-hostile surrounding states (an almost inevitable hostility predicated on natural jostling for power among contiguous political entities). Now, the expectations of persons to certain economic protections—protection for their intellectual property, protection as employees against an overbearing employer—are no longer valid as against states, despite these states' increasing participation in the economic life of the nation. This lack of protection, and a concomitant lack of federal power to extend such protection, weakens the scope and uniformity of the privilege and immunities of citizenship in the United States of America.

The second trap in which the Court is now caught is its use of a style of Constitutional interpretation antithetical to its own announced heuristic principles. In interpreting the Eleventh Amendment while explicitly disavowing its text, the Court has adopted an atextual style of interpretation unanchored by anything in the words of the Constitution itself. The Court's interpretive choices are limited only by its own ideological choices.

It is now time to assess the damage the Court's obsession with state sovereignty, as opposed to popular sovereignty, has done to our body politic. That damage occurs in both of the two areas identified above—first, in the weakening of the uniform rule of law and the loss of security in that rule of law for individual citizens, and second, in the introduction of a dangerously unanchored approach to interpretation of our nation's supreme law, the Constitution. Finally, it is time to pause to explore why the Court is so enamored of states' rights as to be willing to inflict such damage on us all.

I. THE GRADUAL ABANDONMENT OF THE TEXT

Each of the three decisions announced on June 23, 1999, expanded state sovereign immunity, each in its own different way. The first case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁸ concerned whether a private litigant may bring a patent infringement suit against a state. Chief Justice Rehnquist's

8. 527 U.S. at 627 (Patent Act).

majority opinion acknowledged that patents are property to be protected by due process, and further acknowledged that Congress had the power to enact legislation to enforce the Fourteenth Amendment's guarantees of due process. He also acknowledged that legislation enacted to enforce the Fourteenth Amendment could, in the appropriate situation, abrogate the Eleventh Amendment's grant to states of immunity from suit.⁹ He acknowledged that Congress did intend to abrogate that immunity in the Patent Remedy Act.¹⁰ Yet the Court held that act invalid as applied to states, because Congress failed to meet its burden of proof that the legislation was actually needed to remedy a problem, here the problem of states infringing patents and then denying patent holders due process. Only if Congress marshaled sufficient evidence that states were not allowing suits against themselves in their courts could Congress abrogate state immunity in the federal courts.¹¹

In the companion case, also encaptioned *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹² the same plaintiff brought unfair competition claims under the Lanham Act against the same state. In the Court's opinion, Justice Scalia held not only that the state could not be held to have waived its immunity from suit by engaging in commercial activity but reached further to repudiate the constructive waiver doctrine altogether. In so doing, he cast doubt on several decades of the Court's Eleventh Amendment jurisprudence. Yet in his opinion he held himself out to be the champion of stare decisis.

Finally, in *Alden v. Maine*, Justice Kennedy's opinion jettisoned the Eleventh Amendment altogether as the source for state sovereign immunity or as a basis for discovering the limitations of that doctrine.¹³ In *Alden*, the Court held that one cannot bring a federal claim against a state in the state's own courts either. It now appears that unless Congress can satisfy a skeptical Court that it enacted legislation that was sincerely and carefully crafted to enforce the Fourteenth Amendment, no person can ever sue a state anywhere against the state's will. That result is a far cry

9. *See id.* at 637.

10. *See id.* at 635.

11. *See id.* at 643.

12. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666 (1999).

13. *Alden v. Maine*, 527 U.S. 706 (1999).

from the results mandated by any reading of the Eleventh Amendment.

The unanchored reading of the Eleventh Amendment these decisions exhibit arises out of a series of earlier choices the Court made. The amendment's text is open to two readings without doing violence to the words themselves. One, which I have elsewhere called the "contextual" reading, reads the amendment in the context of Article III (which it was, after all, intended to amend) in such a way as to bar only suits against states founded on diversity jurisdiction. The other reading, the "acontextual" reading, reads the amendment to bar all suits against states brought by citizens of other states; it is this latter reading the Court chose. Having chosen that reading, the Court found its literal application to be odd; the Court could not accept barring suits by citizen of other states, but not suits by a state's own citizens. Rather than repudiate the acontextual reading, however, the Court instead began the process, now apparently complete, that repudiated any attempt to read the text at all. Instead, the Court has chosen a romantic reading of the amendment that depends not on the written Constitution but on the unwritten "spirit of the age" of the founding era.

A. *Reading the Eleventh Amendment*

How did we get to this point, where states are unaccountable for even intentional violation of federally protected rights and intentional interference with federal law? Surely the Eleventh Amendment itself does not require such a result. Justice Kennedy, however, in one of the Court's recent opinions expanding state immunity at the expense of weaker parties, pointed out quite clearly:

The Court's recognition of sovereign immunity has *not been limited* to the suits described in *the text* of the Eleventh Amendment. To respect the broader concept of immunity, *implicit in the Constitution*, which we have regarded the Eleventh Amendment as evidencing and exemplifying, we have extended a State's protection from suit to suits brought by the State's own citizens. Furthermore, the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not

the suit is based on diversity jurisdiction.¹⁴

That is to say, the Eleventh Amendment has been replaced with a much broader and largely undefined "concept," which the text only evidences or exemplifies. As Justice Stevens pointed out a decade ago, "this Court's decisions make clear that much of our state immunity doctrine has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment."¹⁵ Current state immunity doctrine also has absolutely nothing to do with simplicity or logical coherence.

The seemingly limitless expansion of the Eleventh Amendment and the increasing complexity of its doctrine can be traced to a choice between two alternative readings of that amendment. One, the acontextual, appears to be the Court's chosen reading, but another textually faithful alternative is to read the amendment in context with the entirety of the Constitution, especially the parts of Article III the Eleventh Amendment in fact amended. Had the Court relied on this contextual reading, much of the complexity and all of the unfairness of current Eleventh Amendment doctrine could have been avoided.

The starting point for any reading of the Eleventh Amendment is, of course, the text itself. The amendment in its entirety reads, "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."¹⁶

The amendment's language is straightforward and concrete, with none of the grand abstractions found in phrases like "due process of law" or "cruel and unusual punishment."¹⁷ However, the text, though specific, is also equivocal, capable of two different readings. The most obvious reading is the acontextual reading, and it yields anomalous, even absurd results. The Court's choice to rely on that obvious reading has led it into the traps mentioned above. In fact, that choice has led the Court to abandon the text alto-

14. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997) (emphasis added).

15. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25 (1980) (Stevens, J., concurring), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

16. U.S. CONST. amend. XI.

17. See U.S. CONST. amends. V, XIV, & VIII.

gether.

1. *The acontextual reading.* The acontextual reading takes the language of the amendment seriously, but it does so without regard for how it fits with the rest of the Constitution, especially Article III. That reading begins with the observation that the amendment, first, is a limit on the federal judiciary's power to hear and decide certain kinds of cases. It prohibits federal judges from deciding cases in which the defendant is a state, and the plaintiff is a citizen of another state or another nation altogether. The language appears to be simple.¹⁸ If the state of New Jersey is the plaintiff, the amendment is irrelevant. If the state of New Jersey is the defendant, one must look at the identity of the plaintiff. If the plaintiff is a citizen of New Jersey, is another state or is another sovereign that is part of the United States,¹⁹ is the United States, or is a foreign state, then the amendment does not apply. Only if the plaintiff is, for example, from Pennsylvania, does the amendment apply. Or at least that is what the language appears to say, and say rather unequivocally.

That reading seems to create an odd result, however. But for the amendment, a citizen of Pennsylvania might have two jurisdictional bases for a suit against the state of New Jersey—what we normally call “diversity of citizenship”²⁰ and also what we normally call a “federal question.” If the Eleventh Amendment bars any suit by that citizen of Pennsylvania against the state of New Jersey, no matter the jurisdictional basis, then the federal question suit is barred as well as that founded on diverse citizenship. On the other hand, while a citizen of New Jersey could not sue her own state because of diverse citizenship, she would remain free to sue her state if it violated federal law. Thus the strange and seemingly unjust result would be that if New Jersey violates federal law and hurts two persons, one a citizen of New Jersey and one of Pennsylvania, only the former and not the latter could bring suit in federal court.

18. It is, however, ambiguous—thus the two readings, the “acontextual” and the “contextual.”

19. For example, a “domestic dependent nation,” such as a federally recognized Native American tribe, one of the First Nations.

20. As noted below, there actually is no single jurisdictional basis one could call “diversity of citizenship”—there are several such bases, and that fact is a key to explaining how to interpret the Eleventh Amendment.

The Court, having chosen this reading, could not accept it. Justice Scalia expressed the orthodox view of the results of the acontextual reading when he wrote:

For there is no plausible reason why one would wish to protect a State from being sued in federal court for violation of federal law . . . when the plaintiff is a citizen of another State or country, but to permit a State to be sued there when the plaintiff is a citizen of the State itself. Thus, [there must [be] some other constitutional principle beyond the immediate text of the Eleventh Amendment.²¹

In other words, confronted with these implausible results, the Court has felt it necessary to ignore entirely what is undoubtedly clear in the language, its specific list of what particular arrangement of parties is forbidden.

There is another reading available, however, which Justice Scalia recognized when he wrote:

If this text were intended as a comprehensive description of state sovereign immunity in federal courts—that is, if there were no state sovereign immunity beyond its precise terms—then it would unquestionably be most reasonable to interpret it as providing immunity only²² when the sole basis of federal jurisdiction that it describes

This other reading is the contextual reading. If that reading were chosen, the result would be greater congruence with the Constitutional scheme and results that seem neither absurd nor inequitable. Moreover, the Court would not have begun to chase down the unwritten principles behind the text which has led to the Court's current romance with state sovereignty, power and "rights."

2. *The contextual reading.* The Eleventh Amendment's language refers back to Article III, which establishes the federal judiciary and its jurisdiction. That article explains that "[t]he judicial Power shall extend to all Cases, in Law and Equity . . . in several select instances." Thus, the first

21. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (Scalia, J., dissenting), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Although Justice Scalia wrote in dissent, his view not only was the orthodox one but the result he sought has not come about; as described below, the Court overruled *Union Gas* in *Seminole Tribe of Fla. v. Florida*. *See id.*

22. *Id.*

several words of the Eleventh Amendment, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity . . ." are a direct and nearly verbatim reference to the beginning of Article III. Moreover, the language, "shall not be construed to extend," bespeaks a desire to avoid wholesale disruption of the Constitutional scheme, a cautious respect for the existing text that appears wholly lacking in current Eleventh Amendment jurisprudence.

Since the first words of the article and the amendment mirror each other, it might prove fruitful to compare the rest of the language in both to see if the latter continues to mirror the former. Therefore, a closer look at the article is in order. There are ten separate phrases in that section, each setting forth a different basis for the exercise of the federal judicial power. The relevant part of Article III reads as follows, with the addition of some numbering to set the phrases apart:

The judicial Power shall extend to all Cases, in Law and Equity, [1] arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—[2] to all Cases affecting Ambassadors, other public Ministers and Consuls;—[3] to all Cases of admiralty and maritime Jurisdiction;—[4] to Controversies to which the United States shall be a Party;—[5] to Controversies between two or more States;—[6] between a State and Citizens of another State;—[7] between Citizens of different States;—[8] between Citizens of the same State claiming Lands under Grants of different States, [9] and between a State, or the Citizens thereof, and foreign States, [10][or foreign Citizens or Subjects.²³

Of the items in this list, two—[1] "arising under" and [3] "all cases of admiralty"—are based on the source of law. At least for the first, what we usually call "federal question" jurisdiction, the drafters surely anticipated that states might be parties, but they were neither specifically included nor excluded. That most plausibly can be explained as because it is irrelevant who the parties are in such cases. Federal question jurisdiction is not based on who the parties are, but something more important, the guarantee of the rule of law.

The remainder of the list is too easily glossed over with

23. U.S. CONST. art. III, § 2, cl. 1 (bracketed material provided by author).

the phrase “diversity of citizenship.” In that list of bases for jurisdiction based not on the source of law but the litigants’ identities, three explicitly arise because a state is a party, and one other normally would be found to include suits in which states were parties, that being [4], suits in which the United States is a party. There has never been a doubt that the States could be sued on this basis.

A structural comparison of the Eleventh Amendment’s language with the rest of the Constitution shows that of the five situations in which federal power had been granted to decide cases involving states, only two were made subject to the Eleventh Amendment’s interpretive rule which allows states to be parties, but not if they are the defendant. Article III reads as follows, deleting all but the two relevant bases of jurisdiction, the sixth and ninth in the list above: (a) “The judicial Power shall extend to all Cases, in Law and Equity . . .” (b) “between a State and Citizens of another State . . .” (c) “and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”²⁴

The Eleventh Amendment adds a vociferous BUT to that grant of power, saying, “[Yes, but] (a) [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity,” [thus mirroring the initial clause of Article III] (b) “commenced or prosecuted against one of the United States by Citizens of another State,” [clarifying that the judicial power for suits between states and citizens of other states was not meant to include suits where the states were defendants, but rather only those cases the state brings] (c) “or by Citizens or Subjects of any Foreign State.” [clarifying that the judicial power established in the ninth item listed in Article III, section 2, also applies only to suits the states initiate].²⁵

Remember, an “amendment” is a change. As the previous ten amendments were really additions to the text in the form of the Bill of Rights, the Eleventh Amendment was the first amendment to be an actual change to the Constitution’s previously drafted provisions. It also was the first to adopt the convention of retaining the original text but adding to it contradictory instructions. This drafting convention should not require us to ignore that the Eleventh Amendment was a change to Article III and can be read back into

24. *Id.*

25. U.S. CONST. amend. XI, *combined with* art. III, § 2, cl.1.

that text. Had the Eleventh Amendment been incorporated directly into the text of Article III to *amend* it, rather than being placed at back of the text of the Constitution, Article III would have read as follows:

The judicial Power shall extend to all Cases, in Law and Equity, [1] arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—[2] to all Cases affecting Ambassadors, other public Ministers and Consuls;—[3] to all Cases of admiralty and maritime Jurisdiction;—[4] to Controversies to which the United States shall be a Party;—[5] to Controversies between two or more States;—[6] between a State and Citizens of another State; *but it shall not be construed to extend to any suit commenced or prosecuted against one of the United States by Citizens of another State*,—[7] between Citizens of different States;—[8] between Citizens of the same State claiming Lands under Grants of different States, [9] and between a State, or the Citizens thereof, and foreign States, [10 or foreign] Citizens or Subjects, *but it shall not be construed to extend to any suit commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State.*²⁶

Therefore, the amendment read in context only amends two of the ten bases of jurisdiction in Article III. If a suit against a state were brought solely on the basis that the plaintiff was a citizen of another state, the federal courts will not hear it. On the other hand, if there is some other basis for the suit, as for example that it arises under a federal law, the federal courts could entertain the suit. That suit would not be dependent on the identity of the parties, so an amendment limiting jurisdiction over cases based on the identity of the parties would not apply.

This reading certainly comports with the history of the Eleventh Amendment that cannot be disputed, which is that it was adopted to overrule *Chisolm v. Georgia*.²⁷ That case was an action by a citizen of another state against Georgia to get the state to pay its debts on war bonds. The action sounded in assumpsit and was based solely on state common law questions of contract and debt. There was no “federal question,” except the pressing question of whether the federal government would force its financially weak-

26. U.S. CONST. art. III, § 2, cl. 1 (bracketed numbering of the bases of jurisdiction and, in italics, the language of the Eleventh Amendment (and the additional word “but”) supplied by author).

27. 2 U.S. (2 Dall.) 419 (1793).

ened constituent states to pay their debts more quickly than the state governments themselves determined they could pay. The paradigm case the Eleventh Amendment intended to “correct” raised the specter of federal execution on state property over garden-variety actions founded on the state’s own laws. No state in those financially troubled times in our early history allowed such suits against themselves in their own courts.

The history and the text, as well as the results it would engender, therefore render the contextual reading “unquestionably . . . most reasonable.”²⁸ Yet the Court (including the justice who acknowledged the contextual reading as most reasonable) has rejected this reading. As the Court cannot abide the results of the acontextual reading either, it ought not to be a surprise that the Court has chosen a third alternative—the romantic reading.

3. *The romantic reading.* The Court, as we shall see, made a choice over a century ago to read the Eleventh Amendment acontextually.²⁹ Although the Court occasionally recognizes the contextual reading, and in fact at times appears to accept it,³⁰ all of its decisions in the last century in fact proceed from the choice of the acontextual reading. Having freely chosen that reading, the Court has found that reading’s implications to be absurd, and therefore the Court has rejected explicitly the text of the amendment as a guide to the amendment’s meaning.³¹ In a sense, then, rather than choose either the contextual or acontextual reading the Court has chosen not to read the amendment at all. The Court does not simply reject the text and ignore the Eleventh Amendment, however, as it has with other parts of the Constitution.³² Rather, it struggles to

28. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31(1989) (Scalia, J., dissenting), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

29. *See infra* notes 61-67 and accompanying text (discussing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

30. *See infra* notes 179-215 and accompanying text (discussing *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd* (Patent Act), 527 U.S. 627 (1999)).

31. *See supra* notes 11 & 20.

32. *See, e.g.*, U.S. CONST. art. IV, § 4 (republican form of government guarantee); U.S. CONST amend. IX; U.S. CONST amend XIV, § 1 (Privileges and Immunities Clause).

find the spirit that the text “merely exemplifies.”³³ That project suggests that the Court is engaged in what could usefully be called the “romantic reading” of the Eleventh Amendment.

To understand why this “reading” could be called “romantic,” it will be useful to remind ourselves of “Romanticism” and of the Hegelian systemization that united and developed many of the Romantic themes (while rejecting others). Calling the Court’s reading “romantic” and suggesting, as this article does, that its reading serves a “Hegelian” object is not to say that the Court is consistently Romantic or Hegelian, or even that it is consciously Romantic or Hegelian. Rather, the Court has adopted certain attitudes and methodologies that can be understood as reflecting Romanticism, and specifically has a view of the state (in the sense of one of the fifty members of one class of government in our multi-layered system of co-ordinate governments) that is very like the Hegelian view of the state (in the sense of “[t]he state [as] the actuality of the ethical Idea”).³⁴

One of the characteristics of Romanticism was its emphasis on “feeling” rather than the rationalism of the Enlightenment.³⁵ (Of course, by and large the Constitution was produced by men whose education was in that very Enlightenment tradition.) Moreover, often “Romanticism” had a strong attraction to bygone eras which it “romanticized”³⁶—a process of simplification and idealization that is familiar to anyone who has ever seen, for example, an old Hollywood movie about the gunfight at the OK Corral. As exemplified by the work of Johann Gottfried von Herder, Romantics tended to see each historical epoch as reflecting its own in-

33. See, e.g., *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997).

34. GEORG WILHELM FRIERICH HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford Univ. Press 1942), excerpted in WILLIAM EBENSTEIN, *GREAT POLITICAL THINKERS* 617 (Dryden Press 1969).

35. JOHN BURT HALSTED, *ROMANTICISM* 13 (1969) (“In a central and constantly repeated figure that dominates Romanticism’s criticisms of its predecessors, the rationalism of the *philosophes* was characterized as cold, like the mechanical universe they believed in, as unfeeling, without the warmth the Romanticists admired.”)

36. *Id.* at 34 (quoting a Romantic historian, Mayerhoff: “The historian, not unlike the artist, must recreate a character, the sense of a meeting, the atmosphere on the eve of a battle, the spirit of [the period studied]”).

trinsic truths, and each nation its own "soul."³⁷ The "soul" of an era and a nation cannot be understood solely by the intellect. It requires an act of feeling and creative imagination.³⁸

One strain of Romanticism especially emphasized the nation's soul, seeing the "people" of a "nation" as an organic unity.³⁹ Georg Wilhelm Friedrich Hegel, who was a professor of philosophy at Heidelberg and Berlin during the glory days of Romanticism,⁴⁰ fully accepted the notion that "the state is an organism . . ."⁴¹ Of course, Hegel's immense influence on Euro-American philosophy cannot be reduced to merely identifying him as a Romantic. Indeed, in very many ways he rejected Romanticism, while in others he brought it to systematic fruition. While the entire breadth of his work need be neither discussed nor criticized, two aspects do need to be mentioned. First, he was an "historicist," with history reflecting a progressive dialectic.⁴² Thus, a Hegelian could speak of the "spirit of the age." Second, Hegel also emphasized the organic unity of the people, but only through the unity of the state.⁴³ It is this aspect that is most important to understanding the Court's Eleventh Amendment project.

For Hegel (though not necessarily for many others iden-

37. See ISALAH BERLIN, *VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS* 181-82 (1976) (noting that Herder often used terms such as "Nationalgeist," "Geist des Volkes," "Seele des Volkes," "Geist der Nation," and "Geiss des Volkes").

38. See HALSTED, *supra* note 35, at 13 ("The heart was held to be the source of knowledge, the location of innate ideas. Intuition was equated with that which men feel strongly . . . One power [existed that] was distinct and superior to reason, namely imagination.").

39. See *id.* at 25 ("[T]he [Romantic view] of the state and of the nation is organic. The state is to be understood genetically as a product of the combined wisdom of earlier generations . . .").

40. See EDWARD CAIRD, *HEGEL* 77 (1968).

41. HEGEL, *PHILOSOPHY OF RIGHT*, excerpted in *GREAT POLITICAL THINKERS*, *supra* note 34, at 616.

42. See, e.g., GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 19 (J. Sibree trans., 1956) ("The History of the world is none other than the progress of the consciousness of Freedom . . ."); *id.* at 23 ("We have spoken of the Idea of Freedom as the nature of Spirit, and the absolute goal of History.").

43. See, e.g., *id.* at 39 ("In the history of the World, only those peoples can come under our notice which form a state. For it must be understood that . . . all the worth which the human being possesses—all spiritual reality, he possesses only through the State. . . . The State is the Divine Idea as it exists on Earth.").

tified as part of the larger Romantic movement), this "organic unity" had a greater reality than the individual. Hegel emphasized that the state is more than any individual citizen. In fact, it is more than the sum of its individual citizens, because a person is born into and created by the social and historical background of the state. For Hegel, "Since the state is mind objectified, it is only as one of its members that the individual himself has objectivity, genuine individuality, and an ethical life."⁴⁴ As he further put it:

The state is absolutely rational inasmuch as it is the actuality of the substantial will which it possesses in the particular self-consciousness once that consciousness has been raised to consciousness of its universality. This substantial unity is an absolute unmoved end in itself, in which freedom comes into its supreme right. *On the other hand this final end has supreme right against the individual, whose supreme duty is to be a member of the state.*⁴⁵

What, then, does all this have to do with the Eleventh Amendment? As noted above, the Court's current reading of the Eleventh Amendment begins with its observation that:

To respect the broader concept of immunity, *implicit in the Constitution*, which we have regarded the Eleventh Amendment as evidencing and exemplifying, we have extended a State's protection from suit to suits brought by the State's own citizens. Furthermore, the *dignity and respect* afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction.⁴⁶

Yet this principle of which the text of the Eleventh Amendment offers only one, presumably insufficient, example is never itself articulated in any of the Court's opinions. That is, the exact criteria for application of the principle of which the Court speaks are never laid out. This article postulates that is because it is not an intellectual principle but the Court's impression of the "spirit of the age" in which the Constitution and the Eleventh Amendment were written. Therefore, one key aspect of the romantic reading is that it relies not on carefully articulated principles but rather on an emotional and imaginative response to the text. The

44. EBENSTEIN, *supra* note 34, at 618.

45. *Id.* (emphasis added).

46. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997) (emphasis added).

words of the text act only as a catalyst enabling our current imaginations to reach into the imagination of another, bygone era. The Court is romantic in its emphasis on a greater knowledge arising from this creative imagination than from the mere intellect alone.

Furthermore, the Court's emphasis on that bygone era, the time of the "founders," reflects the historicism of the Romantics. As described more fully below, the Court's historicism is *not* accompanied by rigorous historical research and analysis. Rather, it is the historicism that romanticizes the past. The history the Court explores is not the complex interaction of social, political, geographical and economic factors that real historians study. Rather, it is the Romantic construct the Court calls the "founders' understanding."⁴⁷ The "founders' understanding" is not something any amount of data on the thoughts and beliefs of any number of particular persons could discover. The Court never wastes time identifying who counts as a founder because no one really has to be a founder—that title reflects the Court's version of the "nation's soul."

To sum up the romantic reading thus far, we see that the text of the Eleventh Amendment is irrelevant except as a catalyst to sympathetic imagination, enabling the Court to enter into the "founders' understanding." That "founders' understanding" is the soul of the nation of a different epoch (an epoch whose ethos the Court claims binds us, and which, one suspects, the Court finds superior to the ethos of our time). What, though, is the object of this "understanding"? Here, the Court's romantic reading serves its Hegelian purpose. The object of the "founders' understanding" is the "State" (the Court always capitalizes the word). The state has "rights"⁴⁸ in this understanding that are on a par with those of any other person, or in fact superior to those of any other person. The state is the original repository of all sovereignty and the source of any sovereignty that now resides in the federal government. The Court resolves conflicting notions of popular sovereignty through a romantic conception of the State as the paradigm of political accountabil-

47. *Alden v. Maine*, 527 U.S. 706 (1999).

48. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666 (1999); see also *infra* notes 241-51 and accompanying text.

ity.⁴⁹ Certain portions of recent Court opinions read as if there were some near-mystical connection between state government and the true "will of the people." The romantic reading of the Eleventh Amendment ignores the text in order to serve the broader and grander "founders' understanding" of a State as a sovereign person, the full expression of which might indeed, reflecting Hegel's thought, be the true and full expression of freedom.⁵⁰

One warning, though. Hegel was not a democrat.⁵¹ Neither is the Court's romantic reading of the Eleventh Amendment one that promotes the values of democracy.

B. *The Parallel Eleventh Amendment: Leaving the Text Behind*

As described above,⁵² *Chisolm v. Georgia* arose out of a garden-variety breach of contract case, grounded in state law of assumpsit. It only came to the federal courts through diversity of citizenship. After the Eleventh Amendment, it was and remains indisputable that the only kind of cases that can be brought under the quoted basis for federal jurisdiction are cases brought by the state against citizens of other states. Until well after the Civil War, the federal courts had no reason to further expand the meaning and doctrine of the Eleventh Amendment.⁵³ After the Civil War

49. See *Alden*, 527 U.S. 706.

50. EBENSTEIN, *supra* note 34, at 616 ("The state is the actuality of concrete freedom.").

51. See *id.* at 620 ("[T]he sovereignty of the people is one of the confused notions based on the wild idea of the 'people.' Taken without its monarch and the articulation of the whole which is the indispensable and direct concomitant of monarchy, the people is a formless mass and no longer a *state*." (emphasis added)).

52. See *supra* note 27 and accompanying text.

53. That is, except for *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1 (1831), which held that federal courts could not hear disputes between the Cherokee Nation and the state of Georgia. Undoubtedly this decision could be seen as an expansion of the scope of state immunity, but it seems to have entered history more as an example of the peculiar disabilities of the First Nations because of their status as "domestic dependent nations." In fact, in that case the Cherokee Nation was seeking an injunction against not only the state but named officers to keep them from enforcing state law inside the Nation's boundaries. That suit, were it brought today, ought to fall under the aegis of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and be cognizable in federal court. On the other hand, the Court's recent decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997), shows that the *Ex parte Young* doctrine often seems to

and the Civil War Amendments⁵⁴ led to a vast expansion of federal power, a couple of seminal decisions expanded the scope of the Eleventh Amendment as well, perhaps as part of a conservative backlash against the new, post-war kind of federalism.⁵⁵ After a brief period of expansion, however, the Court spent most of the twentieth century crafting exceptions to state sovereign immunity, in order to keep the expanded Eleventh Amendment in check. In the last decade of the twentieth century, however, the Court has returned to expanding the role of state immunity. In so doing, it has overturned most of its own careful work over the last several decades to ensure the rule of law is not frustrated by an unwarranted reading of the Eleventh Amendment.

1. *The first wave of expansion: the debtor state cases.*

The Eleventh Amendment began to expand in the latter part of the nineteenth century. It is probably significant that the line of cases from *Chisolm*,⁵⁶ the decision which prompted the Eleventh Amendment, to *Hans*,⁵⁷ the first expansion of that amendment's immunity, to *Principality of Monaco v. Mississippi*,⁵⁸ the last great expansion of that immunity before the contemporary period, all concerned states reneging on a debt. In each decision, the Court avoided what it probably felt was an inappropriate and unseemly use federal judicial power directly against state treasuries. A federal money judgment implies federal execution. Federal execution raises the specter of something like a United States Marshal's sale of state property at public auction, or attachment of state bank accounts. The Court might have done well to address that problem directly, rather than so twist the Eleventh Amendment as to make it devoid of useful form.

The Court managed nearly a century under the Eleventh Amendment before confronting the language of that amendment in a significant way. In the latter part of the

be useless to tribes in intergovernmental disputes with states. See *infra* notes 153-85 and accompanying text.

54. U.S. CONST. amends. XIII, XIV, & XV.

55. See discussion of *Hans v. Louisiana*, 134 U.S. 1 (1890) and *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1931), *infra* notes 57-79 and accompanying text.

56. 2 U.S. (2 Dall.) 419 (1793); see *infra* note 71.

57. 134 U.S. 1 (1890).

58. 292 U.S. 313 (1934).

nineteenth century, however, federal power expanded in a number of ways. Not only were the critical Civil War Amendments passed, along with very far-reaching statutes to enforce those amendments,⁵⁹ but so were federal statutes significantly changing the nature of adjudicating federal claims. It was not until 1875 that the lower federal courts were authorized to hear federal question suits.⁶⁰ From the adoption of the Constitution until 1875 such suits were left to state courts with appeal to the United States Supreme Court. In deciding what to do with federal question suits raised against a state by its own citizens, the Court began to craft an entirely new, "parallel" Eleventh Amendment. In creating the parallel amendment, the Court began to view the text of the Eleventh Amendment not as a specific set of exceptions to the specific list of granted judicial power found in Article III, but as a mere example of a broader, unwritten, but binding, principle of state immunity.

The expansion began in *Hans v. State of Louisiana*.⁶¹ In *Hans*, the plaintiff held bonds which the Reconstruction government of Louisiana issued in order to finance public improvements and stimulate industrial development. The post-Reconstruction government of Louisiana was less friendly to public improvements and industrial development and strongly averse to taxation to pay the bonds. Therefore, it repudiated its bond obligations and did not pay its debts. The state did so by adoption of a new constitution in 1879, which specifically repudiated the bonds.⁶² Hans sued the state in federal court, claiming that the state's issuance of bonds was a contract with him, and its repudiation of that debt was an impairment of contract. He therefore claimed a violation of the Contracts Clause.⁶³

Hans expanded the Eleventh Amendment in two ways, the first necessarily entailing the other. It held that, despite the specific language of the amendment prohibiting only a suit against a state by a citizen of another state or nation, it also prohibits suits against a state by its own citizens. Of course, that latter position would have been very easy to write into the text of the amendment if it is what the

59. See, e.g., 42 U.S.C. § 1981 (1994); 42 U.S.C. § 1983 (1999).

60. See 18 Stat. 470.

61. 134 U.S. 1 (1890).

62. See *id.* at 2-3.

63. See U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts").

amendment's authors wanted. Rather than what it now says, the amendment could have said, "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 the United States* or by Citizens or Subjects of any Foreign State."⁶⁴

Despite the obvious variance from the text, however, the Court felt obliged to rule as it did because it accepted the acontextual reading. That is, the Court believed the Eleventh Amendment applies to suits arising under the "federal question" jurisdiction of the courts rather than simply amending the language of the grants of diversity of citizenship jurisdiction found in Article III. The Court's reluctance to hold a state liable for its political decisions to renege on its debts, and reluctance to threaten a state with execution by federal marshals, was understandable and perhaps even necessary. The problem, however, was one it brought on itself. It is far from clear that the Contract Clause was ever intended to apply to governmental debts, and what is more important, the Court never needed to have so held in the first place.⁶⁵ Rather than ignore the plain text of the amendment to bar the suit, perhaps the Court could have limited the scope of the Contracts Clause. Alternatively, the Court could have noted that Hans' complaint itself was a simple claim for payment of a debt, an assumpsit claim, and the nature of the debt was determined by Louisiana's law of contracts. Only Louisiana's anticipated defense, that it had repudiated the contract by state constitution, raised the federal question as part of the response to that defense. Federal questions are normally held to be properly pleaded only when they are part of the plaintiff's claim in chief; a case does not become subject to federal jurisdiction if the federal question arises from a defense.⁶⁶ As the Court recognized seventy-four years later, it was a

64. U.S. CONST. amend. XI (italicized language in language in text replacing the language "Citizens of another State," which is found in the original).

65. See LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 124-36 (1988).

66. See, e.g., *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (stating that a federal question arises only when it "necessarily appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose") (citing *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914); *Louisville & Nashville Ry. v. Mottley*, 211 U.S. 149 (1908)).

"commonplace suit[] in which the federal question did not itself give rise to the alleged cause of action against the State but merely lurked in the background."⁶⁷

After *Hans*, but for one exception, the next century of Eleventh Amendment decisions concerned not the further expansion of the amendment but instead the crafting of exceptions and fictions intended to render states liable to the rule of law, despite the expanded meaning given to the amendment. That exception was *Principality of Monaco v. Mississippi*.⁶⁸ In 1933, certain persons gave the Principality of Monaco century-old bonds that the State of Mississippi had issued decades before the Civil War, and on which the State defaulted in the 1860s.⁶⁹ The purpose of the gift was to put the bonds in the hands of some entity that might be allowed to sue the State, since the Eleventh Amendment barred the donors. The Principality then asked leave to bring suit in the United States Supreme Court under that Court's original jurisdiction.⁷⁰ Like *Hans*, such a suit was not barred by the explicit terms of the Eleventh Amendment. Also like *Hans*, that case involved a debt which a state had made the political decision to repudiate. Unlike *Hans*, however, the basis of jurisdiction was diversity of citizenship, the one area the contextual reading of the Eleventh Amendment suggests is appropriate for state immunity. Therefore, *Principality of Monaco* is arguably more defensible in its overlooking of the text in order to effectuate the supposed underlying principles behind that text.

Interestingly, the expansion of *Principality of Monaco* was not against an entirely clean slate. One hundred years earlier, in *Cherokee Nation v. Georgia*,⁷¹ the Court appeared to assume that a foreign state *could* sue a state in federal court. *Cherokee Nation* concerned whether the Cherokee Nation could sue the state of Georgia for the latter's vigorous attempts to destroy the former's government and force its people out of their homes. Chief Justice Marshall held that Article III did not allow the suit:

67. *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 187 n.3 (1964), *overruled by Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

68. 292 U.S. 313 (1934).

69. *See id.* at 317-18. The great turmoil and dislocation resulting from the Civil War is an obvious possible explanation for the default.

70. *See id.*; U.S. CONST. art. III, § 2.

71. 30 U.S. (1 Pet.) 1 (1831).

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States *is not a foreign state*, in the sense of the constitution,⁷² and cannot maintain an action in the courts of the United States.

That is, the Cherokee Nation could not sue a state in federal court, *unlike* a foreign nation, which presumably could do so. The Court in *Principality of Monaco* rejected the assumption Chief Justice Marshall made in *Cherokee Nation*. Rather than looking to what the Eleventh Amendment to the Constitution meant, "The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State."⁷³

Such suits were not barred by the terms of the Eleventh Amendment, and Article III certainly mentions suits between states and foreign nations. Despite the text of the Constitution, however, the Court ruled against the *Principality of Monaco* and explained that:

Manifestly, we cannot rest with a mere literal application of the words of section 2 of article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." *The Federalist*, No. 81.⁷⁴

That is, the plan of the Constitution at the time of its adoption and ratification by those States who were surrendering their immunity. While that plan did presuppose surrender of immunity to the extent that States could sue each other (one of rare kinds of cases over which the Supreme Court has original jurisdiction),⁷⁵ the *Principality of Monaco*

72. *Id.* at 20 (emphasis added).

73. *Principality of Monaco*, 292 U.S. at 323.

74. *Id.* at 322 (internal footnote omitted).

75. See U.S. CONST. art. III, § 2, cl. 2 (stating that "[i]n all Cases . . . in which a State shall be a Party, the supreme Court shall have original jurisdiction").

Court held that the states have not surrendered their sovereign immunity against foreign states which are no part of the "constitutional plan." Therefore, a state is not subject "to suits prosecuted against one of the United States by a foreign state."⁷⁶ After that decision, the "parallel" amendment read, "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 the United States, by any Foreign State, or by the Citizens or Subjects of any Foreign State.*"⁷⁷

In fact, an even simpler version of the "parallel" amendment might be, "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 except for suits brought by another State or the United States."

The simplicity of phrasing in both alternatives illustrates something significant. If the drafters of the Eleventh Amendment had wanted to achieve the results the Court's version has achieved, they easily could have written the amendment that way. Drafting that sort of amendment would have required neither detailed, complex phrasing nor a great deal of imagination. The drafters did not choose to write these readily imaginable, simply worded alternatives that would have effectuated the sort of broad principle the Court now chooses to follow. We should respect the drafter's decision not to choose those simple, broad alternatives; the restraint in the language they actually chose must be given due respect.

All the cases that expanded the Eleventh Amendment (except *Cherokee Nation*, which might be viewed as not really about the Eleventh Amendment at all, but just another odd example of the United States discomfiture with the existence of aboriginal cultures that refused to disappear) concerned using federal courts to enforce debts against states. Each case sought, in effect, to tap into state treasuries to pay off contractual obligations, even though it is quite likely that those that held government bonds in the

76. *Cherokee Nation*, 30 U.S. at 52.

77. U.S. CONST. amend. XI. The italicized language includes all the new language replacing the actual language of the textual amendment. The italicized language sets forth the new additions after the *Principality of Monaco* decision.

era these bonds were issued were fully cognizant that shifting politics could lead to debt repudiation. As we shall soon see, the second wave of expansion that began in the last decade of the twentieth century went well beyond this core concern. This concern that it is bad to subject states to suit for their debts is, by the way, no longer significant. State debt obligations are normally enforceable against the states in their own courts, because states have waived immunity in light of the fact that financially prudent investors would never invest in lending money to states with no assurance of being repaid. On the other hand, the new expansion of the Eleventh Amendment is less concerned with the politically sensitive nature of debt repudiation and more concerned with some romantic view of states' rights, with a concomitantly cavalier view toward the rights of people.

2. *Softening the blow: the rise of the ameliorative doctrines.* The first wave of expansion in the Eleventh Amendment ended with *Principality of Monaco*. At least for most of the twentieth century, the Court's Eleventh Amendment decisions were not concerned with protecting states, but protecting private persons from the states, and giving those persons the right to seek redress against abusive state power. Therefore, the Court developed a set of ameliorative doctrines to provide some room for people to sue states for violations of federal law.

In response to the massive growth in the Eleventh Amendment's scope, especially in its expansion into federal question jurisdiction, certain ameliorative doctrines had to be developed to preserve the federal judicial power. The first is the doctrine that while states may not be sued, state officials may be, even for official acts, if the relief sought is prospective—injunctive rather than for damages. The second doctrine, or rather the second set of doctrines, are constructive waiver and abrogation, both of which depend on the notion that a state that enters a field in which Congress has power to regulate, does so at the risk of being regulated and made subject to private persons' suits.

a. *Ex parte Young*. The Court created the oldest and most well-established limitation on the Court's potentially boundless doctrine of state sovereign immunity in *Ex parte*

Young.⁷⁸ One way to describe the doctrine might be that it allows federal courts, despite the Eleventh Amendment, to issue injunctions against state officers in their official capacities—or at least sometimes federal courts may do so. The courts may do so by way of a fiction that holds that a state officer, when violating federal law (constitutional or statutory) must be acting *ultra vires*, and thus the injunction is not really against the state.⁷⁹ The Court has recognized that this is a fiction.⁸⁰ After all, even when a state official as the nominal defendant can operate directly against the state itself,⁸¹ injunctive relief can severely burden a state as well.⁸² Yet without this fiction the Eleventh Amendment might have swallowed the Supremacy Clause nearly whole. It would not have been needed, of course, but for the development of the “parallel” Eleventh Amendment, arising from the acontextual reading of the Eleventh Amendment.

The decision was lengthy and convoluted, but its result was the beginning of the “authority-stripping fiction”⁸³ of the *Ex parte Young* doctrine. As later clarified in *Edelman v. Jordan*,⁸⁴ the doctrine only applies to prospective relief, not retroactive relief—for although the action is putatively against a “rogue” state officer acting out of bounds of authority he might have from the state, the Court realized a money judgment would in fact be against the state treasury.

b. *The constructive waiver and abrogation doctrines.* While *Ex parte Young* is the oldest of the ameliorative doctrines under the Eleventh Amendment, the Court more recently developed two other, less fictive limitations on the amendment’s scope: the constructive waiver and the abrogation doctrines. Under those doctrines, Congress is

78. 209 U.S. 123 (1908), *overruling recognized by* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

79. *See generally id.*

80. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (stating that “we have noted that the authority-stripping theory of *Young* is a fiction that has been narrowly construed”).

81. *See id.* at 101 (citing *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (*per curiam*)).

82. *See id.* at 101-02.

83. *See id.* at 114 n.25.

84. 415 U.S. 651 (1974).

sometimes able to abrogate the states' sovereign immunity when Congress is doing so in service of a constitutional grant of authority. Read broadly enough, these doctrines could have caused the acontextual reading of the Eleventh Amendment to pass away quietly. Now, however, their moment has passed.

Both doctrines arise out of the inevitable clash between ever-increasing direct federal involvement in the lives of individuals and states being increasingly ambitious in the scope of their actions. The decision critical to both doctrines was *Parden v. Terminal Railway of Alabama State Docks Department*.⁸⁵ In that case, the Court allowed injured railroad employees to sue their employer, a state-owned railroad, under the Federal Employers' Liability Act (FELA), 42 U.S.C. §§ 51-60. The Court first reasoned that Congress had the power under the Interstate Commerce Clause to enact FELA.⁸⁶ Second, it reasoned that Congress had made it clear anyone who entered operation of a railroad would be subject to FELA.⁸⁷ Next, it held that the states had surrendered a portion of their sovereignty to the extent needed to effectuate the Interstate Commerce Clause.⁸⁸ Finally, the Court held that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act."⁸⁹

This decision has been characterized as the foundation of the doctrine of "constructive" waiver, and in fact is singled out for criticism in the recent Supreme Court decisions handed down on June 23, 1999.⁹⁰ Given the fact that the current Court disparages the waiver in *Parden* as "constructive" and contrasts it to a "voluntary" waiver, one must note that in *Parden* the Court never used the term "constructive waiver" or any similar terms. To the contrary, the Court's opinion is that the state had to know that it was getting into competition with private, federally-regulated railroads and that it knowingly left "the sphere that is exclusively its own and enter[ed] into activities subject to con-

85. 377 U.S. 184 (1964), *overruled by* *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

86. *See id.* at 190-91.

87. *See id.* at 191.

88. *See id.* at 192.

89. *Id.*

90. *See infra* notes 218-92 and accompanying text.

gressional regulation."⁹¹

The decisions after *Parden* in which the Court discussed states' waiver of immunity illustrates the Court's consistent reading of *Parden* as describing a knowing, voluntary choice to engage in activity that could easily have been foregone, and in so doing being required to accept the consequences. Until this last term, the Court consistently interpreted its ruling in *Parden* to require proof that the state consented to suit. Thus, the statute Congress enacts must make clear an intent to hold states liable for their actions in a certain field.⁹² Only if the state is on notice that a choice to enter a federally regulated field will subject the state to suit will its subsequent decision to enter that field be interpreted as consent.⁹³

The abrogation doctrine is similar to, but much more expansive than, the waiver doctrine begun in *Parden*. Abrogation began, and if it still exists is now limited to, Congressional action under section 5 of the Fourteenth Amendment.⁹⁴ In *Fitzpatrick v. Bitzer*⁹⁵ the Supreme Court, in an opinion written by then Associate Justice Rehnquist, held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."⁹⁶ Therefore, the 1972 amendments to Title VII of the Civil Rights Act of 1964 properly authorized federal courts to award money damages against a state government found to have subjected an individual to employ-

91. *Parden*, 377 U.S. at 196.

92. See, e.g., *Employees of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (holding that the Fair Labor Standards Act section providing for suits against employers was not amended at the same time as the FLSA section adding states to those who must comply with statute); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (holding that Congress did not clearly express in the Jones Act an intent to allow suits against states).

93. In the Lanham Act version of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), Justice Scalia suggested this approach shows a *Lochner*-style judicial meddling in choice of economic theory. He was wrong, of course. Requiring a state that enters a field of federally regulated economic activity to play by the rules is not an attack on that state's right to choose that activity.

94. See U.S. CONST. amend. XIV, § 5 (giving Congress the power to enact legislation to enforce the Fourteenth Amendment).

95. 427 U.S. 445 (1976).

96. *Id.* at 456 (internal citation omitted).

ment discrimination.⁹⁷ Despite the possible implications of *Fitzpatrick*, its holding has in fact not opened a great breach in the dam of state sovereign immunity. For instance, the Court has read the language of 42 U.S.C. § 1983, which provides for actions against “persons acting under color of state law,” not to apply to actions against states themselves.⁹⁸ As a result, even that key civil rights statute has not abrogated state immunity.

A few years later, however, in *Pennsylvania v. Union Gas*,⁹⁹ the Court expanded the abrogation doctrine into the areas suggested by the Court’s statement in *Parden* that, “[w]hile a State’s immunity from suit by a citizen without its consent has been said to be rooted in ‘the inherent nature of sovereignty,’ the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.”¹⁰⁰

The Court ruled that abrogation applied not just when Congress was using its granted power to enforce provisions of the Constitution that came after the Eleventh Amendment but also those which existed at the time the Eleventh Amendment was written and ratified. *Union Gas* represents the high mark, perhaps, of the Court’s attempts to rein in its Eleventh Amendment jurisprudence.

Union Gas arose under CERCLA (Superfund).¹⁰¹ *Union Gas*’s predecessors operated a coal gasification plant along a creek in Pennsylvania, which produced coal tar as a by-product. The Commonwealth of Pennsylvania acquired easements in the property along the creek in order to excavate to control flooding. While excavating, the Commonwealth struck a large deposit of coal tar, which began to seep into the creek. The Environmental Protection Agency found the tar to be a hazardous substance, declared the creek a Superfund site, and together the federal and state governments cleaned up the site. The federal government reimbursed the state for its costs, and then sought recoup-

97. *See id.*

98. *See generally* Will v. Michigan Dep’t of State Police, 491 U.S. 58 (1989).

99. 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

100. *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 191 (1964), *overruled by* Welch v. Texas Dep’t of Highways & Pub. Transp., 483 U.S. 468 (1987) (internal citation omitted).

101. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1999).

ment from Union Gas.¹⁰² Union Gas then brought the Commonwealth of Pennsylvania back into the suit claiming that Pennsylvania was an "owner and operator" under CERCLA.¹⁰³ The Court's essential holding was that Congress intended to make states liable in money damages under CERCLA,¹⁰⁴ thus abrogating the states' sovereign immunity, and that Congress has the power under the Commerce Clause to do so.¹⁰⁵ As Justice Brennan explained, "it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."¹⁰⁶

At first glance, the abrogation doctrine might seem to have the effect of overruling *Hans v. Louisiana*. Indeed, in his dissent in *Union Gas*, Justice Scalia complained that after the majority's opinion, *Hans* "means nothing at all."¹⁰⁷ However, that is not quite the case. Abrogation requires not just a federal question in a dispute against a state, but also congressional authorization of such a suit. Congress's authorization of such a suit, moreover, must be an "unequivocal[] express[ion of] its intent to abrogate the immunity."¹⁰⁸

Abrogation threatened to swallow up only the parallel Eleventh Amendment, those portions of the interpreted amendment that went beyond a faithful contextual interpretation of the words. Although the ruling in *Pennsylvania v. Union Gas* only made Eleventh Amendment doctrine more complicated, it may have been seen at the time as a precursor to something much more monumental—the eventual abandonment of the acontextual reading of the Eleventh Amendment and the attendant emphasis on the implied general principle of sovereign immunity that gave rise to the parallel Eleventh Amendment. One might have expected the complicated fictions to chip away at the over-

102. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5-6 (1989), overruled by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

103. See *id.* at 6 (citing 42 U.S.C. § 9607(a) in a reference to potentially liable parties).

104. See *id.* at 13.

105. See *id.* at 20.

106. *Id.* at 19-20.

107. *Id.* at 36 (Scalia, J., dissenting).

108. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1995) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

broad prohibitions from cases like *Hans* and *Principality of Monaco*, until the entire edifice collapsed. In fact, just ten years ago, one commentator said that “four of [the Court’s] members, and possibly a fifth, may now be prepared to consider wholesale changes to the immunity doctrine that has survived, more or less intact, for the last hundred years.”¹⁰⁹

As it turns out, *Union Gas* was the high-water mark for the Court’s attempts to impose the rule of law on the states. The next few years brought a second wave of expansion for the Eleventh Amendment. That wave began with cases concerning the First Nations (just like the only significant Eleventh Amendment decision before the Civil War, *Cherokee Nation*, concerned the First Nations). That expansion has now gone much further than just “Indian law,” however. It has led to the Court’s recent exposition of the romantic reading of the Eleventh Amendment, all in service of a distinctly Hegelian conception of the state.

3. *The second wave of expansion: the First Nations cases.* While the three decisions announced June 23, 1999, confirm and seem to make nearly complete an expansion of the Eleventh Amendment, that is so broad that it leaves no room for the text of that amendment. This second wave of expansion began, however, with a trilogy of cases concerning intergovernmental disputes between federal recognized “Indian tribes” (hereinafter referred to as the First Nations)¹¹⁰ and the states.¹¹¹ As these cases all concerned the First Nations, one possibility is that the Court’s Eleventh Amendment discussion in those decisions should be read in the light of the Court’s peculiar, convoluted and often contradictory “Indian law” decisions. It is now clear, however, that the import of the first three decisions goes well beyond just “Indian law.”

a. *Blatchford or Cherokee Nation: When it hurts either way.* In *Blatchford v. Native Village of Noatak*,¹¹² a 1991

109. Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212, 212 (1988) (internal footnote omitted).

110. See John Randolph Prince, *Indian Country: A Different Model of Sovereignty*, 33 GONZ. L. REV. 103, 104 n.4 (1998).

111. See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Fla.*, 517 U.S. at 44; *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

112. 501 U.S. at 775.

Justice Scalia decision, the Court held that tribes could not bring an action against the states, not because they *differed* from foreign states, as *Cherokee Nation* had suggested, but because they are *too much* like foreign nations. In fact, Justice Scalia relied on *Principality of Monaco* as his primary precedent.¹¹³ The *Blatchford* Court based its analysis not on the Eleventh Amendment's text but on the Court's own view of the nontextual principles that allegedly existed in some unspecified "founder's mind" even before the adoption of the Eleventh Amendment.

In *Blatchford*, certain Alaska Native villages filed suit against the State of Alaska's Commissioner of Community and Regional Affairs challenging the implementation of State revenue-sharing statute.¹¹⁴ Justice Scalia immediately turned to the Eleventh Amendment and noted that, at least since the time of *Hans v. Louisiana*,¹¹⁵ the Court has

understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . ; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the [Constitutional] convention."¹¹⁶

That is to say, it is not the words the drafters of the Eleventh Amendment wrote, and the words that the ratifying conventions voted to place into the Constitution, that matter, but the drafters' intent that controls. Unfortunately, Justice Scalia failed to heed the advice he himself has quoted with approval in a recent text: "[T]he gravest sins are perpetrated in the name of the intent of the legislature."¹¹⁷

Justice Scalia then explained why the First Nations, although sovereigns themselves, are prohibited from suing other sovereigns within the federal system, the States, even

113. *See id.* at 780.

114. *See id.* at 778.

115. 134 U.S. 1 (1890).

116. *Blatchford*, 501 U.S. at 779. Note Justice Scalia's explicit rejection of the text of the Constitution as controlling constitutional interpretation.

117. ANTONIN SCALIA, A MATTER OF INTERPRETATION 18 (1998) (quoting James M. Landis, A Note on "Statutory Interpretation," 43 HARV. L. REV. 886, 892 (1930)).

though it is clear states can and do sue each other. As he analyzed affairs:

Although tribes are in some respects more like States—which may sue each other—than like foreign sovereigns, it is the mutuality of concession that makes the States' surrender of immunity from suits by sister States plausible. There is no such mutuality with tribes, which have been held repeatedly to enjoy immunity against suits by States.¹¹⁸

Of course, the view that the mutuality of state and tribal sovereign immunity—that states and tribe, mutually, cannot sue each other—is a myth. The tribe's immunity exists entirely at the sufferance of Congress. As Chief Justice Rehnquist explained in an opinion issued in the same term as *Blatchford*, "Congress has always been at liberty to *dis-pense* with such tribal immunity or to limit it."¹¹⁹ As will be seen below, even when Congress tries to limit state immunity, it cannot; even when it tries to do so to allow states and tribes to resolve their disputes in a lawful and orderly way.¹²⁰

Blatchford was only the first of a trilogy of cases concerning the effect of the Eleventh Amendment on disputes between First Nations and states. The other two, *Seminole Tribe of Florida v. Florida*¹²¹ and *Idaho v. Coeur d'Alene Tribe of Idaho*¹²² also had the effect of expanding the Eleventh Amendment. They did so, however, not by increasing the scope of the amendment's coverage but by reducing the doctrines that created exceptions from and ways to get around that amendment's grant of immunity. These two decisions, particularly *Seminole Tribe*, at the least seriously damaged and possibly destroyed the ameliorative doctrines which the Court had been developing over the course of the last century. These doctrines helped soften the blow from the expansion of the parallel amendment the Court also has been developing over the last century.

Even after *Blatchford* expanded the Eleventh Amend-

118. *Blatchford*, 501 U.S. at 775 (citing Syllabus) (citations omitted).

119. *Citizen Band of Pottawatomie Indian Tribe of Okla. v. Oklahoma Tax Comm'n*, 498 U.S. 505, 510 (1991) (emphasis added).

120. See discussion of *Seminole Tribe*, *infra* notes 130-52 and accompanying text.

121. 517 U.S. 44 (1996).

122. 521 U.S. 261 (1997).

ment to include state immunity from suit by the tribes, these tribes still had room for optimism about obtaining a judicial forum for disputes. After all, one of Congress's enumerated powers is an exclusive power to regulate commerce between tribes and all others, private and governmental.¹²³ If a dispute between states and tribes arose over matters falling under the heading of "commerce," and if Congress had not only regulated that area of commerce but expressly subjected states to suits by the tribes, tribes had every reason to believe that state immunity from suit was taken away. Rather than allow that result, however, the Court instead repudiated most of the abrogation doctrine.

b. *Ending abrogation. Seminole Tribe of Florida v. Florida* addressed the power of the sovereign tribe to bring an action against a state in a situation where Congress specifically intended to abrogate any Eleventh Amendment immunity to allow the suit. The Indian Gaming Regulatory Act ("IGRA")¹²⁴ imposes upon the states a duty to negotiate in good faith with an Indian tribe toward the formation of a compact regulating gambling in Indian country found within the boundaries of a state,¹²⁵ and authorizes a tribe to bring suit in federal court against a state in order to compel performance of that duty.¹²⁶ This scheme of negotiation was intended to take the place of a situation where the tribe, claiming the rights of a sovereign, chooses to allow gambling the same way as, for example, Nevada and New Jersey have done.¹²⁷ The tribes, under IGRA, had that right taken away, largely at the insistence of the states which surround most tribal land.¹²⁸ In return, the tribes had every reason to believe the states waived claims to sovereign immunity. Pursuant to IGRA, the Seminole Tribe of Indians filed suit in the United States District Court for the Southern District of Florida against the state and its

123. See U.S. CONST. art. I, § 8, cl. 3.

124. 25 U.S.C. §§ 2701-2721 (1994).

125. See 25 U.S.C. § 2710(d)(3)(A) (1994).

126. See *id.* § 2710(d)(7).

127. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (allowing California tribe to hold bingo games in violation of California law). IGRA was enacted the following year.

128. See 25 U.S.C. § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity [only as long as] conducted within a State which does not . . . prohibit such gaming activity.").

officers to compel negotiations after the State of Florida refused to negotiate.¹²⁹ The State of Florida raised a defense of sovereign immunity under the Eleventh Amendment.¹³⁰ Ultimately, in an opinion written by Chief Justice Rehnquist, the Court agreed with the state that, despite Congress's express intent in IGRA to abrogate the states' sovereign immunity, the Eleventh Amendment forbade any such suit.¹³¹

Of course, the requirement that a First Nation consult another political entity before deciding what economic activities to allow within the Nation's territory is in itself a major surrender of the tribes' sovereignty. IGRA was a compromise of both the states' "sovereign immunity" and an attribute of sovereignty claimed by states themselves and many tribes, as well as the right to make their own decisions about gambling on their territory.¹³² Thus, if broader principles of sovereignty suggest the state cannot be sued, then those same principles might suggest the tribes can and should ignore the states surrounding them, and refuse to negotiate gambling compacts themselves. On the other hand, if suits between sovereigns depend on mutual concession as suggested in *Blatchford*, there is plenty of such concession to go around in state-tribal relations.¹³³

IGRA certainly limited tribal sovereign immunity, for if the tribe violates a gaming contract with Florida, the state could subject the tribe to civil fines and closure of the tribe's gaming facilities,¹³⁴ and, in fact, could seek to have the tribe's patrons and employees criminally prosecuted in federal court.¹³⁵ Indeed, Congress not only can strip the tribes of their immunity but their very sovereignty in all its aspects.¹³⁶ On the other hand, the state's immunity is consti-

129. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 52 (1996).

130. See *Seminole Tribe of Fla. v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992), *appeal dismissed*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 513 U.S. 1125 (1995), *aff'd*, 517 U.S. 44 (1996).

131. See *Seminole Tribe*, 517 U.S. at 44.

132. See, e.g., DEAN R. SNOW, *THE IROQUOIS* 201-09 (1994) (discussing pro-gambling factions at the Mohawk reservation at Akwesasne/St. Regis claiming unrestricted rights to engage in gaming irrespective of the positions of the state of New York or the federal government).

133. See *infra* notes 224-30 and accompanying text.

134. See 25 U.S.C. § 2713 (1994).

135. See 18 U.S.C. § 1166(b) (1994).

136. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It ex-

tutional; after *Seminole Tribe*, it is clear that Congress cannot abrogate that immunity except, perhaps, to enforce the Fourteenth or Fifteenth Amendments, while the tribe's exists entirely at Congress's sufferance. The result is that, after *Seminole Tribe*, the state can refuse to do what Congress presumably has the power to order it to do under the Indian Commerce Clause and immunity from suit to coerce it to do what it is supposed to do. The effect is that the state's exercise of sovereignty will prohibit the tribe's own exercise of its sovereignty—the tribe will not be able to make its own decisions about gaming.

For the Eleventh Amendment, however, *Seminole Tribe* has even broader implications than that the First Nations are in a disfavored position in our complex coordinate system of affiliated governments. To reach its result, the Court not only held that the Indian Commerce Clause did not give Congress the power to abrogate state sovereign immunity, but the Commerce Clause did not either, explicitly and bluntly overruling *Union Gas*.¹³⁷

If it is the theory of abrogation that in 1789 states surrendered these aspects of sovereignty, it is the theory of the Court in *Seminole Tribe* that a few years later the Eleventh Amendment took it back. Following the lead of Justice Scalia's dissent in *Union Gas*, the Court viewed abrogation as founded on an anachronism, because it creates a "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."¹³⁸ That is why the Fourteenth Amendment remains a viable source for abrogation, at least in theory; that amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."¹³⁹ As it came after the Eleventh Amendment, it can limit it.

While the use of chronology to reject abrogation is appealingly simple, it does not work. Only the written text of the Eleventh Amendment came after the adoption of the

ists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.").

137. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (explaining that the Court feels "bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled").

138. *Id.* (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 42 (1989) (Scalia, J., dissenting)) (emphasis added).

139. *Id.* at 65-66 (citation omitted).

Constitution. Nothing in the written text of that amendment prohibits a suit by a tribe located within a state against that state. The only way the tribe was barred from suit was the Court's use, not of the text, but of "the principle embodied in the Eleventh Amendment."¹⁴⁰ That "principle" apparently is much broader in scope than the text, because the Court explained that "we have understood the Eleventh Amendment to stand *not so much for what it says*, but for the presupposition . . . which it confirms."¹⁴¹ That presupposition goes well beyond the words; it reflects a "broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying."¹⁴² That broader principle supposedly was found in the Constitution at the time it was written, because it was the background against which the Constitution was written. Indeed, what really controls are the suppositions of inherent sovereignty existing at the time of the Constitution's adoption modified only by the "plan of the convention" that wrote the Constitution.¹⁴³ The Court did not find immunity based on the amendment ratified in 1798, but rather the world-view already in existence at the time of the Constitution, which the later amendment only "confirms." But if that principle already existent at the time the Constitution was adopted, then the Constitution's terms are *not* antecedent to the principle of state immunity.

The Court cannot have it both ways. Either the adoption of the text of the amendment in 1798 limits the antecedent text in Article III, in which case one must seriously try to interpret those two texts together, or the "principles" of immunity were there all along, and the Constitution's grant of power to Congress comes after, not before, them in time. The only limitation the Eleventh Amendment itself can put on antecedently granted Congressional power is the limitation it states in the text (however one interprets it). To determine what that limitation is, like it or not, the Court must hold its nose and show some "blind reliance upon the text of the Eleventh Amendment."¹⁴⁴

140. *Id.* at 66 (quoting *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)).

141. *Id.* at 54 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)) (emphasis added).

142. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

143. *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934)).

144. *Id.* at 69.

The *Seminole Tribe* Court not only overruled *Union Gas* and dealt a severe blow to abrogation, but it also began a process of weakening the doctrine of *Ex parte Young*, a process that continued into its next term and its most recent attack on the First Nations, *Idaho v. Coeur d'Alene Tribe of Idaho*.¹⁴⁵ The *Seminole Tribe* was not seeking money damages obtained from the state treasury. Rather, it sought to compel the state to enter mediation about a compact as required by IGRA. That remedy, although a creature of a statute, was of course equitable in nature. In order to hedge its bets, moreover, the *Seminole Tribe* brought suit against the governor individually to compel him to act in accordance with federal law—in other words, a suit under *Ex parte Young*. The nature of the remedy sought was totally prospective and totally equitable in nature. Despite the apparently clear claim under *Ex parte Young*, however, the Court found the suit against the Governor to be barred as well.¹⁴⁶

The Court's explanation for why a suit for prospective, non-monetary relief against a state officer still was barred by the Eleventh Amendment was that the suit would improperly supplement a statutory remedial scheme with one created by the judiciary. "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."¹⁴⁷ The detailed remedial scheme to which the Court referred included, after a federal court finds that the state has failed to negotiate in good faith, an order directing the state and the Indian tribe to conclude a compact within sixty days. If the parties disregard the court's order and fail to conclude a compact within the sixty-day period, the only sanction is that each party then must submit a proposed compact to a mediator. Finally, if the state fails to accept the compact selected by the mediator, that mediator shall notify the Secretary of the Interior, who then must prescribe regulations governing Class III gaming on the tribal lands at issue.¹⁴⁸

145. 521 U.S. at 261.

146. See *Seminole Tribe*, 517 U.S. at 74-76.

147. *Id.* at 74.

148. See 25 U.S.C. § 2710(d)(7) (1994). Where the state has short-circuited the first two steps of this remedial process, one might speculate what would happen if the *Seminole Tribe* applied directly to the Secretary of the Interior to

All the Seminole Tribe was seeking in the litigation before the Court was the first step in that process—an order to conclude a compact in sixty days, directed at the state official who was responsible for the non-compliance with IGRA's commands. Yet the Court concluded that such an order—to comply with the statute—would be “additional” to the statute's own remedies, because the statute is directed at “the State” and not particular state officers!¹⁴⁹

In sum, the Court denied the tribe the right to bring suit under the *Ex parte Young* doctrine because there was another, statutory, remedy. At the same time, the Court struck down that very statutory remedy. The principle of state immunity had swallowed up all common sense.

c. *Weakening Ex parte Young*. The capstone of confusion over the Eleventh Amendment and the tribes came in *Idaho v. Coeur d'Alene Tribe of Idaho*.¹⁵⁰ First, the *Blatchford* Court abandoned the text of the Eleventh Amendment entirely in order to rely on the amendment's putative “broader principles” and the undiscovered country of the plan of the convention's implications in order to find that sovereign tribes and sovereign states cannot sue each other. Then, in *Seminole Tribe*, the Court completely jettisoned its recent innovation, the abrogation doctrine, intended to ameliorate the remedial gap its own Eleventh Amendment jurisprudence had created. Finally, in *Coeur d'Alene*, the Court reduced the ameliorative doctrine with the longest pedigree, that enunciated in *Ex parte Young*, to an unreliably confused mess.

The Coeur d'Alene Tribe lives on the Columbia Plateau in Northern Idaho, a region to which they are indigenous. In the nineteenth century, they agreed under rather obvious pressure to relinquish their sovereign status over much of the land they had lived on for centuries and accept a diminished area reserved for them as against the claims of the United States and its citizens. In 1873, President Grant issued an Executive Order establishing the Coeur d'Alene Reservation.¹⁵¹ The boundaries established by that Execu-

prescribe gaming regulations.

149. *Seminole Tribe*, 517 U.S. at 75 n.17 (citation omitted).

150. 521 U.S. at 261.

151. *See id.* at 265 (citing Exec. Order of Nov. 8, 1873, *reprinted in* 1 C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 837 (1904)).

tive Order included "the banks and beds and submerged lands of Lake Coeur d'Alene and some portions of various rivers and streams," including the Spokane River, the Coeur d'Alene River, and the Saint Joe River.¹⁵² Seventeen years later, in 1890, the territory of Idaho was admitted to statehood, completely surrounding the Coeur d'Alene Reservation. The following year, in 1891, Congress formally ratified the fourteen-year-old agreement with the Coeur d'Alene Tribe.¹⁵³

Although Lake Coeur d'Alene is within those boundaries which were preserved to the tribe out of the larger territory to which it held aboriginal sovereign title, and although that reservation preceded the creation of the state of Idaho, Idaho has long assumed and exercised sovereignty over the lake. In fact, in its brief to the Supreme Court in *Coeur d'Alene*, Idaho stated that "[t]he Tribe's action threatens the sovereign authority of the state of Idaho,"¹⁵⁴ assuming the answer to the real underlying question—which sovereign has authority in that territory—the same way, as we shall see, as the Supreme Court did. In any case, the state's exercise of authority was not hypothetical. Idaho not only claimed the submerged lands under the lake,¹⁵⁵ it vested management of the lake in a state board of land commissioners.¹⁵⁶ That state board in turn took such actions as leasing part of the bed of the lake to private operators for a marina, an action challenged in court as destructive to the environment. In that challenge, the Idaho Supreme Court held that the state was in fact the owner of the lake and had the right to act as it did.¹⁵⁷ That same year, the Federal Energy Regulatory Commission ruled that in fact the tribe was sovereign over portion of the lakebed,¹⁵⁸ and the United States has taken the position, both in the recent Supreme Court proceedings and in ongoing litigation it has brought as the tribe's trustee, that in

152. *Id.*

153. See *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F. Supp. 1442, 1452 n.5 (D. Idaho 1992), *rev'd*, 521 U.S. 261 (1997).

154. Brief for Petitioner at *2, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (No. 94-1474), *available in* 1996 WL 290997 (U.S. Pet. Brief).

155. See *id.*

156. See IDAHO CODE § 58-104(9) (1995).

157. See *Kootenai Env't'l Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983).

158. 25 FERC ¶ 61,228 (1983), *reh'g den.*, 26 FERC ¶ 61,026 (1984).

fact the tribe is sovereign over much of the disputed territory.¹⁵⁹ Unfortunately for the tribe, the United States' claim is for less territory than the tribe's claim, so the tribe cannot simply allow the former's lawsuit to settle the matter.¹⁶⁰

Justice Kennedy wrote the opinion for a highly fractured Court. Only Justice Kennedy and Chief Justice Rehnquist agreed in all particulars with the former's opinion; Justice O'Connor wrote an opinion concurring with the judgment but disagreeing with a significant part of the reasoning in Justice Kennedy's opinion, and Justices Scalia and Thomas joined her.¹⁶¹ Meanwhile, Justices Stevens, Ginsburg and Breyer all joined with Justice Souter in dissent.¹⁶² Both the principal and concurring opinions are, in varying degrees, revolutionary. In summary, the five justices who voted to reverse the Court of Appeals all agreed that *Ex parte Young* needed to be limited in some fashion to prohibit suits that challenge state sovereignty, and "State ownership of [lands underlying navigable waters] has been 'considered an essential attribute of sovereignty.'" ¹⁶³ In addition, Justice Kennedy and the Chief Justice suggested replacing *Ex parte Young* with a new test, while the three others have chosen to impose certain ill-defined, "I know it when I see it" limits on the *Young* test.¹⁶⁴

Justice Kennedy, writing for all five justices who decided against the tribe and for the state, first pointed out the obvious, "that *Young* rests on a fictional distinction between the official and the State."¹⁶⁵ Therefore, Kennedy argued (and in this statement four other justices agreed) that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction."¹⁶⁶

If we cannot rely on *Young* "reflexively," what can we

159. See, e.g., United States Amicus Brief, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (No. 94-1474).

160. See *id.*

161. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 288 (1997).

162. *Id.* at 297.

163. *Id.* at 283 (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)).

164. See *infra* notes 172-73 and accompanying text.

165. *Coeur d'Alene*, 521 U.S. at 269 (quoting the Court's interpretation of the holding in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

166. *Id.* at 270 (citation omitted).

do? Justice Kennedy suggested, if only for himself and the Chief Justice, something breathtaking—an entirely new doctrine, unfounded in any hint of text in the Eleventh Amendment or elsewhere in the Constitution, to take the place of *Ex parte Young*.

Justice Kennedy interpreted the long and confusing history of *Ex parte Young* suits to rely on two sets of circumstances. As his view of history has it, “there are, in general, two instances where *Young* has been applied. The first is where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law.”¹⁶⁷

That statement is the opening salvo in a battle to replace *Young* with the “*Coeur d’Alene*” doctrine. Under that test, the tribe here loses for the simple, mechanical reason that a state forum existed. Justice Kennedy spent considerable effort in the next several pages of the opinion defending his interpretation of a few of the many cases decided in *Young* in which the lack of a state forum could be said to have been a problem, and defending state courts as perfectly acceptable fora for federal, even constitutional questions, even when the state itself is a party.¹⁶⁸

Justice Kennedy’s explanation that he would allow an *Ex parte Young* injunctive action when there was no adequate state forum is in tension with the rationale in *Hans v. Louisiana*, which expanded the Eleventh Amendment in a way but for which the *Ex parte Young* fiction would never have been needed in the first place. Recall that in *Hans* the Court reasoned that it must bar claims by a state’s own citizens because otherwise

we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.¹⁶⁹

The *Hans* Court seemed to be disturbed by what it viewed as an anomaly, a federal action where no state ac-

167. *Id.*

168. *See id.* at 270-80.

169. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

tion was possible. Justice Kennedy, however, considers that situation to be the best justification for a federal suit. If nothing else, the fact that what seemed to be an anomaly to one Court is quite rational and fair to another ought to make us suspicious of ignoring the text of the Eleventh Amendment in order to avoid supposedly anomalous or absurd or inequitable results.

After expending some effort to justify this new “lack of state forum” test, however, Justice Kennedy grudgingly had to admit that not all *Ex parte Young* cases could be made to fit that test. There was another instance where the *Ex parte Young* doctrine applied. This instance for applying the *Young* doctrine is much broader than the first one, lack of state forum, and subsumes it. Although clearly he believes that second test should be abandoned, Justice Kennedy is not ready to announce its death quite yet, not until he has laid the groundwork sufficiently. Here is what Justice Kennedy wrote about that “second instance”:

[A] second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law [however] . . . It is difficult to say States consented to these types of suits in the plan of the Convention. Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be applicable in federal court but for an exception based on *Young*. For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court.¹⁷⁰

And still later: “It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.”¹⁷¹ (In response, one might note the irony of the Court’s choosing to bypass the Eleventh Amendment in order to enact a scheme excessively solicitous of the States.)

Kennedy’s lengthy discussion of the “lack of state forum” justification for an injunctive action against a state officer was necessary to him because, as ought to be clear from the just quoted language, he does not agree with the “Supremacy Clause” justification for such suits. He thinks it

170. *Coeur d’Alene*, 521 U.S. at 274-75.

171. *Id.* at 276.

an erroneous reason to allow suits in federal court despite state sovereign immunity and would like to bring it to an end. Short of being able to do that, however, he does the next best thing: subject that instance of *Young* doctrine to a balancing test. Despite their protestations to the contrary, the three concurring justices agreed to just such a balancing test.

Like it or not, Justice Kennedy could not do away with all the cases based on the notion that federal law requires federal courts, but he could make sure that there would also be "a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case."¹⁷² This balancing must be done on a case-by-case basis. As the decision of the three justices who actually agreed with his result characterized this approach, "the principal opinion replaces a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors."¹⁷³

Yet all five justices who voted to reverse in fact did that very thing—they went beyond the straightforward inquiry of whether prospective relief was claimed because they all agreed that the fact that something so significant to state sovereignty as title to submerged lands was involved must be weighed against the litigant's fulfillment of the normal requirements of *Ex parte Young*.

Again writing for a majority, Justice Kennedy emphasized that "[t]he suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters."¹⁷⁴

This challenge to state authority weighed in the balance against the tribe, determinatively so for Kennedy. There was an available state forum, and the vindication of federal law did not outweigh the challenge to state sovereignty.

This challenge to state authority was determinative for Justices O'Connor, Scalia and Thomas as well in their im-

172. *Id.* at 278.

173. *Id.* at 296.

174. *Id.* at 282.

PLICIT balance. Justice O'Connor explained that, "[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State."¹⁷⁵

In other words, such a suit cannot be "properly characterized" as seeking prospective relief.¹⁷⁶ But why not? In effect, the concurring opinion says nothing more than when the state has a great deal invested in continuing an ongoing violation of federal law, then a federal court cannot enjoin that state from doing so. In effect, these three justices engage in their own implicit balancing of federal interests against the state's claims of sovereignty. In doing so, these justices suggest that if the prospective relief will have too great an impact on the state, then an otherwise perfectly acceptable, traditional *Ex parte Young* suit will be barred.

After the three "Indian tribe" cases, Eleventh Amendment doctrine appeared to look this way. First, the amendment barred anybody or anything from suing a state in federal court, even when the question arises out of supposedly superior federal law. The only exception might come from a federal law intended to enforce the Fourteenth Amendment, or from a situation where a plaintiff might be able to claim that the state knowingly entered a federally regulated field and thus waived its immunity. Furthermore, one might be able to seek injunctive relief from an officer of the state, but that depended at least in part on whether one could theoretically obtain a hearing in a state court (no matter how unfriendly that might appear) and on how close to "core aspect of sovereignty" one's requests for relief cuts. That all seems harsh enough for persons whose federally protected rights have been hurt by the state, but the worst was yet to come.

II. JUNE 23, 1999: THE RESULT OF ABANDONING THE TEXT

As seen above, the Eleventh Amendment expanded well beyond its text in the latter nineteenth and early twentieth centuries, but that expansion halted after the *Principality of Monaco* decision. For nearly fifty years thereafter, nearly all Eleventh Amendment decisions from the Supreme Court

175. *Id.* at 296.

176. *Id.*

focused on explaining and expanding the ameliorative doctrines that reduced the damage that the "parallel," nontext-bound Eleventh Amendment could cause. By the beginning of the last decade of the twentieth century one could look with optimism at the prevailing Eleventh Amendment doctrine. Especially after *Pennsylvania v. Union Gas Company*¹⁷⁷ that amendment appeared nearly reduced to its proper scope, to bar only those suits a proper, contextual reading of the amendment would bar. Of course, the doctrines were unwieldy and overly complex, and could have used a shave with Occam's razor to simplify them. Then, of course, as the last decade opened, the Court's trilogy of "Indian cases"—*Blatchford*, *Seminole Tribe*, and *Coeur d'Alene*—reversed that salutary course and began, once again, to expand the parallel Eleventh Amendment and to reduce and sometimes to reject altogether the ameliorative doctrines that had softened the amendment's tendency to destroy the rule of law.

In recent years the Court has shown a strong animus to the First Nations in a variety of ways, not just in its decisions on the Eleventh Amendment.¹⁷⁸ It was open to question, therefore, whether the Court's three cases expanding state immunity from tribal suit really reflected the Court's Eleventh Amendment jurisprudence, or whether the Court would begin to retreat from its embrace of state immunity when cases arose in non-tribal contexts. The three decisions decided at the end of the 1998-99 term show, however, that not only does the Court read the Eleventh Amendment just as expansively outside of the tribal context as in it, but indeed continues to expand state immunity.

177. 491 U.S. 1 (1989), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

178. *See, e.g.*, *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (refusing to allow a federally recognized tribe, owning its land in common in fee simple, which provided the only local police services and utilities to its villages, to claim the sovereign status that would accompany having its land recognized as "Indian country"); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (refusing to allow a tribal court to take jurisdiction over an automobile accident taking place on the reservation, between a contractor whose driver was only driving on that road because he was engaged in a tribal building project and a resident of a reservation whose family were all tribal members).

A. *The Patent Case: Even the Fourteenth Amendment Fails*

Two of the three decisions from June 23, 1999, arose out of a dispute between College Savings Bank and the Florida Prepaid Postsecondary Education Expense Board.¹⁷⁹ One decision, written by Chief Justice Rehnquist, held that the College Savings Bank could not sue the Board for patent infringement, while the second, written by Justice Scalia, held that the College Savings Bank could not bring Lanham Act false advertising claims. Both show how significant and far-reaching the impact of the Court's decision in *Seminole Tribe* has proven to be.

Both cases arose out of the same facts. College Savings Bank, from Princeton, New Jersey, sells CollegeSure certificates of deposit which are supposed to finance the costs of college education. College Savings holds a patent on its method of financing the certificates of deposit.¹⁸⁰ The Board administers similar prepayment contracts available to Florida residents and their children, pursuant to chapter 240.551(1) of the Florida Statutes.¹⁸¹ College Savings brought suit in United States District Court for the District of New Jersey, claiming that the Board directly and indirectly infringed College Savings' patent, and also violated the Lanham Act by making misstatements about its own tuition savings plans in brochures and annual reports.¹⁸²

Given *Seminole Tribe's* complete repudiation of the abrogation doctrine except for when Congress abrogates state immunity pursuant to the Fourteenth Amendment, the patent case predictably turned around the nature of Congress's power to enact remedial legislation under the Fourteenth Amendment. Chief Justice Rehnquist's opinion found, in essence, that Congress had not jumped through enough hoops before it enacted the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy

179. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Patent Act)*, 119 U.S. 627 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Lanham Act)*, 527 U.S. 666 (1999).

180. See *College Sav. Bank (Patent Act)*, 527 U.S. at 631 (demonstrating that the Court did not question the validity of the patent); *College Sav. Bank (Lanham Act)*, 527 U.S. at 670-71 (demonstrating that the Court did not question the validity of that patent).

181. See *College Sav. Bank (Patent Act)*, 527 U.S. at 631 (citing FLA. STAT. ch. 240.551(1) (Supp. 1998)).

182. See *id.* at 631-33 & n.1.

Act").¹⁸³ While the Court agreed that patents are "property" that are worthy of protection under the Fourteenth Amendment's Due Process Clause, the Court held that Congress failed to establish before enacting the Patent Remedy Act that states were violating patents and then using sovereign immunity to deny the patentees due process for that deprivation of property.

Chief Justice Rehnquist readily acknowledged that Congress enacted the Patent Remedy Act for the clearly expressed purpose of abrogating state sovereign immunity and subject states to patent infringement claims.¹⁸⁴ It did so under its Patent Clause¹⁸⁵ and its Interstate Commerce Clause¹⁸⁶ powers found in Article I of the Constitution.¹⁸⁷ After *Seminole Tribe*, of course, those clauses of the Constitution cannot be the source of such power. However, the Congress also claimed to be acting under section 5 of the Fourteenth Amendment.¹⁸⁸ After all, the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law," and section 5 states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." If Congress acted within the scope of the Fourteenth Amendment as it claimed, it could, even after *Seminole Tribe*, force states to submit to suit in federal courts, a point which the Chief Justice again readily acknowledged.¹⁸⁹ Still further, he acknowledged that patents "are surely included within the 'property' of which no person may be deprived by a State without due process of law."¹⁹⁰ Yet he held that the Patent Remedy Act was not an appropriate exercise of Congress's enforcement powers under the Fourteenth Amendment.

The Court's section 5 jurisprudence was most recently illustrated in *City of Boerne v. Flores*,¹⁹¹ a decision in which the Court struck down the Religious Freedom Restoration

183. 35 U.S.C. § 271 (1988).

184. *See College Sav. Bank* (Patent Act), 527 U.S. at 634.

185. U.S.CONST. art. I, § 8, cl. 8.

186. U.S.CONST. art. I, § 8, cl. 3.

187. *See College Sav. Bank* (Patent Act), 527 U.S. at 635.

188. *See id.* at 637.

189. *See id.* at 639.

190. *Id.* at 642.

191. 521 U.S. 507 (1997).

Act¹⁹² as a redefinition of a right protected by the Fourteenth Amendment rather than an effort to enforce that right. The Court's approach began with the observation that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."¹⁹³ Of course, it is difficult to draw that line between remedy and substance. What the Court looks for, therefore, is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹⁹⁴ In other words, Congress's actions must be a fitting reaction to an identified constitutional violation.

The Court's way to test the fit between remedy and violation is to force Congress to "identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."¹⁹⁵ Many others have criticized the path down which this approach takes us, but it is beyond the current scope of this article to criticize the Court's overall section 5 jurisprudence.¹⁹⁶ What is within the scope of this article, however, is to suggest that as the Court applies that test to remedial legislation that abrogates state immunity, it appears its scrutiny of Congressional judgment is strict indeed. As all with even a casual acquaintance with "strict scrutiny" are aware, such scrutiny spells almost certain doom for any legislative scheme.¹⁹⁷

The difficulty in distinguishing between a remedy for rights and a redefinition of rights led to the stringent tests enunciated in *Boerne*. After all, there the redefinition of the free exercise right might diminish the complementary but

192. 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

193. *College Sav. Bank* (Patent Act), 157 U.S. at 638 (quoting *City of Boerne*, 521 U.S. at 519).

194. *Id.* at 639 (quoting *City of Boerne*, 521 U.S. at 519-20).

195. *Id.*

196. The Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), generated a great deal of such criticism already. See, e.g., 39 WM. & MARY L. REV. (printing the contributions to a symposium titled "A Reflection on *City of Boerne v. Flores*").

197. It has been recognized for quite some time that, as far as strict scrutiny is concerned, "strict" in theory is usually "fatal" in fact. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

to some extent opposite establishment clause right. On the other hand, in *College Savings Bank* there was not question of "redefining" any rights. The right in question was the right not to be deprived of what everyone agreed was a protected property interest without the due process of law. There was no question that patents were property and that Congress has the exclusive right to define that property. The only question was whether a certain remedy was available. That is, the only definition involved (what process is due) also was a question of remedy.

Testing the fit between the remedy found in the Patent Remedy Act and the identified problem, as the Court applied that test, required an examination of what Chief Justice Rehnquist called "the record."¹⁹⁸ The opinion noted disapprovingly that "Congress came up with little *evidence* of infringing conduct on the part of the States."¹⁹⁹ Chief Justice Rehnquist noted that the bill's sponsors did not claim to have *any evidence* of widespread violation of patent laws.²⁰⁰ Of course, that criticism of Congress alone would be an uncomfortable basis for a decision striking down the Patent Remedy Act in a case where the state in fact appeared to be violating patent laws. The Court was careful, however, to identify what must be shown as more than just states infringing patents. What must be shown is state infringement of patents and the use of sovereign immunity to deny patent owners compensation for the invasion of their patent rights.²⁰¹ Thus the Court noted the *testimony* Congress heard on whether, if a state violates a patent, the states were claiming immunity and denying due process.²⁰² The fact that a state deprives one of property, even if it does so wrongfully, is not a violation of the Fourteenth Amendment's Due Process clause. Only if it does so and "provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of property without due process" is Congressional action justified.²⁰³

Congress did identify at least two cases of patent infringement, one of which was the case that led to the Patent

198. *College Sav. Bank* (Patent Act), 157 U.S. at 639.

199. *Id.* at 640 (emphasis added).

200. *Id.* at 641.

201. *Id.* at 640.

202. *See id.*

203. *Id.* at 643.

Remedy Act even being proposed.²⁰⁴ Congress further heard testimony that state remedies would be difficult to obtain, hard to plead, and uncertain in application.²⁰⁵

These were not enough for the Court. What would have been? Would, say, testimony of twenty cases, not two, been enough? Would the Court have evaluated that testimony for accuracy? Would testimony that state immunity had been claimed in state courts been enough? Would anything have been enough?

The Court itself did not even try to suggest that the states provide sufficient process. Rather, it claimed it was Congress's job to prove they did not.²⁰⁶ Ironically, of course, the third case decided on June 23, 1999, *Alden v. Maine*,²⁰⁷ was in fact a prime example of a state claiming sovereign immunity to deny a litigant due process and getting away with doing so.

Nothing in the Court's analysis suggests that the result would have been any different if College Savings Bank had proven that, in fact, Florida not only infringed its patent but that no state court action could properly enforce that right. Indeed, the Court's analysis suggests that such proof would be irrelevant. The Patent Remedy Act could be justified as a valid use of congressional enforcement power only if Congress, at the time of enactment, had shown that states infringed patents and used sovereign immunity to get away with it.

The conjunction of *Alden v. Maine* and the *College Savings Bank* cases are quite telling. Chief Justice Rehnquist did not hold that the Patent Remedy Act was an uncalled-for use of the enforcement clause because Florida in fact provided a remedy of its own; he held that the Patent Remedy Act was invalid because at the time it was passed Congress did not establish a pattern of states infringing patents and using sovereign immunity to get away with that infringement. After all, he wrote that the act could not pass

204. *See id.* at 640.

205. *See id.* at 643-44, especially n.8.

206. *See id.* at 643. Chief Justice Rehnquist discussed Congress's receipt of testimony that the states may not provide remedies, or at least not adequate remedies, for patent infringement, but he dismissed that testimony as "limited." *Id.* The tenor of his remarks seems to be that it is up to Congress not only to articulate a reasonable concern for adequate process but to meet some burden of proof on the issue.

207. 527 U.S. 706 (1999).

muster because, "In enacting the Patent Remedy Act, however, Congress identified *no pattern* of patent infringement by the States, let alone *a pattern* of constitutional violations."²⁰⁸ That suggests, first, that one or even a few times in which states infringe patents and refuse to allow remedies would not justify abrogation of state sovereignty, and second, that any proof of such state action cannot come from events after enactment of the statute but from the "evidence" in front of Congress at the time the statute was enacted. Thus, if Florida not only chose to infringe on College Savings Bank's patent but also made a claim of sovereign immunity in any action brought in state court as allowed in *Alden*, College Savings Bank is out of luck. Similarly, if the state refused to allow itself to be sued in state court for unfair competition, the kind of thing the Lanham Act prohibits, the injured competitor is again out of luck. College Savings Bank would be deprived of its property without any process at all and would be subjected to illegal acts of competition without any legal recourse.

As the dissent pointed out, of course, patent law is complex, and the very definition of this species of intangible intellectual property depends on the law and its uniformity. State decisions cannot be appealed to the court of appeals, and although patent matters can be brought ultimately to the United States Supreme Court, that Court does not hear anywhere near all of the patent appeals that it could hear. Indeed, that is why the Federal Circuit was created, because the Supreme Court could not by itself provide the needed uniformity.²⁰⁹ In other words, the property's protection depends on uniformity of law in a complex and specialized field; any remedy that does not provide such protection is necessarily inadequate.

The dissent's error, perhaps, was in arguing that the Court had misunderstood the nature of the property right at stake, the adequacy of the process available to the injured property-holder, and the proper way to evaluate legislation intended to aid such injured property-holder. The key to the Court's opinion is found in its repetition of *Seminole Tribe's* bold assertion that the Eleventh Amendment does not describe the boundaries of the state's sovereign immunity, but only confirms a presupposition of a much

208. *College Sav. Bank* (Patent Act), 157 U.S. at 640 (emphasis added).

209. *See id.* at 650 (Stevens, J., dissenting).

broader immunity.²¹⁰ After all, Chief Justice Rehnquist's opinion was just one of three declaring state immunity from suit—even when Congress thought it was doing so pursuant to a valid power,²¹¹ even when the state was entering into a commercial field in which other, non-governmental participants were federally regulated,²¹² even when the suit was brought to enforce binding federal law in the state's own courts.²¹³

Again, it is not within the scope of this article to discuss at length the Court's approach to testing Congress's power to enforce rather than create Fourteenth Amendment rights. One key part of that approach warrants a few remarks. A few paragraphs earlier, quotations from Chief Justice Rehnquist's opinion noted his constant reference to the "evidence" and the "testimony" found in the Patent Remedy Act's legislative history.²¹⁴ A moment's reflection shows how odd that approach is. The normal use of legislative history is to interpret a statute, in order to determine what the statute means. Of course, even that use of "history" is problematic.²¹⁵ Here, however, the Court has no question about what the statute means; legislative history is being used to test not Congress's intent but whether it did its job thoroughly enough. Congress is being put on trial, and its case-in-chief is its legislative history. Moreover, it was not a fair trial; as the Patent Remedy Act was enacted before either *Seminole Tribe* ended Congress's right to abrogate under Article I and *City of Boerne* raised the burden of proof for Congressional justification of its Fourteenth Amendment enforcement powers, Congress had no idea what its case-in-chief must look like. In the Court's new jurisprudence, the statute that all members of Congress votes on and enacts matters much less than the kind of hearings and data a few committee members and their

210. *See id.* at 634.

211. *See id.*

212. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Lanham Act), 527 U.S. 666 (1999).

213. *See* Alden v. Maine, 527 U.S. 706 (1999).

214. *See supra* notes 198-205 and accompanying text.

215. This is one area where the author of this article and Justice Scalia seemingly agree, if his recent book is any test. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 16-18 (1998). However, Justice Scalia did join Chief Justice Rehnquist's opinion in the patent case despite its heavy and unusual use of legislative history.

staffers can put together.

In fact, although whenever the Court wants to assure its audience that the Fourteenth Amendment properly used can abrogate state sovereign immunity it cites *Fitzpatrick v. Bitzer*,²¹⁶ there is no reason to believe that the Court would reach the same result in that case today. *Fitzpatrick* concerned a suit by state employees that the state's retirement benefit plan discriminated against them because of their sex—they were male—and they sought, among other items, retroactive benefits. Then-Associate Justice Rehnquist writing for the then all-male Court found that Congress had the power to authorize the employees to sue the state. He did so because of section 5 of the Fourteenth Amendment. What is illuminating in comparing the Chief Justice's two "Fourteenth Amendment abrogation" opinions is that in the first one, *Fitzpatrick*, he made no reference whatsoever to the legislative history. Nowhere in that short opinion does he put the record on trial, searching for "evidence" that Congress found of a pattern of state discrimination against men or anyone else. Indeed, there may not have been such evidence available, for as Justice Stevens wrote in his concurrence (arguing that the suit was acceptable under the commerce power alone, without recourse to the Fourteenth Amendment),

I do not believe plaintiffs proved a violation of the Fourteenth Amendment, and . . . I am not sure that the 1972 amendments [to Title VII, the law at stake there] were "needed to secure the guarantees of the Fourteenth Amendment;". . . I question whether s 5 is an adequate reply to Connecticut's Eleventh Amendment defense.²¹⁷

There we have a *friend* of abrogation doubting whether the law in question was "appropriate legislation" to enforce the Fourteenth Amendment. *Fitzpatrick*, however, was decided well before the recent renaissance of state sovereign immunity. Now, with the renewed emphasis on that immunity, and the Court's deep commitment to the principles of state power, it is not clear at all that the Fourteenth Amendment will ever be able to provide another example of abrogation.

The contrast in how the two amendments are read is

216. 427 U.S. 445 (1976).

217. *Id.* at 458.

striking. The Eleventh Amendment is read so broadly that its very text is irrelevant. The “principle” behind that amendment has become a free-floating shield behind which the states can hide all sorts of illegal activity. On the other hand, the Court guards the boundaries of the proper scope of the Fourteenth Amendment jealously. The broader principle that amendment enunciates seems lost in the mix altogether. The recognition that states must be called to account for the harms they can do to individuals, based on the recognition that state governments can be just as likely to harm unpopular minorities as any other majoritarian institutions, has been given short shrift.

*B. The Lanham Act Case: States Are People, Too*²¹⁸

Given the Court’s view that even a patent infringement action, which the Court acknowledged is a procedure to protect “property,” is barred by the Eleventh Amendment, it was almost a foregone conclusion that an action against a state for unfair competition would also be barred. No constitutionally recognized property was involved, and certainly Congress could not subject states to suit under its Commerce Clause powers by abrogating that immunity. Only one small loophole remained for College Savings Bank, and that is the claim that Congress regulated a commercial field in which the state voluntarily entered, competing with private parties, and so when Congress made it clear that a state that does so can be subject to suit for unfair competition under the Lanham Act, the state constructively waived its immunity. Justice Scalia, writing for the Court, dismissed that argument, and he did so on sweeping grounds, rejecting the constructive waiver doctrine altogether.

Interestingly enough, although both Chief Justice Rehnquist and Justice Scalia believe the Eleventh Amendment must be extended well beyond its actual terms, they disagree on what those terms are. Justice Scalia has adopted the acontextual approach, which has made it easy for him to dismiss a textually faithful interpretation of the

218. When one wants to remind one’s children to respect the feelings and rights of others, one often reminds them that “Tommy and Jane are people, too.” This reminds the child that others have feelings that can be bruised and, on a more abstract plane, the ethical priority we assign to other human beings as moral ends in themselves. The current Supreme Court appears to believe both things of states as well.

text as inadequate. Chief Justice Rehnquist, on the other hand, appears to accept the contextual approach. In his opinion on the patent case, the Chief Justice states that, "Although the text of the amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says but for the presupposition . . . which it confirms."²¹⁹ On the other hand, Justice Scalia says something quite different, that the amendment's "precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state . . ."²²⁰ This is quite different from barring only diversity actions; it bars federal question cases as well. It is notable that the same five justices joined in not only the result but the opinions in both *College Savings Bank* cases, although the two opinions enunciate different readings of the text of the Eleventh Amendment. Presumably these five could do so because the text has become irrelevant. Indeed, Justice Scalia dismisses the text contemptuously as "the narrow text of the amendment itself."²²¹

Given Justice Scalia's choice of the acontextual reading, he then is able to sneer at the dissent by saying he found it "puzzling that [the dissent] would choose this occasion to criticize our sovereign-immunity jurisprudence as being ungrounded in constitutional text, since the present lawsuit [between Florida and a New Jersey company] seems to fall four square within the literal text of the Eleventh Amendment . . ."²²² Justice Scalia can state that the federal question case before the Court fell four square into that literal text only because he insists on the acontextual reading of the Eleventh Amendment, although not even all of his colleagues in the sovereign immunity romance would agree.

Justice Scalia states his rejection of the text in the same sentence partially quoted above:

Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign

219. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Patent Act), 527 U.S. 627, 634 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)).

220. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666, 669 (1999).

221. *Id.* at 688 n.5.

222. *Id.* at 689.

state, we have long recognized that the Eleventh Amendment accomplishes much more: It repudiated the central premise of *Chisolm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union.²²³

Thus, the Eleventh Amendment no longer means what it says, but what the Court believes its underlying principles would require. Therefore, in Justice Scalia's view, a state's sovereign immunity is nearly absolute, as there are "only two circumstances in which an individual may sue a State,"²²⁴ Fourteenth Amendment abrogation and a state's waiver of immunity. Given that the Fourteenth Amendment was not enough to support College Savings Bank's patent infringement claim against Florida, even though the Court acknowledged a deprivation of property had taken place, it is not surprising that Justice Scalia held that the Fourteenth Amendment did not give Congress the power to subject Florida to suit, for unfair competition is hardly remarkable.

The second circumstance in which a state may lose its immunity is when that state waives it. However, that waiver, according to Justice Scalia, must be "altogether voluntary on the part of the sovereignty."²²⁵ Indeed, Justice Scalia equates such waiver with an individual's waiver of constitutionally protected rights, such as a right to jury trial, and noted that such waivers must always be carefully scrutinized for voluntariness.²²⁶ The question, however, is what "voluntary" means. While Justice Scalia expends some effort proving waivers must be voluntary, he spends none establishing that so-called "constructive" waiver is not. Rather, it appears he is relying on labels—waivers must be "voluntary," not "constructive" or "implied"—rather than looking to the behavior that underlies those labels. The labels appear to describe different things, so Justice Scalia leaves it at that. Yet in *Parden* itself, the original "constructive waiver" decision, the Court never used that label.

223. *Id.* at 669.

224. *Id.* at 670. Justice Scalia's two circumstances do not include *Ex parte Young*, even though the Court has long acknowledged that doctrine is in fact a form of suit against the state.

225. *Id.* at 675 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

226. *See id.* at 681-82.

In fact, Justice Scalia does not even bother to describe the requirements of “constructive waiver of immunity,” except in a brief and disparaging reference to College Savings Bank’s brief. In that brief, College Savings Bank pointed out the clarifications and refinements of constructive waiver that arose in the cases following *Parden*. These refinements include that Congress must: (1) have Constitutional authority to regulate a field—paradigmatically, interstate commerce; (2) have chosen to so regulate it—for instance, with the Lanham Act; (3) have made it clear and unambiguous that if a state entered that field it would be subject to suit; and (4) the state must *thereafter* enter that field. Moreover, that entry must be a real choice; constructive waiver would not apply to activities that a state must do to be a government, such as run a police force. It only applies to a choice to enter a field traditionally occupied by non-governmental entities, with the best example the operation of a business for profit in the interstate commercial marketplace over which Congress has plenary power.²²⁷ Justice Scalia simply listed these characteristics enumerated in College Savings Bank’s and the United State’s briefs, described them as “severely limiting” *Parden*, did not otherwise discuss them, and then said, “[w]e think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it.”²²⁸

The cases which Justice Scalia saw as “limiting” *Parden*, from which limitation he drew the conclusion that these cases were rejecting *Parden* in piecemeal fashion, could just as easily be seen as clarifying *Parden* and making all the more clear that a “*Parden*-style waiver” is not actually *constructive* at all. These cases are the source of the list of characteristics above, and all these characteristics do is show rather dramatically that, when all those criteria are met, a state would be engaged in rank hypocrisy to claim immunity. The state, if it meets these criteria, truly made an uncoerced choice to enter an area where others already competed, knowing that Congress had made rules for that competition and had made it clear that anyone, including states, that wants to participate had to play by those rules.

227. The list in this paragraph is a paraphrase of the list from the brief that Justice Scalia quotes. See *College Sav. Bank* (Lanham Act), 527 U.S. at 678-82.
228. *Id.* at 680.

In other words, no one is forcing you to come to the Sunday afternoon soccer games, but if you do come, you cannot get away with holding your opponent's jersey. We call those fouls.

The just-listed characteristics may or may not have "severely limited" *Parden*. That is irrelevant. The purpose of these criteria is to ensure that the state's action could be viewed as voluntary, to ensure that the act leading to waiver involved a conscious choice that easily could have been foregone. Florida made its choice to sell financial instruments knowing that it was competing with private businesses, knowing that it was entering a competitive marketplace, knowing Congress regulated behavior in that marketplace, and knowing Congress fully intended to include states in that regulation up to and including subjecting states to a lawsuit for engaging in illicit behavior.

Justice Scalia's failure to examine the actual behavior behind the label "constructive waiver" allowed him to assert that "constructive waiver is little more than abrogation under another name."²²⁹ Actually, establishing constructive waiver requires much more than does abrogation. Abrogation operates on the premise that the states surrendered those aspects of sovereignty that the Constitution assigns to the federal government, such as the regulation of interstate commerce. Therefore, the states also have surrendered their sovereign immunity to the extent the lawsuit arises out of those areas, like the regulation of interstate commerce, that Congress controls. Constructive waiver, on the other hand, operates on the premise that Congress has been given the power to regulate activities in certain fields, again such as interstate commerce. Therefore, if Congress makes it clear that it intends all participants in that activity to be subject to suit, including states, states *later* choosing to enter that activity can be said to have waived any claims to immunity for that activity. Justice Scalia's equation of the two doctrines is characteristic of the opinion as a whole; it is replete with careless analysis.

Constructive waiver applies to fewer state actions than abrogation. For example, as will be seen in the discussion of *Alden v. Maine* below,²³⁰ Congress's interstate commerce clause power gave it the right to enact wage and hour leg-

229. *Id.* at 684.

230. See *infra* notes 252-76 and accompanying text.

islation including a requirement that employers pay overtime. Under abrogation, Congress could also express a desire to subject states to suits in federal courts for failure to pay overtime to its employees, but that power disappeared after *Seminole Tribe*. On the other hand, since states do not really choose to enter the field of having employees—that is an inevitable part of performing even the most basic governmental tasks—it would be inappropriate to argue states constructively waived immunity to suits by those employees.²³¹

When Justice Scalia says, “*Parden*-style waivers are simply unheard of in the context of other constitutionally protected privileges,”²³² he is absolutely wrong. He can only say that because he fails to address the behavior underlying the label of “constructive” applied to *Parden*-style waivers. Even the constitutional rights of an aggrieved individual—surely the most important category of constitutional privileges—can be deemed waived if that individual consciously chooses to engage in behavior which he knows is inconsistent with that right. For example, the Seventh Amendment guarantees a right to a jury in civil trials, an important individual right.²³³ Yet that right is waived unless one demands a jury in a timely fashion.²³⁴ That right is waived unless one makes the effort to assert it. It is a right that can be waived through inadvertence. The so-called “constructive waiver” doctrine provides states with much more protection than that afforded the right to a jury trial.

The most telling point about Justice Scalia’s incorrect assertion that “other constitutional privilege” cannot be waived “*Parden*-style” is his equation of people’s rights with state’s rights. Justice Scalia’s underlying bias toward what this article calls the romantic view of states’ rights is obvious from his discussion of the doctrine of constructive waiver as it applies to various constitutional rights and privileges. He cites several cases in a row to show that courts do not lightly find and “do not presume acquiescence

231. Thus, the employees in *Alden* had to leave the federal system behind after the decision in *Seminole Tribe*.

232. *College Sav. Bank* (Lanham Act), 527 U.S. at 681.

233. See U.S. CONST. amend. VII.

234. See FED. R. CIV. P. 38(d) (“The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury.”).

in the loss of fundamental rights.”²³⁵ In none of these citations about fundamental rights does he identify the actual context of such quoted language—whose rights, and what were they? Justice Scalia cites three cases,²³⁶ *Johnson v. Zerbst*,²³⁷ *Aetna Insurance Company v. Kennedy ex rel. Bogash*²³⁸ and *Ohio Bell Telephone Company v. Public Utility Commission of Ohio*.²³⁹ In *Johnson*, the Court considered the claim of a habeas corpus petitioner who claimed he was denied the assistance of counsel, and the Court noted that his right would not be assumed lightly. Similarly, where Justice Scalia quotes *Aetna Insurance Company v. Kennedy ex rel. Bogash* as stating “courts indulge every reasonable presumption against waiver,” he failed to complete the quote, which was “courts indulge every reasonable presumption against waiver [of jury trial].”²⁴⁰ Finally, in *Ohio Bell Telephone Company*, the fundamental right in question was the right to a hearing before being deprived of property—the right to due process. The fundamental rights were rights of private persons against the power of government.

Justice Scalia apparently sees no distinction in the constitutional scale between the rights of living human beings and the “rights” of government. In fact, he states that “State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected.”²⁴¹ That may seem an innocuous statement to some, but to the author it is frightening. The Constitution does indeed establish divisions of power between state and federal governments, both of which are created to serve the people. It is, however, the people who are sovereign, and the people who have fundamental rights. There are no states’ rights in this fundamental sense, only the rights of people. The Constitution is carefully written on this point. The only holders of rights in the text are the people, individually and collectively. States have “powers,” not rights. For example, the text of the Ninth Amendment reads “The enumeration in

235. *College Sav. Bank* (Lanham Act), 527 U.S. at 682 (quoting *Ohio Bell Tel. Co. v. Public Util. Comm’n of Ohio*, 310 U.S. 292, 307 (1937)).

236. All are from 1937 or 1938—interesting choices.

237. 304 U.S. 458 (1938).

238. 301 U.S. 389 (1937).

239. 301 U.S. 292 (1937).

240. *Aetna Ins. Co.*, 301 U.S. at 393 (emphasis added).

241. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666, 682 (1999).

the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by the people."²⁴²

On the other hand, the Tenth Amendment says "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."²⁴³

The Court's failure to see the distinction between people, who are the bearers of rights, and all other actors in our Constitutional scheme, shows a basic collapse in its Constitutional jurisprudence. The Court could learn from one of the early great men of the court, Justice James Wilson, who wrote in *Chisolm v. Georgia*: "Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator. A State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance."²⁴⁴

Although the particular result in *Chisolm* was overturned by the Eleventh Amendment, that result being that diversity jurisdiction could be used to sue a state for its debts in federal court, there is no reason to believe that Justice Wilson's recognition of the fundamental priority of the people over the state was overturned. To the contrary, it is even more important to assert that priority in the days of necessarily larger and more active government than it was two centuries ago.

As well as equating states' "rights" with those we ascribe to people, a notion that seems ominously anti-democratic, Justice Scalia also expresses an intellectually dishonest view of precedent. Overturning earlier decisions, the way Justice Scalia repudiated *Parden* and its progeny, is certainly within the province of the Court, but it takes an odd sort of courage to do so at the same time as one sings praises to the doctrine of *stare decisis*. This, however, is what Justice Scalia does. While he has rejected precedent creating the abrogation doctrines and the constructive waiver doctrines, and seems to be part of a majority that is rewriting *Ex parte Young* into an unreliable balancing test, he lauds the "venerable precedent" of *Hans* and rests his position that the constitutional text can be ignored on "constitutional tradition and precedent as clear and conclusive,

242. See U.S. CONST. amend. IX (emphasis added).

243. U.S. CONST. amend. X (emphasis added).

244. 2 U.S. (2 Dall.) 419, 425 (1793).

and almost as venerable . . . as *Marbury v. Madison*”²⁴⁵

Justice Scalia’s insistence on the primacy of stare decisis in the same opinion as he admits that his reading of the Eleventh Amendment “accomplished much more” than “its precise terms”²⁴⁶—that is, he chooses to apply it to bar suits that it does not by its own terms bar—is telling. It shows an implicit acknowledgment that judicial behavior is vastly more important than the Constitution judges purport to interpret.

Reliance on stare decisis always has been a rather erratic and result-oriented enterprise, and Justice Scalia’s is no different. He venerates, for instance, the century-old decision of *Hans v. Louisiana*²⁴⁷ and the “still-warm” *Seminole Tribe*,²⁴⁸ but for all intents and purposes he rejects and overrules *Parden v. Terminal Railroad Company*,²⁴⁹ which he attacks as “at the nadir of our waiver (and, for that matter, sovereign immunity) jurisprudence,”²⁵⁰ and attacks over thirty years of Eleventh Amendment jurisprudence, from 1964 to 1996, as “the distorted view of *Hans* that prevailed briefly [!] between *Parden* and *Seminole Tribe*.”²⁵¹ In addition, in *Seminole Tribe*, Justice Scalia joined an opinion that explicitly overruled the “still-warm” *Pennsylvania v. Union Gas*, and the next year, in *Coeur d’Alene Tribe of Idaho*, he joined an opinion that eviscerated an Eleventh Amendment precedent every bit as venerable as *Hans* and *Ex parte Young*. Of course, while attacking those who dissent from his opinion as being disrespectful of *Hans*, he fails to see that they may well be respectful of *Hans* but also the holdings and spirit of *Ex parte Young*, *Parden*, and the thirty-two “brief” years between *Parden* and *Seminole Tribe* which he so blithely dismisses as “distorted.”

The second *College Savings Bank* decision joins the ranks of other recent decisions, like *Seminole Tribe*, that have repudiated the Court’s own precedents as well as the written text of the Constitution in order to be true to the “spirit” of *Hans v. Louisiana*. That in turn was a decision which the Court freely admits was itself based not on the

245. *College Sav. Bank* (Lanham Act), 527 U.S. at 688.

246. *Id.* at 669.

247. 134 U.S. 1 (1890).

248. 517 U.S. 44 (1996).

249. 377 U.S. 184 (1964).

250. *College Sav. Bank* (Lanham Act), 527 U.S. at 676.

251. *Id.* at 688 n.5.

written words of the Constitution but unwritten principles the words supposedly only partially exemplify. The decision illustrates, even more dramatically than its Patent Remedy Act counterpart the, Court's commitment to the spirit behind the text of the Eleventh Amendment, which it perceives to be a broad principle of state immunity. This principle reflects an even broader underlying conception of the state, not as a social and political construct, but a person invested with rights and the need for dignity and respect. This romantic reading of the Eleventh Amendment, however, is most boldly revealed in the last of the Court's June 29, 1999, decisions, *Alden v. Maine*.

C. *Alden v. Maine: The "founders' understanding"*

In *Alden v. Maine*, the Court held that the plaintiffs, all probation officers for the state of Maine, all of whom took their jobs believing that they were entitled to overtime pay pursuant to the Fair Labor Standards Act, but all of whom were cheated of that pay by their employer, had no recourse anywhere—not in federal court and not in state court—to enforce their rights to that pay. The Court gave little attention to the harm done to the plaintiffs. Rather, in an opinion written by the justice who has seemed most intellectually infatuated with state immunity, Justice Kennedy, the Court presented the case as a dispute between the overweening reach of federal power and states, the repository of true political accountability.

The irony of *Alden* runs deep. The plaintiffs obviously rather would have brought their claim in federal court, as it raised a federal question against the state. However, after *Seminole Tribe* ended the abrogation doctrine, a claim based on federal law enacted pursuant to the Interstate Commerce Clause had no chance to stay in federal court, and indeed, an attempt to do so was dismissed. The plaintiffs then brought the FLSA action in state court, which had concurrent jurisdiction over such claims. After *Coeur d'Alene Tribe*, one might have thought the Court would have approved this practice. As one reads Justice Kennedy's opinion in *Coeur d'Alene Tribe*, one cannot miss that opinion's clearly expressed preference for adjudicating claims against the state in a state forum; Justice Kennedy suggested that suits under *Ex parte Young* should only be brought if the better way, a state lawsuit, was unavail-

able.²⁵² Presumably, such suits were somehow less offensive to a state's sovereign dignity. The *Alden* plaintiffs, having lost their preferred forum, might have taken solace in Justice Kennedy's suggestions that it would be better anyway for them to be in state court. Yet it was this same Justice Kennedy who then informed them that they had no right to be there, either.

Re-examining *Coeur d'Alene Tribe* in light of *Alden v. Maine*—both decisions written by Justice Kennedy—reveals an example of the Court holding out the hope of some relief from the hardships of state immunity that in fact do not exist. Justice Kennedy, while holding that a tribe could not bring a suit of any type against the State of Idaho because an action to settle boundaries too greatly impacted the state's sovereignty (apparently unconcerned with what the state's actions did to the tribe's sovereignty), did note that the state allowed suits against itself in state court to quiet title.²⁵³ That is a loophole that, after *Alden*, it is clear the state could close down. In fact, it could allow most quiet title suits to go forward, but refuse to allow such suits only when brought against the state based on titles allegedly preceding the state's acceptance into the union; this would foreclose the tribe's action while allowing other, less politically charged suits to go forward. Other states that feel themselves burdened with too much Indian country could do the same—encroach on those lands, make claims that may or may not even be colorable, use their superior resources to take actions on such land, and refuse to waive sovereign immunity to resolve such suits. Of course, the United States could protect the tribes' territorial claims, but it might not choose to do so, for reasons of politics or funding or Justice Department manpower. The tribes' rights are only really rights if the tribe itself has the ability to seek a remedy for the violation of those rights.

Justice Kennedy began his opinion with the most explicit statement ever made about the Court's complete indifference to textual fidelity. He explained that

[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative in-

252. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270-81 (1997).

253. See *id.*; see also IDAHO CODE § 5-328 (1990).

terpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution²⁵⁴

Thus, the Court explained that it would not "engage in . . . a historical literalism."²⁵⁵ Rather, "[t]he countours of sovereign immunity are determined by the *founders' understanding*"²⁵⁶

The *Alden* approach to constitutional interpretation gives rise to several questions. The first question being whether the Court's history is accurate, or indeed whether any court's amateur intellectual history could hope to be accurate, in gauging the "founders' understanding."²⁵⁷ A related question, indeed part and parcel of that first question, is whether the Court's conclusions drawn on that history are the only conclusions one could draw (assuming the accuracy of the history, as well as its relevance to Constitutional interpretation). The third question is whether it is sufficient to look to only that one historical moment in Constitutional history.²⁵⁸ Finally, and to the author most significantly, one must ask the question of whether any history, accurate or not, is or should in any way be binding on constitutional interpretation.

1. *The Court's use of history.* Justice Kennedy expended most of his opinion trying to prove that the founding generation never intended for a state to be subject to any private person's suit anywhere, and also trying to explain away why, if they meant such a broad immunity, the drafters of the Eleventh Amendment cast it in such narrow terms. Interestingly, most of the more telling pronouncements supporting a broad view of such immunity that Justice Kennedy quotes are not from primary historical documents but rather from other members of the

254. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

255. *Id.* at 730.

256. *Id.* at 734.

257. Indeed, it is far from clear that one could even identify with any certainty who the "founders" were, let alone what they thought. Both the original Constitution and the Eleventh Amendment were ineffective until ratified by the states—and there is very little historical evidence about the intentions of the state ratifiers.

258. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (discussing generally the theme of transformative constitutional "moments").

Court in other opinions, all removed by centuries from the actual events surrounding the drafting of the Constitution and its Eleventh Amendment.

Just as interesting as what Justice Kennedy puts into his opinion is what he left out. Although he argued from the “founders’ understanding” of both the Constitution and presumably of the Eleventh Amendment as well, he only quotes from three of the state ratifying conventions, Virginia, New York, and Rhode Island.²⁵⁹ The quoted language, read in original context, all appear to have arisen out of a fear of states being sued in federal court to enforce the states’ bond obligations—suits that would arise under the federal court’s diversity jurisdiction if at all. For example, the only portions of actual ratification debate the Court quotes are from Virginia, in which James Madison spoke and John Marshall “provided immediate support.”²⁶⁰ Yet the very beginning of James Madison’s statement, which the Court in fact quotes, was, “Its [the federal judicial power] jurisdiction *in controversies between a state and citizens of another state* is much objected to, and perhaps without reason.”²⁶¹ Again, the only quoted language concerned the use of the federal *diversity* jurisdiction to force states to pay their debts. This quoted language never intimates that the ratifiers had a problem with a suit by a state’s own citizens against the state, which necessarily would arise under federal question jurisdiction.²⁶²

The language Justice Kennedy quotes from the Federalist Papers, language which in fact is the source for the current Court’s favorite phrase, that states retained their immunity: “Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States,”²⁶³ is followed immediately by this language:

There is no color to pretend that the State governments would, by adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.

259. *Alden*, 527 U.S. at 717-25, 734.

260. *Id.* at 718.

261. *Id.* at 717 (emphasis added).

262. See *id.* at 760-66, especially 766 n.5 (Souter, J., dissenting).

263. *Id.* at 717 (quoting the Federalist No. 81).

They [those contracts] confer right of action independent of the sovereign Will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?²⁶⁴

The quoted language shows that the focus of discussion was about actions to enforce debt, and at least part of Alexander Hamilton's argument is not about federal jurisdiction, but the substantive law of contracts between a sovereign and an individual. To the extent that it is about federal jurisdiction, it is about whether that jurisdiction encompasses nonconsensual suits to collect a debt—which would arise under the Court's diversity jurisdiction. All of the primary historical evidence cited by the Court, which is precious little, appears to be much like the quoted language from the Federalist Papers—evidence that the proponents of the Constitution were assuring their audiences that the diversity jurisdiction of the federal courts would not be used to enforce state debts. Moreover, the heavy reliance on the Federalist Papers (a common habit of the Court's) is historically problematic, as the Federalist Papers were the "frankest, the baldest and boldest propaganda, ever penned."²⁶⁵

At one point in the opinion, Justice Kennedy explained "the founders' silence" on whether the states could be forced to hear cases against themselves in their own courts, as based on the fact that no such thing was ever contemplated.²⁶⁶ That may be true, but arguing from no evidence is always a risky thing. What the Court failed to explain is the founders' silence on much of any kind of suit against the states in federal courts apart from a diversity suit used to enforce state debts.

The Court disparages the dissent's evidence, offering a contrary reading of historical understandings as based on "scanty and equivocal evidence . . ."²⁶⁷ The evidence that Justice Kennedy cites also is scant and is equally equivocal. Although, for reasons stated below, this article contends that the historical approach of both opinions is wrong-headed, it is worth noting that the dissent's use of primary

264. *Id.* (quoting Federalist No. 81).

265. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-81* 5 n.7 (Univ. of Wis. Press 1970).

266. *Alden*, 527 U.S. at 741.

267. *Id.* at 726.

historical evidence exceeds that of the majority opinion. It is not history as historians do it, but history as the Romantic Movement used it, an idealized and over-simplified backdrop to support one's exaltation of the romantic theme. Moreover, the Court's romantic use of history is matched by its romantic exaltation of mood over intellectual method in dealing with the dissent. The dissent, written by Justice Souter, noted that at the time of the Constitution's drafting, sovereign immunity was supported by two political theories. One view was that it was a common law immunity defeasible by statute,²⁶⁸ which Justice Souter argued was the most popular theory.²⁶⁹ Under that theory, "state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution."²⁷⁰ The other theory was the natural law theory, which held "that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it."²⁷¹ Under that theory, a state would have no immunity from a question arising out of a binding federal statute. The Court made no attempt to refute the contention that these were the two possible understandings of the sovereign immunity of states, nor did it refute the dissent's logic. As true romantics, the Court swept logic aside. Instead, it simply explained that it does not matter what the source of the principle embodied in the Constitution is, now that the principle is a part of the Constitution.²⁷² But if the text itself does not state this broad principle, and it must be inferred from the "founders' understanding," then the dissent is entirely correct that to know what the immunity is, we must know the intellectual theory the founders were using.

The Court's historical method thus appears severely compromised. On the one hand, it claims to be searching for the "founders' understanding," but on the other hand it rejects the dissent's review of that understanding as not just incorrect but irrelevant. The historical evidence the Court does use is scanty, and only seems to establish that some influential people who recorded their views, or whose views

268. *See id.* at 764 (Souter, J., dissenting).

269. *See id.* at 763 (Souter, J., dissenting).

270. *Id.* at 762 (Souter, J., dissenting).

271. *Id.* at 764 (Souter, J., dissenting).

272. *See id.* at 734.

were recorded by others, believed that the new Constitution did not grant the federal courts the power to use their diversity jurisdiction to hear suits against states brought by the states' creditors under state laws of assumpsit. To extrapolate beyond that issue is not history, but imaginative fiction of the sort associated with science fiction involving time machines.

The Court in fact proves its history is mere speculation, although it may not have realized that. Justice Kennedy wrote that in the Eleventh Amendment, "Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution *that had raised concerns during the ratification debates* and formed the basis of the *Chisolm* decision."²⁷³

In other words, the Court admits that the Eleventh Amendment only addresses certain specific concerns. Therefore, the only evidence it has of a view the founders shared of state sovereign immunity is evidence that they did not approve of the use of diversity jurisdiction to collect a state's debts, so that is all the Eleventh Amendment addressed. The Court produced no evidence that any other type of sovereign immunity that may or may not have been thought to be part of the constitutional scheme. Moreover, if the amendment was narrowly drawn to address only the problem that arose in *Chisolm*, because no one even considered the possibility of other suits of other sorts that challenged state immunity, one must explain why the drafters of the Eleventh Amendment so completely ignored the language in *Chisolm* that quite clearly contemplated many other types of federal actions against states.²⁷⁴ If they wanted not only to forbid suits on debts against states, at a time when they were writing an amendment to overrule its result, why did not they write it that way?

In discussing the Eleventh Amendment's scope in the Lanham Act version of *College Savings Bank*, Justice Scalia wrote that despite the limited reach of its language, "the Eleventh Amendment accomplished much more: It repudi-

273. *Id.* at 723 (emphasis added).

274. The examples of potential federal suits against states brought up in the opinion in *Chisolm*, 2 U.S. (2 Dall.) 419 (1793), include suits for the impairment of contracts, the very source of plaintiff's claim for federal jurisdiction in *Hans v. Louisiana*, 134 U.S. 1 (1890).

ated the central premise of *Chisolm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union.²⁷⁵

If that is the central premise of *Chisolm*, which I believe it is, and if the Eleventh Amendment was intended to repudiate that far-reaching premise altogether, why did not its Drafters write it that way?

If one is to rely on history for interpretive technique, one might point out that a majority of the Supreme Court justices at the time of the adoption of the Eleventh Amendment would have disagreed violently with the propriety of such a far-reaching change in the Constitution. These men could not have been nominated to and confirmed in that exalted position by being on the lunatic fringe of political opinion. These men had only been in that position a few years, so it is hard to believe that their views had diverged too greatly from the shifting tides of political opinion (as, say, the "Nine Old Men" of the Depression era had diverged from the shifts reflected in the New Deal). The fact that a majority of the justices ruled as they did in *Chisolm* suggests that the political center of the early federal center, while being disturbed by "commonplace suits on debts" against states in federal courts, would have been disturbed as well by the breadth of sovereign immunity the current Court reads into the text.

2. *The Court failed to use all the right history.* Even assuming history is more significant than the text of the Constitution in determining the scope of state immunity, the Court has failed to explain why it relied on only one part of that history. The history from the first twenty years of our nation's life may shed some light on one view of federal and state powers and privileges. The history from the Civil War and the Reconstruction era would reveal a very different point of view, one that has been incorporated into our Constitution. It is far from clear that the "founders' understanding" of 1798, to the extent it creates extra-textual protection for states, ought to weigh more heavily than the understanding of the refounders of the United States after the Civil War.

In *Alden*, the Court acknowledged that, at least in the-

275. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666, 669 (1999).

ory, "appropriate" legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty.²⁷⁶ However, look at how that abrogation works. If a statute is clearly a case where the specific enforcement power of the Fourteenth Amendment has been invoked, and invoked specifically to enforce, but not define, the rights the Fourteenth Amendment protects, and Congress "proves" the enforcement is needed to remedy an existing pattern of state violation of those rights, only then can a state's immunity from suit be abrogated. That is to say, the Fourteenth Amendment's text is read in as limited a way as possible to make it as hard as possible for the power that text grants to overrule the state immunity where that immunity by and large is not based in the text at all. In understanding the *zeitgeist* that the Eleventh Amendment only "exemplifies," the Court looks well beyond the text. Moreover, the Court enforces that *zeitgeist*. But if the Court uses "history" to seek the "founders' understanding" of the nature of state and federal sovereignty at the end of the eighteenth century, why does it give so little weight to the "founders' understanding" in the middle of the nineteenth century of the nature of state and federal power as they can act against the rights of the people?

What if we read the Fourteenth Amendment as only an exemplification of broader principles themselves unarticulated in the text? That amendment could be read to exemplify the principle that states are not the ultimate sovereign, but the people are. It could be read to exemplify the principle that the people are not homogeneous and some of those sovereign people may not be popular with the dominant set of the people, but that even the unpopular require protection. It could be read to exemplify the view that the states are not any more naturally accountable to or responsive to the needs of the people than the federal government, and that the states no less than the federal government can abuse their power to cheat the people. What if we saw the "broader principle" of the Fourteenth Amendment as the empowerment of the people, taken one person and community at a time, against the states?

Given the Court's recognition that the Civil War worked a great change in the nation's balance of power, it is odd that it does not see the extent to which that balance has

276. *Alden*, 527 U.S. at 756.

changed. It reads the Eleventh Amendment for principles broader than that found in the text. It seems more than clear that it should read the Fourteenth Amendment, which contains much more sweeping language, language much more inviting of a search for broader principles, as enunciating principles behind the text at least as far-reaching as those "exemplified" by the Eleventh Amendment.

The potential for extensive federal actions intended to protect or create personal rights came into being through a constitutional and historical event at least as important as the "Founding" Era, the Civil War, and the Civil War Amendments. Given that the three opinions focus on federal-state relations, and the fact that one of the opinions was as much about the Fourteenth Amendment as the Eleventh Amendment, there was astonishingly little discussion of the post-Civil War Reconstruction of not only our nation but of the Constitution. The asymmetry of the discussion of Founding Era history and Reconstruction Era history is striking. The Founding Era is discussed not only for the words it put into a text, but also for all its supposed assumptions and political presuppositions and the full range of its world-view. On the other hand, the equally important era that gave us the Fourteenth Amendment was discussed only in terms of the actual amendment itself; the Court felt no need to plumb the depths of that era's world-view, political presuppositions, or patience with claims of states' rights.

In any case, the Reconstruction Era gave us constitutional amendments²⁷⁷ and related statutes²⁷⁸ that created the potential to completely alter not only the balance of federal and state power, but also to radically change the nature of the purposes for which federal power may be used. The federal power now reaches inside the states for the purpose of assisting, for example, freedmen and women exert civil and political rights over against the states. These states were no longer viewed as necessarily the guarantors of those rights but perhaps the enemies of those rights. That potential for federal power was, admittedly, largely untapped after a brief flurry during the Reconstruction, in part because of a Supreme Court hostile to a new federal

277. U.S. CONST. amends. XIII, XIV, & XV (enacted in 1865, 1868, and 1870 respectively).

278. See, e.g., 42 U.S.C. §§ 1981, 1983 (1999).

era. It was substantially later before the federal government began to actualize this potential—and thus the growth of the ameliorative doctrines, especially *Ex parte Young*.²⁷⁹

None of the evidence cited in *Alden* about the scope of the Eleventh Amendment addressed the very question the case concerned, which is whether a state court must hear a claim against that state based on federal law that is admittedly binding on the state. As Justice Kennedy admitted, “the Supremacy Clause enshrines as ‘the supreme Law of the Land’ only those federal Acts that accord with the constitutional design,”²⁸⁰ which means that a state is bound to apply in its own courts all valid federal law, because “[t]he Supremacy Clause does impose specific obligations on state judges.”²⁸¹ One such obligation is that state courts must comply with and enforce federal law, and when a court is a court of general jurisdiction, it must entertain federal causes of action²⁸² because the Supremacy Clause “charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.”²⁸³ There is nothing new about this requirement that states follow federal law wherever it leads. There also is nothing new about the requirement that state officials must enforce binding federal law. Furthermore, there is nothing new about subjecting those officials to suit for injunctive relief, or the state as a whole to suit by the United States itself to enforce its law against recalcitrant state governments. All that is new is that in *Alden*, the state court enforcing federal law is asked to enforce it against the state itself, not at the behest of the United States, but the individual whom the United States has empowered. The question one must ask then is why is that last wrinkle new?

As the Court noted in *Seminole Tribe*, “the federal courts did not have federal question jurisdiction at the time the amendment was passed (and would not have it until

279. 209 U.S. 123 (1908). One should note that the *Alden* Court needed *Ex parte Young*, an admitted fiction allowing that result the Court claims is so unthinkable—suits against an unwilling state—in order to make the doctrine of state sovereign immunity at all palatable.

280. *Alden*, 527 U.S. at 731 (quoting *Printz v. U.S.*, 521 U.S. 924 (1997)).

281. *Id.* at 753.

282. *See id.* at 800 (Souter, J., dissenting).

283. *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

1875)²⁸⁴

Think about what that means. It means that if a valid federal statute were enacted, at any time before 1875, any suit founded on that statute would go to state court for trial. Indeed, the annals of the United States Reports are replete with just such state court suits involving federal questions which were appealed to the United States Supreme Court on a writ of error. If that statute governed the relations between a state and a private party, any suit by that private party would be brought, not in federal court, but in state court. That is, until 1875—a significant year, a year in which the sea change in federal-state relations brought on in the Civil War's aftermath was still in process.

Why then did the drafters of the Eleventh Amendment fail to address a suit in state court? Why then did none of the evidence anyone cited in any opinion ever discuss such a possibility? Why, indeed, was *Alden* a case of first impression? What then is new about the federal law in question to give rise to this issue of first impression? It is that the federal law is an exercise of federal power that the founders never would have considered using (nationally regulating wages and hours in private employment). The reason the case arises is not a less deferential view of sovereign immunity in today's Congress but a changed understanding of federal power.

Assuming that Justice Kennedy's history is correct, it shows that in the time of the founders, two hundred years ago, states assumed they were immune in their own courts from claims against them predicated on their own laws; they were later outraged that they could be brought into another court to answer to those same sorts of claims. At the time of the founders, states also agreed to apply federal law when relevant in their own courts²⁸⁵ and agreed that the federal government could assert its law against recalcitrant states in federal courts.²⁸⁶ On the other hand, federal claims against the states by private individuals invoking federal law were not very likely to arise. First, this is because at the time the Eleventh Amendment was written, the scope of potential federal law was more restricted than after the Civil War Amendments, with little of the federal gov-

284. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69-70 (1996).

285. See U.S. CONST. art. VI, § 2; *Howlett*, 496 U.S. at 357.

286. See U.S. CONST. art. III, § 1, cl. 2.

ernment's affirmative power being directed towards the protection of private rights. Just as important, however, is that both federal and state governments were controlled by men who imagined governments engaged in far fewer activities than today's governments. History becomes time travel science fiction when one imagines how someone would have reacted to an issue that was inconceivable to him.²⁸⁷ To the drafters of the Eleventh Amendment, neither the scope of the federal government's regulation of the workplace nor the wide array of state activities in interstate commerce would have crossed their minds.

Alden is a case that only could have arisen in the twentieth century, after two events that the Court leaves out of its history. The first event is a constitutional "founding" every bit as important as the first in 1789, and that event was the Civil War, the changes in attitudes and perceptions about state and federal powers it engendered, and particularly the Civil War Amendments, most particularly the Fourteenth Amendment. The second event is not directly a "constitutional founding," but a real world event that the Constitution could not survive unless the Constitution were not flexible enough to adapt to it.²⁸⁸ That event could be localized to the New Deal, but a better way to look at it is the twentieth century, a century in which ever greater complexity and scope of economic activity led to an ever more active government at all levels, local, state and federal. It was a century in which the interaction between governmental action and private enterprise, once hidden behind the mask of familiarity and regularity which led to invisibility,²⁸⁹ have become open, obvious and dynamic. Or to put it simply, governments at all levels do a lot more than they used to do.

287. We certainly must use the pronoun "him," not the more common law review "her," to refer to a member of that amorphous group we call the founders. Whatever or whoever else they were, they were all men, all white, and all relatively wealthy.

288. See ACKERMAN, *supra* note 258 (describing the New Deal as a "constitutional moment").

289. This describes a situation in which a new wave of romantics looks back nostalgically at a time when government did not "interfere" with the market, a romantic view of history because it is to them beautiful but quite false. Government has always been inextricably entwined with economic activity. It just has been easy to overlook it when we are too familiar with arrangements to realize they are a construct of society, not the gift of nature—a romantic's common failing.

It took both of these events to make *Alden*. It took the Civil War to create the first great test of the Eleventh Amendment, *Hans v. Louisiana*, because only the Civil War led to the creation of federal question jurisdiction for the lower federal courts. It took the Civil War, more significantly, to give us the vast body of case law arising under *Ex parte Young*. It took the Civil War to give us the great fiction we need for nearly every lawsuit brought under 42 U.S.C. § 1983, that the defendant—a policeman, a city, a college, a school district—is not “the state” for purposes of the Eleventh Amendment, but that same defendant’s actions are “state actions” for purposes of finding a constitutional violation. As the Court acknowledged in *Seminole Tribe*, the Civil War and the Civil War Amendments, especially the Fourteenth, “by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution.”²⁹⁰

What the Court neglected to mention is the purpose for which that balance was changed—it was changed for the purpose of protecting people against the state. When the Constitution was adopted, it appears all the attention was being paid to the federal government, and all the fears were focused on protecting “We the People” from that government’s overreaching, but after the Civil War, it was all too apparent that the states needed watching too. That is why the Eleventh Amendment came to life after the Civil War, because only that war opened up new avenues which Article III jurisdiction could be called upon to make states into defendants in federal court. Before the Civil War, the federal government regulated commerce for the good of the nation as a whole; after the Civil War, the federal government protected individual people against their local governments. That is a change of great significance.

It also took the growth in the scope of the states’ governmental activities to create the situations that arose in the *College Savings Bank* and *Alden* cases. Even before the Civil War there were some rare instances where the federal power directly protected individual rights. Ironically enough, one such instance is found in the Patent Clause. In other words, the federal right to protect the interests *College Savings Bank* asserted has been around for two centu-

290. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

ries. That clause gives the federal government the right to regulate patents and grant inventors protection; similar powers were given the government to protect copyrights. Now, two hundred years later, both patent law²⁹¹ and copyright law²⁹² are buzzing with what to do with states that infringe patents and copyrights. The fact that in all that time the right to sue a state for infringing a patent only recently became a matter of controversy shows the other side of the coin from the growth of federal power to protect individuals; it shows the growth in the scope of governmental activities in which federal, state, local and tribal governments now engage, a breadth of activities that the “founders” could not have imagined. The more the government does, sometimes in direct competition with private companies and citizens, the more uncomfortable must the claim of sovereign immunity become.

The reason these questions only now arise is that we live in an era the “founders’ understanding” could never have understood. We live at the end of one century and are heading into another in which government activities seem to be inevitably more wide-ranging, further involved in what once were thought to be exclusively private activities, than the founders could have conceived. At the same time, we live in an age that believes that any government needs to be held accountable for what it does when it enters these fields. The history that gave us these facts—activist state governments that require more accountability—should not be ignored.

3. *Should we care about history?* Historical research and analysis, carefully and properly done, can be very illuminating and probably quite useful in all forms of intellectual endeavor, including law, as long as one recognizes that historical “truths” are never irrevocably established, always remaining provisional and subject to revision. Thus, historical analysis can inform constitutional

291. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Patent Act), 527 U.S. 627 (1999).

292. See, e.g., *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995). In that case, the Court of Appeals first ruled in 1995 that a state university did not have immunity from a suit for copyright infringement. See *id.* The Supreme Court remanded the matter to the Fifth Circuit after the Court decided *Seminole Tribe*, and on remand the Fifth Circuit held the state university was immune. See *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 1998).

analysis, but only in a provisional way. For two reasons, however, such historical analysis can never determine constitutional analysis.

The first reason is epistemological. Legal disputes require decisions, not the reservation of judgment until all the facts are in, although all the facts are never in when history is being done well. An idealized "spirit of the age" might reveal what the "founders" understood in some corporate way, but real history can only reveal the vast diversity of opinion and the wide range of ambiguity in the thought of various real people and groups of real people in the late eighteenth century. The "founders" are a mythic construct. We can learn a great deal about Thomas Jefferson or John Marshall, including a great deal about their expressed opinions on political matters, but we can never learn anything about the "founders."

The second reason historical analysis can never bind us is that it should not bind us. There is a reason constitutions are written and a reason why we can be so proud that we were the nation that led the way in writing our Constitution down. After artful drafting, political compromising, including occasional studied ambiguities to leave exact methods of governance to be worked out among different plausible options and a great deal of non-specific language to allow a great deal of future flexibility to deal with unforeseen future developments, the only thing anyone adopted is the text.

The Anglo-American tradition's greatest contribution to world democratic practice is constitutionalism. The special American contribution is our reliance, not on the "unwritten" common-law constitution, but an easily accessible written one. Nothing in the document has contributed as much as the fact that the document is just that: a document written down, a text all can read.

Here we must distinguish between "constitutional law" and "Constitutional law." The former is law about the basic constitutive principles which participants in a political/legal system accept as binding, even if the participant dislikes them. "Constitutional law" concerns law derived from the written text, capitalized because it refers to a proper noun, the United States Constitution. It may or may not be that the two—"constitutional law" and "Constitutional law"—are co-extensive, but logically they are distinct.

Our second greatest, closely related contribution is that

our constitution is not *overwritten*. It is relatively short, it is concise, it does not attempt to detail what to do in every conceivable situation, unlike a number of other constitutions currently extant, including many state constitutions. The Constitution is specific on certain points (for example, it details exactly when the President's term of office begins and ends, and exactly how many members of Congress there can be). On the other hand, much is left unsaid, even on points not generally conceived to be sweeping and grandiose. For example, Congress has the exclusive power to coin money, but exactly what that means is not detailed, which lack of detail has allowed financial systems to develop without hindrance from Constitutional limitations.

In addition, some of the language is quite sweeping; to take it seriously is to be forced to search for broader principles, and to work those principles out *without* guidance from the Constitution itself. In some instances we have accepted the challenge, while in others we have not done so. For example, to some degree we have accepted the challenge of determining what it means not to allow government to act to deprive people of life, liberty, and property without accountability through legal process; on the other hand, we have largely abandoned any pretense of discovering what the federal guarantee of a republican form of government in the states might entail.²⁹³ Such clauses make it impossible to be faithful to the text and at the same time what the Senate always purports to be looking for in judges, what it once was fashionable to call a "strict constructionist." It is impossible to "just" apply the law when the law demands that we make decisions about basic matters of principle. Taking the text seriously precludes the Constitutional equivalent of fundamentalist biblical literalism. Both biblical fundamentalism and Constitutional fundamentalism require one to take the word "literally" by in large part ignoring what the words actually say. In the case of the Constitution, taking the text seriously means accepting that we must interpret that text, which means making choices. We cannot avoid those choices by pretending we are bound

293. The reasonably sophisticated layperson might argue that a "republican form of government" requires not only widespread voting rights but such other things as the right to call the government into account for injuries it has done—like cheating someone of overtime pay or stealing someone's intellectual property.

by extratextual (and mythical) original intent.

D. *What The Three Decisions Have In Common: A Grand Romance*

All three decisions reflect the Court's romanticism about state sovereign immunity, as well as the Court's romance with that immunity. The Court's three opinions reflect its romanticism in two key ways. First, all three show a preference for the "founders' understanding" over written Constitutional text. That is, all three opinions prefer the "spirit" over the "letter" of the law. That spirit, the "founders' understanding," is not the result of a careful historical analysis but is itself a romantic construct. The Court does not derive the "founders' understanding" from the evidence but marshals what evidence it can to support its almost mystical concept of that understanding.

Second, all three show a commitment to the "state" conceived as a Romantic ideal, reflecting Continental Romanticism's Hegelian influence. Like Hegel, the Court idealizes the state as a person, which subsumes the individual. That state "personage" allows the Court to mischaracterize the interests their opinions serve, by pretending to be protecting the state David from the federal Goliath, while in fact defending the state Goliath against the private person David. In casting the decisions as a fight between the state, which it tends to characterize romantically as "politically accountable,"²⁹⁴ and the federal government, which it tends to characterize as distant and domineering, the Court misstates the obvious. The federal government is not a party to these suits. They were suits brought by private persons against the power of the state, and the Court made sure these private persons lost.

1. *The "founders' understanding" as Romantic construct.* The "founders' understanding" is not, of course, the result of historical research and analysis as those terms are used by contemporary historians. Rather, it represents the "spirit of the age" of the Federal Era, as the Court chooses to see that spirit. The most striking confirmation of

294. *Alden v. Maine*, 527 U.S. 706, 751 (1999) (characterizing the state's political processes as "the heart of the political accountability so essential to our liberty and republican form of government").

that fact is that the Court never even tries to identify whose understanding they have divined; that is, who were these founders? Were they a certain particular group of propertied, white, mostly Protestant men or were they, generally, all white, propertied Protestant men in the country, whose political theory all coalesced into one simple-to-grasp principle of state sovereign immunity that, for some reason, they chose never actually to articulate? And are we comfortable being bound by the opinions of the ruling elite of two centuries ago?

The Court does not seem to be concerned with identifying these founders, however. The phrase "founders' understanding," being a romantic construct nearly synonymous with "spirit of the age," represents something much grander than a prosaic polling of the Federal Era politically active. The "founders' understanding" is something unbound by mere empirical evidence because it represents a motive spirit above and behind experience.

If we were to look at the politically active minority, whose views plausibly could be characterized as the "founders' views," the evidence reveals a diversity of opinion that defies the attempt to construct one simple vision of state sovereignty and immunity. Some of those propertied Protestant white men believed that in a new federal system the states surrendered their sovereign immunity in federal courts more or less altogether, such as the majority in *Chisolm* as well as the Attorney General of the United States at the time of *Chisolm*, who argued in Mr. Chisolm's behalf. Events proved their view to be the minority one, but was it entirely aberrant? On the other hand, it appears others viewed the principle of state sovereignty as an overriding one that was in fact greater than any expressed Constitutional text, a view much like the one the Court now views as the "founders' understanding."

Still others may have believed, less sweepingly, that it would be a bad idea to allow citizens to sue states on claims based on state law without the state's consent, especially when the states were new and fragile entities with large debts that needed to be adjusted. That minority belief is the only understanding for which there is unambiguous support, as it is the result the Eleventh Amendment, under any of the likely readings, must require. It is also a direct reversal of *Chisolm*, which the historical evidence shows was the purpose of introducing the amendment.

In fact, the only evidence of what a majority of white, propertied, mostly Protestant men willing and able to take an interest in political affairs after *Chisolm* understood to be the proper scope of state immunity in federal court is the text of the Eleventh Amendment. All else is conjecture.

Therefore, one must conclude that, along with the “founders,” the Court has also constructed the “understanding” those founders had, that an understanding that flies much higher than the only actual example of that understanding we have, the text we have been given. The Court never fully explains why, if the Eleventh Amendment reflects a broader view of sovereign immunity than is found in the words of that amendment, the drafters did not just write that broader principle into the text. To do so would have been easy. Indeed, given the obvious evidence before them, that unless the principle of state sovereign immunity were explicit, it would be challenged in federal court,²⁹⁵ and given the ease with which the far-reaching principle the Court believes was the “founders’ understanding” could have been written, why is it that the Eleventh Amendment’s actual text is so limited?

2. *The Hegelian state.* The Court’s creation of a “founders’ understanding” made possible the Court’s discovery of principles that cannot be found in the text of the Constitution, yet are more binding on us than the text itself. The principle in question, of course, is a state sovereign immunity that almost entirely exempts states from judicial accountability for their actions unless they consent to be accountable. That principle, in turn, only makes sense in light of the Court’s Hegelian view of the state, not as a political construct of the people, but as a sovereign person in its own right, with rights superior to those of any other persons. In this view, that person gives the full expression to the will of the people and in fact enables the individuals born into its protection the ability to fully express themselves and be free. Hegel held that it is “only as one of [a state’s] members that the individual

295. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was not the only case brought in federal court attempting to get around state sovereign immunity before the passage of the Eleventh Amendment, so *Chisolm* cannot be seen as an anomaly. See, e.g., *Vanstorporst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791); *Oswald v. New York*, 2 U.S. (2 Dall.) 402 (1792).

himself has objectivity, genuine individuality, and an ethical life."²⁹⁶ Similarly, the Court seems to hold that only when the state—or as the Court would write, the “State”—is unfettered by judicial attacks on its “dignity” are the people able to be fully free because the State expresses their will.

The Court develops its Hegelian view in each of the June 29, 1999, opinions, but in each it does so differently. In the Chief Justice’s opinion in the patent case, he expresses that view through an unbounded view of state sovereign immunity unlimited by the text of the Eleventh Amendment, while taking a very stingy view of the limits of state power expressed in the Fourteenth Amendment. In Justice Scalia’s opinion in the trademark case, he equates the “rights” of states with the rights of persons, and in fact subscribes the states greater rights. Finally, Justice Kennedy in *Alden*, unfettered at all by any pretense of interpreting the Constitution’s text, is free to base his opinion entirely on ideology, and thus give the most striking expression of Hegelian political commitments.

Chief Justice Rehnquist’s view of states’ “rights,” as expressed in the Patent Remedy Act version of *College Savings Bank*, is found in the structure of his analysis. As was discussed above,²⁹⁷ he first enunciated a respect for state immunity unbounded by the text of the Constitution. By contrast, he established a uniquely difficult text for the justification of federal protection of individual rights against the state. Bear in mind, unlike *City of Boerne v. Flores*,²⁹⁸ there was no dispute about the definition of the personal right involved. Patents are property and deserve due process protection. The only dispute was whether these defined rights can in fact be protected. Yet the Chief Justice’s opinion applied the test for whether Congress really had Fourteenth Amendment power so stringently that it appears likely no attempt to protect individual rights will outweigh the state’s “right” to be immune from suit.

Justice Scalia’s opinion in *College Savings Bank* (the Lanham Act case) revealed his Hegelian view of the state in more explicit terms. As noted above, he failed to see any

296. EBENSTEIN, *supra* note 34, at 618.

297. See Florida Prepaid Secondary Educ. Expense Bd. v. College Sav. Bank (Patent Act), 527 U.S. 627, 634-35 (1999).

298. 521 U.S. 507 (1997).

distinction between the constitutional status of human rights and state "rights." After all, when he wrote that courts "do not presume acquiescence in the loss of fundamental rights," the rights he contemplated were those of states.²⁹⁹ Yet the cases he cited about fundamental rights—*Johnson v. Zerbst*,³⁰⁰ *Aetna Insurance Company v. Kennedy ex rel. Bogash*³⁰¹ and *Ohio Bell Telephone Company v. Public Utility Commission of Ohio*³⁰²—all involved the rights of individuals to be secure *against* the overbearing state. Justice Scalia ignored this distinction, because his "State" is just like a person, only writ large and, one suspects, better than a flesh and blood person.

Justice Scalia's Hegelianism also was reflected in his attacks on the dissenting opinion of Justice Breyer, which he interpreted as an attack on federalism. He found it

alarming to learn that so many Members of this Court subscribe to a theory of federalism that rejects "the details of any particular federalist doctrine"—which it says can and should "change to reflect the Nation's changing needs"—and that puts forward as the only "unchanging goal" of federalism worth mentioning "the protection of liberty," which it believes is most directly achieved by "promoting the sharing among citizens of governmental decision-making authority"³⁰³

That statement should not be ignored. Justice Scalia was "alarmed"—alarmed!—by a view that our governmental system, including division of power between state and federal government, was intended to protect liberty. He is alarmed (!) that our constitutional system should be viewed as promoting the empowerment of citizens. If these textbook characteristics of democracy are not the purpose of our federal system and Constitution generally, what is? It would seem the purpose is to preserve to the States their "dignity" as "persons."

As explicit as Justice Scalia's Hegelian view of the state may be, the *Alden* Court, unfettered by any constitutional

299. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 310 U.S. 292, 307 (1937)).

300. 304 U.S. 458 (1938).

301. 301 U.S. 389 (1937).

302. 301 U.S. 292 (1937).

303. *College Sav. Bank* (Lanham Act), 527 U.S. at 689-90 (quoting *id.* at 702-03 (Breyer, J., dissenting)).

text in making its decision, could make its reliance on its Hegelian view of the state abundantly clear. For example, Justice Kennedy wrote that states must be protected from “the *indignity* of subjecting a [nonconsenting] State to the coercive process of judicial tribunals at the instance of private parties.”³⁰⁴

Again, the Court stated, “[The Constitution] reserves to them a substantial portion of the Nation’s *primary sovereignty*, together with the *dignity* and essential attributes inhering in that status. They . . . retain the *dignity*, though not the full authority, of sovereignty.”³⁰⁵

Still again, the Court explained that the purpose of sovereign immunity was to protect “the *dignity and respect* afforded a State.”³⁰⁶ As the dissent pointed out, the discussion of “respect and dignity” reflected Blackstone’s discussion of the royal dignity, of which Blackstone said:

First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects The law therefore ascribes to the king . . . certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government.³⁰⁷

The dissenters saw this as “inimical” to the republican conception, which it certainly is.³⁰⁸ It also shows the peculiarly Hegelian concept of the states upon which the Court is operating; it certainly sees the state as in essence a “great and transcendent . . . superior being,” a kind of person who can be respected, can be afforded dignity, and can have rights.

It was easy for Hegel to view the state as a person with rights as great as or greater than that of citizens without creating any discomfort with his political views, as Hegel was not a democrat.³⁰⁹ It is not so easy, however, for the

304. *Alden v. Maine*, 527 U.S. 706, 749 (1999) (quoting *In re Ayers*, 123 U.S. at 505) (emphasis added).

305. *Id.* at 714-15 (emphasis added).

306. *Id.* at 749 (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997)) (emphasis added).

307. *Id.* at 802 (Souter, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *241).

308. *See id.* (Souter, J., dissenting).

309. *See, e.g.*, EBENSTEIN, *supra* note 34, at 620 (“Taken without its monarch

Court to ignore democratic theory, as well as the view that, in the theory of the United States Constitution, "We the People" are the ultimate sovereign, with the power to establish and disestablish governments.³¹⁰ That phrase, "We the People," shows the false assumptions Justice Kennedy made in *Alden*. The states are *not* the primarily sovereign. Only the people are. To some extent, the Court tries to avoid the conflict between state "rights" and popular sovereignty by adopting Hegel's identification of popular sovereignty with the sovereignty of the state. Hegel wrote, "We may also speak of sovereignty in home affairs residing in the people, provided that we are speaking generally about the whole state and meaning only what was shown above, namely, that it is to the state that sovereignty belongs."³¹¹

Justice Scalia at times comes closest to stating this view, that the popular sovereignty exists only in the sense that the state embodies the people, for instance when he excoriates the dissenting opinion in the Lanham Act version of *College Savings Bank*. In response to the dissent's proposition that if the people are the ultimate sovereigns, then the promotion of popular participation in governmental decision-making (that is, a rather uncontroversial definition of democracy), Justice Scalia wrote, "The proposition that 'the protection of liberty' is most directly achieved by 'promoting the sharing among citizens of governmental decision-making authority' might well have dropped from the lips of Robespierre, but surely not from those of Madison, Jefferson, or Hamilton"³¹²

Justice Scalia quite clearly considers comparison with Robespierre an insult and an indication that sovereignty of the people will yield Hegel's "formless mass" and even, perhaps, a reign of terror with a guillotine.

Justice Kennedy is less willing to abandon democracy and resolves the dilemma of popular sovereignty another way—by taking an exceptionally romantic view of the state. His view is not one to allow empirical evidence to interfere, either. That romantic view is ironically apparent when the

and the articulation of the whole which is the indispensable and direct concomitant of monarchy, the people is a formless mass and no longer a state.").

310. U.S. CONST. preamble.

311. EBENSTEIN, *supra* note 34, at 619.

312. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* (Lanham Act), 527 U.S. 666, 690 (1999) (quoting *id.* at 702-03 (Breyer, J., dissenting)).

Justice wrote:

We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."³¹³

That language strikes one either as touchingly naive or strangely cynical in the context of the decision in which it arose. After all, *Alden* was about a state which did in fact refuse to obey the binding laws of the United States that it pay workers overtime; and that state then hid behind sovereign immunity in order to keep refusing to obey binding laws of the United States—and hurt its citizens who happened to be its employees in the process.

Given this romantic ideal of the state, it is not surprising that Justice Kennedy avoids the popular sovereignty dilemma by assuming that the state is politically accountable to the people in all its actions and that all its actions reflect popular will. When reading how he does so, bear in mind the state decision he is discussing is the decision not to pay overtime to its employees, despite their expectation that they had earned it:

When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government. The asserted authority would blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments, displacing "state decisions that 'go to the heart of representative government.'"³¹⁴

In other words, if a state violates the federally protected rights of individuals—for that is what these cases are about, the rights of the plaintiffs, not the federal-state balance of power—that decision by the state is part and parcel of representative government. It is the people themselves acting.

By transferring a case about a government depriving it

313. *Alden*, 527 U.S. at 755 (quoting U.S. CONST. art. VI, cl. 2).

314. *Id.* at 751 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)) (citation omitted).

citizens of their wages into a case supposedly about a state's "representative processes," which are supposedly under federal attack, the Court was able to ignore the tension between popular sovereignty and the "dignity" of the state. Still more, the Court was able to misrepresent which party was the underdog. The Court was able to pretend that in a dispute between the state and underpaid probation officers it was the state which was the oppressed party.

3. *Pretending Goliath is David.* The Court's Hegelian conception of the state leads to some peculiar statements that reflect a strong romantic attachment to a vision of the state unconnected to empirical events. For instance, in *Alden*, Justice Kennedy wrote, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."³¹⁵

Again, the same Court states that "the balance between competing interests must be reached after deliberation by the political processes established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen."³¹⁶ With such high-sounding phrases, one could easily forget the Court is talking about a state decision to cheat workers out of overtime pay. *Alden* did not concern the federal government asserting its authority. The federal government has innumerable ways to do that, including lawsuits in its own name against the states. *Alden* concerned citizens invoking their rights. If the federal law granting that right is valid, and if the state is bound to follow it, then *Alden* is about a state decision to break the law. Is deciding to break the law a "fundamental political process?" Is a citizen's attempt to hold the state accountable for its illegal action "striking at the heart of political accountability?" It is hard to see how that could be the case.

Even 200 years ago there was never a dispute about the federal government's power to assert its supremacy. As the *Alden* Court acknowledged, states always have been ame-

315. *Id.* (citations and internal quotations omitted).

316. *Id.*

nable to the federal government's suit against them in the federal government's own courts.³¹⁷ Any government-to-government disputes not only have been subject to resolution, but resolution in the courts where the federal government had "home court advantage." At the time of the adoption of the Constitution, however, few of the grants of power to the federal government involved an affirmative power to protect individual persons directly.³¹⁸ One must not overlook the practical effect of the Court's three opinions: states are allowed to sell products in the marketplace, and lie about what they sell (the Lanham Act case); they are allowed to copy other people's patented products and sell them (the Patent Act case); and they are allowed to hire employees for an hourly wage, employees who believe that like all other employees they are entitled to time and a half for overtime, and then the states can cheat these workers out of that wage (*Alden*). To read the Court's opinions, however, one would nearly forget that it was these wronged private parties who were trying to sue, so much does the Court try to talk about the overbearing federal government.

The romantic view of states as somehow more politically accountable than the federal government seems to be a holdover from a different era that does not reflect modern realities. Most states have huge populations; California and New York, for instance, have tens of millions of residents. These state governments are not by any stretch of the imagination comparable to a New England town meeting of any other paradigm of small and readily accountable grassroots democracy. Moreover, voting patterns show that fewer voters vote in state elections as opposed to federal elections, making state and local governments even less the actual representative of the electorate. Furthermore, the states themselves have arbitrary boundaries that do not reflect any sort of natural community. Many metropolitan areas—for example, New York City and Philadelphia—are located near the conjunction of state lines, and those multi-state metropolitan areas form more of a natural political commu-

317. *See id.* at 755-56. Justice Kennedy suggests such suits against the "dignity" of the states are allowed because the United States will show "the exercise of political responsibility," a "control which is absent" from those pesky and irresponsible suits by private citizens trying to hold government accountable for the harm it has done them. *Id.* at 756.

318. One exception being, rather ironically, the control of patents. *See* U.S. CONST. art. I, § 8, cl. 8.

nity than does joining the city with the rest of the state not part of that metropolitan area.

Political accountability is critically important. Decentralization is often both more democratic and more efficient. Very little evidence exists, however, that federalism serves either the ends of increased accountability or effective decentralization. Romantic dreams to the contrary should not obscure that fact.

These cases do not concern the ability of states to be politically accountable but the rights of individuals the state has harmed. The state may disagree with the extent of right the federal government has created for a class of individuals; it may feel that creating the expectation of overtime payments for overtime work is an inappropriate balance of the competing interests between employer and employee. That dispute, however, is not about political accountability, as both federal and state governments have that to about the same extent. It is a dispute about whether one level of government, the federal, has the right to strike that balance rather than the state.

Justice Kennedy admitted that while “[t]his case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance.”³¹⁹ The question of form is what suits may be allowed in what courts, but the question of substance is what rights the federal government may protect. The real question is whether the federal government has the power to regulate the terms and conditions of employment, or to regulate advertising behavior, or to protect patents. If that is properly the federal government’s role in our federal structure, then anyone who violates those federally-protected rights should be liable to being held responsible for doing so.

III. ROMANCING THE STATES: THE IMPACT ON HUMAN RIGHTS

Near the end of his opinion in *Alden*, Justice Kennedy attempted to assure his readership that the non-textual, extremely broad sovereign immunity the Court has granted to the states would not utterly destroy the rule of law. He mentioned the doctrine of *Ex parte Young*,³²⁰ and the doc-

319. *Alden*, 527 U.S. at 758.

320. *See id.* at 757.

trine that allows lesser state entities to be sued,³²¹ to show that some relief could be had—although the Court has severely weakened the *Young* doctrine, and the latter doctrine only means that some illegal state actions can be remedied but others cannot. Yet both these doctrines are acknowledged fictions.³²² One would think that it would trouble him, or any other state sovereignty devotee, that the doctrine they trumpet is so harsh that illogical fictions must be created to soften the blow.

He also mentions the doctrine of waiver, which is an odd thing to bring up in a case in which a state most emphatically did not choose to waive its immunity, one of three decided the same day in which states refused to waive their immunity. Justice Kennedy's basic point, however, inspires the least confidence of all:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."³²³

Justice Kennedy says the Court is unwilling to assume that the states will not honor their oaths to the Constitution, in the face of three cases decided the same day in which it was alleged that states chose to violate federal law. Justice Kennedy's pious belief in the good faith of states in that case exhibits the highest degree of romanticism, a commitment to a pretty ideal against which the mundane world of empirical fact cannot prevail. For those of us who care about the world of fact, however, we recognize that even if most of the time most state officials may act in good faith, there is clearly a need to protect ourselves from those

321. *See id.* at 756.

322. *See, e.g.,* Idaho v. Coeur d'Alene Tribe of Idaho 521 U.S. 261 (1997) (*Ex parte Young* rests on fiction); see also that opinion's discussion of § 1983 cases, where at one and the same time a municipality is "not the state," but its actions are "state actions."

323. *Alden*, 527 U.S. at 755 (quoting U.S. CONST. art. VI, cl. 2).

times when the states fail to do so. *Alden v. Maine* shows that the possibility of a state refusing to allow a claim to be made against it for its apparent violations of federal law is far from hypothetical. Indeed, some states have not waived their sovereign immunity in their own courts for any action whatsoever,³²⁴ and others have limited such waiver to very specific actions.³²⁵

These cases illustrate that the Eleventh Amendment, state sovereign immunity, or indeed any issue that concerns the "sovereignty" of a political entity cannot be dismissed simply as a matter of "federalism"³²⁶ with its implications of being simply a matter of federal-state relations, or federal-state-tribal relations. All these cases concern not only the division of "sovereignty" of state and federal governments but the sovereignty of the people themselves. To use an old-fashioned word, these cases affect our personal liberties.

Cleaning up the Court's Eleventh Amendment doctrine completely requires going all the way back to *Hans v. Louisiana* and starting over. That may sound too radical for a profession that values stability, as law values stare decisis. Yet stare decisis has never been an overwhelming stumbling block in Eleventh Amendment cases. As Chief Justice Rehnquist wrote in *Seminole Tribe*, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' Our willingness to reconsider our earlier decision has been 'particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible."'³²⁷

324. See, e.g., ALA. CODE § 41-9-60 (1991) (stating that claims may only be brought administratively); W. VA. CONST. art. VI, § 35 (stating that "the State of West Virginia shall never be made a defendant in any court of law or equity").

325. See, e.g., COLO. REV. STAT. § 24-10-106 (1998) (waiving immunity in tort claims only for injuries resulting from operation of a motor vehicle, operation of a public hospital or a correctional facility, the dangerous condition of public building, the dangerous condition of a public highway or road, a dangerous condition caused by snow or ice, or from the operation of any public utility facility); MINN. STAT. ANN. § 3.736 (West 1999) (stating that a waiver of immunity is invalid when loss arises from state employee who exercises due care or performance or failure to perform discretionary duty); MD. CTS. & JUD. PROC. CODE ANN. § 5-522(a)(5) (1998) (stating that immunity is not waived if a claim from a single occurrence exceeds \$100,000).

326. However, that is how Justice Scalia sees it. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Lanham Act)*, 527 U.S. 666, 688-89 (1999) (characterizing sovereignty as a matter of federalism).

327. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (citations omitted).

Of course, *Hans* need not be overruled bluntly; as we learned from *Parden*, it can be reinterpreted to have been in fact a suit that did not really involve a federal question. Moreover, one could interpret the Eleventh Amendment contextually and still nod to precedent by finding that, given the need to balance federal and state interests, a federal question suit against a state could only be brought if Congress specifically authorized it. Although such an additional layer to the text of the Eleventh Amendment is not authorized by the text, it could be justified as a reasonable rule of prudence when dealing with matters as politically sensitive as these cases seem to the Court to be.³²⁸

IV. ON READING THE CONSTITUTION: SOME CONCLUDING THOUGHTS

All three opinions decided on June 23, 1999, were grounded in the sentiment that the Constitution itself, the written document to which all have access, is irrelevant; rather, only the presuppositions of some unidentified individuals known as the "founders" matter. For purposes of this article, others can argue about who those founders might have been, whether it is possible to know what their presuppositions were or whether in fact all the relevant founders even had similar presuppositions; whether if such presuppositions are discoverable that task is best served by lawyers and judges rather than trained historians; and whether the Court has done an adequate job of discovering those presuppositions. This article focused on another question, which is why we today should effectuate the presuppositions that are not in fact written into the text. The "founders" lived in a different world than ours; but fortunately, they were wise enough not to bind us to their world view. They bound us to a written text, rather short, in many places quite open-ended, which provides both stability and

328. While suits against states may have been political hot potatoes two centuries ago, it is the author's sense that the general political mood at the beginning of the twenty-first century finds such suits perfectly acceptable. An informal poll taken among the author's acquaintances, including many practicing lawyers who have forgotten most of their constitutional law courses over the years of practice, has shown that nearly all of them believed such suits were an everyday occurrence, and did not seem disturbed by that fact. The author's sample group included persons active in Republican party politics, presumably the persons most likely to support states' rights.

flexibility. The Court's current interpretive style provides neither.

The "founders' understanding" upon which the Court relies, and for which the Court purports to search, is not discovered after careful historical analysis, but rather is the Court's own romantic construct.

As lawyers, the only original intent, or indeed legislative intent of any sort, which we are competent to divine is that expressed in the adopted texts—the words themselves, in conjunction with the way the clauses in question interact with and are illuminated by other parts of the text, in comparison with other, similar texts on the same topic. Moreover, that intent—what is expressed in the adopted texts—is the only intent the drafters have a right to impose on the future. If the only way a certain text could muster enough votes to be adopted is to leave out the expression of particular results which the sponsors would have liked to see, those particular results *were not adopted*. If a clause only found acceptance because of a studied ambiguity which obfuscates the drafter's intent, a later court cannot resolve that ambiguity by reference to the drafter's intent outside the text, for that would impose a meaning that was likely opposed by many who voted for the clause's adoption.

The Court's refusal to be bound by the text but rather the spirit of the text is not a neutral procedural choice. It serves a substantive vision of the Constitution, one which identifies "sovereignty" as belonging the governments, not the people to whom those governments purport to be accountable, and one which values "sovereign dignity"³²⁹ over that accountability. The choices the Court made at the end of its last term already have had significant fallout in reducing states accountability to their citizens. The United States Court of Appeals for the Eighth Circuit has found that states cannot be called into account for violating their employees' rights under the Americans with Disabilities Act.³³⁰ That same court has also found that states cannot be brought to account for violating the Individuals with Disabilities Act and the Rehabilitation Act, at least not by the persons who were injured by that violation.³³¹ Furthermore,

329. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that states "retain the dignity, though not the full authority, of sovereignty").

330. *See Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999).

331. *See Bradley v. Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999).

a court that was considering whether to allow suits against state agencies who were delegated federal power to regulate interconnections between local telephone companies for failing to use that delegated federal power properly has held that even that suit is barred by the Eleventh Amendment.³³²

These will not be the last decisions granting states immunity from suit, wreaking havoc with federal regulatory schemes and private parties' federally protected rights.

This article began with the assertion that the Supreme Court's Eleventh Amendment jurisprudence is caught in a trap of the Court's own making. The first part of that trap was identified as an increased empowerment of the states at the expense of their accountability to the "people." That result appears to be a trap to the author but may not appear so to the Court; it may well seem to the Court an appropriate division of power. On the other hand, the second part of the trap ought to be problematic for the Court—that being the trap that arises from the romantic reading of the amendment, which caused justices who decry judicial activism to ignore the written Constitution to forge their own. The first step out of that trap might be to show some intellectual honesty and admit that "romantic reading" is not a reading of the text at all. In other words, the Court could begin by admitting that, in explicitly disavowing the text of the Eleventh Amendment as a meaningful source of state immunity, it is disavowing the Eleventh Amendment altogether as a guide to deciding the balance between state power and accountability. That is to say, the Court, at least on this point, must admit that it finds the Constitution irrelevant.

The Court's decisions on state immunity are constitutional law because they concern the fundamental constitutive elements of our political/legal system, but they are not Constitutional law.³³³ To end the trap of the romantic reading, the Court must admit that, at least on some issues, it no longer finds the Constitution applicable; rather, it relies on certain political principles it believes were important to some people at the time the nation was constituted. In turn,

332. See *Wisconsin Bell v. Public Serv. Comm'n of Wis.*, 57 F. Supp.2d 710 (D.Wis. 1999).

333. See *supra* pp. 489-91 for a comparison of the terms "constitutional law" and "Constitutional law."

the Court might admit that in fact it is applying principles it finds congenial, irrespective of the Constitution. That, in turn, might force the Court to confront its relationship with the entire text of the Constitution and with the notion of constitutional principles (some of which might be external to the text entirely).

What would happen if the Court admitted its state sovereign immunity law was not about the United States Constitution at all. No one knows. The debate about state sovereign immunity, however, would be more honest. The author chooses to believe that an honest debate would produce a more useful and democratic resolution to this and other questions of power and accountability.

