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(Article begins on next page)

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Daniel J. Meltzer

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ESSAYS

STATE SOVEREIGN IMMUNITY: FIVE AUTHORS IN SEARCH OF A THEORY

*Daniel J. Meltzer**

The Supreme Court's federalism jurisprudence has repeatedly been characterized as under-theorized.[1] The three sovereign immunity decisions handed down on the Term's last day—*Alden v. Maine*,[2] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[3] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[4]—provide still more support for that view. Together with decisions of the past few years—*United States v. Lopez*,[5] *City of*

* Story Professor of Law, Harvard Law School. My thoughts on this topic have been shaped in numerous conversations with my colleagues Dick Fallon and David Shapiro. I have also drawn on material included in RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. Supp. 1999) [hereinafter HART & WECHSLER'S 1999 SUPPLEMENT], of which Professor Shapiro was the primary author. I am grateful, in addition, to both Professors Fallon and Shapiro, and to Charles Fried, Andy Kaufman, Bernard Meltzer, Larry Tribe, and Ann Woolhandler, for reading and providing very helpful comments on an earlier draft. Joshua Berman provided invaluable research assistance.

1 *See, e.g.*, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998); Martin H. Redish, *Constitutionalizing Federalism: A Foundational Analysis*, 23 OHIO N.U. L. REV. 1237, 1247–48 (1997); Mark Tushnet, *Keeping Your Eye on the Ball: The Significance of the Revival of Constitutional Federalism*, 13 GA. ST. U. L. REV. 1065 (1997).

2 119 S. Ct. 2240 (1999).

3 119 S. Ct. 2219 (1999).

4 119 S. Ct. 2199 (1999).

5 514 U.S. 549 (1995).

Boerne v. Flores,[6] *Seminole Tribe v. Florida*,[7] and *Printz v. United States*[8]—they do make clear, however, that the majority's commitment to imposing constitutional limits on national legislative authority is far-reaching.[9]

In this Essay, I offer some observations about the implications of last Term's decisions for the enforcement of federal law and about the relationship of those decisions more broadly to judicial enforcement of constitutional limits on federal power. What is most striking about last Term's decisions, in my view, is their effort to enforce a vision of constitutional federalism not by restricting the reach of congressional authority to regulate the states, but rather by limiting the remedial means by which Congress may enforce regulation of the states that is otherwise within its substantive legislative power. In ways that the Court fails to acknowledge, its effort fails to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives.

I. IMMUNITY AND THE LIMITS OF NATIONAL AUTHORITY

The limits on national legislative authority imposed by the Court's recent decisions fall into two sets. First are subject matters that are deemed to fall beyond national legislative power altogether. The leading cases here are *Lopez*, holding that a federal statute prohibiting the possession of firearms near schools fell outside of the Commerce Power, and *City of Boerne*, holding that the Religious Freedom Restoration Act of 1993[10] (RFRA), as applied to state and local governments, was outside of congressional authority under Section 5 of the Fourteenth Amendment.

Second, even when Congress is legislating as to matters generally within its constitutional authority, some legislative techniques are deemed to be constitutionally impermissible because they are not

6 521 U.S. 507 (1997).

7 517 U.S. 44 (1996).

8 521 U.S. 898 (1997).

9 Three years ago, after noting the hazards of prediction, I suggested that there is reason to believe that "the decision in *Seminole* [*Tribe*] is not one of a mounting series of blows to the reach of national power, but rather a gesture in the direction of a diffuse conception of state sovereignty that in the end will not be generally enforced by the Court." Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 65. Subsequent events have confirmed my view that such predictions are hazardous.

10 Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to bb-4 (1994)).

"Necessary and Proper"[11] or otherwise invade an area of state autonomy. Before this Term, one could have summarized these limits as follows:

(1) *Anti-Commandeering.* Congress may not unconditionally[12] commandeer state or local legislative or executive officials[13] to carry out federally-imposed duties—except possibly when Congress legislates under the enforcement clauses of the Reconstruction amendments.[14]

(2) *Eleventh Amendment Immunity.* Absent state consent, a *federal court* may not, consistent with the Eleventh Amendment, entertain a claim in a private suit (i.e., one brought by a plaintiff other than a state or the United States) that (a) names a state as a defendant, or (b) even if nominally against a state official, can be viewed as seeking certain forms of relief (notably damages against the state fisc) that are deemed to be "retrospective"[15]—except when Congress is exercising

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11 *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240, 2256 (1999).

> When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."

Id. (quoting *Printz*, 521 U.S. at 923–24 (quoting THE FEDERALIST No. 33, at 204 (Alexander Hamilton))) (omissions and alterations in *Printz*).

12 The dissenters in *Printz* asserted, without response from the majority, that the Court's decision did not rule out "commandeering" as a condition of federal spending or federal non-preemption of state law. *Printz*, 521 U.S. at 958–62 (Stevens, J., dissenting). Whether that reading is correct remains to be seen. *See infra* notes 210–11.

13 *Printz* reaffirmed a distinction between state judicial officers (who may in some circumstances be required to implement federal law) and other state officers (who may not be) that the Court first elaborated in *New York v. United States*, 505 U.S. 144, 178–79 (1992). *See Printz*, 521 U.S. at 927–29 & n.14.

14 As to whether statutes enacted under the enforcement clauses of the Reconstruction amendments stand on a different footing, see *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212–13 (1998), Adler & Kreimer, *supra* note 1, at 119–33, Evan H. Caminker, Printz, *State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 236–42, and see also Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835 (1994) (noting how frequently federal voting rights legislation requires states to enact changes in their internal political structures).

15 For a discussion of the haziness of the distinction between "retrospective" and "prospective" relief, of the failure of the Court's decisions to track common understandings of those terms, and the possibility that some Justices have abandoned the distinction in recent opinions, see Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh*

(with an adequately clear statement) its enforcement powers under the Reconstruction amendments.[16]

Allied to these two autonomy-based limits is a rule of statutory construction, though one with constitutional foundations, providing that federal legislation will not be interpreted to intrude on a sphere of state political autonomy, absent a clear statement by Congress. That sphere has been variously described as "areas traditionally regulated by the States,"[17] "decisions that 'go to the heart of representative government,'"[18] and "state governmental functions."[19] Some opinions hint that at least certain state functions may be immune not merely from "commandeering" but more broadly from federal regulation, even when Congress has included an adequately clear statement.[20]

So things stood when the Court handed down its immunity decisions last Term, which sharpened both kinds of limits on national power. One, the *Florida Prepaid* decision, narrows the reach of congressional enforcement authority under Section 5 of the Fourteenth Amendment by invalidating a legislative effort to permit patent holders to enforce their property rights against states engaged in infringement.[21] The other two broaden the scope of state sovereign immunity: *College Savings Bank* expanded the scope of the Eleventh Amendment in federal court,[22] and *Alden v. Maine* extended to states an immunity from state court suit generally equivalent to the immunity in federal court conferred by the Supreme Court's interpretation

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Amendment Doctrine, 87 GEO. L.J. 1 (1998), and see also David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149.

16 On whether Congress has the same power to abrogate under the Enforcement Clause of the 13th Amendment as it possesses under those of the 14th and 15th Amendments, see Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 107 n.33 (1996).

17 Gregory v. Ashcroft, 501 U.S. 452, 459 (1991).

18 *Id.* at 461 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

19 *Gregory*, 501 U.S. at 469.

20 *See, e.g.*, *Gregory*, 501 U.S. at 464 (stating that adoption of the plain statement rule "may avoid a potential constitutional problem"); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (citing Coyle v. Oklahoma, 221 U.S. 559 (1911)) ("These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.").

21 *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999).

22 *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999).

of the Eleventh Amendment.[23] Collectively, the three decisions sharply limit federal power to enforce federal obligations validly imposed on state governments through the remedy of private suits for damages.

II. IMMUNITY AND THE ENFORCEMENT OF FEDERAL LAW

The roots of the broadest of the three decisions, *Alden v. Maine*, lie in the Court's decision three years earlier, in *Seminole Tribe*, that Congress lacks power when legislating under Article I to provide for full enforcement in federal court of a state's federal duties. In particular, the *Seminole Tribe* Court held that Congress's powers under Article I do not include the authorization of private suits that name states as defendants or that seek "retrospective" relief from state officials.

The questions whether *Seminole Tribe* was correctly decided, whether it was a necessary implication of *Hans v. Louisiana*,[24] and whether *Hans* itself was correctly decided have been much discussed.[25] However one answers those questions, once *Seminole Tribe* was decided as it was, the issue whether *state courts* were required to hear the very suits that *Seminole Tribe* excluded from federal jurisdiction assumed great importance. Commenting on *Seminole Tribe*, I suggested that "a freedom from unconsented federal court suit by private individuals seeking retrospective relief—and then only if the statute cannot be viewed as enforcing one of the Reconstruction amendments[—] . . . is a curious and unstable place for the last stand of state sovereignty."[26] *Alden*, in extending to the state courts a state's immunity from unconsented private suit (here suit by state employees to obtain overtime wages required by the Fair Labor Standards Act (FLSA)), proves that *Seminole* was not in fact the last stand. But if after *Alden* the scope of constitutional protection of state autonomy has shifted, the current resting place remains curious and perhaps unstable as well.

An evaluation of *Alden* must start with the majority's acknowledgment that Congress has constitutional authority to regulate the labor standards of state and local employees. That was the holding, after all, of the 5-4 decision in *Garcia v. San Antonio Metropolitan Transit Author-*

23 *See* Alden v. Maine, 119 S. Ct. 2240 (1999). For a discussion of possible differences between federal court and state court immunity, see *infra* note 95 (discussing Reich v. Collins, 513 U.S. 106 (1994)).

24 134 U.S. 1 (1890).

25 My own views are set forth in Meltzer, *supra* note 9.

26 *Id.* at 62.

ity[27] in 1985. Although one shouldn't bet the farm against *Garcia*'s being overruled,[28] it remains the law for now. Moreover, *Alden*, while failing even to cite *Garcia*, re-affirmed that the statutory elaboration of federal labor standards for the states was not to be merely precatory; the *Alden* majority mentions three mechanisms by which those duties might constitutionally be enforced: suit by the United States, private suit against state officers to enjoin ongoing violations, and private suit against state officers seeking damages from them in their personal capacity.

The question *Alden* presented is whether an additional and familiar remedial technique—a damage action by injured parties against the organization responsible for the injury—is constitutionally impermissible when the organization is a state government. The importance of that technique to enforcement of federal law surely is relevant to (though not necessarily determinative of) that question.

The significance of organizational liability for damages may be highlighted by showing the major shortcomings in each of the permissible alternatives noted by the majority. Begin with private suits for prospective injunctions. Quite apart from the need to amend the FLSA to authorize employees to seek prospective relief,[29] many violations do not arise from ongoing practices subject to injunctive orders, while in other cases (*Alden* included[30]) the employer may come into compliance so as to make injunctive relief inappropriate. In those cases, a rule that only injunctions may be obtained is tantamount to a rule that no relief is available. Even where ongoing practices exist, merely enjoining their continuation fails to compensate for harm suffered, and may not by itself provide adequate incentives for reasonably complete and prompt compliance. On the latter point, state

27 469 U.S. 528 (1985).

28 For the view that *Garcia* has already been effectively overruled, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1334 (1997). One month after granting certiorari in *Alden*, 119 S. Ct. 443 (1998), the Supreme Court denied a petition for certiorari that, in seeking review of a federal court action under the FLSA brought by private individuals against a local government, presented the question whether *Garcia* should be overruled. *See* West v. Anne Arundel County, 137 F.3d 752, 760–61 (4th Cir.), *cert. denied*, 119 S. Ct. 607 (1998).

29 *See* 29 U.S.C. §§ 211(a), 216(b), 217 (1994) (granting to the Secretary of Labor authority to seek, inter alia, prospective relief against employers but granting employees authority to seek only back wages and liquidated damages); *see also* Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47 (8th Cir. 1984); Keenan v. Allan, 889 F. Supp. 1320, 1382 (E.D. Wash. 1995) (stating that "with the exception of child labor law violations, only the Secretary of Labor may seek an order to restrain violations of the FLSA"), *aff'd*, 91 F.3d 1275 (9th Cir. 1996).

30 *See Alden*, 119 S. Ct. at 2269.

officials who act as Holmesian bad men would have little to lose, and much to gain, by resisting compliance with the FLSA unless and until an injunction is obtained.[31]

Of course, state officials do not generally act as bad men: routine rule-following, respect for the law, and desire to avoid the burdens of litigation often will induce compliance with federal duties. In some instances, however, these factors may operate only weakly, and then the threat of retrospective organizational liability will be an important enforcement technique in the public as in the private sector. Among the situations where such liability is of particular importance are those in which the scope of federal duties is uncertain or the cost of compliance is very high; in such cases, the prospect of liability for non-compliance may induce greater care in considering whether federal law truly permits the conduct in question.[32]

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31 *See* Edelman v. Jordan, 415 U.S. 651, 692 (1974) (Marshall, J., dissenting). Absent any remedy which may act with retroactive effect, state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate that assistance be paid with reasonable promptness to all eligible individuals. This is not idle speculation without basis in practical experience. In this very case, for example, Illinois officials have knowingly violated since 1968 federal regulations on the strength of an argument as to its invalidity which even the majority deems unworthy of discussion. . . . Without a retroactive-payment remedy, we are indeed faced with "the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them."

Id. (quoting Jordan v. Weaver, 472 F.2d 985, 995 (7th Cir. 1972)); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1793 (1991) (noting that broad refusals to issue retroactive remedies based on expansive conceptions of new law "threaten the maintenance of an appropriate structure of incentives to learn and comply with constitutional [or other federal] rules").

In a related vein, Vicki Jackson suggested to me in conversation that the *Alden* decision reduces the incentives for plaintiffs' lawyers to devote time to seeking out-of-court resolutions with state officials, and for state officials to be receptive to such approaches, for only when an injunctive order is secured does the government face the possibility (through contempt sanctions) of monetary liability to a private plaintiff for noncompliance with federal law. *See infra* note 48. *Alden* thus strengthens the incentives of plaintiffs to go to court immediately and of defendants to use delaying tactics.

32 John Jeffries has objected to unlimited governmental damage liability in the context of actions under 42 U.S.C. § 1983 (1994). He would restrict such liability to situations in which state actors are at fault, which he would determine by applying a test analogous to existing qualified immunity doctrine in § 1983 actions. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50–51 (1998). It is not clear whether Jeffries would extend his analysis to violations of statutory duties like those under the FLSA or federal intellectual property laws. How-

Alden does not, of course, limit enforcement to injunctive actions. But while it leaves open two avenues for obtaining retrospective damages relief, both have serious shortcomings. The first is for injured parties to sue state officers personally for damages.[33] Without more, the resulting regime would be inadequate for plaintiffs, intolerable for state governments, and unfair to state officials.[34] Such a regime would, however, in turn pressure states to indemnify their officials, a move in the direction of governmental liability.[35] Yet it is too easy, in my view, to equate officer liability accompanied by indemnification with direct governmental liability.[36] To begin with, here too, Congress would need to ensure that a range of statutes applicable to state governments in fact impose monetary liability on individual officers,

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ever, his analysis is policy-driven; he does not suggest that the Constitution demands his preferred regime. *See id.* at 51.

For present purposes, what is important is that the *Alden* rule does not address the problem that concerns Jeffries. Even if one agrees with his analysis, one would want a fault requirement whether the nominal defendant was a state or local government or an individual officer. *Alden,* by contrast, leaves open the possibility that individual officers (in their personal capacity) or local governments might be held liable even when not "at fault" while precluding the imposition of retrospective liability upon state governments even when their "fault" for having violated federal law is undisputed. *See also* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis,* 1987 SUP. CT. REV. 249, 272.

A recent manuscript of Daryl Levinson argues that the imposition of constitutional damages liability upon governmental units for torts and takings is ineffectual because governments fail to internalize the costs of constitutional remedies; some aspects of his argument would seem to extend to governmental damages liability in general. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs,* 67 U. CHI. L. REV. (forthcoming Spring 2000). While Levinson's argument seems to me exaggerated, for present purposes the critical point is that it, like Jeffries's argument, is a functional one about the desirable allocation of liability; unlike the *Alden* opinion, Levinson does not make a constitutional argument that Congress, even if it seeks to impose governmental liability, should be precluded from doing so. *See id.*

33 *See* Regents v. Doe, 519 U.S. 425 (1997); Jeffries, *supra* note 32, at 49.

34 *See generally* PETER SCHUCK, SUING GOVERNMENT (1981).

35 *See* Fallon & Meltzer, *supra* note 31, at 1823; Jeffries, *supra* note 32, at 62. Indeed, Kramer and Sykes have argued that if one makes certain heroic assumptions, individual and entity liability are indistinguishable. *See* Kramer & Sykes, *supra* note 32, at 272.

36 For an argument that views the two regimes as being closer to parity than I would, but that acknowledges the limitations of simpler assertions of parity as well as many of the pertinent uncertainties, see Jeffries, *supra* note 32, at 49–50, 62–66, and see also Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?,* 106 YALE L.J. 1683, 1775 (1997).

amending existing provisions when necessary.[37] Beyond that, the idea of personal liability would in some cases be jarring: imagine if the state director of revenue or of public assistance, for example, were personally liable for the "refund" of past taxes that had been collected, or for payment of past welfare benefits that had been denied, in violation of federal law—even if the amounts involved totaled millions of dollars.[38] In addition, such a regime would require sometimes difficult and burdensome determinations of which official(s) should be held personally liable for illegal action.[39] For that and a range of other reasons, juries may hesitate to award adequate damages against individual officers serving the public under often difficult conditions.[40] And even with complete indemnification, officials might well have grounds to fear the entry of significant judgments against them personally.[41] Moreover, indemnification, though generally thought to be widespread, is not universal: for example, some employ-

37 The FLSA's substantive wage and hour provisions impose liability only on "employers," *see* 29 U.S.C. § 206(a) (1994 & Supp. III 1997), but that term is broadly defined to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203(d). Most courts have ruled that an employer's agent who exercises supervisory authority over an employee's wages and hours may be jointly and severally liable with the employing organization, *see, e.g.*, Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983), although some of the holdings in this line relate to the owners or chief executive officers of small businesses, *see, e.g.*, United States Dep't of Labor v. Cole Enter., 62 F.3d 775, 778 (6th Cir. 1995), and thus might not support imposing liability, for example, on a middle manager in a large bureaucracy. Moreover, one circuit has taken the quite different view that individual supervisors are never personally liable under the FLSA. *See* Wascura v. Carver, 169 F.3d 683, 686 (11th Cir. 1999).

Individual liability is less certain still under other federal statutes. For example, considerable authority denies that individual defendants may be held personally liable for damages under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). *See, e.g.*, Butler v. Prairie Village, 172 F.3d 736, 743–44 (10th Cir. 1999) (collecting cases).

38 In this regard, the *Alden* Court's endorsement of personal liability included an ambiguous qualification: "Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct *fairly attributable to the officer himself*, so long as the relief is sought not from the state treasury but from the officer personally." *Alden*, 119 S. Ct. at 2267–68 (emphasis added). Whether the Court meant to suggest a limit on congressional power to impose liability on state officers for particular state action to which they had only a limited connection remains to be seen.

39 *See supra* note 38.

40 *See, e.g.*, Jeffries, *supra* note 32, at 50–51.

41 *See id.*

ees or agencies may (advertently or otherwise) be excluded;[42] indemnification may be permissive rather than mandatory[43] (though admittedly a routine practice of permissive indemnification may blunt any distinction); some states impose monetary limits on indemnification;[44] and many indemnification provisions exclude conduct that is criminal, egregious, willful, or the like.[45] Given these kinds of gaps, to shift damages liability from state governments to state officials would at a minimum have the most serious transition costs.

Finally, even universal indemnification may not be equivalent to governmental liability. Consider a case like *Harper v. Virginia Department of Taxation*,[46] where the state's retrospective liability for having collected an unconstitutional tax was estimated to be several hundred million dollars. Even if positive law authorized suit against the official who directed the state revenue department for those enormous sums, assume that the official's net worth was $100,000. If a $200 million judgment were entered against the official, would the state, because of its indemnification policy, simply write a check for that amount to the plaintiffs? A state indemnification law could surely be written to require that result, and some may, but there is also authority suggesting that a government's obligation to indemnify does not mature at the time that a judgment is entered against an indemnitee but only when the indemnitee has sustained a loss by actual payment of the judgment.[47] One could surely imagine that a state faced with a $200 mil-

42 *See* Phillip E. Hassman, Annotation, *Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Indemnify Public Officer or Employee for Liability Arising out of Performance of Public Duties*, 71 A.L.R.3d 90 (1976).

43 That is the case in my home state of Massachusetts. *See* MASS. GEN. LAWS. ch. 258, § 9 (1992).

44 *See id.* (setting a one million dollar limit).

45 *See, e.g.*, ALA. CODE § 11-47-24 (1992 & Lexis Supp. 1999) (requiring state agencies to indemnify employees from any judgment arising out of performance of official duties except where the employee's conduct was "intentional or willful or wanton"); COLO. REV. STAT. ANN. § 24-10-110 (West 1992 & Supp. 1999) (requiring public entities to defend and indemnify employees from judgments arising out of official conduct, except where conduct was "willful and wanton").

46 509 U.S. 86, 129 (1993).

47 That appears to be the case in my home state of Massachusetts. *See* Filippone v. Mayor of Newton, 452 N.E.2d 239, 244 (Mass. Ct. App. 1983). The *Filippone* decision was reversed by the state's highest court, whose opinion cast some doubt on the usefulness, in the specific circumstances of the case, of a distinction between broad indemnity for liability of an indemnitee (which would be established simply by entry of a judgment) and a more limited indemnity for losses suffered by the indemnitee (which would be established only by payment or execution of the judgment). The court did not, however, reject the distinction more generally. *See* Filippone v. Mayor of Newton, 467 N.E.2d 182, 186–87 (Mass. 1984); *see also* Restivo v. Town of Swansea,

lion judgment would take the view that it would indemnify the official to the extent of any execution of the judgment (e.g., the value of bank accounts or real estate seized, or of wages garnished) but would refuse to pay the plaintiffs more than that—perhaps in turn leading to a settlement likely to be closer to $100,000 than to $200 million.

Thus, the first option for damages actions that *Alden* leaves open—relying on the imposition of personal liability coupled with indemnification—may not in fact be tantamount to the alternative that *Alden* prohibits—governmental liability. But even if the former in fact worked no differently from the latter, *Alden* and *Seminole Tribe* would simply mean that Congress could indirectly achieve the result those cases prohibit, but in order to do so would have to (a) amend a number of federal enactments to make them provide for personal liability of state officials, and (b) impose a personal liability that is sufficiently harsh to ensure that state governments effectively have no choice but to provide universal indemnification to the full extent of any judgments entered against state officials. That kind of federal pressure, even if it were to provide an adequate substitute for governmental liability, hardly seems like a blow for harmonious federalism.[48]

The other possibility for damages liability that remains viable after *Alden* is suit by the United States on behalf of the victims of federal violations—a course that the FLSA expressly authorizes.[49] Here too, however, in order to avail itself of this technique more generally, Congress would have to amend other statutory schemes (for example, patent and copyright laws) under which, at present, no federal agency has authority to bring suit. And one should not underestimate what a dramatic shift in enforcement techniques would be required. For example, under the FLSA, private suits (whether against private or pub-

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495 N.E.2d 838, 839 (Mass. 1986) (holding, in a suit by plaintiffs against a town seeking a writ of mandamus requiring the town to pay the plaintiffs the amount of unsatisfied judgments obtained by them against town police officers, that the applicable indemnification provision "does not require the defendant town to satisfy the plaintiffs' . . . judgments against the town's police officers").

48 *See* Meltzer, *supra* note 9, at 48. In *Hutto v. Finney*, 437 U.S. 678, 691 & n.17 (1978), an action against state officials, the Court affirmed an order awarding the plaintiffs certain attorney's fees, to be paid out of the state treasury—an order that the Court treated as analogous to compensatory contempt. In rejecting the argument that the order violated the 11th Amendment because it required payment by the state rather than by the officials, the Court declared that to have made the officials liable for the fee award "would be a remarkable way to treat individuals who have relied on the Attorney General to represent their interests throughout this litigation," *id.* at 692 n.19—despite the possibility, mentioned in the *Hutto* dissent, *see id.* at 716 (Rehnquist, J., dissenting), that state law permitted indemnification.

49 *See* 29 U.S.C. § 216(c) (1994).

lic employers) outnumber suits by the United States by a ratio of roughly ten to one.[50] Though I doubt that statistic would have surprised the majority, it does cast doubt on the Court's cavalier suggestion that the lawsuit in *Alden* must not have been that important because "the United States apparently found [the federal interest in compensating the State's employees for past violations of federal law] insufficient to justify sending even a single attorney to Maine to prosecute this litigation."[51]

Of course, a Congress devoted to full enforcement could in theory both confer broad enforcement authority on federal agencies (where necessary, creating new ones) and sharply increase appropriations. But the implausibility of such a response goes far beyond doubts that the current Congress would be so inclined.[52] For it has long been noted that the budgets of public enforcement agencies "tend to be small in relation to the potential gains from enforcement as they would be appraised by a private, profit-maximizing enforcer."[53] Nor does the fact that a violator of federal law is a state agency necessarily provide a reason for public enforcement; if a university has denied overtime wages to an employee, or infringed a patent, it is hard to see why the appropriate enforcement strategy should differ if the violator is Penn State (a state school) rather than the University of Pennsylvania (a private one). Indeed, Congress may reasonably doubt that federal governmental resources are wisely used to pursue litigation against state agencies when a private rightholder's interest is great but the public interest may be small.

50 The following statistics are compiled from the Report of the Administrative Office of the United States Courts on the Judicial Business of the United States Courts for 1997 and 1998, Hd. C-2 (visited Jan. 17, 2000) <http://www.USCourts.gov/judicial_business/c02Sep97.pdf>.

CIVIL CASES COMMENCED IN U.S. DISTRICT COURTS UNDER THE FLSA

	U.S. as Plaintiff	Other Plaintiff	Total Cases
1997	143	1490	1633
1998	150	1412	1562

These statistics do not distinguish suits against states from those against other defendants. Since private plaintiffs sometimes file in state court but the United States virtually never does, these federal court statistics may slightly understate the ratio of private-plaintiff cases to U.S.-as-plaintiff cases.

51 119 S. Ct. at 2269.

52 *See generally* Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 26, 51–56 (1999) (highlighting impediments to national action arising from the existing configuration of political forces).

53 William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 36 (1975).

Moreover, public and private enforcement are different animals. Government bureaucracies may respond far less quickly than private lawyers to shifting demand for enforcement action, and even decentralized governmental bureaucracies are likely to be less convenient and flexible than are private lawyers. The point is not that private enforcement of damage remedies against states is always superior to public enforcement, but rather that it often will be superior, and thus there are considerable costs to holding private enforcement unconstitutional.

The Court does not concern itself with these issues, but stresses instead that when states must pay damages in suits by the United States, the enforcement action is taken by politically responsible officials.[54] Perhaps the Court is offering a novel extension of the familiar political safeguards of federalism argument—suggesting that such safeguards should restrain not only the exercise of legislative authority but also the decision whether to sue a state that has violated congressionally-created duties. Those safeguards may indeed operate in broadly similar fashion on both federal political branches.[55] That sim-

54 *See Alden*, 119 S. Ct. at 2267.

55 Evan Caminker has recently suggested a different point of view: "federal prosecutors have no duty of loyalty to states per se, and thus it seems dubious that they would refrain from initiating an otherwise promising suit out of an abstract respect for the states's dignitary interests." Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 122 (1999). My own belief—based in part upon recollections from working at the Department of Health Education and Welfare in the Carter Administration—is that a broader view of federal enforcement would reveal a great deal more complexity than is found in Caminker's picture of prosecutors making discrete decisions whether a particular case is meritorious. In federal agencies, regulation frequently involves a complex of techniques—information gathering, informal oversight, notice of non-compliance, negotiation of remedial plans—and litigation is often a last resort. In that environment, deciding what is a "promising suit"—that is, an occasion for litigation rather than for other approaches to securing compliance—may not be clearcut. Additional unclarity about whether to bring a "promising suit"—for example, against Maine for violation of the FLSA—arises because such a decision is likely to implicate the question whether to allocate scarce resources to suing the state or, instead, to bringing a "promising suit" against a private regulatee.

In making decisions that are, it seems to me, less open and shut than Caminker suggests, officials are often operating in a somewhat politicized environment. While Caminker's primary concern is with qui tam actions under the False Claims Act, in which the federal enforcers are located in the Justice Department, federal "prosecutors" often are not officials in the Department of Justice; the Department of Labor, for example, is the agency authorized to bring suit to enforce the FLSA. While efforts to influence Department of Justice officials may be viewed as particularly inappropriate, officials in an executive agency like the Department of Labor routinely are involved in discussion with both regulatees and with "political" actors in the Executive

ilarity is particularly likely if one agrees, as I do, with Larry Kramer that the political safeguards today are strongly buttressed by, if not primarily located in, a complex web of extra-constitutional political institutions (like political parties and organizations representing state and local governments) and complex connections among officials in parties, organizations, and the various levels of governments.[56] And indeed, only recently President Clinton promulgated an Executive Order—albeit, according to newspaper reports, as a defensive effort to forestall more far-reaching legislation[57]—designed to ensure, *inter alia*, that actions taken by the executive branch do not limit the policymaking discretion of the states except as necessary and only after consultation with state and local officials.[58]

Whether or not the Executive Order is a wise measure, it does not create any rights or immunities that are judicially enforceable—much less immunities that are constitutionally protected from revision in the ordinary political process.[59] Indeed, one could view the new Execu-

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Office of the President or on Capitol Hill. In that environment, agency officials may not infrequently be wary of suing a state, not so much because of an abstract respect for state "dignity," but rather because they may have been subjected to, or fear becoming subject to, political pressure—whether directly from the states themselves, or indirectly through the intervention of other government officials who in turn are responding to state pressure.

Having said this, I would note that my phrasing in text—that the political safeguards may operate in "broadly similar fashion" on legislative and executive officials—is not inconsistent with the view, which I would espouse, that the political culture of members of the House and the Senate, and of their staffs, is in general more responsive to political pressure from states than is that of officials in executive agencies. In that respect, the political safeguards may be more robust in the legislative than in the executive branch. In other respects, however, the political safeguards may be more effective in forestalling federal litigation than in forestalling federal legislation: in the legislative process, states may be less likely to have advance notice that adverse action is about to be taken, whereas a government lawsuit is likely to follow a crystallized dispute known to state officials; moreover, identification of a single critical decisionmaker with control over executive enforcement may be easier than identification in Congress of a particular legislator who plainly has the power to control a legislative outcome.

More broadly, however, Caminker and I agree that, however one describes the behavior of executive enforcement officials, the Court in *Alden* fails to offer a convincing reason for permitting only federal officials to seek retrospective damages liability against unconsenting states for their violation of federal laws enacted under Article I.

56 *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1522–60 (1994).

57 Stephen Laboton, *Anti-Federalism Measures Have Bipartisan Support*, N.Y. TIMES, Sept. 6, 1999, at A12.

58 Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (1999).

59 *See id.* § 11.

tive Order, and the congressional activity that may have stimulated it, as evidence that the political safeguards retain some potency. Over time, one might expect that in some periods or in some federal agencies, state and local officials will have very limited influence in executive branch decisions, while in other periods or agencies their influence will be stronger—perhaps in some instances, so strong as to steer federal officials away from important national action that should be taken.[60] The contrast between the ebb and flow of such forces and the *Alden* ruling is striking. For under *Alden*, even after both Houses of Congress and the President have overcome state resistance and joined in a clear statement creating federal rights against the state, those rights may be fully enforced only if subsequent administrations are so inclined in the face of resource constraints and possible ongoing opposition from state and local governments. *Alden* precludes Congress and the President from enacting legislation that makes available a very traditional form of redress—private suits for damages against the regulated entity—when that remedy is thought desirable in order to guarantee an ongoing and politically insulated basis for full enforcement of federal law. The preclusion of that remedy seems to cut against, rather than in favor of, political accountability.

Indeed, one can say more broadly that the course of sovereign immunity decisions of the Burger and Rehnquist Courts represents more of an obstacle to than a reaffirmation of notions of democratic accountability. The example of the FLSA itself is noteworthy. Congress first enacted the statute in 1938,[61] and nearly thirty years later, in 1966, extended the Act to cover certain public employees for the first time. After a 1973 Supreme Court decision held that the 1966 amendments had not purported to lift the states' Eleventh Amendment immunity,[62] Congress in 1974 again amended the FLSA to make clear that suits like that in *Alden* could be filed in either state or federal court, and at the same time broadened the Act's coverage of public employees.[63] But *Alden*, coupled with *Seminole Tribe*, tells Congress that if it is serious about retrospective enforcement of liabilities, it must amend the FLSA still again so as to authorize some combination of (a) private injunctive actions, (b) damage actions against state officials personally, and (c) increased federal enforcement capacity—

60 *See generally* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 107–40 (1995).

61 *See* 29 U.S.C. § 201 (1994 & Supp. III 1998).

62 *See* Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 283 (1973).

63 *See* Fair Labor Standards Amendments of 1974, 29 U.S.C § 216(b) (1994).

and, if the last approach is to be effective, must vastly increase appropriations to the Department of Labor year after year.

The net result of the Court's decision in *Alden* thus seems to be that Congress may regulate the states, but in the end will lack the practical tools necessary to do so with maximum effectiveness. One can argue about whether the shortcomings in the alternatives to private damage actions against the states leave the enforcement glass half full or half empty. But the Court never explains what sense it makes "for states to be subject to federal regulation [under the FLSA] but to enjoy immunity with respect to major techniques of enforcement of that regulation."[64] Indeed, there is some considerable tension between the Court's arguments that (a) even without private suits against state treasuries, federal enforcement will not suffer, and (b) those private suits are so distinctively offensive or intrusive as to be unconstitutional.

The *Alden* decision also raises a question about whether private damage actions against local governments will be treated differently from those against states.[65] Under the Eleventh Amendment, local governments, unlike state governments or their agencies, have no immunity from suit in federal court.[66] That distinction, though peculiar in many respects, is well-entrenched. Indeed, the *Alden* opinion relies on it in distinguishing *Howlett v. Rose*[67]—a decision that had recognized a state court's obligation to entertain a damage action against a school board—on the ground that the defendant there was not an arm of the state but merely a local government and as such had no immunity from damages liability.[68] But while the *Alden* Court thus reaffirmed the state/local distinction, the Court's reasoning may ultimately work to undermine it. For the immunity that *Alden* recognized was based not on the Eleventh Amendment (whose text is limited to suits in federal court and to suits against states) but on broader princi-

64 HART & WECHSLER'S 1999 SUPPLEMENT, *supra* note *, at 136.

65 *See id.* Professor Jackson puts the question another way: Why, if local governments have no 11th Amendment immunity, should they be protected by related principles of federalism (specifically, the anti-commandeering rule of *Printz*)? *See* Jackson, *supra* note 1, at 2194.

66 On the origins of this distinction, see RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1056–57 (4th ed. 1996) [hereinafter HART & WECHSLER'S THE FEDERAL COURTS].

67 496 U.S. 356 (1990).

68 *See Alden*, 119 S. Ct. at 2259. *Howlett* also relied on the ground that the state court's unwillingness to entertain a federal law action under 42 U.S.C. § 1983 (1994), while entertaining analogous state law claims against local school boards, constituted unlawful discrimination against federal rights. *See Howlett*, 496 U.S. at 378–81.

ples of immunity said to be rooted in constitutional structure and reinforced by the Tenth Amendment.[69] (No longer can one say that "the [Tenth A]mendment states but a truism."[70]) The same sources underlay the anti-commandeering decision in *Printz*—which recognized a form of constitutional immunity extending to local governments and their officials, and in so doing declared that the distinction between states and municipalities "is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity" and has no bearing on "the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment."[71] Indeed, the *Alden* Court in turn relied on *Printz* as support for the proposition that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[72] And moving from precedent to policy, it is a familiar point that the litany of values associated with federalism, particularly those related to political participation, often are most fully realized by local rather than by state governments.[73] One wonders whether one of the few limits on state sovereign immunity that the Court has consistently observed—that it shields only the state or arms of the state, and not local governments—will be maintained.[74]

III. IMMUNITY AND THE VALUES OF FEDERALISM

The issue presented in *Alden*—when may states claim immunity in their own courts from federal suit—had never been squarely resolved;[75] no constitutional text addresses it; the constitutional history, as the warring opinions in *Alden* demonstrated, was hardly uniform or

69 *See Alden*, 119 S. Ct. at 2247, 2259.

70 United States v. Darby, 312 U.S. 100, 124 (1941).

71 *Printz*, 521 U.S. at 931 n.15. Although the majority in *Printz* gave the 10th Amendment only a bit part, two members of the majority made that provision more central to the reasoning in their concurring opinions. *See id.* at 935 (O'Connor, J., concurring); *id.* at 936–39 (Thomas, J., concurring).

72 *Alden*, 119 S. Ct. at 2259.

73 For an example of this argument, see Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1311 (1994).

74 Thus, for example, Richard Seamon—who agrees with the *Alden* Court that states should generally be immune in their own courts from private suit under federal law, and who would base that immunity on the 10th Amendment and the anti-commandeering principle—argues that the immunity should extend to suits against local governments. *See* Richard Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 318, 389–90 (1998–99).

75 *See* Meltzer, *supra* note 9, at 57.

clear; and precedents could be adduced—and distinguished—on both sides of the issue.[76] When facing such an issue, the Court might appropriately consider not merely a decision's consequences for the effectiveness of federal regulation and the range of enforcement choices open to Congress, but also the extent to which that decision fits with the values underlying a federal structure. Those values have been recited in prior decisions and extensive commentary and are almost mind-numbingly familiar:[77] facilitating political participation in smaller units; permitting a closer match of citizen preferences and governmental policy than is available at the national level, thereby fostering citizen choice and inter-jurisdictional competition; providing opportunities for experimentation as well as for diverse approaches; and providing a set of political counterweights to the national government so as to prevent tyranny. Critics of *Alden* might question this litany, expressing doubts about whether all of the functional values associated with federalism should be viewed as having constitutional roots,[78] whether those values are promoted by federalism as much as by localism and decentralization (which could be promoted by a unitary, national government),[79] and whether in any event opposing values favor national and uniform solutions.[80] But even if one simply accepts the conventional litany, one would still want to ask whether it supports the doctrinal pattern with which we are left after *Alden*—permitting federal imposition of duties on a "*state qua state*"[81] but at

76 Elaborate discussions of the precedents are found in the parties' briefs in *Alden* and in a number of law review articles. *See, e.g.*, Ellen D. Katz, *State Judges, State Officers, and Federal Commands After* Seminole Tribe *and* Printz, 1998 WIS. L. REV. 1465; Seamon, *supra* note 74; Vázquez, *supra* note 36; Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981); Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME LAW REVIEW 919 (2000).

77 *See, e.g.*, Printz v. United States, 521 U.S. 898, 919–21 (1997); Gregory v. Ashcroft, 501 U.S. 452, 457–60 (1991); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568–72 (1985) (Powell, J., dissenting). *See generally* SHAPIRO, *supra* note 60.

78 *Cf.* Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 15 (1978) (noting that the convention and ratification debates made little of the argument that federalism helps to accommodate levels of government to territorial diversity).

79 *See, e.g.*, Adler & Kreimer, *supra* note 1, at 77 (citing additional sources); Briffault, *supra* note 73; Malcolm Feeley, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009 (1997); Jackson, *supra* note 1, at 2213–14, 2217–28 (citing additional sources; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

80 For a masterful exposition of the arguments on both sides of the question, see SHAPIRO, *supra* note 60.

81 National League of Cities v. Usery, 426 U.S. 833, 847 (1976).

the same time barring enforcement of those duties through private damage actions against those same state entities.

Of the litany of federalism values, the two to which the Court's federalism decisions have given the greatest prominence are (1) maintaining political accountability—presumably so as to permit effective electoral control of both levels of government as well as a transparent competition for political allegiance—and (2) preventing tyranny.[82] Of these two, the political accountability concern has been the primary basis for the anti-commandeering decisions. And perhaps if, as *Garcia* suggested, protection of state autonomy is going to rest substantially on the political process, that protection requires clear lines of accountability (although the Court's position that such accountability is impaired by federal commandeering of state and local legislative and executive processes has been forcefully contested).[83]

Whether or not the anti-commandeering argument in the end is convincing, no similar argument could support the result in *Alden*.[84]

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82 *See Printz*, 521 U.S. at 920–23 (political accountability); *id.* at 921 (prevention of tyranny); *Lopez*, 514 U.S. at 576–77 (political accountability); *id.* at 552 (prevention of tyranny); New York v. United States, 505 U.S. 144, 168–69 (1992) (political accountability); *id.* at 181 (prevention of tyranny); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (political accountability); *id.* at 458–59 (prevention of tyranny).

The relative emphasis on these considerations is no surprise, as the other considerations typically put forward—matching preferences, permitting citizen choice and exit, permitting social experimentation—have less to do with federal regulation of the states themselves than with locating governmental regulation of private actors and governmental spending decisions at some sub-national level of government. Moreover, the persuasiveness of these other considerations depends upon a complex of empirical and shifting factors (should the national government permit greater flexibility in income maintenance arrangements, or is redistribution a distinctively national responsibility; do the values of uniform national standards outweigh the benefits of experimentation in a specific areas?) particularly unsuited to judicial evaluation. *Accord* Andrej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 409.

83 *See* Adler & Kreimer, *supra* note 1, at 98–102; Caminker, *supra* note 1, at 1061–72; Caminker, *supra* note 14, at 220–31; Jackson, *supra* note 1, at 2195–2205.

84 Probably the key difficulty for any theory that seeks to justify the anti-commandeering principle is to explain why commandeering is more constitutionally offensive than the recognized power to preempt state regulation altogether. Several commentators have explored whether one might justify a distinction between commandeering and preemption based on notions that mandated action is more offensive than mandated inaction. *See, e.g.*, Adler & Kreimer, *supra* note 1, at 93; Caminker, *supra* note 1, at 1055 n.218.

With regard to the goal of tyranny prevention, Adler and Kreimer suggest that although, at first blush, liberty may be more threatened by government action than by inaction, in the end that claim is unpersuasive. *See* Alder & Kreimer, *supra* note 1, at 98–101. Moreover, the suggested distinction assumes that the alternative to federal

Imagine the objections that a contrary result in *Alden* would, to use the current idiom, have commandeered the state courts, constituted

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commandeering of the states is the absence of regulation; it may, instead, be direct federal regulation with a larger federal apparatus and the absence of state participation that might otherwise have served as a counterweight to federal overreaching. *See* Caminker, *supra* note 1, at 1014.

With respect to the value of promoting local political communities, Adler and Kreimer also note the "sense" that commandeering "seems, somehow, to be more of an interference with state autonomy than a requirement that they refrain from enacting a particular statute." Adler and Kreimer, *supra* note 1, at 94. In the end, however, they conclude that neither that intuitive sense nor consideration of other values of federalism can justify the preemption/commandeering distinction, noting that either technique limits the options available to self-governing political communities. *See id.* at 95–101.

With regard to the value of political accountability, if federal commandeering risks misallocation of responsibility from federal to state officials for actions the latter undertake only under federal compulsion, so federal preemption risks misallocation of responsibility from federal to state officials for the latter's failure to undertake action that federal law prohibits. *See id.* at 99; Caminker, *supra* note 1, at 1061–74; Jackson, *supra* note 1, at 2200–05.

Rick Hills has defended an anti-commandeering rule in part as preventing forced speech and in part on a complicated functional argument about when federal compulsion of states, as distinguished from federal purchase of services from states, is required. *See* Hills, *supra* note 1. The argument about compelled speech, it seems to me, also fails to distinguish preemption: if commandeering is forced speech, then preemption is suppression of speech, which should be equally suspect. Hills's complex functional argument is based on the view that the government should have to purchase rather than commandeer state regulatory services, and that doing so will not impair national policy. While the argument is nuanced and sophisticated, at bottom it remains quite uncertain that it adequately distinguishes commandeering from preemption (which in theory could also be purchased). *See* Adler & Kreimer, *supra* note 1, at 101–02.

Finally, it is not clear that Hills's general argument about commandeering is particularly apt with regard to the rule of *Alden*. It is hard to think of a requirement that state judges articulate and enforce federal law—whether in private suits or in suits against the states—as "compelled speech"—particularly since their obligation to engage in such "compelled speech" when federal law arises by way of defense seems uncontroversial. Nor, as he recognizes, *see* Hills, *supra* note 1, at 928–33, is his concern about federal expropriation of state services limited to a federal obligation that state courts entertain suits against the states; the concern is equally applicable to the long-recognized obligation of state courts to entertain federal actions against private parties when they entertain analogous state law actions. *See, e.g.*, Testa v. Katt, 330 U.S. 396 (1946). He does suggest that perhaps *Testa* is misguided and that the Madisonian Compromise—under which Congress need not create inferior federal courts and may instead rely on state courts to entertain federal claims—should be understood as requiring Congress to purchase the services of state courts. That is a quite different argument from the Court's, and one that seems to me, even accepting each step of his rather complicated functional argument, a doubtful interpretation of the Constitution. *See also infra* note 85.

an unfunded mandate, diverted state judicial energy from state agendas, and confused voters about whom to blame for either (a) the way state courts allocate resources, or (b) decisions enforcing the FLSA against state governments.[85] Those objections would be no more germane to the facts of *Alden* than to a myriad of other federal obligations that state courts constitutionally must discharge. It is nothing short of fanciful to think that state political accountability is threatened by requiring state courts to add damage actions against state treasuries to the set of federal actions that they must otherwise entertain—for example, suits of all types against local governments;[86] suits to enjoin state officials from ongoing violations of federal law; federal claims against private defendants or against state officials in their personal capacities (at least so long as states entertain analogous state law claims);[87] and suits against states that have waived immunity in order to gain federal funding.[88] When a state court issues a decision that a state or local government is violating federal law, one doubts that state voters seeking to allocate responsibility will focus on the identity of the plaintiff (private party or the United States), the defendant (state government, local government, or officials), or the nature of the relief (prospective vs. retrospective). Nor, for that mat-

85 *See* Caminker, *supra* note 1, at 1051–53; Seamon, *supra* note 74, at 359. In this vein, Professor Merritt has argued that federal commandeering consumes state political energy in a way that federal preemption does not. *See* Deborah J. Merritt, *Federalism as Empowerment*, 47 U. FLA. L. REV. 541, 553–55 (1995). The point is undoubtedly true insofar as it ordinarily is easier to do nothing than to do something. Whether or not that observation relates importantly to notions of federalism is a different matter; requiring state motor vehicle officials to report information to federal authorities seems less intrusive to state self-governance than does preempting all state motor vehicle regulation. Indeed, the observation may be particularly inapt when applied to the judiciary, one of whose distinguishing features is its lack of power to set its own agenda, thus requiring that it devote its adjudicative energy to a set of tasks established by others.

86 I assume existing law under which sovereign immunity does not extend to such actions. *But cf. supra* text accompanying notes 65–74.

87 *See* HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 469–91. Indeed, application of the anti-commandeering principle to state judges would be hard to square with the one clear implication of cases like *Testa v. Katt*, 330 U.S. 386 (1947)—that state courts may not refuse to entertain federal actions when they entertain analogous state law actions. The majority in *Printz*, by contrast, was unconcerned with whether state and local executive officials administered analogous state laws; the bar on federal compulsion of executive officials in *Printz*, rather, was unqualified. *See Printz*, 521 U.S. at 935.

88 For a post-*Alden* decision re-affirming congressional power to condition the award of federal funds upon a state's waiver of sovereign immunity from suit with regard to the funded activities—and thus upholding private suit against a state in federal court—see *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999).

ter, are voters likely to be concerned with whether Congress was legislating under Article I or under Section 5 of the Fourteenth Amendment—or perhaps even with whether challenged action violated state or federal law.

Indeed, if damage actions against state treasuries threaten political accountability, state agendas, and state resource decisions, that is just as true of the numerous suits in which federal law supplies not the plaintiff's claim but rather a defense or a procedural requirement (from constitutional limits on criminal prosecutions to limits on personal jurisdiction to statutory or constitutional defenses to state law liability). A state court's obligation to apply Eighth Amendment law in a death penalty case, or the actual malice rule in a defamation action, can consume considerable judicial resources, thus diverting state courts from other tasks; federal law may control the outcome in a way that could, in theory, lead voters to hold state judges accountable merely for carrying out federal obligations. And in cases with federal defenses, no less than in cases in which federal law supplies the claim, Congress could have vested jurisdiction in the federal courts by providing for removal once the federal defense was raised. But it has long been clear that Congress may "commandeer" the state courts to apply federal law and need not instead give federal courts exclusive jurisdiction over every case or controversy arising under federal law within the meaning of Article III.

Indeed, the entire political accountability argument seems like a fish out of water as applied to state judges. While most are indeed elected,[89] they are not meant to be politically accountable in the same way as state legislative and executive officials. (Imagine the campaign slogan: "Put Smith on the State Supreme Court: She'll Defy the Supremacy Clause.")

So much for political accountability. As for whether immunity from state treasury liability is necessary to prevent tyranny, we must begin with the fact that the *Alden* decision, although it does not even cite *Garcia*, plainly accepts that Congress has legislative authority to impose FLSA regulation upon state governments and to enforce that liability through techniques other than private suit against the states. Thus, judicial enforcement of federal fair labor standards does not so cripple the states as to prevent them (1) from representing (or from serving as the basis for organizing) groups (whether insular minorities or dispersed majorities) that are left out of the national political pro-

89 *See, e.g.*, Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 690 (1995).

cess, or (2) from combating capture of the federal government by a special interest distinct from that of the people.[90]

More complete enforcement of the FLSA, to be sure, would impose additional burdens on the states—burdens that Justice Kennedy described in rather draconian terms. He raised the specter that private damage actions could "threaten the financial integrity of the State"[91] and "create staggering burdens, giving Congress a power and leverage over the States that is not contemplated by our constitutional design";[92] were the states not immune from private suits, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals."[93] Familiar responses exist to all of these objections: the burdens (staggering is surely an exaggeration of what was at issue in *Alden*) exist by virtue of congressional mandates whose constitutionality *Garcia* affirms; the cost of ongoing compliance with the federal law—whether through "voluntary" decisions like that of the state of Maine, after the *Alden* litigation was filed, to alter its future conduct, or in other instances through adherence to prospective injunctions issued at the behest of private suitors—is likely over time to far exceed the cost of remedying past violations;[94] and private damage actions against local governments have long existed without transforming them into pawns of the judiciary.[95] Ultimately, as the dissent empha-

90 *See generally* Rapaczynski, *supra* note 82, at 380–95.

91 *Alden*, 119 S. Ct. at 2264.

92 *Id.*

93 *Id.* (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)); *see also* Seamon, *supra* note 74, at 366–72.

94 Indeed, *National League of Cities* itself was a suit by governmental plaintiffs seeking to enjoin the application to them of the FLSA, and the Court, in upholding their position, placed considerable weight on the cost and associated burdens of ongoing compliance with the FLSA. *See National League of Cities*, 426 U.S. at 846.

95 Moreover, the Supreme Court has required state courts to entertain private damage actions against unconsenting states that are of far greater consequence than the *Alden* litigation. In this respect, *Reich v. Collins*, 513 U.S. 106 (1994), was an awkward precedent for the *Alden* Court. In *Reich*, the Court unanimously reaffirmed that absent an adequate predeprivation remedy, a state court must provide a refund remedy when taxpayers challenge the constitutionality of state taxation—"the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* at 110. It is hard to square that precedent—and cases in that line that have required refunds that sometimes reach hundreds of millions of dollars, *see, e.g.*, Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 129 (1993)—with the Court's concern in *Alden* that suit by Maine probation officers could "turn the State against itself and ultimately commandeer the entire political machinery of the State against its will and at the behest of individuals," *Alden*, 119 S. Ct. at 2264.

sized,[96] any incremental burden imposed by damages liability is required by the rule of law and materializes only when states do not live up to federal obligations that have constitutionally been imposed. It would be an odd constitutional theory that Congress may constitutionally regulate state labor standards only if federal law is not very well enforced.

Reich posed a difficulty for the *Alden* Court in two additional ways. First, *Reich* recognizes the power and obligation of the Supreme Court, even when acting without a congressional clear statement, to require state courts to impose retrospective liability on state governments. (Efforts to re-cast *Reich* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), as requiring only a remedy against state officials, rather than against the state—*see, e.g.*, Seamon, *supra* note 74, at 394–406; Vázquez, *supra* note 36, at 1770–77—seem to me unpersuasive, and, in any event, the *Alden* Court did not follow that line.) One might have thought that imposition of retrospective liability on state treasuries should be more, not less, tolerable when, as in *Alden*, it was plainly authorized by the federal political branches. *Cf.* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

Second, *Reich* cannot be accommodated to the majority's theoretical construct. In order to circumvent the textual limitation of the 11th Amendment to *federal* judicial power, the *Alden* Court reasoned as follows: (a) "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits," *Alden*, 119 S. Ct. at 2252; (b) *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), mistakenly interpreted Article III as having stripped states of immunity from suit in federal court, *see Alden*, 119 U.S. at 2252–53; (c) "[a]s the [11th] Amendment clarified the only provisions of the Constitution [Article III] that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush," *id.* at 2252; (d) state sovereign immunity therefore derives not from the 11th Amendment (which is treated as having merely corrected the error of *Chisholm*) but from the basic constitutional design, *see id.* at 2254. On this theory, the scope of the immunities that states enjoy in state and federal courts should be identical, as they derive from the same source in constitutional history and structure—a point that the Court's opinion acknowledged. *See id.* at 2256 ("The logic of the decisions [denying that Congress has power to abrogate state sovereign immunity from private suit in federal court] . . . does not turn on the forum in which the suits were prosecuted but extends to state-court suits as well."). However, the Court has squarely held that the 11th Amendment bars a federal action by a taxpayer for a refund from the state treasury of taxes alleged to have been unconstitutionally exacted. *See, e.g.*, Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944). The contrasting federal and state decisions on whether a state is immune from tax refund suits thus belies the Court's premise in *Alden* that there is a uniform immunity, rooted in the Constitution—and restored in federal court actions (after the constitutional heresy of *Chisholm*) by the 11th Amendment—applicable wherever a state is sued by a private party.

96 *Alden*, 119 S. Ct. at 2288–89 & n.34 (Souter, J., dissenting).

Thus, the Court offers no convincing reason to believe that the additional burdens of private enforcement against state treasuries would undercut the capacity of states to compete for the political allegiance of citizens or to serve as a counterweight against national tyranny. Indeed, those capacities of states are hardly promoted by a constitutional ruling that—insofar as Congress wishes to make state employers liable to state employees for FLSA violations—privileges enforcement by an (expanded) federal bureaucracy (whose lawsuits in practice would likely be filed exclusively in federal court) over private enforcement in state court.[97]

Put differently, the *Garcia* decision entrusted protection of state autonomy primarily to the national political process, supplemented by a subsequently-announced rule of clear statement designed to ensure that state interests were duly considered by Congress.[98] The debate over what exactly those safeguards are, how they operate, and whether they adequately protect the states is well-known.[99] But so long as those safeguards are deemed presumptively adequate with regard to the imposition of FLSA liability generally on state employers in the first instance,[100] there is no reason to think them insufficient with regard to

97 Of course, the Court in *Printz* was unmoved by any suggestion that federal "commandeering" of state executive officials to administer federal law—when compared to the alternative of exclusive federal administration—might improve local participation and governmental responsiveness to local problems, "make valuable use of" the distinctive perspectives of state officials, and promote diversity and experimentation. *See* Caminker, *supra* note 1, at 1014. Indeed, similar rationales for relying on state implementation of federal directives underlay the scheme of the Articles of Confederation. *See* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1043–44 (1997). That that scheme did not work well as the exclusive basis for national action in the chaotic and embryonic stages of nation-building following the Revolutionary War hardly demonstrates that it would not be a useful, if relatively uncommon, mode of national action more than two centuries later. *See, e.g.*, Caminker, *supra* note 1, at 1046.

98 *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991). Needless to say, there is considerable tension between Justice O'Connor's opinion for the Court in *Gregory* and the *Garcia* opinion, from which she dissented. *See* Yoo, *supra* note 28, at 1335–40 (contending that *Gregory* rejects the underlying tenets of *Garcia*).

99 *See generally* Kramer, *supra* note 56.

100 There is, indeed, evidence that the political safeguards of federalism have, in some cases, helped state and local governments to secure their objectives in the national political process. In 1985, following the *Garcia* decision, Congress amended the FLSA to permit state and local governmental employers (unlike their private counterparts) to provide compensatory time-off rather than premium compensation for employees who work overtime. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 878 (1985) (codified at 29 U.S.C. § 207(o)(1) (1994). That same act also exempted legislative employees from protection, while several other provisions of the current law accommodate particular concerns of governmen-

the authorization of damages liability in private FLSA suits. In the end, one is hard pressed to see the distinctive set of limits that the Court has established, and the national powers that it has preserved, as responsive to or promoting any theory of constitutional federalism.

The majority offered one additional argument that related in a somewhat different manner to conceptions of constitutional federalism. It contended that its result was sound because the contrary result would create an anomaly—that federal rights could be fully enforced in state but not in federal court. The point is not without some force; as I have argued before,[101] there is some tension between *Seminole Tribe* (recognizing an insurmountable Eleventh Amendment immunity from federal court suit) and the dissenters' position in *Alden* (refusing to recognize a commensurate immunity from state court suit). If states are to be liable for damages in private suits to enforce federal laws, it is hard to see why federal courts should not hear those actions.

Seminole Tribe, however, had foreclosed that approach. For some, like me, it is the Court's interpretation of the Eleventh Amendment that is anomalous. But that interpretation is, for the moment, well-entrenched. Against that background, the question becomes which additional anomaly is greater: (1) preserving congressional authority to deploy private suits as a mechanism for enforcing federal law, but only in state court, or (2) recognizing a non-textual immunity from private suit in all courts, thereby truncating federal legislative power fully to enforce valid congressional duties.

My view that the second anomaly is the more profound one is supported by the existence of arguments that it does make sense to uphold state court obligation while denying federal court power to entertain private damage actions.[102] (Although these arguments do not persuade me that *Seminole Tribe* was correct, they seem to me well short of being anomalous.) If one starts with the Court's view that state liability in private actions is a particularly sensitive matter, one might view the interposition of state judges as a useful buffer.[103] State

tal employers. *See, e.g.*, 29 U.S.C. § 203(e)(2)(C) (1994) (exempting certain positions from overtime requirements); *id.* § 207(k) (1994) (establishing special overtime rules for law enforcement personnel). Needless to say, state and local government interests do not always prevail in Congress, nor has the national legislative process always focused very clearly on whether federal regulation should extend to state and local governments. *See generally* Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW 301 (1988).

101 *See* Meltzer, *supra* note 9, at 57–59.

102 For an overlapping but somewhat different set of arguments, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 88–104 (1988).

103 *See id.* at 99–100.

courts, one assumes, will be particularly sympathetic to state interests and particularly likely to avail themselves of whatever flexibility federal law provides to avoid imposing untoward burdens on state political branches. Giving states the right to be sued only in courts of their own creation rather than in those of a distinct sovereign—a home court advantage that, by its nature, is not possessed by other litigants—could be viewed as respecting their dignity and status.[104] Indeed, two years to the day earlier, Justice Kennedy, in his opinion in *Idaho v. Coeur d'Alene Tribe*,[105] had said precisely that: "The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."[106]

Justice Kennedy's position in *Coeur d'Alene Tribe* is echoed in other jurisdictional doctrines. Indeed, the arguments for reading the Eleventh Amendment as giving the states an immunity only from federal court suit underlie the various abstention doctrines that the Supreme Court has established—doctrines that deem it preferable in particular circumstances to have federal issues litigated in state than in federal court.[107] Similarly, the Johnson Act[108] and the Tax Injunction Act[109] channel specified federal causes of action exclusively to state court. (The Tax Injunction Act echoes *Alden*'s concern about the sensitivity of judicial orders that directly affect state treasuries.) Rather than viewing these jurisdictional arrangements as anomalous, the Court has embraced them with considerable enthusiasm.[110]

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104 *See* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 41 (1994); *see also* Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 293–94 (1973) (Marshall, J., concurring in result).

> The issue is not the general immunity of the States from private suit—a question of the common law—but merely the susceptibility of the States to suit before federal tribunals. Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.

Id.

105 521 U.S. 261 (1997).

106 *Id.* at 287 (plurality opinion).

107 *See generally* HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 1247–1308; *see, e.g.*, Younger v. Harris, 401 U.S. 37 (1971); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

108 28 U.S.C. § 1342 (1994).

109 *Id.* § 1341 (1994).

110 The enthusiasm is particularly notable with regard to the *Younger* doctrine, *see, e.g.*, HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 1256–75, and decisions concerning the Tax Injunction Act, *see, e.g., id.* at 1216–22.

IV. STATE DIGNITY AND STATE SOVEREIGNTY

The Court did not, in fact, seek to justify its decision in *Alden* with a careful analysis of the relationship of the new immunity it recognized to the purposes of constitutional federalism. Instead, the Court's normative defense of state sovereign immunity rested on two somewhat more abstract notions: the dignity of states and the sovereignty of states.

The notion that sovereign immunity protects the dignity of states has been more prominent in decisions of the 1990s than it was in earlier decades.[111] "Congress," the Court declares in *Alden*, "must

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In any event, the majority's approach creates other anomalies. One that David Shapiro pointed out to me can be made concrete with this hypothetical: Suppose Nevada employees were to spend several months living in California to study the operation of its public university system. If the employees work more than 40 hours a week and Nevada denies them overtime pay, *Seminole Tribe* indicates that they cannot sue Nevada in a federal court, and *Alden* now adds that they likewise cannot sue in Nevada state court. However, under *Nevada v. Hall*, 440 U.S. 410 (1979), they may be able to sue the state of Nevada in California state court. My hypothetical can be distinguished from *Hall*, where the claim against Nevada was based on California tort law rather than on federal law, but the position that Nevada has greater immunity from federal law than from the law of a sister state seems impossible to justify.

In the example given, the constitutionality of California's exercise of personal jurisdiction would not seem to be in doubt, given the ample "minimum contacts" between the defendant state of Nevada and the forum state of California. And more generally, if state lines are not themselves of significance in restricting the federal government when establishing personal jurisdiction over civil cases in the federal courts, *see* HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 1587–88, it is far from clear that they should hamper the federal government in authorizing the exercise of personal jurisdiction by state courts over those same federal civil claims.

If there is a theory that would support this set of results, it escapes me. Of course, of the six Justices in the *Hall* majority, only Justice Stevens remains on the Court, and the current Chief Justice authored a sharp dissent in *Hall*; thus, perhaps that decision will be the next victim of the seemingly relentless expansion of state sovereign immunity.

111 A Westlaw search, conducted on October 26, 1999, of the SCT database (which extends back to 1945) for the terms ["Eleventh Amendment" and dignit!] turned up a number of private suits against states, all decided after 1992: *Alden v. Maine*, 119 S. Ct. 2240 (1999), *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

Only two other cases turned up by this search even mention protection of state dignity in connection with state sovereign immunity. In *Nevada v. Hall*, 440 U.S. at 416, the Court, in the course of rejecting a claim of sovereign immunity, stated that any protection Nevada could claim against suit in a California court must emanate not from the 11th Amendment but from "the voluntary decision of the second [state] to respect the dignity of the first [state] as a matter of comity." In *Petty v. Tennessee-*

accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States."[112] Indeed, *Alden* depicts state dignity in more unqualified terms than state sovereignty: the states "retain the dignity, though not the full authority, of sovereignty."[113]

Appeals to dignity are somewhat evanescent; indeed, it is easy to dismiss them out of hand by observing that states, unlike humans, lack emotions and cannot suffer affronts.[114] Perhaps, however, such a dismissal is a tad too quick. Article III itself reflects, in its Original Jurisdiction Clause, a particular concern with suits to which states are parties, by vesting original jurisdiction over them in a court of special dignity—the Supreme Court of the United States.[115] Similarly, Congress, for roughly the first two-thirds of this century, maintained a jurisdictional structure that permitted only federal district courts of special dignity—composed of three judges—to entertain actions seeking to enjoin state laws as unconstitutional.[116] (Such actions were nominally against state officers, but Congress saw through the form.[117]) Still, neither of these jurisdictional recognitions of state dig-

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Missouri Bridge Commission, 359 U.S. 275 (1959), the Court, in discussing the *Chisholm* decision, quotes, in a footnote, a secondary source that describes the movement to adopt the 11th Amendment as motivated by the desire "to prevent subsequent affronts to the dignity of states." *Id.* at 276 n.1 (quoting MARIAN DORIS IRISH & JAMES WARREN PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 123 (1959)). This passing reference was not of particular significance in *Petty*, where the Court ruled that the states involved had waived any immunity by virtue of their entry into an interstate compact; nothing in the waiver analysis turned on conceptions of state dignity.

112 *Alden*, 119 S. Ct. at 2268; *see also id.* at 2263.

113 *Id.* at 2247 ("[The Constitution] reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.").

114 *See* Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998); Monaghan, *supra* note 16, at 132.

115 *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1598 (1990).

116 The history is sketched in HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 1212–15.

117 For discussion of formal versus functional elements in the Court's federalism decisions, see Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78 (1995). For a broader, if even a bit overstated, critique of the Supreme Court's federalism decisions as formalistic, see Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

Even the formal distinction between injunctions against state officers (permissible under *Ex parte Young*, 209 U.S. 123 (1908)) and damage actions against state treasuries (forbidden by *Alden* and *Seminole Tribe*) breaks down in practice. Injunctions, as Owen Fiss noted, can be viewed as pinpointed obligations under the governing

nity freed states from full compliance with federal law; instead, they merely prevented state subjection to judicial orders by a single federal judge.

The notion that respecting state dignity requires not merely regulating the forum but also restricting congressional power to authorize private suit at all is, however, difficult to integrate with the American constitutional tradition. Justice Souter's dissent noted that the dignitary concept is drawn from royal dignity[118]—hardly a promising doctrinal source in a democratic republic based on sovereignty of the people and subject to legal-constitutional constraints (including, incidentally, a prohibition on titles of nobility).[119] And more than a century ago, Justice Miller, in discussing the sovereign immunity of the United States, dissected the dignitary rationale in language on which it is hard to improve:

> Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment. . . .
>
> Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.[120]

More concretely, broad notions of state dignity are difficult to square with accepted features of constitutional tradition. Foremost among these are the power of another sovereign (the federal govern-

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constitutional or statutory provisions. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 32–37, 68–74, 80–81 (1978). And the Court has held that violation of the pinpointed obligations set forth in federal injunctions can lead to a judicial levy against the public fisc for contempt. *See* Hutto v. Finney, 437 U.S. 678 (1978); *see also supra* note 48. Why state dignity requires immunity from general statutory duties (no matter how clear) but not from pinpointed obligations as specified in a court order is never explained. Perhaps the Supreme Court is more concerned about adequate enforcement of judicial directives (injunctions) than of congressional directives (statutes).

118 *See Alden*, 119 S. Ct. at 2271–73.

119 *See* U.S. CONST. art. I, § 10.

120 United States v. Lee, 106 U.S. 196, 206, 208–09 (1882).

ment) to impose unwanted duties (like those of the FLSA) on the states, and the power of that other sovereign to strip states of their regulatory authority via federal preemption. State dignity is also compromised by all of the alternative means of judicial enforcement of federal duties that the majority mentions as valid (perhaps most notably, by state subjection to injunctions entered nominally against state officials), and by the manifold prohibitions and duties set forth in Article I Section 10, in Article IV, and in Amendments 13–15, 19, 24 and 26 to the Constitution.

If all of these burdens and accepted powers are consistent with state dignity, what, exactly, is it about private damage actions that grates? Perhaps it is the notion that if private parties can sue states for damages, nothing is left of a conception of state sovereign immunity—much as the Court was concerned in *Lopez* that if the Gun Free School Zones Act could be upheld, no statute could ever be found to be outside of Congress's commerce power.[121] Whatever the merits of *Lopez*, the axiom that Congress has limited and enumerated powers is well-entrenched in the Constitution's history and structure[122] (though of course the question whether or how courts should enforce those limits today is highly contestable). By contrast, the notion that state dignity demands some form of sovereign immunity from federal regulation falling within those enumerated powers is anything but axiomatic.

The Court's paean to state dignity is accompanied by a similar invocation of state sovereignty: "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States."[123] But as Jack Rakove has written, even under the Articles of Confederation (much less under the Constitution), the States were not "nation-states in the conventional sense, fully empowered to confront the nations of Europe as equal sovereigns."[124] Rakove elaborates,

> From the start (that is, from the era of the American Revolution), our practice and theory alike have made a hash of the traditional concept of sovereignty that the colonists inherited from European theorists. That traditional concept emphasized sovereignty's unitary and absolute nature; ours parcels sovereignty out into bits and pieces that are scattered throughout our system of governance, yet

121 *See Lopez*, 514 U.S. at 564–65.

122 *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS 57–93, 181–201 (1996).

123 *Alden*, 119 S. Ct. at 2255–56.

124 Rakove, *supra* note 97, at 1043.

somehow mystically reunited in the ineffable concept of an all-sovereign American people.[125]

In fairness, Justice Kennedy could be viewed as conceding that states are not *fully* sovereign. It is doubtful, however, that the idea of sovereignty is useful in describing our constitutional federalism.[126] Consider how bizarre it would be to suggest that the sovereign nation of France (1) may require the government of Great Britain to conform to French fair labor standards and bring suit (or authorize private injunctive actions against British officials) to enforce such laws, or (2) may preempt Parliament's legislative authority over labor standards.

In deploying conceptions of sovereignty, the critical vote in recent cases, and the greatest enigma, is Justice Kennedy. Of those in the majority in *Alden*, only he also joined the majority in *U.S. Term Limits, Inc. v. Thornton*,[127] and thus, was in the majority in every major federalism decision in recent years.[128] Kathleen Sullivan has suggested that he alone sees both sides of constitutional federalism—preventing state interference with federal sovereignty while preventing federal authority from intruding on matters reserved to the states.[129] But that duality may result less from a coherent view of federalism than from an oscillation among inconsistent visions in succeeding cases. Thus, his conception of the relation of nation and states in *Alden* seems quite different from his position several terms ago in *U.S. Term Limits*. His concurrence there, while perhaps best known for its vivid metaphor that "[t]he Framers split the atom of sovereignty,"[130] explicitly endorsed the transformative nationalism of Chief Justice Marshall in *McCulloch v. Maryland*:[131]

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125 Jack N. Rakove, *Making a Hash of Sovereignty*, 2 GREEN BAG 35, 35 (1998).

126 *See* Rapaczynski, *supra* note 82, at 346–59.

127 514 U.S. 779 (1995).

128 The same five Justices joined the majorities in *Lopez*, *Seminole Tribe*, *Alden*, *Printz*, and *Gregory*. Justice Souter added a sixth vote to the *Gregory* majority.

129 *See* Sullivan, *supra* note 117, at 103.

130 514 U.S. at 838 (Kennedy, J., concurring).

131 *See id.* at 840–41 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819)).

I refer to transformative nationalism as the view that while the Articles of Confederation were a traditional federation that preserved state sovereignty, the Constitution represented a novel re-ordering of affairs, in which the sovereign people designed a new national government that was supreme over the states but whose powers were limited in important respects. That view can be seen as standing between two others. A more purely nationalist view would stress that the separate colonies acted collectively through the Declaration of Independence and the Continental Congress and suggest that neither before nor after Independence were the states fully sovereign in

> The Convention which framed the constitution was indeed elected by the state legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves . . . .[132]

Rejecting the view in Justice Thomas's *U.S. Term Limits* dissent that popular consent was given by the people of each state separately, not as an undifferentiated national populace,[133] Justice Kennedy's concur-

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the classic sense—most notably in their lack of traditional authority over foreign affairs. *See, e.g.*, SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 192–94, 235–36 (1993). A more state-oriented conception would contend that the states not only became sovereign entities during Independence and remained so during the Confederation period, but also that they preserved their political sovereignty even when the Constitution was ratified, except insofar as they delegated limited powers to the national government. *See, e.g., U.S. Term Limits*, 514 U.S. at 845–49 (Thomas, J., dissenting).

> History rarely falls into neat models. As Jack Rakove suggests,
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> The deeper political reality underlying American constitutionalism was that sovereignty was effectively divided—parceled out—from the origin of the Republic(s). It did not leap the Atlantic in one fell swoop, to be partitioned among thirteen sovereign states, or to be vested intact in the national government of the Continental Congress. Rather, Congress and the states emerged simultaneously as effective institutions of government, each exercising powers that could be described as traditional marks of sovereignty, each collaborating in supporting the other's authority, and each compelled to place the imperatives of revolution above any concern about preserving sovereignty in its virginal, unitary purity. . . .
>
> As the American *colonies* metamorphosed into states, they alone possessed the sovereign power to enact statutes, collect taxes, and maintain the judicial systems that best defined the rights and duties of citizens. Yet in matters of war and diplomacy—the traditional badges of sovereignty in its international usage—the Continental Congress enjoyed an undisputed monopoly from its own inception in 1774. Significantly, too, when the time came to replace the defunct colonial regimes and the extralegal apparatus of revolutionary conventions with new legal governments, local authorities always solicited the approval of Congress before proceeding to draft the written charters that set American constitutionalism on its distinctive course. Yet when Congress in turn began drafting articles of confederation to define its own authority, its members recognized that whatever document they drafted would require approval by the states.

Rakove, *supra* note 125, at 39 (emphasis in original).

132 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819).

133 *See U.S. Term Limits*, 514 U.S. at 846–47 (Kennedy, J., concurring).

rence affirmed, consistently with the *U.S. Term Limits* majority, that "it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system" and that "the National Government . . . owes its existence to the act of the whole people who created it."[134]

Alden, by contrast, makes no reference to the sovereignty of the people as a whole. Rather, Justice Kennedy begins with the dubious assertion that states enjoyed sovereignty before the ratification, and that except as altered by the Constitution, they retain their "residuary and inviolable sovereignty."[135] His concern in *U.S. Term Limits* that the national government, though limited in its objects, "is, and must be, controlled by the people without collateral interference by the States"[136] seems to fall by the wayside in *Alden,* where he treats states and the United States as being on a par:

> It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.[137]

This notion of constitutional reciprocity is an odd one indeed.[138] Contrast with it the following language from the Supreme Court:

> The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby

134 *Id.* at 838–39. Even commentators not unsympathetic to limits on national authority have been skeptical of Justice Thomas's constitutional account. *See, e.g.,* Charles Fried, *Foreword: Revolutions?,* 109 HARV. L. REV. 13, 14–15 (1995).

135 *Alden,* 119 S. Ct. at 2247.

136 *U.S. Term Limits,* 514 U.S. at 841 (Kennedy, J., concurring).

137 *Alden,* 119 S. Ct. at 2264. In *Printz,* too, the Court put forward this notion of parity. *See Printz,* 521 U.S. at 928.

138 States, after all, lack broad authority to regulate the federal government or sometimes even its officials, *see, e.g., Barr v. Matteo,* 360 U.S. 564 (1959), or to preempt national legislative authority.

In considering the aptness of a notion of reciprocity with regard more specifically to state and federal judiciaries, contrast the following well-established doctrines: (a) Congress may limit the exercise of state court jurisdiction over federal causes of action by vesting exclusive jurisdiction in the federal courts, *see generally* HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 444–45, but (b) the states may not limit the exercise of federal jurisdiction (e.g., jurisdiction based on diversity of citizenship) over state causes of action, *see* Railway Co. v. Whitton's Adm'r, 80 U.S. 270 (1871).

> established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.[139]

Those words were written by that well-known radical nationalist, Justice Van Devanter.

Finally, invocations of state dignity and sovereignty are far harder to maintain today than in 1789.[140] In this regard, consider the changes in the Supreme Court's view of the question whether a Governor may be obliged by federal law to extradite fugitives to another state. In its 1860 decision in *Kentucky v. Dennison*,[141] the Court interpreted the federal extradition statute to create only a moral duty, ruling that

> the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, *and might impose on him duties of a character incompatible with the rank and dignity* to which he was elevated by the State.[142]

That decision was unanimously overruled in 1987 in *Puerto Rico v. Branstad*,[143] where the Court found it to rest "upon a foundation with which time and the currents of constitutional change have dealt much less favorably," and on a fundamental premise—"that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns"—that is "fundamentally incompatible with more than a century of constitutional development."[144]

Of course, *Dennison*'s broad language may have been inspired by the politics of slavery (extradition had been sought of a free black charged with assisting the escape of a slave), and the decision came on the eve of the Civil War, when, according to the *Branstad* Court, "the practical power of the Federal Government [was] at its lowest ebb

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139 Mondou v. New York, N.H. & H. R.R., 223 U.S. 1, 57 (1912). To be sure, other language in *Mondou* indicates that the case did not involve any attempt by Congress to enlarge state court jurisdiction, but rather that federal law presupposed that state courts already possessed such jurisdiction. *See id.* at 56.

140 Indeed, it is interesting how far the *Alden* majority succeeded—not completely, but considerably—in inducing Justice Souter to debate the case on originalist premises.

141 65 U.S. 66 (1860).

142 *Id.* at 107–08 (emphasis added).

143 483 U.S. 219 (1987).

144 *Id.* at 227, 228, 230. Notably, Justices O'Connor and Powell dissociated themselves from these broad statements. *See id.* at 231.

since the adoption of the Constitution."[145] Yet although slavery and the Civil War are surely unique, the history of state sovereign immunity has also been influenced by the ebbs and flows of national power, including the extent of federal courts' "practical power" to enforce judgments against the states.[146] Today one hardly doubts that judicial power (whether state or federal) is adequate to require Maine, if found liable, to pay a judgment under the FLSA. (There is little reason to think that the practical capacity of federal courts to enforce private judgments against the states when enforcing statutes enacted under Article I is any less than their capacity to do so when enforcing statutes enacted under Section 5 of the Fourteenth Amendment—enforcement that sovereign immunity law still permits.)

More broadly, just as understandings of the federal commerce power necessarily have expanded in the face of national economic integration and expanded federal regulation, so notions of state sovereignty cannot remain static given the dramatic growth in both state governmental activity and in its intersection with that same federal regulation. Multiple Congresses, in their exercise of Article I powers, have indicated—with the clear statement that the Supreme Court now demands—that proper regulation under a range of federal statutory regimes calls for state damage liability.[147] Those congressional deci-

145 *Id.* at 225.

146 *See generally* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889 (1983).

147 The majority opinion in *Alden* states that the first example of such legislation was the Federal Employer's Liability Act (FELA) in 1908. *See Alden,* 119 S. Ct. at 2261. In recent decades, as federal legislation has reached more widely and state activity has expanded so as to intersect with federal regulatory concerns, statutes subjecting states to suit have increased in number. They include (in addition to the FELA and the FLSA) the laws protecting copyrights, *see* 17 U.S.C. §§ 501(a), 511 (1994) (enacted by Pub. L. No. 101-553, § 2(a)(1), 104 Stat. 2749, 2749–50 (1990)), trademarks, *see* 15 U.S.C. § 1122 (1994) (enacted by Pub. L. No. 102-542, § 3(b), 106 Stat. 3567, 3567–68 (1992)), and patents, *see* 35 U.S.C. § 296 (1994) (enacted by Pub. L. No. 102-560, § 2(a)(2), 106 Stat. 4230, 4230–31 (1992)); the Individuals with Disabilities Education Act, 20 U.S.C. § 1403 (Supp. III 1997) (enacted by Pub. L. No. 105-17, tit. I, § 101, 111 Stat. 37, 47 (1997)); the bankruptcy laws, *see* 11 U.S.C. § 106 (1996) (enacted by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117 (1994)); the Veterans' Reemployment Rights Act, 38 U.S.C. § 4303(4)(a)(iii) (1994) (enacted by Pub. L. No. 103-353, §2(a), 108 Stat. 3149, 3150 (1994)); the Family and Medical Leave Act of 1993, 29 U.S.C. § 2617(a)(2) (1994) (enacted by Pub. L. No. 103-3, tit. I, § 104, 107 Stat. 6, 15 (1993)); laws preventing discrimination on various bases by recipients of federal funds, *see* The Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, tit. X, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7 (1994)); laws providing for equal opportunity for individuals with disabilities, *see* 42

sions have been made against a broader legal trend of restricting state and federal immunity from suit[148]—treating sovereign immunity, in the words of Justice Frankfurter, as "an anachronistic survival of monarchical privilege" that "runs counter to democratic notions of the moral responsibility of the State."[149] In the face of all this, one has to question the decision of sometime-textualists to impose a non-textual limitation on federal legislative power that is based on a highly contestable vision of the original understanding[150] and that has all of the infirmities previously noted. So much for judicial restraint.

V. WHY *ALDEN*?

How, then, can one understand the Court's current direction in its federalism decisions? Despite the difficulties of seeking to explain judicial behavior—whether of individual Justices or, in this case, of a consistent majority of five—I will hazard a few suggestions.

One hypothesis would focus on the Court's perception of the need to protect its own role in the constitutional scheme of separation of powers—a hypothesis that links *Alden* to *City of Boerne*. In *City of Boerne*, the Court viewed enactment of RFRA as an effort by Congress, prompted by disagreement with the Court's rulings, to change the contours of a constitutional right.[151] The Court might similarly view efforts by Congress to authorize private suit in state court as reflecting a lack of respect for the Court's commitment to the Eleventh Amendment as a protection of state immunity from federal court suit. In *Seminole Tribe*, the Court plainly expressed its view that a contrary holding there, so as to permit Congress routinely to overcome immunity from federal court suit via statutory abrogation, would have made immunity of little consequence.[152] Having thus fortified immunity from federal court suit by making it invulnerable to abrogation by stat-

U.S.C. § 12202 (1994) (enacted by Pub. L. No. 101-336, tit. V, § 502, 104 Stat. 327, 340 (1990)); and the age discrimination in employment laws, *see* The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74 (codified as amended at 29 U.S.C. § 630(b) (1994)).

148 *See generally* GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 1330–31 (3d ed. 1997); HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 66, at 1027–39; James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Reveiew of State Court Judgments After* Seminole Tribe, 46 UCLA L. REV. 161, 205–07 & nn.166–69 (1998).

149 Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).

150 *See generally Alden*, 119 S. Ct. at 2269–87 (Souter, J., dissenting).

151 *See* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).

152 *See Seminole Tribe*, 517 U.S. at 64 ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless

utes enacted under Article I, the Court may not have wanted Congress to be able to make an end run around immunity by authorizing private suit in state court; hence *Alden*.[153] Insofar as Congress was seen as promoting private suit against states, whether in federal or state court, one might say here, as Michael McConnell said of the *City of Boerne* decision, that the majority "viewed congressional action as an irrelevance, if not an impertinence."[154]

Turning from institutional role to substantive commitment, one can view *Alden* as part of a reaction by the Justices in the majority against what they view as excessive and unjustified federal intervention into matters that should be left to the states—a reaction not exclusively against regulation of "*states qua states*," but more broadly against improvident uses of federal regulatory power that, even after *Lopez*, remain within constitutional bounds.[155] The Court may well lament, as I often do, that our current political climate assigns so little weight to the tradition—proclaimed by Herbert Wechsler in 1954 as the most important political safeguard of federalism—that federal intervention is "exceptional" and must be justified by "some necessity."[156] Indeed, various of the decisions limiting national power have been characterized, by me and others, as a warning shot, or a form of cuing, to Congress, meant to admonish it not to go "too far."[157]

Congress clearly says so, it means nothing at all." (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 36 (1989) (Scalia, J., dissenting))).

153 Of course, the *Alden* ruling created considerable tension with statements in earlier opinions that the 11th Amendment does not apply in state court—statements whose fair implication was that the point disposed of any sovereign immunity issue. *See, e.g.*, Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 205 (1991); Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980); *cf.* Nevada v. Hall, 440 U.S. 410, 420–21 (1979) ("[A]ll of these cases [concerning the scope of state sovereign immunity] concerned questions of federal-court jurisdiction . . . . These decisions do not answer the question whether the Constitution places any limit on the exercise of one's State's power to authorize its courts to assert jurisdiction over another State."). For some of the difficulties found in *Alden*'s treatment of precedent, see HART & WECHSLER'S 1999 SUPPLEMENT, *supra* note *, at 135–36.

154 Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 174 (1997).

155 For a similar suggestion, see Caminker, *supra* note 1, at 1001, 1007.

156 Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954).

157 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 190–95 (1982); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447–50 (1995); Jackson, *supra* note 1, at 2227; Meltzer, *supra* note 9, at 63; Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1270 (1976); Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1652 (1994).

But perhaps the Court thinks that Congress, to use a contemporary idiom, just doesn't get it, and hence some additional medicine is needed to counteract congressional excesses. The medicine administered prior to *Alden* could be viewed as relatively mild. *Lopez*, as many have noted,[158] invalidated a pointless federal crime enacted for symbolic or political reasons, and set forth constitutional limits that Congress can usually satisfy with little loss of regulatory effectiveness—as Congress illustrated when it rehabilitated the very statute invalidated by *Lopez* by adding a jurisdictional element that will virtually always be present.[159] *New York v. United States* and *Printz* raised fascinating problems of constitutional theory, but the absence of a square precedent in either case suggests that the impact of those decisions may be quite limited;[160] indeed, the Court rejected an expansive reading of *Printz* this Term in *Reno v. Condon*.[161] Perhaps, then, the Court in *Alden* wanted to send a stronger message. To be sure, *Alden*, like *Printz* or *New York v. United States*, did not hold a particular subject matter (regulation under the commerce power of fair labor standards,

158 *See* Jesse H. Choper, *Did the Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court"?*, 46 CASE W. RES. L. REV. 663–64 (1996); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 692 (1995); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 648 (1996); Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 551–52 (1995); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 652 (1995).

159 The current version of 18 U.S.C. § 922 (1994), as amended by Pub. L. No. 104-208, tit. I, § 101(f) (1996), forbids possession in a school zone of a firearm "that has moved in or that otherwise affects interstate or foreign commerce." Most commentators have assumed that the amended statute falls comfortably within the Commerce Clause even after *Lopez*, *see, e.g.*, Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 662–64 (1997); Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793, 822 n.119 (1998); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 930–31 (1997), and the statute's constitutionality was upheld in a routine opinion in *United States v. Danks*, 187 F.3d 643 (8th Cir. 1999) (unpublished table decision).

160 *See, e.g.*, Caminker, *supra* note 14, at 199–200; Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996–1997 Term*, 19 CARDOZO L. REV. 2259, 2269 (1998).

161 120 S. Ct. 666 (2000). There, the Court unanimously reversed the Fourth Circuit, which had declared the Federal Driver's Privacy Protection Act unconstitutional under both *Printz* and *New York*. In so ruling, the Supreme Court stressed that the Act, while it regulates the states, does not require a state to either enact any laws regulating private individuals or to assist in enforcing federal statutes regulating private individuals. *See id.* at 672. The Court did say that it did not need to address (and thus could be viewed as having left open) the question whether a law lacking either of these defects might nonetheless be void because it regulates the states exclusively; the Act regulates private entities as well. *See id.* at 669–70.

registration of handguns, or nuclear waste) to be outside congressional authority. But the enforcement technique that *Alden* invalidated, private suit against the states, is of far more general importance to a broad range of federal programs than is "commandeering" of state political officials. Indeed, while protesting in *Alden* that its decision really did not curtail federal enforcement power in any significant respect,[162] perhaps the Court was not perturbed if, in fact, the decision drew a little blood.

A distinct though consistent hypothesis is that some if not all of the Justices in the majority lack sympathy for *Garcia* and do not trust the political safeguards of federalism adequately to protect their vision of state autonomy from direct federal regulation. Justices Rehnquist and O'Connor, the only *Garcia* dissenters still on the Court, both pointedly predicted in their *Garcia* dissents that the majority's position there would in time be overruled.[163] But even if five of today's Justices would not, as a matter of first impression, have joined the *Garcia* opinion, they might hesitate to overrule it in a case like *Alden*.[164] For to have done so would have meant that in each of the last four decades of this century, the Court would have shifted its position on whether Congress may subject state and local governments to fair labor standards. Imagine this citation: *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *overruled by Alden v. Maine*, 119 S. Ct. 2240 (1999).[165]

A variation on this theme would begin with the same uncertainty about whether five Justices remain sympathetic to *Garcia*, but would focus on problems of constitutional implementation.[166] If the *Garcia* majority is taken at face value, the Court there rejected the state autonomy approach of *National League of Cities v. Usery*[167] in large part because of the judiciary's inability to develop a doctrine whose application was relatively predictable and did not appear to be unduly re-

162 *Alden*, 119 S. Ct. at 2266–68.

163 *See* Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 580 (1980) (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

164 *See supra* note 28.

165 On the other hand, perhaps *Alden* could contribute to the Court's arguing, some years from now, that *Garcia* has been sufficiently undercut by subsequent decisions that it can no longer be viewed as good law. *Cf.* Yoo, *supra* note 28, at 1334–35 (declaring, before *Alden*, that *Garcia* is not and should not be viewed as good law).

166 *See generally* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

167 426 U.S. 833 (1976).

sult-oriented.[168] Although that objection did not convince Justices Rehnquist and O'Connor, it may resonate with other members of the *Alden* majority insofar as they, though surely sympathetic to protection of state autonomy, also believe in the importance of determinate doctrine. (Justice Scalia is the most obvious example.[169]) But a decision like *Alden* permits pursuit of the impulse to protect state autonomy without the difficulties of *National League of Cities*, for the Court could borrow the readily available Eleventh Amendment doctrine limiting federal court power, and by applying it also in state courts, expand it into a general immunity from private suit. Eleventh Amendment doctrine, to be sure, is replete with quirks, and, like most doctrines, has considerable uncertainty at its margins,[170] but it is relatively determinative and has been richly elaborated in prior cases.[171] Moreover, a doctrine of state sovereign immunity from private suit can be viewed as premised on less controversial limitations concerning legislative technique rather than on judicial evaluation of the importance of legislative ends.

It is worth pausing to explore in more detail the implications of this last hypothesis. Ordinarily, questions of substantive constitutional law are thought of as of primary importance, while questions of jurisdictional and remedial authority to enforce substantive constitutional doctrines are secondary to, and indeed are shaped by, the substantive constitutional doctrines. Thus, the central questions of constitutional law would be the scope of national legislative authority (the issue in *Lopez*) or the scope of a state's substantive immunity from national

168 *See Garcia*, 469 U.S. at 533–39, 546–47. Mark Tushnet notes from his examination of the Court's internal records in the Brennan and Marshall papers that Justice Blackmun initially voted to invalidate the application of the FLSA to the governmental activity involved in *Garcia*, but after being assigned the opinion, he prepared a draft reaching the opposite result—presumably because the opinion he expected to draft would not write. *See* Tushnet, *supra* note 157, at 1627–28.

169 *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989).

Of course, Justices Scalia and Kennedy did join *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which endorses a doctrinal test, as a matter of statutory interpretation, that may also be difficult to apply predictably. *See supra* text accompanying notes 15–17.

170 *See, e.g.*, Currie, *supra* note 15, at 149; Vázquez, *supra* note 15, at 2–3.

171 Moreover, though I doubt that the historical materials go very far in supporting the Court's ultimate conclusion, without a doubt there were elements in the historical record—both from the Founding era and from the evolution of remedies in the nineteenth and early twentieth centuries—that resonate with the view that state governments are immune from retrospective liability. *See generally* Woolhandler, *supra* note 76.

regulation (the issue in *National League of Cities* and *Garcia*). That is why I have described *Lopez* as a "narrow decision about a question of great moment—the scope of congressional power to regulate," while *Alden,* like *Seminole Tribe,* is "a broader decision about a question of less significance."[172]

Thus, at least for as long as *Lopez* is quite a marginal limitation, and *Garcia*'s overruling of *National League of Cities* remains good law, the Court's current regulation of constitutional federalism seems to be leading with the tail rather than the dog: the Constitution does not limit Congress's power to impose duties on the states under the FLSA, but it does limit Congress's authority to provide the full range of remedies for those duties. Lacking a robust theory of what limits (or what judicially enforceable limits) the Constitution places on congressional regulatory authority, the Court directs its primary effort to limiting the scope of remedies that Congress may deploy.

This approach to enforcing some conception of constitutional federalism seems at once ineffectual and counterproductive. It is ineffectual because it leaves the states subject to FLSA regulation; indeed, if states were to comply fully and in good faith with federal duties, then the immunity recognized by *Seminole Tribe* and *Alden* would be beside the point, for private suits seeking damages would never have to be filed. The inadequacy of *Alden* to promote any robust conception of state sovereignty underlies Charles Fried's vivid description of *Alden* as "like using a screwdriver to pound nails."[173]

However, in order to evoke more clearly the damage that *Alden* may cause to the enforcement of legitimate and important federal objectives, one could equally well invert Fried's image, and describe the decision as "like using a hammer to drive screws." For *Alden* is a rule of enormous generality, applicable apparently to all exercises of national legislative authority under Article I, not merely to those that seem marginal or overreaching. Federal regulation under relatively more specific grants of regulatory power—to enact uniform rules regarding bankruptcy, or to create exclusive rights in "Writings and Discoveries"—are now limited by state immunity, as is legislation that no one would think near the outer reaches of the commerce power (e.g., the regulation of state-owned railroads operating in interstate commerce). Because, as noted earlier, retrospective liability may be an important regulatory tool, the Court's recognition of a general immu-

172 Meltzer, *supra* note 9, at 63.

173 Charles Fried, *Supreme Court Folly,* N.Y. TIMES, July 6, 1999, at A17.

nity from private suit in both federal and state court may have significant consequences for regulatory effectiveness.[174]

That *Alden* is at once ineffectual in protecting state interests and harmful to achievement of legitimate national objectives may explain differing reactions to it. Focusing on the first point, some have argued that *Alden* is a decision of only marginal significance. Thus, for example, Kathleen Sullivan wrote shortly after this Term's immunity decisions that criticism of them was "hyperbolic" and stated that "the striking feature of these rulings is how little they challenged the federal government's substantive power to make labor, patent and trademark law."[175] She stated, quite accurately, that "[t]hese decisions were not about whether Congress may regulate the states in these areas but rather how it may enforce such regulation," but with a clear implication that the latter question is of greatly subordinate importance.[176] But those who, like me, are more inclined to think that *Alden* has greater significance, focus less on its leaving substantive regulatory ruling intact and more on its potential to impair effective enforcement of the substantive power that the federal government retains.[177] To be sure, given the lack of a longstanding history of federal

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174 *See supra* Part I.

175 Kathleen M. Sullivan, *Federal Power, Undimmed*, N.Y. TIMES, June 27, 1999, § 4, at 17.

176 *Id.*; *see also* Rapaczynski, *supra* note 82, at 346 n.21 (dismissing sovereign immunity as largely irrelevant to federalism because states are not immune from suit by other states or the United States—with little attention to the effectiveness of such suits in enforcing legal regimes).

Mark Tushnet echoes this perspective and offers the related argument that "less-than-maximally effective remedies are not strangers even to constitutional law," pointing to cases limiting the reach of *Bivens* remedies or extending qualified immunity from damages in constitutional tort actions against officials. Tushnet, *supra* note 52, at 73 n.212. The point is surely correct, but overlooks the difference between remedies ordered by courts on their own (or when enforcing broadly worded enactments like 42 U.S.C. § 1983 (1994)) and remedies whose provision is specifically directed by federal legislation; constitutional foreclosure of the latter is a far more serious matter.

177 A sociologist of the legal academy might wonder whether differing perspectives on the significance of a decision like *Alden* may be partially explained by the conventional division of constitutional law topics in law school curricula. In general, the bulk of federalism-related matters—for example, the reach of the commerce power (as well as its dormant preemptive effect); the existence *vel non* of constitutionally protected areas of state autonomy from federal regulation; and the scope of legislative power under the Reconstruction amendments—are discussed in the basic constitutional law course. Other topics that bear importantly on the enforcement of constitutional rights—sovereign immunity, constitutional remedies, congressional control of federal court jurisdiction, and remedial authority—are typically considered in federal courts or civil rights courses. Dean Sullivan is a teacher of constitutional law but not

imposition of retrospective liability on state governments, there is something to the claim that the constitutional preclusion of such liability cannot be treated as a serious truncation of necessary federal authority.[178] Yet "experience for much of that time, when both federal regulatory power and state governmental activity were far more constricted, may not be highly pertinent to today's problems";[179] the intersection of the application of federal patent laws to the states and recent growth in the development of patentable products by state universities is just one example of that phenomenon. Surely Congress, which one would ordinarily take to be better equipped than the Court to determine what means of enforcement are important, has repeatedly taken a view in recent years that retrospective state liability should be an available remedy under a variety of federal statutes.[180]

The tail-wagging-the-dog quality of the Court's interventions regarding constitutional federalism makes me think that the current doctrinal pattern is not a stable one. The Court may decide to extend *Lopez* or resurrect *National League of Cities* or otherwise recognize substantive limits on Congress's regulatory authority. Or perhaps, to offer a more hopeful vista, a future Court will take the view that *Seminole Tribe* and *Alden* were misguided and will overrule their limitation of congressional power.

VI. ABROGATION UNDER SECTION 5: THE *FLORIDA PREPAID* DECISION

The Court's companion decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[181] exhibits a similarly

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of federal courts. By contrast, as a federal courts teacher who does not teach the standard constitutional law course, perhaps I am predisposed "to doubt that 'the central problems for constitutional law . . . are issues of the definition of rights rather than the creation of a machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protections.'" Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 282 (1988) (quoting Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1413 (1983)). Attention to the available machinery in statutory cases like *Alden*, it should go without saying, is of equal importance.

As put, the point is plainly too crude: some constitutional law teachers lament *Alden*, while some federal courts teachers think it correct; and quite a few law professors confound any simple distinction by teaching both subjects. But nonetheless it seems possible that the differing perspectives of the different courses may account for some of the variation in reactions to *Alden*.

178 *See* Meltzer, *supra* note 9, at 47.

179 *See id.* (discussing *Seminole Tribe*, 517 U.S. at 71–72).

180 *See supra* note 147.

181 119 S. Ct. 2199 (1999).

constricted judicial willingness to defer to Congress in matters of constitutional federalism. The issue there was the validity of the "Patent and Plant Variety Protection Remedy Clarification Act,"[182] through which Congress, in 1992, had purported to abrogate the states' Eleventh Amendment immunity and thus to subject them to private damage actions in federal court for patent infringement. The validity of the abrogation depended on the source of legislative authority behind it: if authorized only by the Patent Clause of Article I, the effort to abrogate was doomed under *Seminole Tribe*; but if authorized by Section 5 of the Fourteenth Amendment, the Act was, under the Court's decision in *Fitzpatrick v. Bitzer*,[183] a valid exercise of congressional power. Given that somewhat odd doctrinal structure, recognition of broad power in Congress to legislate under Section 5 might seem, at least to devotees of state sovereign immunity, to permit an end run around the Eleventh Amendment and *Seminole Tribe*.[184]

From this perspective, it was no great surprise that the five Justices in the *Alden* majority again joined together in *Florida Prepaid* to hold that the Patent Remedy Act could not be upheld under Section 5 as a measure to enforce the right of patent holders not to be deprived of their intellectual property without due process of law. In *Florida Prepaid*, the Court purported to apply the framework of its decision two years earlier in *City of Boerne*, a case not involving state sovereign immunity, which had decided far broader questions about the scope of congressional authority under Section 5. This Essay is not the occasion to evaluate the Court's approach in *City of Boerne*.[185] What is

182 Pub. L. No. 102-560, § 2(a), 106 Stat. 4230, 4230 (1992) (codified at 35 U.S.C. §§ 271(h), 296 (1994)).

183 427 U.S. 445 (1976).

184 Concern to that effect had been expressed directly by lower courts. *See, e.g.*, Chavez v. Arte Publico Press, 139 F.3d 504, 510–11 (5th Cir. 1998) (holding that to permit an action against a state for copyright infringement under Section 5 would be "a direct end-run around *Seminole*'s holding that Article I powers may not be employed to avoid the Eleventh Amendment's limit on the federal judicial power"), *vacated and remanded*, 180 F.3d 674 (5th Cir. 1999) (en banc) (per curiam).

185 For varying defenses of this decision, see, for example, Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999), and William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996).

For criticism, see, for example, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 818–27 (1999), David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, and McConnell, *supra* note 154.

noteworthy about *Florida Prepaid*, however, is that the Court's application of the *City of Boerne* framework was at once cavalier and highly restrictive, leading one to surmise that the majority's powerful commitment to the proposition that states should not be suable at the behest of private parties may shape its application of related constitutional doctrines.

In *Florida Prepaid*, the Court began by considering the scope of the constitutional right that the Patent Remedy Act could be viewed as redressing. The majority advanced two reasons why a state that infringes a private patent may not have deprived the patent holder of property without due process, and, therefore, why the Patent Remedy Act extended well beyond enforcing the patent holder's due process right. First, the Court doubted the existence of a *deprivation*. Writing for the Court, the Chief Justice contrasted the Court's due process precedents—which hold that no *deprivation* results from merely negligent action of state officials—with the patent laws, which authorize infringement actions against (*inter alia*) the states even where the infringement was entirely inadvertent.[186] But as the dissenters noted without contradiction, the patent holder's complaint alleged a willful violation of the patent laws,[187] an adequate basis (at the pleading stage) for establishing that, as applied to the case at hand,[188] the Patent Remedy Act was redressing a *deprivation* of property.[189]

186 *See Florida Prepaid*, 119 S. Ct. at 2209 (quoting 5 DONALD S. CHISUM, PATENTS § 16.02(2), at 16–31 (rev. ed. 1998) ("It is, of course, elementary that an infringement may be entirely inadvertent and unintentional and without knowledge of the patent.")).

187 *See id.* at 2213 (Stevens, J., dissenting).

188 On the preference for as-applied adjudication, see, for example, *United States v. Salerno*, 481 U.S. 739, 751–52 (1987), *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985), and *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912).

189 Moreover, the precise meaning of the requirement of intentional conduct in the patent context is difficult to discern because of the Court's failure to apply it to the facts of the case. The requirement originated in *Daniels v. Williams*, 474 U.S. 327 (1986), where a prisoner claimed that he injured himself after tripping over a pillow negligently left on a staircase by a prison official. Quite different from that situation was the one alleged in *Florida Prepaid*—that a state agency was engaged in systematic marketing of a product that infringed the plaintiff's patent. Surely the conduct of the responsible state officials in developing and marketing the product in question was intentional, as was any resulting harm to (diversion of business from) the plaintiff. It would hardly seem necessary, in order to be faithful to *Daniels*'s evident concern with avoiding the constitutionalization of isolated instances of official negligence, to require a further showing that the responsible state officials knew (a) that the plaintiff held the patent in question, (b) that the patent was valid, or (c) that the state's use was an infringing one.

The Justices comprising the majority in *Florida Prepaid* have been those most insistent on judging the constitutionality of statutes on an as-applied rather than a facial basis.[190] Consequently, their failure even to articulate any argument for departing from their own preferred practice of as-applied adjudication is puzzling.[191] But perhaps

190 *See* City of Chicago v. Morales, 119 S. Ct. 1849, 1867–70 (1999) (Scalia, J., dissenting); *id.* at 1886 (Thomas, J., joined by Rehnquist, C.J. & Scalia, J.); Janklow v. Planned Parenthood, 517 U.S. 1174, 1175–76 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting) (denying certiorari to Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995)); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990) (Kennedy, J., joined, *inter alia*, by Rehnquist, C.J. & O'Connor & Scalia, JJ.) (stating that "[t]he Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur"); United States v. Salerno, 481 U.S. 739 (1987) (Rehnquist, C.J., joined, *inter alia*, by O'Connor & Scalia, JJ.).

191 My colleague Dick Fallon, while in the end critical of the Court's facial invalidation of the Patent Remedy Act, has suggested a possible explanation therefor. In his view, (a) the appropriateness of facial challenges depends upon the nature of the constitutional infirmity in the statute, as some infirmities (e.g., unconstitutional purpose) may infect a statute in its entirety, and (b) the defect in *Florida Prepaid* might plausibly be viewed as a failure by Congress adequately to deliberate about, and to articulate legislative findings concerning, the need for the legislation as a means of enforcing the Constitution—a failure that infected the entire statute. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. (forthcoming Apr. 2000). Of course, as Fallon recognizes, the observation that some constitutional defects may infect any conceivable statutory application does not necessarily require facial invalidation—that is, a judicial order enjoining every application of the statute. Rather, it ordinarily would suffice for the court to invalidate the statute as applied to particular litigants, albeit on a theory whose implication is that no other application of the statute would be constitutional. In practice the two approaches are unlikely to vary significantly unless a second court not bound by the prior ruling were to disagree with it. The key question, then, is whether the applicable test under *City of Boerne* concerns a defect in congressional process.

The recent decision in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), suggests that the initial inquiry under *City of Boerne* is one of proportionality, which considers whether a substantial percentage of cases to which a statute applies involve conduct that also would violate the 14th Amendment. *See id.* at 644–45. The Court added, however, that the fact

> [t]hat [a statute] prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our Section 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that Section 5 precludes Congress from enacting reasonably prophylactic legislation. . . . One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action.

Id. at 648. It thus appears that any process concern under *City of Boerne* is secondary, arising only after a finding that an insufficient proportion of conduct reached by a statute is also unconstitutional.

in deciding whether to engage in facial or in as-applied adjudication, the key factor is the depth of the Court's commitment to the underlying constitutional value. Much as the Warren Court permitted First Amendment facial attacks in part because of its view of the singular importance of free expression, the Rehnquist Court may permit facial challenges to statutes as outside the enumerated powers of Congress in part because of its view of the importance of constitutional federalism, or, more specifically, of state sovereign immunity.[192] If that is so, it would only highlight the distance the Court has moved from the theory of *Garcia*: not only is federalism now to be enforced in the judicial rather than the political process, but enforcement is to be implemented through an especially aggressive adjudicatory technique.

There remains, however, a question about how this primary standard of proportionality is capable of as applied adjudication. In individual rights litigation, a litigant whose conduct is constitutionally protected may, without more, have a statute declared invalid as applied to his conduct. By contrast, a state, when contending that a measure falls outside of Section 5, does not prevail simply by showing that the particular conduct at issue is not independently unconstitutional; the constitutional question in the particular case depends upon consideration of the general reach of the statute as compared to the reach of the self-executing Constitution. Still, merely because the proportionality test by its nature compares two classes of conduct does not preclude as applied adjudication. For example, even were the Patent Remedy Act to be deemed unconstitutional, because disproportionate, if applied to all state patent infringement whether or not intentional, the Court could have ruled that at least as applied to a narrower set of conduct (for example, intentional state infringements) the Patent Remedy Act was not disproportionate and thus could be constitutionally be applied on this narrower basis. And had the Court followed that approach, it appears that there would have been no occasion to consider any possible "process" defect in the Act.

Other arguments for permitting facial attacks in some cases might be based upon (a) the unavailability of a determinate rule to delineate the narrowed scope for valid statutory application, *see* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; *cf.* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); or (b) relatedly, whether such excision can easily be imposed or instead would burden the courts by requiring a very large number of as-applied attacks in order clearly and fully to remove constitutional defects, *cf.* Baggett v. Bullitt, 377 U.S. 360, 376–78 (1964) (refusing to abstain in a vagueness challenge where it was "fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty"). However, a simple holding that the Patent Remedy Act could be applied to intentional (and perhaps reckless) conduct but not to negligent or faultless conduct would have been more than adequately determinate. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 1 (1964) (holding that common law liability for defamation of public figures could be enforced only when the defendant acted with knowledge of or reckless disregard for the truth, even though state defamation doctrine did not itself impose that scienter requirement).

192 *See* Fallon, *supra* note 191.

But all of this is speculation, for the majority offers no explanation of, much less justification for, its facial invalidation of the Patent Remedy Act.

The Court's second reason for finding that state patent infringement may not violate the Due Process Clause is equally problematic. Relying on the doctrine of *Parratt v. Taylor*[193] and *Zinermon v. Burch*,[194] the Court held that a state's patent infringement, even if a deprivation, would not necessarily constitute a deprivation *without due process*. The *Parratt* and *Zinermon* decisions ruled that when a deprivation of liberty or property is random and unauthorized, the only process due is a meaningful post-deprivation remedy (for example, a tort action against the state or the responsible officials); thus, a procedural due process violation comes into being only when the state fails to provide such a post-deprivation remedy. But the Patent Remedy Act, the Supreme Court reasoned, by authorizing a federal patent infringement remedy without regard to the existence of a state post-deprivation remedy, extends to circumstances in which the state has committed no constitutional violation.

Here, too, however, the *Florida Prepaid* Court paid no attention to whether the Patent Remedy Act was constitutional as applied to the facts in the case. For under the *Parratt/Zinermon* doctrine, the Act would reach beyond the Due Process Clause only if (a) the alleged deprivation by the State of Florida was random and unauthorized[195] *and* (b) Florida in fact provided meaningful post-deprivation redress under state law. The Court did not inquire whether either, much less both, of these conditions obtained.[196]

193 451 U.S. 527 (1981).

194 494 U.S. 113 (1990).

195 On that point, the facts in *Florida Prepaid* were very different from those of *Parratt* and its progeny, which were one-shot instances of unlawful conduct by individual state officers. In *Florida Prepaid* the state was continuously involved in the marketing of a product that it knew the plaintiff claimed to be an infringement of the plaintiff's patent. On those facts, the plaintiff patent holder might well have been able to establish that, in the words of the *Zinermon* decision, it "seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue." *Zinermon*, 494 U.S. at 136.

196 Moreover, the idea that patent infringement issues should be determined in state courts under state post-deprivation remedies is itself troubling for a different reason. As Justice Stevens noted in his dissent, *see Alden*, 119 S. Ct. at 2212–13, Congress has long determined that claims arising under the patent laws should be within the exclusive jurisdiction of the federal courts, which are more expert than state courts and better able to promote much-needed uniformity, *see* 28 U.S.C. § 1338 (1994). For much the same reasons, but far more exceptionally, Congress has consolidated appeals in patent cases in a single circuit—the Court of Appeals for the Federal Circuit. *See id.* § 1295. Yet the *Florida Prepaid* opinion wreaks havoc with this system in

Quite apart from the Court's departure from as-applied adjudication, the *Florida Prepaid* opinion seems to hurdle past difficult questions in invalidating the Patent Remedy Act's purported abrogation of state sovereign immunity. The *Zinermon* opinion had clearly stated (in dictum but without dissent on this point) that the existence of post-deprivation remedies is relevant only to procedural and not to substantive due process claims.[197] That limitation is not merely a technical point of doctrine, but a critically important understanding of the reach of federal constitutional protection. Three-quarters of a century earlier, in *Home Telephone and Telegraph Co. v. City of Los Angeles*,[198] the Supreme Court affirmed that the Constitution protects individuals against action by a state official—even if that action was not authorized by or contrary to the policy of the state, and whether or not the state courts would stand ready to provide redress for the official's violation of state law. The *Parratt-Zinermon* rule is a limited exception to that fundamental proposition, one that, to date, the Court has confined to procedural due process violations that are random and unauthorized.[199] It is not an easy question whether, under the Court's precedents, a state's deprivation of intellectual property rights via infringement of a patent is better viewed under the rubric of substantive due process—as an interference with property rights that is complete when effected—or under the rubric of procedural due process—in which case a post-deprivation remedy is, at least in some circumstances, all the process that is due.[200] Here

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those cases in which the alleged patent infringer is a state government: for even when an alleged infringement might violate constitutionally protected property rights, on the Court's theory the only remedy (at least in states that do provide post-deprivation remedies) is for patent holders to file suit in state trial courts and to proceed though the state court system, with virtually no chance of obtaining federal review.

197 *Zinermon*, 494 U.S. at 124–27.

198 227 U.S. 278 (1913).

199 A second exception to the general rule of *Home Telephone* is found in the rule, long pre-dating *Parratt* and *Zinermon*, that under the Just Compensation Clause a taking of property by a state official without authorization does not give the property holder a right to compensation from the state, but instead only to remedies against the official. *See infra* note 205. It is a question worthy of further study how that doctrine and the rule of *Home Telephone* came to co-exist.

200 For some discussion of this question from quite different frameworks, see Christina Bohannan & Thomas F. Cotter, *When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity from Federal Infringement Claims Constitutional in Light of* Seminole Tribe*?*, 67 FORDHAM L. REV. 1435, 1503–08 (1999), Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993), and Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After* Seminole Tribe*: The Eleventh Amendment and Other Immunity Doctrines*, 55 WASH. & LEE L. REV. 849,

too, however, the Court's opinion fails even to advert to the question.[201]

In one last respect, the Court's opinion is open to criticism—for its failure to give Congress the "wide latitude" promised by the *City of Boerne* opinion "in determining where [the line]" lies "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."[202] In invalidating RFRA, the *City of Boerne* Court noted that while only those generally applicable state laws enacted because of religious bigotry violate the Free Exercise Clause, RFRA had subjected all state laws to a form of statutory strict scrutiny—and had done so without legislative findings that unconstitutional motivation was commonly present.[203] In *Florida Prepaid,* the Court similarly questioned the means/ends fit, objecting that Congress, when enacting the Patent Remedy Act, had identified no pattern of patent infringement (much less of constitutional violations) by the states. The analogy to *City of Boerne,* however, was misplaced. There, the *ratio* of constitutional violations to statutory applications was, in the Court's view, inordinately low. But under the Patent Remedy Act—assuming that its application were limited to intentional patent infringements that are deprivations of property,[204]

900–01 (1998). My own view is that the entire set of cases has mischaracterized in procedural due process terms what should be viewed as substantive harms, and that the critical question should be whether the substantive harm is the kind of injury against which the Constitution provides protection. For an elaboration of a similar view, see, for example, Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts,* 18 GA. L. REV. 201 (1984).

201 Moreover, as Vicki Jackson has pointed out, the evident purpose of the *Parratt-Zinermon* doctrine was to avoid federalizing routine state law actions when the tortfeasor happens to be someone acting under color of state law—hardly a concern in the patent area, which long has been the exclusive domain of the national government. *See* Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law,* 30 RUTGERS L. REV. (forthcoming 2000).

202 *City of Boerne,* 521 U.S. at 519–520. Note in the companion decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 119 S. Ct. 2219 (1999), an offhand comment by the Court described the scope of power under Section 5 in terms far narrower than those used in *City of Boerne.* After having found that the state conduct at issue did not constitute a deprivation of property, the Court said,

> [W]e need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of Section 5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was *genuinely necessary* to prevent violation of the Fourteenth Amendment.

Id. at 2225 (emphasis added).

203 *City of Boerne,* 521 U.S. at 530–31.

204 *See supra* note 191.

and that at least a good number of those deprivations will be without due process of law—the ratio of such instances of patent infringement to the number of constitutional violations will be relatively high. Perhaps the absolute numbers of both will be small if, as the Court suggested, patent infringement by states is not a large problem. But whether the absolute number of state infringements is large or small, the ratio of statutory violations to constitutional violations will be the same. Thus, even if the Court was correct in suggesting that patent infringement by states is infrequent, nothing in *City of Boerne*, or elsewhere in the Constitution, bars Congress from enacting limited statutes to address limited problems.

Thus, the Court's analysis in *Florida Prepaid* of the constitutionality of the Patent Remedy Act suffered from a multitude of difficulties. Those difficulties might be the product of end of the Term pressures, but more likely they arose from a determination to announce a ruling that the Act was invalid *in toto*, so as to preserve the principle of state sovereign immunity.[205] My own view, which I have explained else-

205 *See* HART & WECHSLER 1999 SUPPLEMENT, *supra* note *, at 105. The Court did not consider a distinct argument for upholding the Patent Remedy Act—that it was a valid exercise of power under Section 5 to enforce the constitutional protection against takings of property without just compensation. Noting that neither the text nor the committee reports suggested that Congress had in mind the Just Compensation Clause, the Court took the view that Congress's explicit reliance on its (purported) authority under Article I and its authority under Section 5 to enforce the due process right "preclude[d] consideration of the Just Compensation Clause as a basis for the Patent Remedy Act." *Florida Prepaid*, 119 S. Ct. at 2208 n.7.

That refusal was somewhat extraordinary, though not entirely unprecedented. For example, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court invalidated sections 1–2 of the Civil Rights Act of 1875 as falling outside the scope of the congressional authority under the enforcement clauses of the 13th and 14th Amendments. In so ruling, the Court refused to consider whether those provisions, in at least certain applications, might be justified as a valid exercise of the commerce power, reasoning that the provisions "in question are not conceived in any such view." *Id.* at 19. The dissent objected in turn: "Has it ever been held that the judiciary should overturn a statute, because the legislative department did not accurately recite therein the particular provision of the Constitution authorizing its enactment?" *Id.* at 60 (Harlan, J., dissenting).

More recent authority, however, suggests, that no such recitation is necessary. In *EEOC v. Wyoming*, 460 U.S. 226 (1983), the Court stated that the constitutionality of a federal statute does not depend on whether Congress recited the particular source of legislative authority under which the statute might be upheld. *Id.* at 243–44 n.18 (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948)). The statement was strictly dictum, as the Court there upheld the ADEA under the commerce power, on which Congress had explicitly relied. However, both the majority opinion and the Chief Justice's dissent appeared to agree that Congress, in extending that act to state and local governmental employers, had not expressly relied upon any purported au-

where,[206] is that the entire structure of abrogation doctrine—permitting congressional abrogation under the Fourteenth and Fifteenth Amendments but not under Article I—makes little sense. But that structure seems for the moment well-entrenched, and more litigation as to the scope of legislative authority under Section 5 will be required to determine whether existing efforts by Congress to abrogate Eleventh Amendment immunity are constitutionally valid.[207] Already one more decision in this line has been handed down, holding that Congress lacks power under Section 5 to abrogate state immunity from suit under the Age Discrimination in Employment Act.[208] Although

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thority under Section 5 of the 14th Amendment. *See id.* at 243–44 n.18; *id.* at 251–52 (Burger, C.J., dissenting). And in its recent decision in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), the Court did proceed to rule on whether that same act, as applied to state employers, could be upheld as an exercise of congressional power under Section 5—without suggesting any disagreement with the view that Congress had not purported to rely on that source of legislative authority in enacting the ADEA.

With regard to the Patent Remedy Act, given that Congress made clear its intention both to regulate the states and to rely on both Article I and Section 5 powers in doing so, it is difficult to see what purpose would be served by refusing to consider whether the Act might be justified as a measure enforcing the Just Compensation rather than the Due Process Clause.

In the end, however, given the Court's approach to the due process argument in *Florida Prepaid*, it is doubtful that a Section 5 argument based on the Just Compensation Clause would have prevailed. First, it appears to be well accepted under the Just Compensation Clause that government action that is ultra vires is not a taking. *See generally* Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998). This understanding presents a particular problem if, as some have argued, federal intellectual property laws preempt authority states would otherwise have to condemn, and pay just compensation for, intellectual property rights. *See* Bohannan & Cotter, *supra* note 200, at 1459–69. On that view, because states by definition lack authority to take intellectual property rights, any infringement by officials is unauthorized. Whatever the correct view on the preemption issue, insofar as state officials who were infringing patents were doing so without state authorization, their conduct would not give rise to a right to just compensation and thus, under the approach of *Florida Prepaid*, the Patent Remedy Act would be constitutionally suspect as sweeping more broadly than does the Constitution.

Relatedly, even where a taking is not ultra vires, a claim for just compensation ordinarily is not ripe until the claimant has sought compensation under state law. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). Insofar as states do offer compensation for takings of intellectual property rights, then under the analysis of *Florida Prepaid* the Patent Remedy Act would, for a second reason, reach far beyond the scope of the Just Compensation Clause.

206 *See* Meltzer, *supra* note 9, at 20–24.

207 *See id.* at 47–50.

208 Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000), *affirming* Kimel v. State Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998). This Term, the Supreme Court granted certiorari in two cases raising the question whether Congress has constitu-

that decision seems to be a straightforward application of the framework of *City of Boerne*,[209] one may still fear that pronouncements about the reach of Section 5 may be shaped by the Court's wish to prevent congressional "evasions" of sovereign immunity and may unduly restrict legislative authority to enforce the Fourteenth Amendment. And any restrictions that result will, of course, have ripple effects in cases having nothing to do with sovereign immunity.

VII. CONCLUSION

It remains to be seen whether Congress will continue to try to find new means, consistent with the most recent Supreme Court pronouncements, to make states subject to private suits seeking damages for violations of federal law. While *Alden* closed off what might have been one means to achieve that objective (suit in state court), and *Florida Prepaid* limited a second (abrogation of immunity by legislation enacted under Section 5), Congress has other possible techniques at hand: to condition federal spending,[210] or perhaps the failure to preempt state power, on state waivers of immunity, or to authorize *qui tam* actions on the theory that they fall under the protective umbrella of suits by the United States. While none of the opinions in the three sovereign immunity decisions is very illuminating as to the pre-existing uncertainties about the scope or validity of these techniques, some language could be viewed as signaling that some of these mechanisms may also be limited if not sacrificed at the altar of state sovereign immunity.[211]

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tional power to abrogate the states' 11th Amendment immunity from suit under the Americans with Disabilities Act, but certiorari was dismissed in both cases. *See* Alsbrook v. Arkansas, 120 S. Ct. 1003, *cert. dismissed*, No. 99-423, 2000 WL 230234 (U.S. Mar. 1, 2000); Florida Dep't of Corrections v. Dickson, 120 S. Ct. 976, *cert. dismissed*, No. 98-829, 2000 WL 215674 (U.S. Feb. 23, 2000).

209 The dissenters made no effort to argue that the ADEA was a valid exercise of legislative authority under Section 5; instead, they took issue with the holding of *Seminole Tribe* that Congress lacks power, when legislating under Article I, to abrogate state sovereign immunity. *See* 120 S. Ct. at 650–52 (Stevens, J., dissenting).

210 *See* Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999).

211 The Court's language in *Alden* concerning conditional spending is entirely unilluminating: "Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits." *Alden*, 119 S. Ct. at 2267.

The discussion of suits by the United States could be viewed as ominous with regard to the qui tam issue:

> [A] suit which is commenced and prosecuted against a State in the name of the United States *by those who are entrusted with the constitutional duty* to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, differs in

Already this Term, the Court has ruled that Congress lacks power to abrogate immunity from suit alleging age discrimination,[212] and has granted certiorari in two cases to decide a similar question as to suit under the Americans with Disabilities Act, but certiorari was dismissed in both cases.[213] Also pending is a case in which the Court could decide whether states enjoy sovereign immunity from qui tam

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kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself *require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons* to sue nonconsenting States.

Id. (emphasis added). For a powerful argument that sovereign immunity does not shield states from qui tam actions, see Caminker, supra note 56.

As for conditional preemption—that is, legislation providing that state activity in a particular area will be preempted unless the state waives sovereign immunity—the holding in the companion decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), may cast some doubt upon the constitutionality of at least some uses of that legislative technique. The Court there ruled that Florida had not waived its sovereign immunity by engaging in federally-regulated for profit activity in the face of a federal statute clearly providing that such activity would subject the state to suit. In expressly rejecting any notion of constructive waiver of immunity, the Court distinguished holdings permitting Congress to require a state to waive its immunity as a condition of obtaining federal funds or federal approval of an interstate compact. Those holdings, the Court ruled in *College Savings Bank*, involved congressional grants of gratuities (spending or approval of compacts); by contrast, exclusion of a state from otherwise permissible activity, the Court stated, is not a gratuity but a sanction. *See id.* at 2231. Preemption, needless to say, is precisely exclusion of a state from otherwise permissible activity.

Of course, there is a baseline problem here that the Court failed to acknowledge. Suppose that Congress had in an initial enactment unconditionally preempted states from operating railroads that engage in or affect interstate commerce. If Congress were thereafter, in a second enactment, to offer the states the opportunity to have that prohibition lifted, so as to permit them to operate railroads, on the condition that states waive immunity, that offer would expand the states' options as compared to the baseline of the prior unconditional preemption of state authority. Thus, it would be hard to view the second enactment as imposing a sanction. Yet it is difficult to believe that the constitutionality of a statutory scheme that preempts state authority unless the state waives immunity should depend on whether the congressional action was taken all at once (in which case the state could be viewed as excluded from otherwise permissible activity) or in two steps (in which case the state could be viewed as permitted, conditionally, to engage in what would otherwise be impermissible).

212 *See Kimel*, 120 S. Ct. at 643.

213 *See Alsbrook*, 120 S. Ct. at 1003; *Dickson*, 120 S. Ct. at 976.

actions,[214] as well as a different case raising the question whether the Violence Against Women Act falls within the scope of the commerce power.[215] I suspect that national power may be trimmed back still further by the Term's end.

Judicial enforcement of constitutional limits on national power, it has been argued, has value in part because it may shape the political process: Supreme Court decisions attract Congress's attention, while providing another set of arguments that states can raise in the political forum.[216] One need not quarrel with that view to note that everything depends on what the limit is. One cannot take as a premise that there must be some judicially enforceable limit,[217] no matter how artificial or unresponsive to the underlying federalism concerns, or how plainly at odds with the prevailing will of the political branches, any particular limit might be. And distinctive constitutional limits on the suability of states are, for all the reasons noted above, difficult limits to justify.

We live in an era in which Congress not infrequently passes legislation that gives the federal government an unnecessary role in matters better left to the states. To a considerable extent, the problem has passed well beyond the range of judicial correction, for most of the important and debatable exercises of federal power in recent years fall comfortably within the range of constitutional authority. Even the statute invalidated in *Lopez*—one widely and correctly viewed as a dubious exercise of federal power—was rather easily rehabilitated to fit within constitutional bounds with little loss in its reach.[218]

The majority in *Alden* and *Florida Prepaid* may have thought that by protecting a small enclave of state autonomy, it was helping to right a ship of state that was listing in the direction of excessive national intervention. But for the reasons noted above, the solution provided seems constitutionally doubtful and functionally harmful. Without touching the dubious exercises of national power just noted, the Court invalidated legislation that the national government reasonably

214 United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999), *order directing supplemental briefing*, 120 S. Ct. 523 (1999).

215 See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (invalidating the Violence Against Women Act), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

216 *Cf.* Jackson, *supra* note 1, at 2226–28. *See generally* Adler & Kreimer, *supra* note 1, at 134–40; Monaghan, *supra* note 16, at 121–22 (stating that decisions like *Seminole Tribe* "work as a catalyst for political and social change").

217 *See* Kramer, *supra* note 56.

218 *See supra* note 159.

and perhaps correctly viewed as necessary for effective national regulation with regard to matters (fair labor standards and patent regulation) historically and properly undertaken by the federal government. I have previously suggested that the Court's attempt to cling to conceptions of state sovereign immunity is not stable, and that history casts serious doubt on the capacity of the Court to stand against the current of the national political process in any sustained way.[219] (Such a prediction—much like a prediction that the stock market will soar or crash—is more likely eventually to be proven correct if repeated with sufficient frequency.)

What will retard improvident exercises of federal power, if anything will, is not constitutional intervention but political responsibility. I have no great hope that such responsibility will be forthcoming: nearly everyone claims to believe in federalism, but for most the belief is an anemic one, easily overcome when it might stand in the way of particular political or programmatic objectives.[220] Still, misdirected judicial intervention can make a bad situation worse. In a perhaps apocryphal story, a member of the British Parliament is once said to have remarked, "Reform? Don't speak to me of reform. Things are bad enough as they are." There may be wisdom in that remark not only for legislators but also for judges.

219 *See* Meltzer, *supra* note 9, at 64.

220 For a stronger statement, see JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 8 (1998) (noting that by the early 1990s, "[t]he notion that some matters are properly reserved for the state and localities to determine for themselves . . . seemed almost to have disappeared from political culture as well as constitutional law").