

THE ALDEN TRILOGY: STILL SEARCHING FOR A WAY TO ENFORCE FEDERALISM

Ann Althouse*

31 Rutgers L.J. 631 (2000)[†]

I. INTRODUCTION	631
II. THE MODERATE VERSION OF ENFORCING FEDERALISM	635
III. <i>ALDEN v. MAINE</i> : MOVING TO STATE COURT	640
A. The Reaffirmation and Expansion of an Old Interpretation	640
B. How Deeply Do Believers in the <i>Hans</i> Interpretation Need to Believe?	648
C. Exposing the Shortcomings of Justice Souter's Dissent: How <i>Alden</i> Represents the Moderate Version of Enforcing Federalism	653
IV. <i>COLLEGE SAVINGS BANK v. FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD</i> : THE CONSTRUCTIVE WAIVER THEORY	660
V. <i>FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD v. COLLEGE SAVINGS BANK</i> : SQUEEZING FEDERAL STATUTES INTO SECTION 5 OF THE FOURTEENTH AMENDMENT	674
VI. CONCLUSION	685

I. INTRODUCTION

Three sparkling new Supreme Court cases on one doctrinal topic will surely spark symposium fervor, but the writer must shrink with dread at the prospect of taking on the subject of state sovereign immunity. There have been almost twenty-five years of bitter haggling about this body of doctrine *since* Justice Rehnquist (now Chief Justice) characterized the realm of the Eleventh Amendment as a twilight zone.¹ It has been a decade since I have *632 dared to broach the topic. In 1989, I wrote an article called "When to Believe a Legal Fiction"² and had to revise it drastically at the page proof stage to take account of the Court's important new announcement in *Pennsylvania v. Union Gas Co.*³ There, the Court held that Congress could abrogate the states' sovereign

* Robert W. and Irma M. Arthur-Bascom Professor of Law, University of Wisconsin Law School.

[†] Copyright © 2000 by Rutgers University School of Law, Camden; Ann Althouse.

¹ *Edelman v. Jordan*, 415 U.S. 651, 666 (1974) ("[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night."). To be fair, Justice Rehnquist thought this quality of unclarity beset most areas of law, a view unlikely to cheer many law students.

² Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989).

³ 491 U.S. 1, 42 (1989).

immunity using not only its power under Section 5 of the Fourteenth Amendment,⁴ but also its power under Article I. While I think that I made a few points that remain intact, that article's shelf life ended in 1996 when the Supreme Court decided to rain irony on my earnest late-hour efforts at keeping so very up-to-date: it overruled *Union Gas* in *Seminole Tribe v. Florida*.⁵

Seminole touched off the litigation that led to the three sparkling new Supreme Court cases that bring us here today. In *Seminole*, Chief Justice Rehnquist, writing for the majority, distinguished his own earlier opinion in *Fitzpatrick v. Bitzer*,⁶ which had held – with unanimity nearly unique in this area of law – that the Fourteenth Amendment empowered Congress to abrogate the sovereign immunity of the states. According to *Seminole*, the *Fitzpatrick* Court relied on the Reconstruction Era mindset: the Fourteenth Amendment “fundamentally altered the balance of state and federal power.”⁷ Post-Civil War nationalism justified reading the grant of power in the fifth section of that amendment to authorize Congress to make new intrusions on the state for the benefit of the individuals who were given new rights against the state in the first section of the amendment. The *Union Gas* plurality had seen no reason to single out Section 5 as a superpower; if one power held an implied power to abrogate sovereign immunity, so did they all. The plurality made a leap of logic consistent with its general tendency to skew all questions of federalism, regardless of historical era, in favor of federal power.

In fact, the four members of the plurality – Justices Brennan, Marshall, Blackmun, and Stevens – all supported a change in sovereign immunity doctrine that would make abrogation unnecessary. They repeatedly argued *633 that the mere existence of a federal law claim precluded the states from asserting sovereign immunity.⁸ Unable to gain a majority for overruling the case – *Hans v. Louisiana*⁹ – that stood in the way of their preferred obliteration of sovereign immunity in federal questions cases, this group naturally favored the second-best alternative, broadly empowering Congress to abrogate the immunity. Although Justice White had voted consistently to preserve *Hans v. Louisiana*, in *Union Gas*, he contributed the fifth vote that made this second-best

⁴ The Court established in 1976 that the Fourteenth Amendment supported abrogation, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but for years left open the question whether Congress' original Article I powers entailed the power to abrogate.

⁵ 517 U.S. 44, 66 (1996).

⁶ 427 U.S. 445, 456 (1976).

⁷ 517 U.S. at 59 (reiterating the language found in *Fitzpatrick*, 427 U.S. at 455).

⁸ See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258-302 (1985) (Brennan, J., dissenting). This so-called "diversity theory" of the Eleventh Amendment (that the text of the amendment and the ratification debate about sovereign immunity refer only to the effect of Article III's reference to citizen-state diversity jurisdiction) has received a tremendous amount of discussion and approval in scholarly literature. See William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-1941 (1983); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 53 (1990). For criticism of the diversity theory, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); and Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989). I consider the question too close to be capable of determination through historical analysis, but consider the diversity theory the best way to explain the history after one has used some other methodology to reach the determination that *Hans* should be overruled.

⁹ 134 U.S. 1 (1890).

alternative law.¹⁰ The odd balance of doctrine that resulted – empowering Congress to take away the states’ immunity by explicitly saying that they are subjected to suit in federal court, but not by merely creating a cause of action that could be asserted against them – seemed right only to one member of the Court, Justice White. Yet Justice White confounded the sliver of the legal profession that aspires to make sense of sovereign immunity doctrine: he refused to give *any reason at all* for his position.¹¹ *634

The *Union Gas* dissenters openly displayed their contempt for Justice Brennan’s reasoning. Justice Brennan had written that the states consented to suits Congress imposed on them, because they had consented to the powers delegated to Congress when they ratified the Constitution; if Congress has the power to regulate in any given area, it can then impose suits against the states. Justice Scalia in dissent wrote, “The suggestion that this is the kind of consent our cases had in mind when reciting the familiar phrase, ‘the States may not be sued without their consent,’ does not warrant response.”¹² Perhaps sniping at the silent Justice White, Justice Scalia wrote that only those who “refus[e] to accept the fundamental structural importance” of the *Hans* notion of immunity can approve of the broad abrogation doctrine.¹³ He pronounced the new doctrine “muddled,” “astounding,” “unstable,” and “at war with itself.”¹⁴ To those with the fortitude to witness these doctrinal battles, it can scarcely have caused much surprise when the *Union Gas* dissenters, having obtained their likely fifth vote when Justice Thomas took his place on the Court, overruled *Union Gas*.

It did not take a brilliant litigation strategist to perceive where the post-Seminole battles would take place:

1. Moving to state court

Perhaps all the restrictive sovereign immunity doctrine can be pinned on the Eleventh Amendment, which refers only to the power of the federal courts, thus opening up the state courts as fresh territory. *Seminole*-thwarted litigants might try regrouping in the states’ own courts. Does Congress at least have the power to abrogate the states’ immunity in their own courts? *Alden v. Maine*¹⁵ says no.

2. Reviving constructive waiver

If Congress cannot directly abrogate the states’ sovereign immunity outside of the Fourteenth Amendment, perhaps in some areas it can impose a condition, letting the state know that engaging in certain federally-regulated activities will be deemed consent to

¹⁰ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 45-57 (1989) (White, J., concurring in the judgment in part and dissenting in part).

¹¹ *Id.* Justice White’s entire expression of opinion on the subject is the following sentence: “I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.” *Id.* at 57.

¹² *Id.* at 39 (Scalia, J., dissenting).

¹³ *Id.* at 44.

¹⁴ *Id.* at 44-45.

¹⁵ 119 S. Ct. 2240, 2294 (1999).

suit. *College Savings Bank v. Florida *635 Prepaid Postsecondary Education Expense Board*¹⁶ deals this strategy a death blow.

3. Squeezing federal statutes into Section 5 of the Fourteenth Amendment

In order to litigate against the state for retrospective relief,¹⁷ relying on a federal statutory cause of action that authorizes suits against the states, you could try arguing that Congress created that cause of action using Section 5 of the Fourteenth Amendment. Finding room in the Fourteenth Amendment for various statutes that would fit so much more comfortably into an Article I power would become an important skill for the plaintiff's lawyer.¹⁸ This is the one post-*Seminole* strategy that still works, but *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*¹⁹ shows how tricky it will be to make it work.

II. THE MODERATE VERSION OF ENFORCING FEDERALISM

Before we survey the post-*Seminole* battlefield and take account of the three new cases, it should prove helpful to make a few preliminary observations about the current Court and its approach to federalism questions.

Federalism doctrine, when articulated by the conservative side of the Court, begins with a presumption that things will work best "if the States and their institutions are left free to perform their separate functions in their separate ways."²⁰ Intrusions on the states must be justified, and exceptions to the general rule must rebut the presumption.²¹ Following this approach, **636* judges properly have a role enforcing the relationship between the national government and the states.²²

The liberal side of the Court subscribes to a different approach altogether. It takes the position that things will work best if the courts keep out of the federalism-enforcing business and permit Congress to decide what matters ought to be handled at the federal

¹⁶ 119 S. Ct. 2219 (1999).

¹⁷ The case law had long permitted litigants to seek prospective relief that would effectively run against the state. See *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (restricting *Ex parte Young*, 209 U.S. 123 (1908), which permitted suits against the state official acting for the state to suits seeking prospective relief).

¹⁸ See, e.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (stating that the Age Discrimination in Employment Act, 29 U.S.C. § 621 to 634 West 1998, is not supported by Section 5 power); *Muller v. Costello*, 1999 U.S. App. LEXIS 18651, 25-28 (2d Cir.) (discussing cases addressing whether the Americans with Disabilities Act, 42 U.S.C. § 12101 (1994), fits within the Section 5 power); *Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1999) (rejecting argument that Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 to 4333 (West 1998), fits Section 5).

¹⁹ 119 S. Ct. 2199 (1999).

²⁰ See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

²¹ For example, the *Younger* doctrine presumes that state courts can field the federal constitutional questions that arise as defenses in criminal prosecutions and requires federal courts to abstain from exercising jurisdiction; exceptions to the general rule identify situations in which the presumption is rebutted. Thus, where state prosecutors acted in bad faith, using state judicial processes only to harass individuals and not genuinely in pursuit of a conviction, the *Younger* doctrine does not require abstention. *Younger*, 401 U.S. at 48 (explaining *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

²² For a helpful discussion of how courts might competently enforce federalism, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

level and what can be left to the states. The paradigmatic case is *Garcia v. San Antonio Metropolitan Transit Authority*,²³ which relies on the notion that Congress is structured in such a way as to promote the consideration of state interests. *Garcia* overruled *National League of Cities v. Usery*,²⁴ which required courts to identify “traditional state governmental functions” and to invalidate federal statutes that intruded on them.²⁵ Under *Garcia*, Congress itself should decide which areas of state functioning are better left free of federal regulation. Congress is trusted with the power to make inroads into the states’ autonomy, because, presumably, “[t]he political process ensures that laws that unduly burden the States will not be promulgated.”²⁶

The same justices that made up the *Garcia* majority determined the outcome in *Union Gas*: Justices Brennan, White, Marshall, Blackmun, and Stevens. These two cases were decided in 1985 and 1989, respectively, and during this period there was only one change on the Court: Justice Kennedy replaced Justice Powell. Both Justices Powell and Kennedy voted on the dissenting side in these key cases. Unlike *Garcia*, *Union Gas* has been overruled, and its overruling is easily attributed to personnel change on the Court that enabled the federalism-enforcing side to gain ascendancy. A startling amount of personnel change took place on the Court in the period *637 between 1989, when *Union Gas* was decided, and 1996, when *Seminole* overruled *Union Gas*. Of the five-member group that produced the nationalizing doctrine of *Garcia* and *Union Gas*, only Justice Stevens remained. Justice Souter had replaced Justice Brennan, and Justice Breyer had replaced Justice Blackmun. Justices Souter and Breyer have generally voted in favor of national power and against protecting the states in cases that raise federal issues, although they have diverged from their predecessors on the question whether to overrule *Hans*. Justice Souter’s dissenting opinion in *Seminole*, which Justice Breyer joined, viewed *Hans* as incorrectly decided, but justified by stare decisis.²⁷ Justice Ginsburg replaced Justice White, who had written separately and opaquely to cast the fifth vote for the result in *Union Gas*. Justice Ginsburg has continued White’s tradition of voting on the side of the national government. And, like him, she would not overrule *Hans*.²⁸ Justice Thomas replaced Justice Marshall, and it was this change that shifted the balance of power. All of the dissenting justices from *Union Gas* remained on the Court. With the vote of Justice Thomas added to the votes of these four justices – Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy – a majority in favor of overruling *Union Gas* emerged.

There is still a five-four balance on the Court, but the weight is now on the conservative side. Moreover, the Court is no longer at all close to overruling *Hans*: in the

²³ 469 U.S. 528 (1985).

²⁴ 426 U.S. 833, 865 (1976).

²⁵ *Garcia*, 469 U.S. at 547-52.

²⁶ 469 U.S. at 556. The *Garcia* Court relied on the analysis in Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954); see also Jesse Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing against judicial enforcement of federalism).

²⁷ *Seminole Tribe v. Florida*, 517 U.S. 44, 146 (1989) (Souter, J., dissenting).

While I would not, as a matter of stare decisis, overrule *Hans* today, an understanding of its failings on these points will show how the Court today simply compounds already serious error in taking *Hans* the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it.

Id.

²⁸ See id. at 100 (Justice Ginsburg joined the Souter dissent in *Seminole*).

days when the liberal side of the Court held sway, only Justice White's disagreement kept *Hans* in place. Today, as we look ahead to what changes may occur in the near future, the revival of *Union Gas* could easily occur with the change of a single justice, but overruling *Hans*, a change that currently has only one vote (Justice Stevens), seems out of reach.

The *Seminole* majority, which also produced the three sovereign immunity cases under discussion today, has never really accepted the *Garcia* concept of trusting Congress.²⁹ Three members of the *Seminole* majority *638 were in dissent in *Garcia*, where they made a point of threatening to overrule the decision as soon as they acquired the requisite votes.³⁰ As for the other two members of the *Seminole* majority, Justice Kennedy has nearly always voted on the side of enforcing federalism,³¹ and I am not aware of any non-unanimous decision in which Justice Thomas has not sided with the interests of the states over the interests of the federal government. Thus, I think it is fair to say that the theory behind *Garcia* – the belief in the “political safeguards of federalism” – no longer appeals to a majority of today's Court.³² Despite the survival of the basic rule of law established in that case, federalism doctrine in recent years has drawn on the ideology of the conservative side of the Court and relies on the presumption of state autonomy. It is notable that the majority of the Court has not used its voting power to overturn *Garcia*, and we should pay close attention to what it has done instead. I would suggest that it has tried to structure doctrine that presumes against impositions on the state but accepts intrusions in some situations in which Congress follows the steps that demonstrate that it has *639 taken the states' interests into account. I will call this doctrine the *moderate version of enforcing federalism*. It is moderate in that it avoids the two extremes of disempowering Congress or entirely deferring to Congress.

Even before the *Garcia* majority began to lose ground, it was possible to infer that Congress would need to realize that it was creating liability running against the states before its presumed solicitude for the states would be activated.³³ Once the Court's

²⁹ See *Garcia*, 469 U.S. at 557. I doubt whether *anyone* thinks Congress has much capacity to protect the interests of state and local government. The real difference of opinion is about how much protection the state and local government deserve. Those who think minimal protection is appropriate tend to accept Congress as the final arbiter: they prefer to err on the side of underprotecting this interest in relation to other interests.

³⁰ See *id.* at 589 (O'Connor, J., dissenting).

³¹ A key exception is *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), where Justice Kennedy, voting with the liberal side of the Court, cast the fifth vote that denied states the power to impose term limits on their own representatives in Congress. See *id.* at 781. But in his concurring opinion, he emphasizes that the members of Congress become part of the national government and do not belong individually to the state that elects them: Congress represents the people of the United States as a whole. *Id.* at 838-45 (Kennedy, J., concurring). This is a central proposition of the *Garcia* dissenters. So, even though he votes to deny states a power in *U.S. Term Limits*, in this important idea, he is more in line with the *Garcia* dissenters than anyone else on the *U.S. Term Limits* Court.

³² For a discussion that views *Seminole* as part of the Court's attempt to invigorate the enforcement of federalism and criticizing this endeavor as incoherent, see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 499-500 (1997). Professor Jackson disparages the Court's grappling for an enforceable version of federalism:

Political accountability, enclaves of state regulation, and judicial nonaccountability are the notes sounded in these three decisions – notes that do not readily blend into a harmonic whole. In its intuitive efforts to reassert limits to federal authority, the Court has failed to articulate an understandable federalism doctrine, one that focuses adequately on Congress' perceived lack of restraint.

Id. at 500. *Seminole* itself, according to Jackson, is "a clear mistake." *Id.* In a similar vein, see Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295 (1997); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998); and Henry Paul Monaghan, *Comment, The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996).

³³ Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* § 6-25 (2d ed. 1988); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488-89 nn.22-26 (1987).

majority shifted in favor of justices who either dissented or would have dissented in *Garcia*, modifications of *Garcia* began to seep into the doctrine, and these modifications have aimed at improving the legislative process. Most notably, in *Gregory v. Ashcroft*,³⁴ the majority required that Congress make a “clear statement” of its intent to regulate matters “traditionally” left to the states.³⁵ Ambiguous statutes fail to assure us that Congress has considered state interests, so these statutes are presumed not to include the states. Naming the states explicitly at least makes a show of Congress knowing that it was reaching the states, so that any built-in deference to the states would have come into play. In the case of congressional attempts to abrogate sovereign immunity, clear statements of intent to reach the states became the rule after *Atascadero*,³⁶ which required Congress to make its intent to subject the states to suit “unmistakably clear in the language of the statute.”³⁷ *640

In the *Alden* trilogy – and in *Seminole* – we have no basis for concern that Congress might have unwittingly intruded on the states. *Atascadero* has already put in place the doctrinal device needed to ensure that Congress pays attention to the effect on the state. *Seminole* took the position that the conscious, deliberate intent of Congress to impose on the states is not enough. *Seminole* can be seen as the more extreme *National League of Cities* mode of enforcing federalism. The state is given an area of absolute freedom from federal law: Congress cannot use its original Article I powers to impose individual suits for retrospective relief on the states without their consent. But *Seminole* also sets the stage for the *Alden* trilogy cases. So let us now examine these cases in an attempt to understand the conservative majority’s way of enforcing federalism and to compare it to the minority’s simple position of trusting Congress to set the terms of federalism. Throughout, I will try to address the question of whether the majority’s elaborate forays into doctrine-making are justified and workable and whether the minority’s alternative of judicial restraint ought to be viewed as the better solution to the long-standing problem of how to arrange the federalism relationship.

³⁴ 501 U.S. 452 (1991).

³⁵ See *id.* at 460. The dissenting justices in *Gregory* viewed the new clear statement rule as a “direct [] contraven[ti]on” of *Garcia* and criticized the majority for returning courts to the “unworkable” task of deciding what state activities are traditional. *Id.* at 477 (Blackmun, J., dissenting). However, the problem of having to identify traditional state functions is not as much of an impediment to Congress as it was during the reign of *National League of Cities*. See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1006-07 (1993) (“Under *National League*, the line-drawing was crucial: Either Congress could reach the states or it was absolutely barred ... *Gregory*, on the other hand, merely demands explicitness when including the states ... Congress has no cognizable interest in writing ambiguous statutes.”)

³⁶ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

³⁷ *Id.* at 242. This high standard of clarity provided a ground for resolving cases, such as *Atascadero* itself, that raised the question whether Congress has the power to abrogate sovereign immunity using its Article I powers. This is why it took from 1976, the year *Fitzpatrick* was decided, until 1989 to reach the question in *Union Gas*, which was itself very nearly resolved on the issue of clarity: Justice White wrote a lengthy opinion explaining why the statute in question in that case was not sufficiently clear, but he failed to obtain a fifth vote for this position when Justice Scalia sided with the members of the Court that formed the plurality that he found so objectionable. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring). It is testament to Justice Scalia’s own dedication to text and lack of interest in actual understandings by legislators that he cast the vote that resolved this preliminary issue in a way that forced the second issue. Had he voted with Justice White, there would never have been a *Union Gas* opinion to overrule in *Seminole*. Perhaps the disappointment at losing Justice Scalia’s vote provoked Justice White’s perverse refusal to express himself. It was uncharacteristic of Justice White to resist expounding on the breadth of federal legislative power. See *New York v. United States*, 505 U.S. 144, 188 (1992) (White, J., concurring in part and dissenting in part); *Gregory*, 501 U.S. at 474 (White, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (White, J., dissenting); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting).

III. ALDEN v. MAINE: MOVING TO STATE COURT

A. The Reaffirmation and Expansion of an Old Interpretation

Shortly before the Supreme Court issued its opinion in *Seminole*, a group of probation officers filed suit against their employer, the state of Maine, complaining that it had violated the overtime provisions of the federal Fair Labor Standards Act (“FLSA”).³⁸ Because they filed their case in federal court and asked for retrospective relief, *Seminole* led ineluctably *641 to the dismissal of their case.³⁹ They refiled in state court and had some reason to think that they might be able to obtain compensation there, as *Seminole*’s limitation on congressional power might apply only to suits filed in federal court. Perhaps the only sovereign immunity that limits Congress is the sovereign immunity constitutionalized by the Eleventh Amendment, which only addresses the scope of Article III of the Constitution. Article III defines the power of the federal judiciary and says nothing about the state courts, so even after *Seminole* an argument remained that the states’ ability to resist the power of Congress did not extend into the states’ own courts. The state courts in Maine nevertheless held that sovereign immunity barred the lawsuit.⁴⁰ Noting a split in the circuits on this question,⁴¹ the United States Supreme Court granted certiorari⁴² and affirmed, in an opinion written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas.

Justice Kennedy first distanced himself from the Eleventh Amendment: the Court’s various past references to “Eleventh Amendment immunity” should be seen as “convenient shorthand but something of a misnomer.”⁴³ The Eleventh Amendment is not the source of the states’ immunity; sovereign immunity predates the original Constitution. The Court speaks of the Constitution only to answer questions about whether the states’ immunity survived the Constitution. Thus, the Court in *Hans v. Louisiana*⁴⁴ considered whether the Constitution, by creating power to make federal law, destroyed that preexisting immunity in any cases based on that law and answered no. *Seminole*⁴⁵ considered whether congressional power to legislate in particular areas included a power to abrogate the states’ immunity and held that it did not. The issue was never the scope of the immunity granted by the Eleventh Amendment, but the scope of the powers granted to the federal government. According to Justice Kennedy, the original Constitution “specifically recognizes the States as sovereign entities”⁴⁶ with constitutionally protected status as separately functioning governmental institutions. In “a deliberate departure from the Articles of *642 Confederation,”⁴⁷ the constitutional design provided for a federal

³⁸ Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (citing FLSA of 1938, Pub. L. No. 718, 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 201 to 219).

³⁹ See Mills v. Maine, 118 F.3d 37 (1st Cir. 1997).

⁴⁰ Alden v. State, 715 A.2d 172 (Me. 1998).

⁴¹ Jacoby v. Arkansas Dep’t of Educ., 962 S.W.2d 773 (Ark. 1998).

⁴² 119 S. Ct. 443 (1998).

⁴³ Alden, 119 S. Ct. at 2247.

⁴⁴ 134 U. S. 1 (1890).

⁴⁵ Seminole Tribe v. Florida, 517 U.S. 44 (1996).

⁴⁶ Alden, 119 S. Ct. at 2247 (quoting *Seminole*, 517 U.S. at 71 n.15).

⁴⁷ Id. (citing THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton)).

government that did not need to act through the states because it could act directly upon the people. Within this scheme, the states would also function independently: they would operate in “their respective spheres,” free from interference by the federal government.⁴⁸ In the majority’s view, this constitutional design does not merely enable the federal government to act without relying on the states, thus permitting the states to operate independently, it also deprives the federal government of the option of intruding on the states. According to the majority, the Constitution affirmatively provides for independently functioning states, thus creating judicially enforceable state sovereignty: “Various textual provisions of the Constitution assume the States’ continued existence and active participation in the fundamental processes of governance.”⁴⁹

Justice Kennedy looks back at English law, which barred suits without consent against the Crown. He concedes, as he must, that “the American people had rejected other aspects of English political theory”⁵⁰ at the time of the Constitution’s founding, so English roots alone will not determine the scope of state sovereignty. Justice Kennedy must struggle to show that the immunity of the state from private suits did remain embedded in the hearts of the founding generation: does it make sense to reject monarchy and still accept the immunity originally associated with kings? Justice Kennedy cites Blackstone’s explanation for sovereign immunity: sovereignty is “pre-eminence,” and a court exercising jurisdiction is itself exercising “superiority of power.”⁵¹ But once there is no king, and the courts are one of the three branches of government, and once the states’ “pre-eminence” is controverted by the existence of a national government, Blackstone’s logic collapses. Perhaps Justice Kennedy’s point has more to do with what people at the time of the founding believed than with whether these beliefs made much sense: if questions of interpretation relate only to the intention of those who made the Constitution, their illogical thoughts count too. But do *643 we know that those who made the Constitution respected the immunity of the states from private lawsuits?

To answer this question, Justice Kennedy recites the familiar *Hans* version of the sovereign immunity:⁵² the worries expressed in the ratification debates about the states’ Revolutionary War debts, the well-worn reassurances from Hamilton, Madison, and Marshall,⁵³ *Chisholm*’s⁵⁴ shockingly surprising refutation of sovereign immunity,⁵⁵ and

⁴⁸ Id. (quoting THE FEDERALIST NO. 39 (James Madison)).

⁴⁹ Id. (citing *Printz v. United States*, 521 U.S. 898, 919 (1997) (citing U.S. Const. art. III, § 2; art. IV, §§ 2-4; art. V)).

⁵⁰ Alden, 119 S. Ct. at 2248; see also *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2234 (1999) (Breyer, J., dissenting).

⁵¹ Id. at 2248 (quoting 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 234-235 (1765)). Justice Souter also addresses Blackstone, in examining whether sovereign immunity is a matter of common law or natural law, a distinction to which he ascribes great importance. Id. at 2289 (Souter, J., dissenting).

⁵² Id. at 2248 (citing *Hans v. Louisiana*, 134 U.S. 1, 16 (1890)).

⁵³ Id. at 2248-49 (citing THE FEDERALIST NO. 81 (Alexander Hamilton); J. Elliot, 3 DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1854) (quoting James Madison) [hereinafter Elliot’s Debates]; id. at 555 (quoting John Marshall)). Of course, these very quotes have endured the scrutiny of sovereign immunity’s opponents. They have argued repeatedly that the quotes relate only to suits based on citizen-state diversity and do not address what no one worried about at the time, cases premised on federal law. Justice Souter in his dissenting opinion in Alden writes that only Hamilton’s statement from The Federalist No. 81, supports what he characterizes as the majority’s “absolutist view.” Yet Hamilton, as Justice Souter and many others have noted, allows for “a surrender of this immunity in the plan of the convention,” so even his view is not absolute. Id. at 2275 (Souter, J., dissenting) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

⁵⁴ Id. at 2248 (quoting *Chisholm v. Georgia*, 2 U.S. 419 (1793)).

⁵⁵ Sovereign immunity opponents do not accept the received opinion that *Chisholm* actually shocked people at the time.

Congress' quick response in the form of the Eleventh Amendment. The theory that *Chisholm* may have been a correct interpretation of original intent and the Eleventh Amendment, a new addition to the Constitution, is, Justice Kennedy declares, "unsupportable."⁵⁶ The *Chisholm* opinions themselves, he writes, reveal an awareness of their own incorrectness in that they fail to address the original understanding of the Constitution, tolerate the survival of some sovereign immunity,⁵⁷ and predict the unpopularity of the decision.⁵⁸ Beyond *Chisholm*, the text of the Eleventh Amendment expresses the belief that the original Constitution preserved sovereign immunity. The amendment purports to overrule the Court, and *Hans*, with the current Court's endorsement, accepts that the amendment did just that. The language of the amendment that refers specifically to the citizen-state diversity clause in Article III should not be read as a restriction on sovereign immunity, Justice Kennedy writes; the text takes that form because it was composed in response to *Chisholm* and designed to overrule it. This interpretation includes more than the idea that sovereign immunity *survived* *644 the Constitution; according to Justice Kennedy: "[T]he Constitution was understood ... to *preserve* the States' traditional immunity from private suits."⁵⁹

It is difficult to see why the subsequent enactment of the Eleventh Amendment undercuts evidence from the ratification period. *If* the Eleventh Amendment, as interpreted in *Hans*, really arrives at the original understanding about sovereign immunity, then *Chisholm* was in fact incorrectly decided. One cannot assume the *Hans* theory, which relies on evidence from the founding era, to disqualify evidence from that period that does not support *Hans*, unless one means to do nothing more than invoke stare decisis. But the written opinion in *Alden* expresses renewed belief in *Hans*'s evaluation of original intent, and this reaffirmation makes little sense without a willingness to review the evidence from the founding period without resorting to the *Hans* opinion for support. The dissenting justices in *Alden* find some evidence from the founding era that not everyone held sovereign immunity dear, but Justice Kennedy discounts this evidence as "scanty and equivocal."⁶⁰ Statements made by Edmund Randolph and James Wilson during the ratification debates fall short because Wilson and Randolph later repeated their "views" as justices on the *Chisholm* Court, and the Eleventh Amendment then "decisively rejected" them.⁶¹

Justice Kennedy observes that if sovereign immunity antedates the Constitution and is not a creation of the Eleventh Amendment, its effects can extend beyond federal

⁵⁶ Alden, 119 S. Ct. at 2250.

⁵⁷ Id. Two of the justices noted that Article III's provision for jurisdiction where the United States is a party did not deprive the United States of sovereign immunity. Id. at 2251.

⁵⁸ Id. at 2250.

⁵⁹ Id. at 2252 (emphasis added).

⁶⁰ Id. at 2253.

⁶¹ Id. at 2252. Justice Kennedy also states, "Randolph appears to have recognized that his views were in tension with the traditional understanding of sovereign immunity." Id. Kennedy finds this appearance in Randolph's statement: "I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*." Id. (quoting 3 ELLIOT'S DEBATES, supra note 53, at 573). This is all Kennedy offers on this point, strangely enough, even though he had earlier conceded that the American Constitution accepted only some of its inherited tradition. See 119 S. Ct. 2248. Here is a place in the debate where Randolph specifically points out that this is a traditional notion that we explicitly refute with text. Justice Kennedy seems to take Randolph's statement that the text really means what it says to undercut the plain meaning, simply because it shows that he knew it was an innovative step.

jurisdiction. In this view, the states were not granted immunity by the amendment; they possessed it from the start. Thus, the question becomes whether any of the Constitution's grants of power to the national government should be read as inroads into that immunity.⁶² In *645 Alexander Hamilton's oft-quoted phrase: "Unless ... there is a surrender of this immunity in the plan of the convention, it will remain with the States...."⁶³ The use of the word "surrender" is telling: it betrays a belief that the states are the parties to the agreement, deciding which of their possessions they want to cede to the national government.⁶⁴ Justice Kennedy addresses whether there is "compelling evidence" that the powers given to Congress represent a surrender of state immunity.⁶⁵ That Congress can regulate a particular matter does not mean that it can choose any means to achieve it. Most notably, it cannot violate the constitutional rights of individuals. To use Justice Kennedy's language: rights are not "defeasible by statute."⁶⁶ The majority sees sovereign immunity as having equivalent stature. *646

In the final section of his opinion, Justice Kennedy reaches the kind of analysis that I think is crucial: what is good federalism? He refines the question in light of *Seminole*, which establishes that it violates structural principles of federalism for Congress to impose federal court lawsuits on the states (unless it is using the Fourteenth Amendment power). Is it more of an imposition on the states to impose a *state court* lawsuit based on federal law or less? "In some ways," he writes, it is "even more offensive" to make the states suable in state court, because states have traditionally controlled what happens in their own courts.⁶⁷

A power to press a State's own courts into federal service to coerce the other branches of the State ... is the power first to turn the State against itself and

⁶² Note that the Alden interpretation undermines cases that rely on the Eleventh Amendment as the key point in time for analyzing the power to abrogate. Consider, for example, *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998) (individual action for damages under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, which bars employment discrimination based on membership in the armed forces, and § 4311(a), which purports to abrogate sovereign immunity §§ 4303(4)(A)(iii), 4323(c)(1)(A), (3), and (7)). There, Judge Posner wrote an opinion rejecting congressional power to abrogate under the war powers, relying on the ground that the constitutional war powers predate the Eleventh Amendment. *Id.* at 392. ("The only constitutional basis of USERRA is ... the war power, which like the commerce power at issue in *Seminole Tribe* predates the Eleventh Amendment [N]o legislation enacted under any provision of Article I can abrogate the sovereign immunity of the states.") This analysis must be revisited. The question must be what the states surrendered in the original grant of powers in Article I. It is quite conceivable that the states withheld the power to abrogate sovereign immunity with respect to the commerce power but surrendered it as part of the war powers. Looking at the question from the perspective of the side of the Court that seeks to find a way to enforce federalism values, one can conceive of the states needing to preserve their autonomy in areas that Congress might regulate under the commerce power and think at the same time that a greater surrender of power took place with respect to the war powers, where the need for vigorous enforcement and strict national uniformity is so much greater. If one moves away from originalist interpretation and analyzes the issue pragmatically, finding the power to abrogate in the war powers makes sense. There is little, if any, recognizable normative value to the states' ability to produce diverse solutions tailored to local needs and preferences, as there is with the commerce power. Moreover, the federalism-enforcing side of the Court may think it necessary to offset the extremely broad interpretation of the commerce power. This problem may not exist at all with respect to the war powers.

⁶³ THE FEDERALIST NO. 81 (Alexander Hamilton) (quoted in Alden, 119 S. Ct. at 2248).

⁶⁴ Cf. *McCulloch v. Maryland*, 17 U.S. 316 (1819) (the people, not the states, are the sovereign that delegated some powers to the federal government and reserved others to the states).

⁶⁵ Alden, 119 S. Ct. at 2255 (quoting *Blatchford v. Native Village*, 501 U.S. 775, 781 (1991)).

⁶⁶ *Id.* at 2256.

⁶⁷ Alden, 119 S. Ct. at 2264. Unexplored is the notion that state court might treat the state defendant with special solicitude. This is not surprising, as the conservative side of the Court has long relied on a presumption that the state courts can treat both parties with proper neutrality and fairness. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). To characterize the state courts as favoring state interests would undercut our vast reliance on them to treat criminal defendants fairly. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (denying federal court access for review of state application of Fourth Amendment exclusionary rule unless a habeas petitioner can demonstrate the inadequacy of the state court).

ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.⁶⁸

Justice Kennedy expresses concern about the “financial integrity of the states.”⁶⁹ If Congress could authorize private lawsuits, it might impose harsh liability, including attorneys’ fees and punitive damages.⁷⁰

Justice Kennedy worries that individual private lawsuits will cost the states too much money, making them less able to respond to the collective needs and desires of their citizens.⁷¹ It is better for the state to structure its own approach to paying its debts, balancing that concern against other demands on the state’s resources;⁷² the power to structure its budget goes “to the heart of representative government.”⁷³ Sovereign immunity, then, has normative value because it works to keep the states “politically *647 accountable” to all of their constituents. In this view, individual lawsuits become an assertion of federal “authority over a State’s most fundamental political processes, [and thus] strike [] at the heart of the political accountability so essential to our liberty and republican form of government.”⁷⁴ Private lawsuits are seen as the federal government “compell[ing]” the state courts to “displace” the elective branches of their own government, imposing their own specious budgetary decisions on the state.⁷⁵

In the very end of his opinion, Justice Kennedy appends assurances that the results will not really be so bad.⁷⁶ Perhaps the states will follow the law out of a sense of duty, quite apart from any judicial enforcement.⁷⁷ In any event, there will be judicial review: the state might consent to suit, the federal government may directly seek enforcement against the states, Congress can still abrogate sovereign immunity under the Fourteenth Amendment, “lesser” local government entities like cities can be sued, prospective relief remains available (using *Ex parte Young*), and the individuals who act for the state may still be sued personally (subject to official immunity doctrine).⁷⁸ This last part of the opinion belies the stolid originalist style of interpretation in the beginning of the opinion. It all appears to be a pragmatic balance after all: “The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States.”⁷⁹ Given the counterbalancing doctrine, the abrogation power sought here is “unnecessary to uphold the Constitution

⁶⁸ Id. “Commandeer” is, of course, a fighting word in the federalism arena. See *Printz v. United States*, 521 U.S. 898, 919 (1997).

⁶⁹ *Alden*, 119 S. Ct. at 2264.

⁷⁰ For further concern about Congress imposing attorneys’ fees and punitive damages on the states, see the discussion of Florida Prepaid, *infra*, Part V.

⁷¹ *Alden*, 119 S. Ct. at 2264.

⁷² Id. at 2265.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id. at 2267. One wonders how much this sense that it’s not really so bad affects the rest of the analysis, but I note that this part of the opinion falls after the official constitutional interpretation.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 2268.

and valid federal statutes as the supreme law.”⁸⁰ In other words, the national interest will win whenever we think it is important enough – federal interests basically govern, but this point of doctrine seems unimportant enough, so we will take this opportunity to add the weight to the state side of the balance. *648

B. How Deeply Do Believers in the *Hans* Interpretation Need to Believe?

In *Alden*, Justice Kennedy makes quite a show of credulity in the *Hans* version of the Eleventh Amendment story. He goes to greater lengths to reaffirm and warmly embrace *Hans* than any other recent opinion. This demonstration of belief in an originalist interpretation is surprising coming from Justice Kennedy, who has elsewhere written in a candid and broad-minded fashion, weighing present day interests to justify judicial enforcement of the Constitution’s structural provisions. Indeed, prior to *Alden*, Justice Kennedy had distinguished himself as a practical reasoner.

Notably, in *United States v. Lopez*,⁸¹ which limits the reach of the commerce power, Justice Kennedy writes an immensely helpful concurring opinion that adds a pragmatic structural analysis. The main opinion, written by Chief Justice Rehnquist, concentrates on the vision of the Constitution’s framers and the importance of preserving their structure of enumerated national powers.⁸² In contrast, Justice Kennedy, referring repeatedly to “the practical conception of the commerce power,” explores the normative values of a dual system of government, the importance of preserving the accountability and responsiveness of elective officials, and the contributions the states can make in finding different solutions tailored to local problems and preferences.⁸³ Writing separately in *Lopez* seemed to announce Justice Kennedy’s dissatisfaction with unalloyed originalism and his preference for thinking pragmatically about federalism.⁸⁴

To his credit, Justice Kennedy does eventually pay some attention in *Alden* to the questions of normative federalism,⁸⁵ although most of this discussion is only along the lines of excusing the doctrine because it is not too harmful given all the many ways around it.⁸⁶ The only argument that *649 sovereign immunity is a good thing, worthy of

⁸⁰ Id.

⁸¹ 514 U.S. 549 (1995).

⁸² Id. at 552.

⁸³ Id. at 572-73.

⁸⁴ Similarly, in *Clinton v. New York*, 524 U.S. 417, 449-53 (1998), Justice Kennedy, concurring, justified judicial enforcement of the Constitution’s structural limitations with pragmatic arguments about how the line item veto might lead to abuses of power and dysfunction in the democratic process.

⁸⁵ Using my word processor’s “find” function I searched for the syllable “norm” in the text of the Alden trilogy cases. It is a good indication of the opinion-writing methodology that I found “Norman Conquest,” Alden, 119 S. Ct. at 2280 (Souter, J., dissenting), but not “normative.”

⁸⁶ Justice Scalia made a similar defense of sovereign immunity in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part). Justice Scalia’s *Union Gas* opinion also emphasizes the century of reliance on *Hans*: had past Congresses thought that the states would be subject to suits under various statutes, they might have given some thought to carving out exceptions for the states. Id. at 34-35. If *Hans* were suddenly overruled, would the courts interpret statutes according to an assumption that Congress meant to preserve the immunity that *Hans* automatically provided? Would it somehow be possible to look at particular statutes and decide case by case whether Congress would have intended the states to be subject to suit? Or would the states simply become subject to all the causes of action covering the activities they have happened to engage in over the years? The Seventeenth Amendment would become dubious, according to Justice Scalia: if the state governments had known they were subject to suit in all federal question cases, would they have ratified the amendment that gave up their control over the selection of United States senators? Id. at 35. For Justice Scalia, the problems of reliance on *Hans* multiply the force of *stare decisis*. If the reliance problem

judicial preservation, addresses not the *Hans* interpretation as a broad matter, but the narrow question of whether Congress should be able to abrogate the state's sovereign immunity in the state's own courts. Here, Justice Kennedy argues that a state's courts should not be structuring the state's budget. Of course, this can be broadened into an idea about sovereign immunity generally: it is a disapproval of requiring the states to use their funds to pay money damages in court cases. The notion is that a state should be able to look at its budget as a whole and make decisions about where to allocate funds. A lawsuit only looks at one demand on the state's money, not the whole, and leaves the decision to the legal process of finding facts and applying rules. Sovereign immunity represents a choice not to make the state spend money that way. Is that a choice we want to defend? I would like to hear the majority really answer that question head on, at least before making a special reaffirmation of *Hans* as it did in *Alden*.

At some point in the analysis, the Court ought to step away from abstract logic and historical exegesis and ask how to set a good balance between the interests in the separate functioning of state government and the enforcement of federal law.⁸⁷ Instead, Justice Kennedy would have us accept the abstract proposition that the original Constitution preserves sovereign immunity and proceed quite formalistically: once *Seminole* has held that Congress' Article I powers do not include the power to impose lawsuits brought by individuals in federal court, the implication that state court lawsuits are also barred by sovereign immunity becomes almost *650 inescapable. I say "almost inescapable" because one could escape that implication with some reason to find that state court lawsuits, and not federal court lawsuits, are necessary to the constitutional plan.

This "true believer" attitude toward *Hans* is absurdly out of line with other case law, particularly *Ex parte Young*⁸⁸ and its progeny. To understand *Young*, consider the reasoning of Justice Powell – Justice Kennedy's immediate predecessor on the Court – in the *Pennhurst* case.⁸⁹ In *Pennhurst*, Justice Powell openly called *Young* a legal fiction.⁹⁰ Articulating the scope of this fiction, the courts had to recognize that "the need to

were the only objection to overruling *Hans*, interpreting existing statutes to implicitly preserve the immunity that *Hans* automatically provided would make the effect in statutory cases purely prospective. But it is difficult to see how the Seventeenth Amendment problem could be solved – other than by simply denying or ignoring it.

⁸⁷ For an earlier statement of this position, see Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989).

⁸⁸ *Ex parte Young*, 209 U.S. 123 (1908). Justice Kennedy equates sovereign immunity with individual rights. But if sovereign immunity has this stature, how can *Young* be tolerated? A similarly transparent fiction capable of blocking individual rights would seem outrageous. Justice Kennedy tolerates this dissonance. He only uses *Young* as evidence of the Court's understanding that the states could not be sued in their own courts: "Had we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine." *Alden*, 119 S. Ct. at 2263 (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270-71 (1997)).

⁸⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (Young device not available for claims based on state law). *Pennhurst* makes sense as a "process federalism" case, oriented not toward how Congress must act in order to intrude on the states (the subject of this article), but toward how the states must act in order to be free of federal intrusion. Under the doctrine of *Pennhurst*, the "good state" wins independence from the supervision of the federal courts: when the state offers the plaintiffs a state law right that they choose to rely on (in addition to the federal rights also available), the *Pennhurst* doctrine will require them to use the state's own courts. Thus, the instruction to the state is: offer your citizens attractive new rights that go beyond what federal law offers them. Only the state that exceeds the federal norm gains this ability to function separately from federal jurisdiction. Other states may be sued under federal law in federal court. (Of course, those suits must use the *Young* device of naming the state official and, thanks to *Edelman v. Jordan*, 415 U.S. 651 (1974), can only pursue prospective relief; however, under *Fitzpatrick v. Butzer*, 427 U.S. 445 (1976), Congress could use the Fourteenth Amendment to impose suits directly on the states and to make retrospective relief available.). This interpretation of *Pennhurst* is elaborated in Althouse, *supra* note 33.

⁹⁰ *Pennhurst*, 465 U.S. at 105.

promote the supremacy of federal law must be accommodated to the constitutional immunity of the States.”⁹¹ For Justice Powell, the Court restricted *Young* to prospective relief, not because of any logic, but out of a practical analysis of the importance of that relief to the federal interest in enforcing federal law.⁹² Prospective relief is clearly more important, and though retrospective *651 relief might also be important to “the supremacy of federal law,” if *Young* worked there as well, nothing would remain of the states’ immunity.⁹³ Justice Powell noted that the distinction between past and future was not that great, but that a line had to be drawn to preserve a balance of state and federal interests.⁹⁴ Justice Powell’s methodology in *Pennhurst* differed from that of the dissenting Justice Stevens, who made abstractly theoretical arguments premised on actually believing *Young*’s proposition that a state actor does not really represent the state when acting in violation of the law. Justice Powell dismissed Stevens’ ideas as “out of touch with reality.”⁹⁵

If pragmatic balancing suits *Young*, why should it not permeate thinking about sovereign immunity? Indeed, it makes sense to see the coexistence of *Young* and *Hans* as a balance. Just as *Young* moderates *Hans*, *Seminole* moderates *Fitzpatrick*. In this manner of thinking, let us ask: why not permit Congress to abrogate sovereign immunity for suits in state court as a way of moderating *Seminole*? Why not draw a line between *Seminole* suits in federal court and *Alden* suits in state court and permit the latter as a nice, moderating compromise? It is too late in this rather bizarre doctrinal chain to demand that we follow *Seminole* to its logical conclusion. The rule set in *Alden* needs support from realistic reasons why these suits in state court would upset the balance between the federal interest in the enforcement of federal law and the state interest in separate functioning. The majority committed to *Hans* needs to find a way to explain its position in a way that does not endlessly repeat and insist upon the story of *Hans* to listeners who tend to find it “pernicious.”⁹⁶ Justice Powell in *Pennhurst* found it possible *652 to use practical, interest-balancing, structural reasoning. How would a more pragmatic analysis

⁹¹ Id. at 114.

⁹² See David L. Shapiro, *Comment, Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 83 (1984) (criticizing *Pennhurst* generally but welcoming its “frank” federal interest analysis).

⁹³ *Pennhurst*, 465 U.S. at 105. Explaining *Edelman v. Jordan*, 415 U.S. 651 (1974), Justice Powell writes, “[We] declined to extend the *Young* doctrine to encompass retroactive relief, for to do so would effectively eliminate the states’ constitutional immunity.” *Pennhurst*, 465 U.S. at 105.

⁹⁴ Justice Powell wrote:

Accordingly, we concluded that although the difference between permissible and impermissible relief “will not in many instances be that between day and night,” [415 U.S. at 667], an award of retroactive relief necessarily “fall [s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.” [Id. at 665] (quoting *Rothstein v. Wyman*, 467 F.2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert. denied, [411 U.S. 921] (1973)). In sum, *Edelman*’s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States. *Pennhurst*, 465 U.S. at 105-06.

⁹⁵ *Pennhurst*, 465 U.S. at 107.

⁹⁶ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302 (1985) (Brennan, J., dissenting). Perhaps, the fire gone from the liberal side of the Court, *Hans* no longer strikes anyone on the Court as “pernicious.” See *supra* text accompanying note 27. It is merely “incorrect,” a glitch in the doctrine that demands no renunciation, but simply some doctrine skillfully drafted to offset it. Justice Stevens excluded, the current set of liberal Justices most closely resembles Justice White, and, given a majority vote, this side of the Court would leave *Hans* alone and revive *Union Gas*. The defect in this solution is that it places great trust in Congress to determine when private lawsuits for retrospective damages are desirable. This reliance on Congress means that plaintiffs asserting constitutional rights not supported by the current national majority will continue to go without retrospective relief, while plaintiffs with more popular claims (like patent holders?) will have full relief. See Althouse, *supra* note 2, at 1168-85 (proposing a distinction between constitutional and nonconstitutional claims as an alternative to overruling *Hans*).

of the *Alden* question look?⁹⁷ That is, even if *Seminole* *653 logically requires *Alden*, would pragmatic reasoning justify a distinction between the two types of lawsuits: can we defend a congressional power to authorize suits by individuals against the state in state court but not in federal court?

Let us take what may seem like a digression into the dissenting opinion written by Justice Souter. This seeming digression will, I think, lead us to an answer to the questions just posed.

C. Exposing the Shortcomings of Justice Souter's Dissent: How *Alden* Represents the Moderate Version of Enforcing Federalism

Justice Souter writes a dissenting opinion, which Justices Stevens, Ginsburg, and Breyer join. The majority, he argues, incorrectly views sovereign immunity as an "inherent notion of statehood," actively preserved by the Tenth Amendment.⁹⁸ Citing his *Seminole* dissenting opinion, he asserts that Congress' legislative powers entail the power to abrogate sovereign immunity. Even if sovereign immunity were a matter of "natural law," predating and surviving the Constitution, Justice Souter writes, it would only apply to claims against the government that created the claim and thus would not apply when federal law is asserted against the state.⁹⁹

Justice Souter disagrees with the majority's belief that sovereign immunity, like individual rights, is not "defeasible by statute."¹⁰⁰ To Justice Souter, rights are different

⁹⁷ It should be noted that Justice Kennedy has previously undertaken a quite pragmatic approach to sovereign immunity analysis, similar to Justice Powell's in *Pennhurst*. In *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), seeking to establish its exclusive right to land, the Coeur d'Alene tribe had sued the state and various state officials in federal court. Because it sought prospective relief, the tribe must have assumed that the rule of *Edelman v. Jordan* would permit it to proceed against the officials by using the device recognized in *Ex parte Young*. Justice Kennedy wrote an opinion that Justices O'Connor, Scalia, and Thomas only accepted in part. (Chief Justice Rehnquist stayed with Justice Kennedy throughout his opinion.) In the controversial portion of the opinion, Justice Kennedy justified denying the use of the *Young* device by characterizing *Edelman* as establishing only a presumption in favor of federal court access, but allowing that presumption to be overcome, depending on "the particular context." *Coeur d'Alene*, 521 U.S. at 277. He would look at the "background principles of federalism and comity," and bar the use of *Young* where it would "upset the balance of federal and state interests that it embodies." *Id.* (quoting *Papasan v. Allain*, 478 U.S. 265, 277 (1986)). The state interests outweighed the federal interest in vindicating federal law. The three Justices whose votes were needed to constitute a majority added a concurring opinion, written by Justice O'Connor, to explain their disagreement. See *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment). They emphasized the special nature of this particular lawsuit, in which the state's sovereignty over territory was at stake, thus making the fiction of *Young* – that the lawsuit is not really against the state – more unbelievable than in the usual *Young* case. *Id.* at 291-94. Paradoxically, the O'Connor opinion calls *Young* a fiction yet tries to analyze its applicability in terms of how believable it is in a particular context. Justice Kennedy is more forthright to admit that it is a matter of balancing and to try to give the best meaning to federalism. He did not, however, garner critical praise for his efforts at frankness. See Vicki C. Jackson, *Coeur d'Alene, Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENTARY 301, 312 (1998); Carlos Manuel Vazquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998) (arguing that *Young* should apply except in suits by individuals for retrospective money damages, criticizing Justice Kennedy's "unmoored case-by-case" balancing). Perhaps Justice Kennedy, his moderation underappreciated, has decided to reposition himself by writing in the ostentatiously scholarly style that impresses admirers of Justice Thomas's opinions in *Lopez* and *U.S. Term Limits*. Steven G. Calebresi, *Out of Order*, J. OF AM. CITIZENSHIP POL'Y REV., Sept.-Oct. 1996, at 14 (referring to "Thomas's elegant and brilliant dissent" in *U.S. Term Limits*); John O. McGinnis, *Original Thomas, Conventional Souter*, 74 POL'Y REV. 25 (1995) (citing admiration for Justice Thomas from "[l]iberal and conservative commentators alike"); William H. Freivogel, *Thomas Becomes a Major Voice on High Court; Promotes Strict Interpretation of Constitution*, THE PLAIN DEALER, June 4, 1995, at 10A ("Clarence Thomas has emerged as a significant voice on the U.S. Supreme Court, where he is the strongest advocate for interpreting the Constitution the way the framers meant it.").

⁹⁸ *Alden*, 119 S. Ct. at 2261-70.

⁹⁹ *Id.* at 2285-86.

¹⁰⁰ See *supra* text accompanying note 66.

because they are *specified* by the Constitution.¹⁰¹ Thus, the rights existing as a matter of common law before the Constitution do not need to have the ability to survive the Constitution: the Constitution's *textually explicit* rights have replaced them. Justice Souter attempts to analyze the question of the extent of Congress' power with hard-core textualism. Sovereign immunity cannot have survived the creation of federal *654 powers because it is not provided for explicitly in the text of the Constitution. Sovereign immunity is different from individual rights not because it is less important or more of an obstacle to the exercise of federal power, but because rights, unlike sovereign immunity, are explicitly enumerated in the Constitution. In Justice Souter's view, individual rights would also be "defeasible by statute" if the Bill of Rights had not been added.¹⁰²

The Ninth Amendment offers clues for the analysis of the meaning of the Eleventh Amendment, because both amendments contain the phrase "shall not be construed."¹⁰³ Both amendments suggest that there was (at least at the time of the amendment) an understanding that some traditional protections survived the Constitution, yet neither easily answers the question whether Congress can use its delegated powers to alter those traditional protections. One could take the position that the rights referred to in the Ninth Amendment may survive the Constitution itself, but are nonetheless subject to whatever powers Congress may have received and are thus, unlike the enumerated individual rights, "defeasible by statute."¹⁰⁴ Only Justice Souter refers to the Ninth Amendment: "[I assume the Court does not argue] that every legal advantage a State might have enjoyed at common law was assumed to be an inherent attribute of all sovereignties, or was *655 constitutionalized wholesale by the Tenth Amendment, any more than the Ninth Amendment constitutionalized all common-law individual rights."¹⁰⁵

Because sovereign immunity lacks a constitutional text, it needs something more to have the capacity to survive the creation of federal legislative powers, according to Justice Souter. He assumes that whether this capacity exists or not depends on whether sovereign immunity deserves the appellation "natural law."¹⁰⁶ He proceeds to analyze at

¹⁰¹ See *Alden v. Maine*, 119 S. Ct. at 2240, 2269 (1999) (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined this opinion. See *id.*

¹⁰² The original Constitution did not contain a bill of rights, and its supporters argued that there were inherent limitations on the powers granted to the national government that would prevent intrusion on individual rights. See, e.g., *THE FEDERALIST* No. 84 (Alexander Hamilton). At the ratification debates, concern about these rights led to plans for the amendments that became the Bill of Rights. Laurence Tribe, 1 *AMERICAN CONSTITUTIONAL LAW* 8 n.8 (3d ed. 2000). And, notably, the Bill of Rights contained the Ninth Amendment's assurance specifying some rights "shall not be construed" to eliminate other rights "retained by the people." See U.S. Const. amend. IX.

¹⁰³ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1483 (1987). Professor Amar contends that the additional rights referred to in the Ninth Amendment are "natural rights," which survive the Constitution itself, but can be replaced by "contrary superior positive law – congressional or constitutional." *Id.* Reading the Ninth Amendment this way harmonizes it with the dissenters' interpretation of the Eleventh Amendment. Professor Amar starts with an interpretation of the Eleventh Amendment and then uses that interpretation to propose a meaning for the similarly worded Ninth Amendment. *Id.* The Ninth Amendment, in his view, would preserve various natural law rights, which the courts would develop as a matter of federal common law, but which Congress could alter by statute. *Id.*

¹⁰⁴ *Id.* at 1481-84. (viewing the Ninth Amendment this way after taking the corresponding position regarding the Eleventh Amendment).

¹⁰⁵ *Alden*, 119 S. Ct. at 2270-71 n.2.

¹⁰⁶ Justice Souter insists that his argument is airtight. "There is no escape from the trap" of this logic. He writes, "if the Court admits that the source of sovereign immunity is the common law, it must also admit that the common-law doctrine could be changed by Congress acting under the Commerce Clause." *Id.* at 2287. The majority sees no trap at all: in asking how much power Congress received and what the states surrendered, it does not matter whether the preexisting immunity was thought of as common law or natural law. All that matters is whether it was surrendered as part of the powers delegated to Congress. *Id.* at 2256-57.

length whether sovereign immunity is “natural law” or mere common law, even though the majority does not agree that this distinction determines whether Congress’ original powers entail the power to abrogate immunity. But, Justice Souter’s analysis of whether sovereign immunity is “natural law” or merely common law really only boils down to asking whether or not sovereign immunity is “defeasible by statute.”¹⁰⁷ In other words, it is another way of asking the same old question: Does Congress have the power to abrogate sovereign immunity? By restating the abrogation issue as common law versus natural law, however, Justice Souter can tap into rhetoric that disparages natural law more generally. Justice Holmes supplies the useful insult: “The jurists who *656 believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted ... as something that must be accepted.”¹⁰⁸

Despite Justice Souter’s lengthy criticism, nothing about the majority’s acceptance of the *Hans* interpretation depends on natural law. Even if one goes back to the reasoning in *Hans*, one does not find the “jurist” believing in natural law. The *Hans* Court justified its decision in terms of the ratifiers’ understanding: they voiced a political and practical concern for the states’ power and received assurance that this loss of power would not occur. This interpretation has more to do with understanding the terms of a bargain than jurisprudential abstractions anyone at the time actually believed.

Justice Souter invokes Justice Holmes for the non-naive view of sovereign immunity: “A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”¹⁰⁹ This passage exposes a point much more apt than Justice Souter’s meandering about natural law (which, perversely enough, could be used to ridicule belief in the importance of individual rights). Sovereign immunity *lacks the compelling moral weight* of individual rights. Individual rights acquired their resistance to legislative power because people came to believe in and truly care about the experience of the individual intruded upon by the state. But sovereign immunity, as Holmes observes, is just a concession to reality: you will not have much luck attempting to sue the state, because the state controls the legal system you are attempting to invoke. This may be a long common law tradition – would-be litigants have long faced this reality – but perhaps it is one that the people forming the Constitution meant to change or that we today can afford to jettison. It is quite easy to see individual rights as surviving the grant of powers in the Constitution, but why should the Constitution be read to preserve the immunity of government when its very nature is to

¹⁰⁷ Justice Souter relies on *Nevada v. Hall*, which allowed a state, proceeding in its own courts, to sue another state. *Id.* at 2270. In *Hall*, the Court wrote that a state’s sovereign immunity in its own courts:

affords no support for a claim of immunity in another sovereign’s courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

Nevada v. Hall, 440 U.S. 410, 416 (1979), cited in *Alden*, 119 S. Ct. at 2274. To Justice Souter, this suggests that state sovereign immunity in state courts is a matter of common law, and hence, “defeasible by statute.” *Alden*, 119 S. Ct. at 2270 n.1 (Souter, J., dissenting). For Justice Kennedy, *Hall* signifies only that the Constitution did not contain any agreement as to how the states would treat each other; thus relegating the scope of this interstate immunity to state law. *Alden*, 119 S. Ct. at 2258-59. The Constitution does, however, contain an agreement – once we believe *Hans* – that the federal government would respect the states’ sovereign immunity. *Id.* The ability of the states to modify the law of sovereign immunity does nothing to expand Congress’ power. *Id.* at 2259.

¹⁰⁸ Oliver W. Holmes, *Natural Law*, in *COLLECTED LEGAL PAPERS* 312 (1920), quoted in *Alden*, 119 S. Ct. at 2286.

¹⁰⁹ *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), quoted in *Alden*, 119 S. Ct. at 2286.

bind government to the limitations of law?¹¹⁰ There is no basis for glib equation of sovereign immunity and individual rights. The real question is not *657 whether the majority is succumbing to notions of natural law but whether sovereign immunity has the same stature as individual rights.

When Justice Souter finally discusses the structure of federalism, he speaks in conceptual terms, not about what is practical or what works or what is good. The subject is the theory of sovereignty. He concedes that it is possible that sovereign immunity was part of the scheme affirmatively adopted at the time of the founding.¹¹¹ The majority, as Justice Souter recognizes, sees that structure as including states with some measure of autonomy.¹¹² The Constitution represents a departure from the notion that sovereignty must reside only in one power and divides sovereignty between the national government and the states. In Chief Justice Marshall's words: "They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."¹¹³ This formal concept connects easily with the point that the *Hans* opponents have made all along: as long as Congress has legislative power, it has thorough control. Thus, whenever Congress can legislate, it can abrogate sovereign immunity.

This sort of reasoning stirs up memories of the *Lopez* case.¹¹⁴ There, the majority recognized that the Constitution embodied "first principles" that could be lost if we simply follow the logical consequences of the broadly interpreted commerce clause.¹¹⁵ For the dissenters, the principles of *Garcia* trump this *Lopez*-style restraint: there is no federalism-based limit on the exercise of the commerce power.¹¹⁶ As noted in Part I of this Article, however, the conservative majority does not believe in the principles of *Garcia*. It is thus not surprising that they reject Justice Souter's logic: one can expect the conservative majority to invoke first principles and eschew the product of any logical chain that contains, as a link, the broadly interpreted commerce power.

The dissenters do not hesitate to apply the commerce power to the states. That this power has acquired a very expansive application does not suggest any reason to devise ways to spare the state governments.¹¹⁷ Nor *658 does it matter that the resulting intrusions on the states would amaze the Constitution's framers:

The Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure, but they

¹¹⁰ See also *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2238 (1999) (Breyer, J., dissenting) (citing *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)).

¹¹¹ *Alden*, 119 S. Ct. at 2270 (Souter, J., dissenting).

¹¹² *Id.*

¹¹³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819) (quoted in *Alden*, 119 S. Ct. at 2288).

¹¹⁴ *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress lacks power under the commerce clause to criminalize the possession of guns in the vicinity of a school).

¹¹⁵ *Id.* at 552.

¹¹⁶ *Alden*, 119 S. Ct. at 2291.

¹¹⁷ *Id.*

do not hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated.¹¹⁸

Although the commerce power has swelled to a proportion that would leave the framers “rubbing their eyes” with amazement,¹¹⁹ if the current case law permits Congress to regulate, *Garcia* dictates that the state must suffer that regulation, and, with it, the loss of sovereign immunity. The Framers’ vision must give way to the notion of the living Constitution.¹²⁰

Justice Souter expresses concern for the state employees who will bear the brunt of the majority’s decision.¹²¹ They are far more sympathetic characters than the “eyes-open creditors”¹²² who lost out in the early years of the development of sovereign immunity doctrine. For the dissenters, straightforward normative reasoning seems to demand that these workers receive their lost wages. One senses Justice Souter’s frustration with the recalcitrant state when he wonders why it did not see fit to end all of this *659 litigation by simply paying the workers what the FLSA required¹²³ and when he ridicules, as mere “whimsy,” the majority’s idea that the Secretary of Labor¹²⁴ can serve the litigation interests of the nation’s 4.7 million state workers.¹²⁵

Justice Souter’s rejection of federal enforcement as an alternative to private lawsuits is reminiscent of Justice Stevens dissenting opinion in *Printz*. There, Justice Stevens wrote:

By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State’s rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.¹²⁶

¹¹⁸ Id.

¹¹⁹ Id. at 2291-92.

¹²⁰ Justice Souter invokes the classic quotations:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.), cited in Alden, 119 S. Ct. at 2291 (Souter, J., dissenting).

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch*, [17 U.S. (4 Wheat.) at] 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed.

Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) cited in Alden, 119 S. Ct. at 2291.

¹²¹ Alden, 119 S. Ct. 2292.

¹²² Id.

¹²³ Id. The answer must be that Maine thought it had an argument that it was not in violation. Why would it make a spectacle of resisting federal law, especially when the effectiveness of the sovereign immunity defense was not obvious at the time?

¹²⁴ The Secretary of Labor is authorized by 29 U.S.C. § 216(c) to seek damages, and sovereign immunity doctrine does not bar suits for retrospective relief brought by the United States government.

¹²⁵ Alden, 119 S. Ct. at 2293 (Souter, J., dissenting).

¹²⁶ *Printz v. United States*, 521 U.S. 898 (1997) (Stevens, J., dissenting).

Justice Stevens warns that cutting off state enforcement and eliminating that flexibility for Congress simply goads Congress into increasing the size of the federal bureaucracy.¹²⁷ Perhaps there is good reason to require Congress to create and pay for its own mechanisms of enforcement. Even though Congress may regulate the activities of the state – thanks to *Garcia* – *Alden* designs a special disincentive to offset that power. The disincentive comes in the form of requiring public enforcement at the federal level. If Congress wants adequate enforcement, it is going to have to come up with the money for it and put the decisionmaking about when and how to enforce into the hands of publicly accountable executive branch officials.

Statutes like the FLSA still bind the states and are still enforceable against them, but one way of enforcing them is withdrawn. The measure of protection the states receive comes in the form of withholding only the private right of action for retrospective relief. Congress is not prevented from reaching the states, but it must take the special, extra, more difficult step of providing a public manner of enforcement. Executive branch officials must serve as intermediaries for the individuals Congress would *660 like to empower against the states. This safeguard of the sort of enforcement that is subject to the judgment of accountable, federal public officials is the solicitude given the states. One might say that if *Garcia*'s political safeguards really worked, Congress would, on its own, have decided to limit remedies this way.¹²⁸ In this light, we might see the Court's restriction of remedial choice as a modest alternative to overruling *Garcia*.

Because Congress can still impose on the states, though only in a particular, deferential way, *Alden* is an example of the moderate version of enforcing federalism. In comparison to overruling *Garcia*, *Alden* can be seen as better because it does not restrict Congress from regulating in all areas and protects the states from the excesses of litigation by permitting only federal officials to bring lawsuits for retrospective relief. Not only can this be seen as a preferable way to balance state and federal interests, but it is a better way to use judicial resources. *Garcia* spares courts from having to figure out where to draw the line between what Congress can and cannot regulate, and *Alden* relieves courts of all but the lawsuits that federal officials deem worthwhile.¹²⁹

IV. COLLEGE SAVINGS BANK v. FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD: THE CONSTRUCTIVE WAIVER THEORY

College Savings Bank,¹³⁰ like its companion case *Florida Prepaid*,¹³¹ arises out of a dispute between College Savings Bank, an organization that devised and patented a

¹²⁷ For further discussion of this argument in the Printz dissenting opinions, see *infra* note 192 and accompanying text.

¹²⁸ For a discussion of the (*Garcia*-refuting) enthusiasm with which Congress has subjected the states to individual lawsuits in the last three decades, see Jackson, *supra* note 97, at 312.

¹²⁹ Indeed, *Alden* could be seen as so advantageous to the judiciary as to raise suspicions about the real motivation behind it: perhaps it is less to spare the states from the expenses and harassments of litigation than it is to spare the courts.

¹³⁰ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999).

¹³¹ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

savings plan aimed at parents saving for college tuition, and the state of Florida – operating through Florida Prepaid Postsecondary Education Expense Board¹³² – which marketed a rival plan. *661 Hoping to quell the competition, College Savings filed two cases against Florida in federal court: in *College Savings*, it alleged a violation of trademark law; and in *Florida Prepaid*, it alleged patent infringement.¹³³ The next section of this Article will consider the patent case, which raises the question of the reach of the Fourteenth Amendment.¹³⁴ Here, we consider the trademark case, *College Savings*.

Justice Scalia writes for the majority.¹³⁵ He recounts the *Hans* version of the Eleventh Amendment story: the Eleventh Amendment reminded us to read between the lines of Article III. Unlike Justice Kennedy in *Alden*, Justice Scalia does not reaffirm the accuracy of the *Hans* interpretation. Justice Scalia merely states it, notes its long status as *stare decisis*,¹³⁶ and excoriates the dissenters for refusing to accept precedent.¹³⁷

College Savings relied on the Lanham Act's prohibition of false and misleading advertising,¹³⁸ which explicitly authorizes suits against the states under the Trademark Remedy Clarification Act ("TRCA").¹³⁹ Congress lacked power to abrogate Florida's sovereign immunity here, because the TRCA could not be characterized as an exercise of the Section 5 power.¹⁴⁰ A second argument was also raised: could it be said that Florida waived its own immunity? Years ago, in the *Parden* case, the Court had construed a *662 state's operation of a railroad as a waiver of sovereign immunity in cases based on the Federal Employers' Liability Act ("FELA").¹⁴¹ The state knew of the federal regulation that covered railroads and subsequently chose to begin operating a railroad. The Court construed the state's decision to go ahead as an acceptance of a *condition* Congress had laid down: if you operate a railroad, you consent to suit under FELA. The only difference of opinion among the justices in *Parden* was over whether FELA stated this condition clearly enough, not over whether Congress had the power to impose a condition of this kind.¹⁴² In *College Savings*, Justice Scalia now characterizes *Parden* as "the nadir of our

¹³² The Florida Prepaid Postsecondary Education Expense Board was an "arm of the state" within sovereign immunity doctrine. *College Savings*, 119 S. Ct. at 2223; *Florida Prepaid*, 119 S. Ct. at 2204 n.3. This Article will refer to the state entity as "Florida" or "the state" in this discussion. The majority did not address this point in any depth, noting that Florida had not appealed on this ground. *Florida Prepaid*, 119 S. Ct. at 2204 n.3. It should be noted that Justice Stevens, writing for himself alone in dissent in *College Savings*, proposes a tighter definition of what is to be considered an "arm of the state" for Eleventh Amendment purposes. *College Savings*, 119 S. Ct. at 2233 (Stevens, J., dissenting). One way to deal with the problems Justice Breyer identifies in his dissent, see *infra* text accompanying notes 147-51, would be to use arm of the state doctrine to deprive the state of immunity when it enters the commercial marketplace. This approach has a precedent in the treatment of foreign sovereign immunity. See 28 U.S.C. § 1605(a)(2), cited in *College Savings*, 119 S. Ct. at 2234 n.1 (Stevens, J., dissenting). Justice Scalia's answer is terse and formal: foreign sovereign immunity is not a matter of constitutional law. See *College Savings*, 119 S. Ct. at 2231 n.4.

¹³³ *Florida Prepaid*, 119 S. Ct. at 2203 (citing 35 U.S.C. § 271(a) (1994 & Supp. 1997)).

¹³⁴ That section will also look at the brief discussion of this issue that appears in *College Savings*. The main part of *College Savings*, addressing the constructive waiver doctrine, will be discussed in this part of this Article.

¹³⁵ *College Savings*, 119 S. Ct. at 2233. Justice Stevens writes alone, *id.*, and Justice Breyer is joined by Justices Stevens, Souter, and Ginsburg, *id.* at 2234.

¹³⁶ *Id.* at 2231-32.

¹³⁷ *Id.* at 2232. In his dissenting opinion, Justice Breyer openly states his unwillingness to accept the proposition of law set forth in *Seminole Tribe*. *Id.* at 2237-38 (Breyer, J., dissenting).

¹³⁸ 15 U.S.C. § 1125(a) (1994).

¹³⁹ Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992).

¹⁴⁰ See *infra* note 231.

¹⁴¹ *Parden v. Terminal R. Co. of Alabama*, 377 U.S. 184 (1964).

¹⁴² *Id.* at 198-200.

waiver (and, for that matter, sovereign immunity) jurisprudence.”¹⁴³ Earlier case law had accorded great respect to the state’s own limited concessions of susceptibility to suit, construing even explicit statements of waiver narrowly and avoiding finding implied waiver.¹⁴⁴ Later case law had moved away from *Parden*.¹⁴⁵ The Court had gone so far as to say that “*Parden*’s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law,” and “to the extent *Parden* is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language.”¹⁴⁶

Justice Breyer, dissenting, joined by Justices Stevens, Souter, and Ginsburg, still sought to preserve something of *Parden*’s waiver theory.¹⁴⁷ One man’s nadir is another man’s peak: *Parden* got it right, and the cases to the contrary ought to be cleared away. Justice Breyer’s waiver theory would not make it possible to sue the states in every area in which they operate, only “[w]hen a State engages in ordinary commercial ventures, ... like a private person.”¹⁴⁸ Congress would not be able to use its Article I powers to reach a state when it acts in “the area of its ‘core’ responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation.”¹⁴⁹ The theory is that a state acts in its “core” area of basic *663 governmental functions because it *must* act, so no inference of waiver can arise; but when the state moves beyond this “core,” it is making a choice, and it becomes acceptable for Congress to attach a condition. A condition imposed by Congress compels the state to make a hard choice between refraining from engaging in this activity or entering it subject to the full set of federal regulations and remedies. “Reason” supports this constitutional power, Justice Breyer writes: Congress “need[s]” this power to avoid an “enforcement gap” in many important regulatory programs and to force the state to play fair as it competes with private businesses in the marketplace.¹⁵⁰

Justice Scalia flatly rejects this attempt to “salvage” *Parden* and expressly overrules whatever “remnant” of it may have remained.¹⁵¹ He equates sovereign immunity with individual rights, quoting *Edelman v. Jordan*: “[C]onstrucive consent is not a doctrine commonly associated with the surrender of constitutional rights.”¹⁵² He makes an analogy to demonstrate the evil of constructive consent by asking what if Congress deemed entry into the business of securities transactions a constructive waiver of the right to a jury trial. Clearly, such an attempt would fail because individual rights are waived through the

¹⁴³ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226-27 (1999).

¹⁴⁴ *Id.* at 2225-26.

¹⁴⁵ *Id.* at 2229 (citing *Employees of Dep’t of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973)).

¹⁴⁶ *Welch v. Texas Dep’t of Highways and Public Transp.*, 483 U.S. 468, 478 n. 8 (1987), quoted in *College Savings*, 119 S. Ct. at 2227.

¹⁴⁷ See *College Savings*, 119 S. Ct. at 2234 (Breyer, J., dissenting).

¹⁴⁸ *Id.* at 2235.

¹⁴⁹ *Id.*

¹⁵⁰ *College Savings*, 119 S. Ct. at 2235 (Breyer, J., dissenting) (citing banking, securities, occupational health and safety, trademark, copyright, and patent laws).

¹⁵¹ *Id.* at 2228.

¹⁵² *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), quoted in *College Savings*, 119 S. Ct. at 2229.

“intentional relinquishment or abandonment of a known right or privilege.”¹⁵³ Sovereign immunity should command equal respect, according to Justice Scalia.

Although Justice Scalia regards the constructive waiver theory as indistinguishable from the position taken by the dissenters in *Seminole*, Justice Breyer’s theory is more limited than the abrogation theory that the *Seminole* dissenters favored. Constructive waiver only affects areas the state may choose not to enter. Somehow, Justice Scalia views this limitation as random, no better than saying Congress may not abrogate sovereign immunity except on “the last Friday of the month.”¹⁵⁴ Justice Scalia rejects the comparison to the “market participant” exception in negative commerce clause doctrine.¹⁵⁵ The negative commerce clause affects how much the state may *regulate*, and when the state acts as a “market participant,” it is ***664** simply not regulating.¹⁵⁶ A suit against a state, however, is “the very evil” prohibited by sovereign immunity. The fact that the suit is against the state remains true whether or not the state acted as a market participant. To put matters in less formal terms than those chosen by Justice Scalia, in negative commerce clause analysis, the market participant exception is designed to give the state greater freedom, to treat it no *worse* than a private business, by removing a limitation that applies when the state is regulating; to remove sovereign immunity for nontraditional activities would be to treat the state no *better* than a private business and to impose a new burden on the state.

Justice Breyer invokes the spending clause cases in which the Court has held that a state accepting a federal grant is bound to the conditions imposed on acceptance of the grant.¹⁵⁷ What is that but a waiver attached to a voluntary choice made by the state? Refraining from entering marketplace activities presents no greater hardship than refraining from accepting federal money.¹⁵⁸ Indeed, it is more difficult, Justice Breyer contends, for states to pass up the billions of dollars of federal aid and more coercive and “oppressive” of Congress to use this money as a bribe to compel the states to follow federal standards.¹⁵⁹ Justice Scalia finds the grant cases “fundamentally different.”¹⁶⁰ Federal grants are pure “gifts” from Congress. If the state receives no money from Congress, it is still free to go about conducting its activities however it likes, just without assistance from Congress.¹⁶¹ But constructive waiver would affect a state that is going about its own business, exercising its own powers. Congress would be intruding into the state’s affairs.¹⁶² Of course, Congress’ Article I powers permit it to intrude on these activities with regulations. Even *National League of Cities* permitted that intrusion. The

¹⁵³ Johnson v. Zerbst, 304 U.S. 458, 464 (1938), quoted in College Savings, 119 S. Ct. at 2229.

¹⁵⁴ College Savings, 119 S. Ct. at 2230.

¹⁵⁵ Id. at 2228.

¹⁵⁶ Id.

¹⁵⁷ Id. at 2236 (Breyer, J., dissenting) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)); see also South Dakota v. Dole, 483 U.S. 203 (1987) (stating requirements for imposing conditions on grants of federal money to the states).

¹⁵⁸ College Savings, 119 S. Ct. at 2236.

¹⁵⁹ Id.

¹⁶⁰ Id. at 2231.

¹⁶¹ Id.

¹⁶² Id. at 2231-32.

College Savings Court is only holding the line on private lawsuits aimed at enforcing those regulations.

To the extent that the sheer size of the federal spending really does amount to coercion of the states, Justice Scalia points out, spending power doctrine already contains the remedy.¹⁶³ It provides that “the financial inducement offered by Congress might be so coercive as to pass the point at *665 which ‘pressure turns into compulsion.’”¹⁶⁴ Spending that equals coercion is perceived as the regulation it really is; spending power doctrine will not allow that coercion to slip by in the guise of a condition. Therefore, Justice Breyer’s realistic perception about the coercive power of conditioned federal grants not only fails to persuade the majority to make immunity easier to waive, it stirs up thoughts of revitalizing limits on the spending power doctrine. Indeed, one can expect to see *College Savings* used as leverage in future arguments aimed at restoring some bite to spending power limitations.

Justice Breyer condemns the majority’s decision as a new *Lochner*, gumming up the workings of federal power in a manner that purportedly went out of style in 1937.¹⁶⁵ Like the discredited *Lochner* era cases, the Court’s new sovereign immunity doctrine deprives Congress of “flexibility.”¹⁶⁶ Specifically, Congress cannot devise “a decentralized system of individual private remedies.”¹⁶⁷ If decentralization is good, as proponents of state autonomy tend to believe, why not embrace the “decentralization” that comes with authorizing lawsuits by individuals to enforce federal law standards? The majority compels Congress to support federal law with federal bureaucracy:¹⁶⁸ isn’t this the sort of centralization conservatives should abhor? Seizing the pro-state rhetoric that praises the state’s ability to provide local solutions tailored to local problems and preferences, Justice Breyer contends that private lawsuits against the state *666 “deliberately take account of local differences” because local citizens, rather than federal officials, shape and control the individual lawsuits.¹⁶⁹

Finally, Justice Breyer discusses the meaning of federalism in a more general way. History has affected our specific conceptions of federalism. Territorial expansion, the Civil War, the New Deal, and the civil rights movement have changed the details of

¹⁶³ Id.

¹⁶⁴ Id. at 2231 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

¹⁶⁵ Id. at 2238 (Breyer, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905)). In Alden, Justice Souter also hurled the *Lochner* epithet: “The resemblance of today’s state sovereign immunity to the *Lochner* era’s industrial due process is striking.” Alden v. Maine, 119 S. Ct. 2240, 2294 (1999) (Souter, J., dissenting). What is the similarity? Seizing onto an incorrect conception and allowing it to grow “insistently fictional with the years.” Id. at 2294-95. The conclusion is that because the one met its doom, doom is inevitable for incorrect conceptions that grow out of hand. For another Justice Souter *Lochner*-based critique, see his dissenting opinion in *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Souter, J., dissenting) (recommending extreme deference to Congress on the issue of the reach of the commerce power).

¹⁶⁶ *College Savings*, 119 S. Ct. at 2238.

¹⁶⁷ Id. Of course, under *Fitzpatrick*, Congress can set up “a decentralized system of individual private remedies,” *College Savings*, 119 S. Ct. at 2238 (Breyer, J., dissenting), to enforce individual rights protected by the post-Civil War amendments. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); supra notes 4-6 and accompanying text.

¹⁶⁸ *College Savings*, 119 S. Ct. at 2238.

¹⁶⁹ Id. A similar argument could be made in Alden: the use of state rather than federal courts would produce remedies that reflect and conform to local values and preferences. See Alden, 119 S. Ct. at 2265.

doctrine.¹⁷⁰ Nevertheless, one can identify a core value: “the protection of liberty.”¹⁷¹ In Justice Breyer’s view, this “liberty” includes not only the freedoms enjoyed by the individual, but also the individual’s participation in government.¹⁷² The divisions of power adopted by the Constitution are designed to promote citizen participation in government. In Justice Breyer’s view, the Constitution only favored local government because it “facilitated” this participation.¹⁷³ But the concept of democratic participation in government plays out differently in the modern world:

Modern commerce and the technology upon which it rests needs large markets and seeks government large enough to secure trading rules that permit industry to compete in the global market place, to prevent pollution that crosses borders, and to assure adequate protection of health and safety by discouraging a regulatory “race to the bottom.”¹⁷⁴

So the standards need to be selected at the national level, but “local control,” Justice Breyer asserts, is still “necessary.”¹⁷⁵ In Justice Breyer’s scenario, however, this “local control” will come not in any sort of local democratic process, but in the form of lawsuits brought by individuals seeking to enforce federal standards.¹⁷⁶ Federal law will set a standard – say, restricting environmental pollution – and then individuals in particular localities acting in accordance with local preferences and values will decide when a lawsuit is justified. Justice Breyer claims that placing the enforcement of federal law against the state in the hands of individuals will *667 help people “maintain ... a sense of community” in the face of globalization.¹⁷⁷ Somehow, litigants pursuing their own interests in courts will provide a good substitute for citizens participating in local democracy – and all in the name of “liberty.”

In the *Garcia* tradition, Justice Breyer would assign the role of deciding what responsibilities ought to be allocated to what level of government to Congress.¹⁷⁸ With each regulatory subject, Congress decides how much to federalize and how much to leave to local control:

Specific regulatory schemes, for example, can draw lines that leave certain local authority untouched, or that involve States, local communities, or citizens directly through the grant of funds, powers, rights, or privileges. Depending upon context, Congress may encourage or require interaction among citizens working at various

¹⁷⁰ College Savings, 119 S. Ct. at 2239 (Breyer, J., dissenting).

¹⁷¹ Id.

¹⁷² This is a position taken by the conservative majority in cases like *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *New York v. United States*, 505 U.S. 144 (1992).

¹⁷³ College Savings, 119 S. Ct. at 2239 (Breyer, J., dissenting).

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id. at 2239-40.

levels of government. That is why the modern substantive federalist problem demands a flexible, context-specific legislative response.¹⁷⁹

Justice Scalia condemns Justice Breyer's "diffuse" discourse on federalism and flexibility.¹⁸⁰ Justice Breyer's theory identifies only the most abstract value – "the protection of liberty" – and even cedes to Congress the role of adjusting all the specifics presumably in furtherance of that end.¹⁸¹ Leaving all of the decision-making about federalism to Congress removes the check on government that decentralized, protected state power was supposed to provide: it "den[ies] federalism utterly."¹⁸² Justice Scalia wisecracks: "Legislative flexibility on the part of Congress will be the *668 touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher."¹⁸³

It is still the Court's role to define the limits of Congress' power, that is, to deny the Congress "flexibility" beyond those limits. Justice Scalia flips Justice Breyer's pro-flexibility rhetoric: to force the state to give up immunity when it takes on "ordinary commercial ventures" is to deny the state flexibility. Here, Justice Scalia finds a way to toss the *Lochner* epithet back at the dissenters. The problem of *Lochner*, according to Justice Scalia, was best "captured in Justice Holmes's dissenting remark about 'Mr. Herbert Spencer's Social Statics'"¹⁸⁴ that the Constitution does not embody "a particular economic philosophy."¹⁸⁵ To saddle the states with a traditional economic role that excludes participating in the market is to embrace "a particular economic philosophy." Of course, this assumes that it is a special penalty to be subjected to the same enforcement mechanisms as private business. It may make sense to allow the state to do new things but still prevent them from taking unfair advantage of private competitors in the marketplace. If rejecting the mistakes of *Lochner* means, as Justice Scalia writes, the stripping away of beliefs about where the state ought properly to act, then *National League* really is wrong and properly displaced by *Garcia*.¹⁸⁶

In this light it becomes possible to see that Justice Breyer's theory resembles *National League of Cities*, in that it cuts off congressional power over the states as they perform traditional state governmental functions. An effect identical to Justice Breyer's waiver

¹⁷⁹ Id. at 2239.

¹⁸⁰ Id. at 2232.

¹⁸¹ Id. at 2232-33. Compare Justice Scalia's discussion of levels of generality in the right of privacy cases. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 124-26 (1989). He is critical of the liberal members of the Court who extend the meaning of individual rights by identifying a value at a high "level of generality" and then interpret that generality as authorization for whatever specifics they prefer. For example, in Michael H., Justice Scalia stated that he would not recognize the reproductive rights of a father of a child born to a woman married to another man, because the tradition of the Court's recognition of parental rights exists at a more specific level that excludes adulterous fathers. Id. at 127-28 n.6.

¹⁸² College Savings, 119 S. Ct. at 2233.

¹⁸³ Id. I know some Court observers are offended by Justice Scalia's supposedly harsh words, but I find the humor refreshing and would like to encourage it. Other Scalia wisecracks in this opinion are: "handwriting on the wall which even an inept cryptologist would recognize," id. at 2227 n.2, and "Justice Breyer reiterates (but only in outline form, thankfully) the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods," id. at 2231-32.

¹⁸⁴ Id. at 2233 (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

¹⁸⁵ Id.

¹⁸⁶ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also *National League of Cities v. Usery*, 426 U.S. 833 (1976).

theory could be achieved by overruling both *Seminole* and *Garcia*. Congress could then impose private lawsuits on the state except in the state's areas of traditional governmental functioning. The waiver theory articulated by Justice Breyer would only reach optional state activities and not the traditional governmental activities. It is striking that both *Garcia* and *Parden* involved local government *669 operating a railroad, which *Parden* preservationists like Justice Breyer would categorize as nontraditional activities, susceptible to congressionally imposed conditions, because states exercise choice. *Garcia* rejected the line between traditional and nontraditional as too hard to draw and too dismissive of state innovation.¹⁸⁷ Justice Blackmun's *Garcia* opinion, in fact, relies heavily on a vision of the states entering new, nontraditional activities:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be. Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.¹⁸⁸

Had Justice Breyer been on the Court in 1985, he would, we can assume, have voted with the majority in *Garcia* to reject a distinction based on traditional and nontraditional governmental activities, where the end was to expand the powers of Congress. He votes in *College Savings* in favor of such a distinction where drawing that line also expands the power of Congress. It seems fair to say that everyone can perceive a reasonable place for a line there, but that the decision whether to draw it can sometimes favor the states (as in *National League*) and sometimes Congress (as in Justice Breyer's constructive waiver theory). With the rejection of Justice Breyer's theory, the traditional/nontraditional line has lost its place in current federalism doctrine. The line based on “market participation” in negative commerce clause doctrine is entirely different: the state's buying and selling in the marketplace extends into the most traditional areas, like hiring state workers and building state buildings, and the least traditional areas, such as manufacturing a product.

Current constitutional law doctrine does still draw a line that affects the division of state and federal power: Congress cannot use its powers to reach into the institutions of state government and to use them to carry out federal policy; that is, it cannot “commandeer” state government.¹⁸⁹ Putting *Garcia* *670 and the “anti-commandeering” cases together, we see that Congress can compel the states to follow regulations of the sort that would also apply to private businesses (like minimum wage requirements), but it cannot use the states to perform federal governmental functions. Congress cannot add items to the states' executive or legislative agenda. Thus, there is still some idea of federal power varying according to different state functions. We might find some similarity here to Justice Breyer's *College Savings* argument for treating the states no

¹⁸⁷ See *Garcia*, 469 U.S. at 543-47.

¹⁸⁸ *Id.* at 546.

¹⁸⁹ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

better than a private business when the states choose to enter a field of business traditionally occupied by private companies. Perhaps the hands-off treatment of sovereign immunity *should* end at the point when the state becomes too much like a private business. That is Justice Breyer's proposal.

A more interesting comparison to the commandeering cases lies in Justice Breyer's discussion of congressional flexibility. As we saw above, Justice Breyer bemoaned the loss of the "flexibility" to choose, as a mode of enforcement of federal policy, the individual suit against the state.¹⁹⁰ He made a very similar argument in *Printz*, where he justified giving federal law enforcement assignments to local law enforcement officials as a way of "reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity."¹⁹¹ Consider again Justice Stevens' statement in *Printz* (which Justice Breyer specifically endorsed in his own dissenting opinion in that case). Justice Stevens fretted about the "aggrandize[ment]" of the federal government, should it be forced to create the enforcement mechanisms to support its own regulations.¹⁹² He purported to fear the "creat[ion of] vast national bureaucracies" that would be needed to enforce federal law.¹⁹³ Similarly, Justice Breyer argues in *College Savings* that individual lawsuits can make it *671 unnecessary to have a national bureaucracy to seek retrospective relief for violations of law, though it seems unlikely that Congress or the executive branch would put great efforts into procuring this relief.¹⁹⁴ Indeed, much of the criticism of the *Alden* trilogy expresses doubt that the federal government will use its powers to obtain relief for, say, workers not paid the overtime to which federal law entitles them. Of course, this means that without individual lawsuits the state just gets off the hook. The real risk is the loss of compensation, not an overgrown federal bureaucracy.

Justice Breyer equates individual lawsuits with local democratic processes, noting that both provide decentralization, which is supposedly a good thing.¹⁹⁵ Since Justice Breyer does not ordinarily argue in favor of decentralized government,¹⁹⁶ this argument appears to be more of an attempt to convince the other side of the Court to see good in the private right of action to enforce federal law. But this attempt to convince cannot be anything more than a gesture, as the conservative side of the Court is quite unlikely to perceive individuals enlisting the judiciary as a good substitute for local democracy. That side of the Court is more concerned with freeing local government from the burdens of

¹⁹⁰ See *College Savings*, 119 S. Ct. at 2238 (Breyer, J., dissenting). Both sides in *Printz* argued for flexibility. Those in favor of the statute thought Congress should have the flexibility to use state law enforcement officials, see *Printz*, 521 U.S. at 978 (Breyer, J., dissenting), and the states argued that federal work assignments denied the local officials the flexibility to decide which law enforcement tasks ought to be given priority. See *id.* at 927-28 (majority opinion). Clearly, arguing in favor of "flexibility" is no more helpful in favor of "power." Neither is an unalloyed good, and the real questions have to do with how to decide who should get this desired commodity and how much of it they should get.

¹⁹¹ *Id.* at 977. Note that the more extended argument on this point appears in *Printz* in the dissenting opinion of Justice Stevens, which Justice Breyer joins. *Id.* at 939 (Stevens, J., dissenting). Justice Breyer also writes separately to add that several European countries embrace this notion of federalism. *Id.* at 976 (Breyer, J., dissenting).

¹⁹² *Id.* at 959 (Stevens, J., dissenting).

¹⁹³ *Id.*

¹⁹⁴ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2240 (1999) (Breyer, J., dissenting).

¹⁹⁵ *Id.* at 2239.

¹⁹⁶ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

litigation.

Justice Breyer moves federalism up the ladder of generality until it becomes only its asserted goal: liberty. This is quite reminiscent of the sort of arguments favored by the liberal side of the Court in the area of separation of powers. Instead of preserving the structure provided for in the Constitution, one identifies the supposed purpose of that structure and then offers an alternate structure that also serves that purpose.¹⁹⁷ Here, one can even argue that the original choice of structure did not work very well toward the goal for which it was intended. In this view, if federalism was designed to preserve liberty, but the states actually do an inferior job of protecting liberty, one can eliminate the role of the states altogether.

This explanation sheds light on *Fitzpatrick*, the case that validates congressional power to abrogate sovereign immunity using Section 5 of the Fourteenth Amendment.¹⁹⁸ We might say that, when the states are violating individual rights, they cannot be said to promote liberty, so the interest in ***672** liberty justifies intruding on the states. If that is the case, isn't *Fitzpatrick* enough? Justice Breyer argues that liberty extends beyond individual rights to individual participation in government; the founders associated federalism with liberty because they envisioned the greatest citizen participation in local government. If changed circumstances have made that model of participatory local government obsolete because "the global market place" requires uniform national regulation, the Framers' structure no longer works, and it ought to be possible to devise innovative new structures.¹⁹⁹

If local participation is the "liberty" that federalism was meant to foster, something similar is achieved, according to Justice Breyer, through individuals controlling their lawsuits.²⁰⁰ Can participation in lawsuits substitute for participation in the democratic processes? Surely, this is not an argument designed to appeal to the conservative side of the Court, which has for years scorned those who would transplant their political struggles to the judicial arena, as anyone familiar with the last thirty years of standing doctrine cases knows.²⁰¹ Federal lawsuits are by their nature – especially in light of standing doctrine – about seeking recompense for personal injuries, not about a public-spirited debate over which local problems are important and how much of the state's resources they deserve. Since *Ex parte Young* already enables individuals to seek prospective relief forcing the state to begin to follow federal law, the lawsuits Justice Breyer is talking about are ones that would extract money from the state for the benefit of individuals, leaving less money to be allocated as the local majoritarian government would choose. Exposing the state government, which must marshal and allocate its limited funds, to lawsuits brought at the discretion of individuals, is supposed to empower the local community and cure the alienation caused by globalization. Though it

¹⁹⁷ See *Clinton v. New York*, 524 U.S. 417 (1998) (holding that a line item veto is unconstitutional); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that a legislative veto is unconstitutional).

¹⁹⁸ See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

¹⁹⁹ This is the same sort of argument used (unsuccessfully) to defend the legislative veto and the line item veto: new devices should be permitted to do what the original structural safeguards can no longer do. See cases cited supra note 197.

²⁰⁰ *College Savings*, 119 S. Ct. at 2239 (Breyer, J., dissenting).

²⁰¹ See, e.g., *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Allen v. Wright*, 468 U.S. 737 (1984).

may be a good thing to give an injured party retrospective relief, portraying it as a process of participation that can be called “liberty” is ludicrous.

The liberal side of the Court would recognize Congress as having the role of deciding what level of government should carry out various needed functions.²⁰² In other words, it believes in the *Garcia* notion that Congress, *673 and not the judiciary, is best situated to decide what can be left to the states and what ought to be done at the national level. Courts, Justice Breyer writes, can exercise some sensitivity to the meaning of federalism as they apply various legal provisions, but the basic decisions about allocating authority depend on the particular area to be regulated, and Congress has the greater institutional capacity to compare the interests in local control and national uniformity and to design perhaps a complex intermixed structure leaving some matters to the states and some to the federal government.²⁰³ The position taken here is basically the same as the one taken by the dissenters in *Seminole*.²⁰⁴ The idea of invigorating democracy by having Congress set the standards and private individuals doing the enforcing is unlikely to appeal to the conservative side of the Court.

This is a vision of federalism that the conservative side of the Court finds entirely unappealing. Not only do these justices distrust Congress as the decisionmaker about what should be regulated at the national level, they also disapprove of blended structures that obscure the lines of political accountability.²⁰⁵ Congress will need to support its laws with federal public enforcement mechanisms, not delegate enforcement to individuals. Although they are not the typical “private attorney general,” empowered to sue in order to advance the public interest, Justice Breyer’s theory casts them in that light.²⁰⁶ If the individuals bringing the lawsuits are trying to enforce their own constitutional rights, the rule announced in *Fitzpatrick* enables Congress to abrogate sovereign immunity. Given a conservative majority that feels compelled to preserve some area of separate functioning for the state, this is in all likelihood the best place for them to draw the line. *Fitzpatrick* and *Seminole* together make a statement that there is something extraordinary about constitutional rights. Constitutional rights mark out where doctrine should not have the goal of stimulating local democracy and thus where private lawsuits have an especially appropriate role to play. Drawing the line at constitutional rights also means that the parties will need to speak in terms of rights. Thus the Court’s new sovereign immunity cases have invigorated the debate about what rights are.²⁰⁷ *674

²⁰² College Savings, 119 S. Ct. at 2238-40 (Breyer, J., dissenting).

²⁰³ Id.

²⁰⁴ See *Seminole Tribe v. Florida*, 517 U.S. 44, 100 (Souter, J., dissenting).

²⁰⁵ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

²⁰⁶ See *supra* text accompanying notes 170-205.

²⁰⁷ The tendency of the law to transform so many matters into questions of rights could be viewed as a positive, stimulating a vital discourse about the most important values, but it could also be seen in a negative light. See generally Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

V. FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD v. COLLEGE SAVINGS BANK: SQUEEZING FEDERAL STATUTES INTO SECTION 5 OF THE FOURTEENTH AMENDMENT

Federal patent law contains an explicit provision authorizing individual suits in federal court to remedy state violations of patent law.²⁰⁸ Congress added this provision in response to *Atascadero State Hospital v. Scanlon*,²⁰⁹ which required that Congress express its intent to abrogate sovereign immunity in “unmistakably clear” language in the statutory text.²¹⁰ Under *Union Gas*, a clear statement would allow Congress to remove the sovereign immunity defense for all federal causes of action.²¹¹ Once *Seminole* was decided, *College Savings* needed to characterize the private right of action on which it relied as an exercise of Congress’ power under Section 5 of the Fourteenth Amendment.²¹² The lower courts agreed with that characterization.²¹³ They reasoned that the patents are property, Section 1 of the Fourteenth Amendment protects property rights,²¹⁴ and a private right of action for patent violations has the remedial quality it needs to fit within Section 5.²¹⁵

This reasoning was aimed at satisfying the Supreme Court’s newly enhanced Section 5 doctrine. In *City of Boerne v. Flores*, the Court had stricken the Religious Freedom Restoration Act.²¹⁶ Congress, according to the Court, had not fashioned a remedy designed to respond to violations of a right found in Section 1 of the Fourteenth Amendment. It had redefined a Section 1 right. In fact, it had openly replaced the Court’s new test for *675 violating the free exercise clause with the very test the Court had recently rejected.²¹⁷ It was at least arguable that the two tests represented different degrees of scrutiny to be applied in looking for the same rights violation, and that Congress’ choice of a more vigorous test was simply a choice to make more violations remediable.

The majority rejected this theory, in part because Congress flaunted its intention of overturning a Supreme Court decision, but also because the legislative history lacked any

²⁰⁸ Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. §§ 271(h), 296(a) (Supp. 1994).

²⁰⁹ 473 U.S. 234 (1985).

²¹⁰ *Id.* at 242.

²¹¹ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989).

²¹² U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”)

²¹³ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2204 (1999).

²¹⁴ U.S. Const. amend. XIV, § 1 (“No State shall ... deprive any person of life, liberty, or property, without due process of law.”).

²¹⁵ *Florida Prepaid*, 119 S. Ct. at 2203-04. *College Savings* also argued here, as in *College Savings*, that Florida’s action in entering this activity constructively waives sovereign immunity. The opinion in *Florida Prepaid* does not add to the discussion of constructive waiver, but only cites *College Savings*. See *id.* at 2204-05.

²¹⁶ 521 U.S. 507 (1997).

²¹⁷ See *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, a case challenging a generally applicable state law, the Court declined to apply test the of *Sherbert v. Verner*, 374 U.S. 398 (1963), which required the state to show a “compelling governmental interest” and the use of the “least restrictive means” of furthering that interest whenever the plaintiffs could show the state had imposed a “substantial burden” on their exercise of religion. See *Smith*, 494 U.S. at 883.

evidence of a real-world problem demanding such a vigorous remedy.²¹⁸ Earlier cases validating statutory remedies for violations of voting rights had made Section 5 power seem rather expansive, but the *Boerne* Court distinguished them.²¹⁹ Congress passed the voting rights laws in the face of evidence of a long history of the states' deliberating using such devices as literacy tests to carry out race discrimination.²²⁰ No corresponding evidence of burdening religion existed: *676 laws against drug possession did not, for example, include peyote as a roundabout way of suppressing the Native American Religion.²²¹ Not only was there no evidence of states' deliberately restricting religious freedom, there was almost nothing to show unintentional burden.²²² Moreover, the Religious Freedom Restoration Act was not tailored to any specific problem: it was a sprawling general rule that had applications to all sorts of legislation that state and local government might adopt.²²³ By contrast, the voting rights laws had been carefully tailored – respectfully to the states – to apply only to precise matters where evidence showed that the states had actually acted badly.²²⁴

The Patent Remedy Act was aimed at the problem of the states' using sovereign immunity to avoid paying damages for patent infringements, but as the Chief Justice noted in his opinion for the majority in *Florida Prepaid*, Congress had before it no stirring set of facts about states outrageously violating patents and shielding themselves with sovereign immunity.²²⁵ Quite the opposite: no real problem existed at all. The House Report conceded that "many states comply with patent law" and only cited two lawsuits based on a state's patent infringement.²²⁶ When the bill's sponsor, Representative Robert Kastenmeier, questioned Jeffrey M. Samuels, Acting Commissioner of Patents and Trademarks, about the need for the law in the absence of any existing problem,²²⁷ Samuels, defending the law in language that sounded like a clear alert for the pro-

²¹⁸ *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997).

²¹⁹ *Id.* at 525-29.

²²⁰ *Id.* In *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), the Supreme Court had upheld a statute, enacted under the enforcement provision of the Fifteenth Amendment, that suspended the use of literacy tests to qualify voters, even though a challenge brought directly under the amendment, before the statute was enacted, did not find the tests unconstitutional. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); see also *City of Rome v. United States*, 446 U.S. 156, 161 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). The power exercised in the voting rights cases was only "remedial," the *Boerne* Court wrote, and the remedies were indeed, carefully tailored in response to evidence of states' violating rights and shaped so that they only in fact bound the states that had a poor record:

In *South Carolina v. Katzenbach*, the challenged provisions were *confined to those regions of the country where voting discrimination had been most flagrant*, ... and affected a discrete class of state laws, i.e., state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was *limited* to those cases in which constitutional violations were most likely (in order to *reduce the possibility of overbreadth*), the coverage under the Act would *terminate* "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." In *City of Rome*, the Court rejected a challenge to the constitutionality of a Voting Rights Act provision which required certain jurisdictions to submit changes in electoral practices to the Department of Justice for preimplementation review. *The requirement was placed only on jurisdictions with a history of intentional racial discrimination in voting.*

Boerne, 521 U.S. at 525 (citations omitted) (emphasis added).

²²¹ See *Smith*, 494 U.S. at 877-78.

²²² *Id.* at 878.

²²³ *Id.*

²²⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997).

²²⁵ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207-08 n.6 (1999).

²²⁶ *Id.* at 2207 (citing H.R. Rep. No. 101-960, pt. 1, at 38 (1990) [hereinafter H.R. Rep.]).

²²⁷ *Id.* at 2207-08 n.6.

federalism side of the Court, justified the remedy: "I guess as a general policy statement ... as a general philosophical matter ..."²²⁸

College Savings argued that patent infringement when combined with an assertion of sovereign immunity constitutes a deprivation of property without due process.²²⁹ In *Florida Prepaid*, the Chief Justice agreed that a *677 patent infringement "interfere[s] with a patent owner's right to exclude others" and thus is an interference with a property right.²³⁰ Though the infringement itself may amount to a deprivation of property, it is only a deprivation *without due process* if the state also fails to provide an adequate remedy.²³¹ That Congress did not even consider whether the states provided adequate remedies underscores what is for the majority a key point: *678 Congress was not operating in the remedial mode demanded by *Boerne*.²³² Congress was concerned about

²²⁸ See *id.* at 2207 n.6.

²²⁹ *Id.* at 2208. College Savings also claimed that Florida's behavior amounted to a taking without just compensation; the United States, which had intervened as a party to defend the federal statute, only subscribed to the due process argument. *Id.* The Court, in a footnote, rejects the takings argument because of the lack of evidence that Congress had this right in mind and the explicit citation to the due process clause. *Id.* at 2208 n.7. For an article predating *Florida Prepaid* and rejecting both the theory of taking without compensation and deprivation without due process as a basis for upholding the patent remedy against the states, see Christina Bohannon & 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*, 4 *FORDHAM L. REV.* 1435 (1999).

²³⁰ *Florida Prepaid*, 119 S. Ct. at 2208. Satisfying this requirement proved more difficult in the companion case, *College Savings*, discussed in the previous section with respect to the constructive waiver theory. See *supra* Part IV. But *College Savings* also asserted abrogation under the Fourteenth Amendment in that case. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999). The Lanham Act imposes liability on "any person," and The Trademark Remedy Clarification Act ("TRCA"), 106 Stat. 3567, defines that "any person" language to include the state and its instrumentalities and even goes on to explicitly state that there is no immunity based on the Eleventh Amendment or sovereign immunity. *College Savings*, 119 S. Ct. at 2223. The TRCA is obviously an "unmistakably clear statement" of intent to abrogate. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). The majority, in an opinion written by Justice Scalia, holds that the remedy for prohibition of false and misleading advertising does not enforce any right found in Section 1 of the Fourteenth Amendment. *College Savings*, 119 S. Ct. at 2224-25. Justice Scalia notes that the Lanham Act also protects trademarks against infringement and that such provisions may fit under Section 5, as enforcing Section 1's right against the deprivations of property without due process, but *College Savings* only attempted to avail itself of the prohibitions against false and misleading advertising. *Id.* ("The hallmark of a protected property interest is the right to exclude others."). Justice Scalia reasoned that *College Savings* can only cite its losses in the marketplace, not any intrusion by Florida on a protected property interest – an interest that entails "the right to exclude others." *Id.* Although *College Savings* may have property interests in its own business, which suffers if a competitor engages in false or misleading advertising, the harm to those interests does not amount to a "deprivation" within the meaning of the due process clause. *Id.* at 2225. Since the statute does not aim at protecting a Fourteenth Amendment right, Justice Scalia finds it unnecessary to go on to analyze whether the chosen remedy was genuinely remedial within the standards set out in *Boerne*. *Id.* at 2225-26. Justice Stevens, in dissent, argues that "the activity of doing business" is property, essentially it is the property identified in accounting as "good will." *Id.* at 2234. He writes: "A State's deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause." *Id.*

²³¹ *Florida Prepaid*, 119 S. Ct. at 2208 (citing *Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984); *Parratt v. Taylor*, 451 U.S. 527, 529-31 (1981)).

²³² *Id.* The court cites the "limited amount of testimony" about "uncertain" remedies in some states. *Id.* at 2209 n.8. For example, a patent holder might be required to restate the patent claim as a tort or restitution claim to fit within a statute consenting to suit. Under Florida law, *College Savings* could have pursued a takings or a conversion claim in state court or a legislative remedy against the state of Florida. See *id.* at 2209 n.9 (citing *Jacobs Wind Elec. Co. v. Florida Dep't of Transp.*, 626 So. 2d 1333 (Fla. 1993); Fla. Stat. ch. 11.065 (1997)). In *Jacobs Wind*, the State Department of Transportation had built a tidal flow system similar to the system *Jacobs Wind* had patented. 626 So. 2d at 1334. After the DOT refused to pay royalties, *Jacobs Wind* sued in federal court only to be met with the sovereign immunity bar. *Jacobs Wind Elec. Co. v. Florida Dep't of Transp.*, 919 F.2d 726, 727 (Fed. Cir. 1990). *Jacobs Wind* then sued in state court. *Jacobs Wind*, 626 So. 2d at 1335. The lower court had thought that the fact that federal law places patent claims within the exclusive jurisdiction of the federal courts, 28 U.S.C. § 1338(a) (1988), meant that the state courts could not have jurisdiction over these state law claims. *Id.* at 1335. The Supreme Court of Florida held this to be in error, on the ground that federal patent law does not preempt state law remedies that may entail questions of the validity of a patent. *Id.* The state court displayed particular concern that the patent holder not go without a remedy:

This case presents a situation where a party was not just denied a particular remedy but was denied total access to courts to redress its grievances. *This cannot be countenanced* in light of article I, section 21 of the Florida Constitution, which provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Id. at 1337 (emphasis added). The court held that the patent holder could sue under conversion law and under both the federal and state constitutional provisions against taking of private property without due process or just compensation. *Id.* (citing U.S. Const. amends. V, XIV; Fla. Const. art I, § 9, art. X, § 6(a)). The dissenting judge thought it was enough that the patent holder could sue for

providing a uniform and efficient remedy in federal court, which is a valid concern for patent legislation in general and far beyond what would be required to validate an exercise of the commerce *679 or the patent power.²³³ But it does not suffice under the Fourteenth Amendment, where the concern must be the violation of rights; disuniform and less efficient remedies may be troublesome for patent law litigants, but such remedies are not violations of due process.²³⁴

Moreover, the cases defining what it means to “deprive” a person of due process have excluded actions that fall short of intentional or reckless,²³⁵ and Congress had no evidence at all, according to the majority, of state patent infringements that were anything more than negligent.²³⁶ Even as a matter of speculation, the House Report itself conceded that “willful infringement” of patents would be “very rare.”²³⁷ Justice Stevens, in dissent,²³⁸ tries to minimize the importance of the cases requiring more than negligence: this doctrine originated in prison litigation, where the Court expressed concern about flooding the federal courts with the routine torts committed by prison employees.²³⁹ He also attempts to dismiss the problem of lack of evidence of willful infringement by noting that in this case there is an allegation of intentional infringement.²⁴⁰ But the presence of an assertion of intentional infringement *in this case* does not help the Patent Remedy Act fit the *Boerne* doctrine: Congress must be legislating in response to rights violations.*680

The Chief Justice sees it as the Court’s role to protect the states from excessive litigation.²⁴¹ Beyond the textual demand of Section 5 for tailoring the solution in proportion to real problems lie broader pragmatic policies. The legislative history depicts a Congress that does not go about its work with a natural solicitude for the states’ interests, as *Garcia* assumes. The House Report used the prediction that states are likely

prospective relief under *Ex parte Young*, 209 U.S. 123 (1908), or seek a claims bill from the state legislature. 626 So. 2d 1338 (Harding, J., dissenting).

One final point deserves note. In making its decisions, the Florida court analyzed whether Congress intended patent remedies to be exclusive and took special account of the fact that the patent law applicable at the time did not cover the states. Jacobs Wind, 626 So. 2d at 1336. The Patent Remedy Amendment Act had been enacted, but by its terms, it applied only prospectively. See *id.* at 1336 n.7. The Patent Remedy Amendment Act is obviously an expression by Congress that it means to cover the state, and thus, one could now argue that federal law does preempt state law and, because of sovereign immunity, leaves the patent holder without a remedy. Could Congress manufacture violations of due process by the state by explicitly making all enforcement of patents a matter of exclusive federal jurisdiction and expressing an intent to preempt all state law remedies? The Chief Justice cites the Jacobs Wind case but omits any discussion of this fine point. See 119 S. Ct. 2209 n.9. Justice Stevens, however, addresses this point in his dissenting opinion, discussed *infra* at text accompanying notes 245-48.

²³³ Florida Prepaid, 119 S. Ct. at 2209 (“The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.”).

²³⁴ *Id.* at 2209-10.

²³⁵ *Id.* at 2213 (discussing *Daniels v. Williams*, 474 U.S. 327, 332-34 (1986) (holding that an injury caused by negligent act of leaving pillow on a stair not a “deprivation” of due process)).

²³⁶ *Id.* at 2210.

²³⁷ *Id.* at 2210 (quoting H.R. Rep. No. 101-960, at 39 (1990)).

²³⁸ *Id.* at 2211 (Stevens, J., dissenting).

²³⁹ *Id.* at 2213 (Stevens, J., dissenting). Justice Stevens does not pursue this point, but it seems intolerable to restrict prisoners to a special limited meaning of a constitutional right. Perhaps the Court has pursued the goal of limiting prison litigation too aggressively, and perhaps without this pragmatic consideration affecting its judgment the Court should take a new look at the meaning of “deprive” in the due process clause. Sensible though it may be to leave routine prison cases to the state courts and to gather all the patent cases into the federal courts, the interpretation of a constitutional right should not be bifurcated to achieve this goal.

²⁴⁰ *Id.* at 2213-14 n.5. Allegations of intentional infliction of emotional distress are common practice since it is the general practice to send a “cease-and-desist” letter before suing. *Id.*

²⁴¹ See *supra* text accompanying notes 29-37.

to commit inadvertent patent violations as a reason to impose broad liability.²⁴² It heartily embraced the “full panoply of remedies” against the state: this blithe imposition of punitive damages, attorneys’ fees, and the like, and this inattention to the states’ interests clearly disturbs the majority.²⁴³ Congress might have shown concern for the autonomy of the states by limiting liability to nonnegligent infringements or to cases where the state failed to offer an adequate remedy. Not only would this kind of tailoring fit the Section 5 doctrine, but it would also accord with the majority’s ideas about federalism by taking account of the special role of the states in the federal system.

Justice Stevens contends that the Patent Remedy Act expressed Congress’ intent to preempt all state remedies and, without any state remedies in place anymore, state infringements are without due process, and the Patent Remedy Act does fit Section 5 of the Fourteenth Amendment.²⁴⁴ This is an extraordinary bootstrap argument,²⁴⁵ as a simple hypothetical will show. Assume all the states really do have their own perfectly adequate state law remedies for their patent infringements. They are all thus acting scrupulously with regard to individual rights. Congress only has the power to impose lawsuits on the states if the states have fallen short in their regard for individual rights. This has not occurred. Where then would Congress get the power to write the statute that obliterates these state remedies? Under **681* Justice Stevens’ analysis, it gets that power from Section 5!²⁴⁶ But Section 5 only empowers Congress to act in a remedial mode concurrent with and proportionate to the states’ violations. Where are the requisite violations? In Justice Stevens’ analysis the violations spring into being because Congress has itself taken away the protections of rights.²⁴⁷ Section 5 is used to destroy rights protections, rather than to correct rights violations. Either that attempt at preemption is itself a violation of due process or Congress at no point had the power to act under Section 5. Justice Stevens would have Congress using the power to create the foundation for exercising the power: the ultimate bootstrap argument.

Justice Stevens’ dissenting opinion emphasizes the special complexity of patent cases, which has led Congress to make federal jurisdiction in patent cases exclusive and to provide for a single court, the Court of Appeals for the Federal Circuit, to hear all appeals in patent cases.²⁴⁸ The legislative history, according to Justice Stevens, reflects concern about the variation in the application of law from circuit to circuit and the consequent forum shopping by litigants.²⁴⁹ Justice Stevens also points out that the

²⁴² 119 S. Ct. at 2210.

²⁴³ Id. at 2211. The Chief Justice notes that when Congress waived the United States’ sovereign immunity in patent infringement case it took care to restrict the suits. Id. at 2211 n.11. Justice Stevens in dissent minimizes the difference in Congress’ treatment of the United States and the states; he notes that treble damages are only available on a showing of “wanton disregard” for the patent holder’s rights, attorney’s fees are restricted to “exceptional” circumstances, and military considerations warrant a special exception from injunctions for the United States. Id. at 2218 n.15 (Stevens, J., dissenting).

²⁴⁴ Id. at 2211.

²⁴⁵ Justice Stevens appears to launch an attack on the Boerne doctrine: it is worth noting that Justice Stevens joined the main opinion in *Boerne*. 521 U.S. at 510. He also wrote separately, in a concurring opinion that is a model of concision and clear thinking, finding RFRA violates the Establishment Clause. Id. at 536 (Stevens, J., concurring in part).

²⁴⁶ 119 S. Ct. at 2216.

²⁴⁷ Id.

²⁴⁸ Id. at 2213 (citing the House Report on the Federal Courts Improvement Act of 1982, H. R. REP. NO. 97-312, at 20-21 (1981)).

²⁴⁹ 119 S. Ct. at 2213 n.3.

majority's reliance on state court remedies will produce new problems.²⁵⁰ The state courts will produce less uniformity than the federal courts in cases against the state, either because of bias or because of their lack of experience in that area of law; moreover, the Federal Circuit court cannot hear appeals from the state courts, thus cutting off that method of producing uniformity. The United States Supreme Court can take cases originating in the state courts,²⁵¹ but, Justice Stevens points out, the Supreme Court has traditionally rarely taken patent cases; Congress created the Federal Circuit court to deal with the problems of disuniformity caused by the Supreme Court's own reluctance.²⁵²

Justice Stevens would limit *Boerne* to congressional attempts at redefining constitutional rights.²⁵³ The Religious Freedom Restoration Act *682 was a flagrant usurpation of the judicial role: Congress rewrote the test for free exercise clause violations.²⁵⁴ It failed to act in the remedial – “corrective or preventive” – mode and engaged instead in a “definitional” act.²⁵⁵ Justice Stevens argues that since *Boerne* approved of “preventive” measures, it should permit the Patent Remedy Act's response to potential future violations.²⁵⁶ The Patent Remedy Act is not designed to overrule a Supreme Court case or to prescribe the meaning of constitutional law.²⁵⁷ It identifies a particular problem, patent infringement by the states, and tailors a solution that, according to Justice Stevens, affects only the states that contribute to the problem.²⁵⁸ This limited effect gives the statute the proportionality the majority claims it lacks.²⁵⁹ If the problem remains purely theoretical, Justice Stevens argues, the law has no effect on the states.²⁶⁰ But to the “precise” degree that states do infringe patents the statute affects them.²⁶¹ According to Justice Stevens, there is no spillover effect, burdening the states as they attempt to enforce their own laws, the way Religious Freedom Restoration Act impinged on all sorts of legitimate state activities.²⁶² Indeed, states would most likely run into conflicts with patent holders as they moved away from the traditional core of state activity and began to engage in commercial behavior, in competition with private business, as Florida did in the case at hand.²⁶³

Interpretations under Section 5 exemplify the moderate version of enforcing federalism values: the doctrine tells Congress what it must do to impose on the states. The states are presumptively autonomous and Congress, by going about it the right way – that is, the way that ensures consideration of state interests – can rebut that presumptive

²⁵⁰ Id. at 2212.

²⁵¹ See *McKesson Corp. v. Florida Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) (finding Supreme Court review of state court cases deciding questions of federal law, even where the state is a party, “inherent in the constitutional plan”).

²⁵² *Florida Prepaid*, 119 S. Ct. at 2216 n.13 (citing H. R. Rep. No. 97-312, at 22 (1981)).

²⁵³ Id. at 2217-18.

²⁵⁴ Id. at 2217.

²⁵⁵ Id. (quoting *Boerne*, 521 U.S. at 525).

²⁵⁶ Id.

²⁵⁷ Id. at 2217-18.

²⁵⁸ Id. at 2218.

²⁵⁹ Id.

²⁶⁰ Id.

²⁶¹ Id.

²⁶² Id.

²⁶³ Id.

autonomy and intrude on the states. *Boerne* reveals reasons to doubt the *Garcia* dogma and offers doctrine premising Congress' power on doing things that demonstrate solicitude for the states. Let us examine this idea more closely.

The statute at issue in the *Boerne* case, the Religious Freedom Restoration Act, must have stoked the conservative majority's disbelief in the political safeguards of federalism. The statute's sweeping generality *683 broadly empowered individuals to embroil state and local government in litigation, forcing them to muster their resources to defend, perhaps unsuccessfully, any sort of regulation that a religious group found burdensome. The facts of the *Boerne* case itself further stimulated doubts about Congress' reliability as a guardian of state interests. *Boerne* involved no government hostility to religion. A city had endeavored to carry out a traditional and worthy function – zoning to protect landmarks – and to do so in an evenhanded way.²⁶⁴ Even if the city could have shown the “compelling interest” needed to defend the burdens its generally applicable law placed on religion, it would still have had to channel its resources into the litigation process. *Boerne* stood as particularly egregious evidence against *Garcia*'s notion that Congress will protect interests of state and local government.

In *Florida Prepaid*, Chief Justice Rehnquist further shapes Section 5 doctrine. We can read this case to prescribe a process that Congress must follow in order to impose lawsuits for damages on the states. The instructions are: (1) Understand what rights are: show proper deference to the courts' role of saying what constitutional law is; (2) Document the problem: marshal evidence of the states really violating rights guaranteed in Section 1 of the Fourteenth Amendment; and (3) Design a remedy with an eye toward the problem thus documented and tailor the remedy to the evidence with a sensitivity to the interest of the state in being free of excessive restrictions. Do not make overbroad remedies reaching out toward possible additional problems that have not been documented. Do not indulge in sweeping generalities sacrificing state autonomy for symmetry of language or “philosophical” appeal. The Section 5 doctrine thus embodies a presumption of deference to the states and requires leaving them alone to perform their separate functions in their separate ways. If the states abuse this autonomy by violating rights, they justify a transfer of power to the federal level. Congress cannot take power simply because it thinks a uniform rule is better or because it thinks the states *might* violate rights.

Justice Stevens, in his dissent, complains that it is not fair to look back on statutes passed before the Court laid out the *Boerne* instructions and to find fault in Congress' failure to follow them.²⁶⁵ When it passed the Patent Remedy Act, Congress was just trying to catch up with the high standards *684 laid out in *Atascadero*.²⁶⁶ Justice Stevens'

²⁶⁴ The church that brought the lawsuit wanted to use RFRA to free itself from the restrictions on altering its building. 521 U.S. at 511-12. RFRA offered special privileges to religious organizations to avoid restrictions that fell evenly on all property owners in the landmark district. See *id.* at 536-37 (Stevens, J., dissenting).

²⁶⁵ 119 S. Ct. at 2214.

²⁶⁶ See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). *Atascadero*'s requirement of a clear statement denies Congress the power to impose lawsuits on the states unless it makes a show of noticing that its legislation will reach the state. It is not enough to create liability that then happens to include the states in its net. One might say that this requirement is fully consistent with the *Garcia* notion that Congress naturally takes account of the states interests whenever it is legislating; unwitting effects might not have been noticed. Explicitness about the inclusion of the states ensures that the *Garcia* solicitude for the states will be stirred into action. Of

portrayal makes it look as though the Court keeps throwing out new obstacles, peevishly impairing Congress from getting anything done. This portrayal misses the point. If the premise of *Garcia*, that Congress will protect the states, were really in force, Congress would, on its own, have gone through the steps of the *Boerne* instructions. That it did not provides even more reason not to believe the *Garcia* proposition.

Florida Prepaid elicited commentary warning that the states could now violate patents with impunity. Professor Fried has written that this problem makes overturning *National League of Cities* preferable.²⁶⁷ He speculates that the Court regrets extending the commerce power so far and is now trying to make up for the perceived mistake in *Garcia* with misguided doctrine designed to mitigate its effects.²⁶⁸ I would speculate that the conservative majority does disapprove of *Garcia*, but that it also deliberately rejects the option of going back to *National League*. It is attempting to structure a new and better sort of doctrine that enforces federalism in a more moderate, process-oriented way. The question is whether this new approach to enforcing federalism is better or worse than simply carving out areas of state functioning and permanently disempowering Congress. Professor Fried takes the position that, without *National League* in place to protect the states against damaging intrusion by Congress, the Court makes doctrine that unfairly burdens the legitimate interests, like the interests of the patent holder in *Florida Prepaid*.²⁶⁹ *685

But it is not true that the states can now outrageously violate patents with impunity. If the *Florida Prepaid* decision emboldens the states to infringe on patents and then to refuse to offer adequate remedies after the fact, they will be manufacturing the very foundation of evidence needed to empower Congress under the Fourteenth Amendment. "Widespread and persisting deprivation of constitutional rights"²⁷⁰ are exactly what *Boerne* requires to support the inference that a uniform federal right of action against the state is truly remedial: it would be a solution congruent with and in proportion to the problem. The moderate federalism-enforcing approach begins with the assumption that things will work well enough with the states left alone. After *Florida Prepaid*, that presumption prevails, but it can be rebutted. It is now up to Congress to follow the federalism-enforcing instructions: amass evidence of the states' violating patents and

course, *Atascadero* is the product of the side of the Court that does not believe that Congress will exercise caution in burdening the state, so for them the requirement takes on a greater importance. Having to name the states simply makes it harder for Congress to impose burdens and spurs opponents of these burdens into action at an earlier stages.

²⁶⁷ Charles Fried, *Supreme Court Folly*, N.Y. TIMES, July 6, 1999, at A17.

²⁶⁸ Id.

²⁶⁹ Id.

The Court's real complaint is with the wage and hours law, which it may reasonably be argued should not be allowed to apply to the states. The straightforward thing to do would have been to reinstate the 1976 decision and declare that states have immunity from this intrusion of the Federal Government's substantive power. To remove an employee's right to sue is a backhanded and awkward way to nullify this law, and led to the absurd result we enjoy now.

Id.

²⁷⁰ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2210 (1999) (citing *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)). Justice Stevens contends that the Supreme Court "has never mandated that Congress must find 'widespread and persisting deprivation of constitutional rights,' in order to employ its § 5 authority." Id. at 2217. It would seem that he meant to write that the Court "had" not said as much at the time of the Patent Remedy Act. That is, Congress had no notice that it needed to provide a foundation of this kind. *Boerne* does purport to find this requirement in the earlier case law and certainly uses that case law in making its distinction between the valid voting rights laws, based on strong findings, and the Religious Freedom Restoration Act. Oddly, Justice Stevens finds it "unfair" to require Congress to meet the requisites of doctrine announced after the passage of the statute. Id. at 2214; see discussion *infra* text accompanying notes 267-68.

denying adequate remedies in their own courts and tailor a federal court remedy to this documented problem, preferably with a sensitive ban on punitive damages and attorneys fees.

VI. CONCLUSION

For less than a decade, Congress enjoyed the power, acknowledged in *Union Gas*, to use its Article I powers to impose private lawsuits for damages on the states without their consent. When a one-vote shift in the balance of power occurred, the Supreme Court, in *Seminole*, withdrew that acknowledgment. Another one-vote shift could easily resurrect *Union Gas* and consign this year's *Alden* symposia to dustbin of legal scholarship, but for now it is our task to sort through the aftermath of *Seminole*. The *Alden Trilogy* *686 cases represented three strategies to evade the full force of *Seminole*, and only one strategy now remains. Neither relocating to state court nor recasting abrogation in terms of constructive waiver will work, but, as was clear at the time of *Seminole*, a statutory abrogation supported by the Fourteenth Amendment Section 5 power will.

Individual litigants using federal law to sue the state for retrospective relief therefore must contend that Section 5 supports the federal law on which they rely. Thus, the conservative majority's new limitations force litigants to speak in terms of constitutional rights, for it is only to enforce rights that Congress may activate the lone litigant to sue the state and seek recompense from the state's treasury. As to all other sorts of claims, either the state may make its own decisions about which of the multitudinous claims on the state treasury will prevail or Congress will have to provide the resources to make federal public enforcement possible.

All of the doctrine created this year is tenuous and subject to change, so we are, one might say, entering a test period. How will this new doctrine work?

1. How will it work to place so much emphasis on saying what constitutional rights are?

We are now experiencing litigation over, for example, whether remedies for age discrimination and discrimination against the handicapped are really enforcements of Fourteenth Amendment rights.²⁷¹ If *Seminole* had not overturned *Union Gas*, this inquiry would have been unnecessary. Perhaps some good will come of arguing about and deciding what Fourteenth Amendment rights really are. But perhaps at some point too many things are too expediently packaged as rights, thus hemming in future lawmaking. Perhaps too few things will qualify as Fourteenth Amendment rights, and worthy claims will go unsatisfied. Experience with the new doctrine in action should prove useful.

2. How will Congress function with this new set of instructions?

²⁷¹ See, e.g., *Kimel v. State of Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (federal age discrimination act not supported by Fourteenth Amendment power); *Muller v. Costello*, 187 F.3d 298, 309-310 (2d Cir. 1999) (discrimination against the disabled).

The Court no longer trusts Congress to take care of the states' interests, but has structured doctrine to limit Congress to choices that do protect the states. Congress can respond to that doctrine by absorbing and following the *687 instructions it embodies. Congress can take this setback as an opportunity to hone the political safeguards of federalism.²⁷² The advice to Congress is not hard to discern: Use the Fourteenth Amendment power meticulously, only creating private actions against the state where a real problem of rights violations has arisen and, even then, shaping the remedy with sensitivity to the demands on the financial resources of the states. Where regulation does not fairly fit into the Section 5 power, do not attempt to shoehorn it in; that only builds up more evidence that Congress does not have the qualities the *Garcia* Court was willing to perceive. Instead, admit that that regulation belongs under the Commerce Clause or other Article I power and choose a permissible enforcement mechanism. If you want to make retrospective relief available, empower federal officials to seek that relief; enforcement *688 must come from the same place as the regulation. Yes, that is more difficult and expensive, but willingness to pay the price demonstrates solicitude for the states. If Congress responds in a positive way to the new doctrine, it may influence at least the more moderate center of the Court when the question of overruling *Seminole* turns up at some future date.

3. How will the states treat their new freedom from lawsuits?

The states might abuse the freedom the Court has preserved for them. They may use it as an opportunity to deprive citizens of their legal rights, by not paying workers the overtime to which federal law entitles them, flouting valid patents and trademarks, polluting the environment, and so forth. Just as Congress has itself undermined the belief that Congress will protect the states' interests, the states might undermine the trust the conservative side of the Court now places in them. In the past, the actions of the states themselves eroded trust in them and led to law that relocated that trust in the national government. Look at the poor performance of many of the states during Reconstruction and during the Civil Rights Movement: Congress passed statutes that intruded on the states' erstwhile autonomy, and the Court's constitutional interpretation supported that

²⁷² For example, "a broad bipartisan coalition" in Congress has drafted legislation (called the "Federalism Accountability Act" and the "Federalism Act," in the Senate and the House, respectively) in a deliberate attempt to respond to the jurisprudence of the Alden trilogy cases. Steven Labaton, *Anti-Federalism Measures Have Bipartisan Support*, N.Y. TIMES, Sept. 6, 1999, at A12; cf. *Corrections*, N.Y. TIMES, Sept. 7, 1999, at A2. ("A headline yesterday about efforts in Congress to shift political power to the states referred incorrectly to the movement to limit Congress' ability to impose laws on the states. It is known as Federalism, not anti-Federalism."). The legislation, supported by such groups as the National Governors' Association, the National Conference of State Legislatures, and the National League of Cities, would abolish implied preemption of state law and empower state and local government to bring lawsuits challenging federal statutes that lack explicit preemption statements.

Opposing the bill is "an unusual coalition of big business, environmental groups, labor organizations and consumer advocacy groups." The business groups reportedly fear having to comply with diverse standards on such matters as safety. One might think the consumer groups would correspondingly appreciate access to the state law that might offer greater remedies. (After all, the current tobacco litigation was made possible by the Supreme Court's preservation of state law by limiting the scope of preemption in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). Apparently, at least some consumer groups reflexively oppose anything that looks like a weakening of federal power to impose uniform standards.

The bill might represent the sort of solicitude for the states that justifies *Garcia's* belief in the political safeguards of federalism. But see Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990) (describing congressional self interest in not preempting state regulation). By contrast, President Clinton, reportedly in an attempt to render the proposed legislation unnecessary, issued an executive order on federalism that requires federal agencies to have a "federalism assessment officer" to consult with local government officials and to consider the effect of regulations on local government. Labaton, *supra*, at A12. The President and other executive branch officials oppose the authorization of federal lawsuits as creating undesirable inefficiency in the lawmaking process. *Id.* This preference for federal efficiency over state interests is the sort of behavior that activates the federalism-enforcing side of the Court.

intrusion.²⁷³ The current willingness of the conservative side of the Court to skew toward state interests, I suspect, draws on a background belief that the states' potential to do good for people outweighs the risk that they will do harm. The liberal side of the Court tends, I think, to retain more vivid memories of the negative side of the states' historical record: touting the states' positive role rings false to them. The "test period" can affect these background beliefs. If states use their new freedom to deal sensibly and fairly with the many claims on their limited resources, the current doctrine is more likely to survive than if states see the new doctrine as *carte blanche* to flout federal law. Moreover, some flouting of federal law can be characterized as a violation of due process, so states engaging in flagrant abuses will be generating the evidence Congress needs in order to act under Section 5 of the Fourteenth Amendment. Even if the Court leaves the current doctrine in place, the states have been given the power to throw their own autonomy away. *689

I am not dismayed by the Court's new sovereign immunity cases, though I realize it strikes many people as wrong that there can be federal law binding the states but not enforceable by the individuals the law aims to benefit. The conservative side of the Court is struggling to find some way to give enforceable meaning to federalism; it strikes these Justices as wrong that such a fundamental principle could lose all meaning in courts and be left to Congress, the states' competitor for power, to define. In an attempt to preserve federalism, the Supreme Court has for the most part sought to limit the way Congress can do things, not to place areas of regulation wholly off-limits to Congress.²⁷⁴ This effort at doctrine-making deserves some credit as reasonably moderate and responsive to the needs of the competing institutions: the states, the Congress, and the courts themselves. Congress itself provoked this doctrine by its failure to live up to the too-optimistic trust that welled up in the *Garcia* case.

It seems very likely that the Court will revisit the question of the scope of Congress' power to abrogate state sovereign immunity, and a change of one or two members of the Court can make all the difference. But the institutions affected by the doctrine have a role to play creating the context for that future decision. It remains to be seen how well the newly calibrated doctrine will work, and the different players in the system have an opportunity to demonstrate how trustworthy they really are.

²⁷³ See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (supporting abrogation of sovereign immunity under the Fourteenth Amendment); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (broad interpretation of the commerce power into areas once left to state regulation in the context of validating the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (1964)).

²⁷⁴ Perhaps only *Lopez* runs counter to this trend of focusing on the way Congress intrudes on the states.