



6-1-2001

Sovereignty and Union: The Legends of Alden, Of

Louise Weinberg

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Louise Weinberg, *Sovereignty and Union: The Legends of Alden, Of*, 76 Notre Dame L. Rev. 1113 (2001).
Available at: <http://scholarship.law.nd.edu/ndlr/vol76/iss4/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

OF SOVEREIGNTY AND UNION: THE LEGENDS
OF ALDEN

*Louise Weinberg**

INTRODUCTION	1114
I. SITUATING ALDEN	1118
A. <i>The Struggle over Union Gas</i>	1121
B. <i>Ex parte Young</i>	1129
C. <i>The Diversity Theory Controversy</i>	1131
D. <i>Take That, Henry Hart!</i>	1141
II. THE WAGES OF FEDERALISM	1141
A. <i>Fiscal Fancies: Little Luxuries and Staggering Burdens</i>	1141
B. <i>Overshooting the Garcia Target</i>	1145
III. THE MAGIC MOUNTAIN: A MYTHICAL THEORY OF FEDERALISM	1146
A. <i>The Myth of Sovereign Immunity and the Constitutional "Concept of States"</i>	1146
B. <i>Our New Antebellum Constitution</i>	1148
C. <i>The Myth of the State as the True Sovereign</i>	1149
D. <i>States of Imagination: The Mythical Theory of the Prëexisting State</i>	1151
E. <i>Calhoun's Ghost</i>	1156
F. <i>The Myth of Retained Sovereignty: The Tenth Amendment and the "Conditions" of Ratification</i>	1157
IV. THE MYTH OF THE SEAMLESS WEB	1158
A. <i>The Myth of the Background Understandings</i>	1158
B. <i>Castle in the Sky: Alden's Mythical "Constitutional Structure"</i>	1160
C. <i>The Anti-Commandeering Embarrassment</i>	1165

* Holder of the Bates Chair and Professor of Law, The University of Texas. I am grateful to the editors and to Jay Tidmarsh for their invitation to write for this issue. The views expressed in this Article were first offered in a talk presented at a faculty colloquium on "Federalism and the Eleventh Amendment" at the University of Texas School of Law in September 1999 and again, in somewhat altered form, in a panel talk presented at the Conference of State Chief Justices held at the University of Texas School of Law in February 2000.

V. OUR ANTIFEDERALIST FOUNDERS.....	1167
VI. THE MYTH OF ALDEN'S INCONSEQUENCE	1169
A. <i>A Little Problem of Due Process</i>	1170
CONCLUSION: TWO BAD MELODRAMAS, ONE LAST ACT	1181

INTRODUCTION

Arguably the big federalism case in a time of big federalism cases is not *Bush v. Gore*,¹ or *Lopez*,² or *New York*,³ or even *Boerne*.⁴ My nomi-

1 121 S. Ct. 525, 529, 532–33 (2000) (ruling, in a contested presidential election, that a state supreme court violated the Equal Protection Clause by ordering a state-wide recount of machine-rejected ballots under the state's statutory standard of "clear intent of the voter;" interpreting the state's law to require a deadline such that there was no time for the recount under more detailed standards; thus determining the outcome of the presidential election).

2 *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that Congress lacks commerce power to criminalize possession of guns near schools, such possession not being an economic activity with a substantial effect on interstate commerce); *see also* *United States v. Morrison*, 120 S. Ct. 1740, 1748–54 (2000) (holding, in part under *Lopez*, that Congress had insufficient commerce power to enact the Violence Against Women Act).

3 *New York v. United States*, 505 U.S. 144, 161, 177 (1992) (holding, under the Tenth Amendment, that Congress may not "commandeer" a state's legislative processes to enact a federal program; striking down the "take title" provision of the Low Level Radioactive Waste Policy Amendments Act, while acknowledging that Congress has Article I power over radioactive waste disposal); *see also* *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not "commandeer" a state's administrative processes to carry out a federal program, striking down the interim "background checks" provision of the Brady Handgun Violence Prevention Act). The Court's new "anti-commandeering" principle revives, probably usefully, a rule from the otherwise indefensible *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842) (Story, J.) (holding, among other things, that Congress may not require state magistrates to implement the federal Fugitive Slave Act of 1793):

As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.

See also *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 109–10 (1861) (holding that Congress may not require a state governor to extradite a fugitive from justice).

4 *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding, under Section 5 of the Fourteenth Amendment, and on principles of federalism, that Congress may not enact remedies for violation of the Fourteenth Amendment unless the remedies are proportional and congruent to a substantial pattern of violation; striking down at least as to state actors the Religious Freedom Restoration Act); *see also* *Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963, 967–68 (2001) (holding, under *Boerne*, that Congress's Fourteenth Amendment power is insufficient to overcome state sovereign immunity in an action under the Americans with Disabilities Act; holding also that discriminations

nation would go to the case that is also the big case on the dual-court system, *Alden v. Maine*.⁵ That is the case in which the Supreme Court, dividing five to four along its usual political fault line, held that Congress has no commerce power⁶ to enforce federal law against an unconsenting state. Only three years earlier, in the stunning case of *Seminole Tribe of Florida v. Florida*,⁷ the Court had definitively stripped Congress of commerce power to make federal law enforceable against the states in the federal courts.⁸ But *Seminole* left intact the option of private suit against a state in the state's own courts.⁹ *Alden* extends *Seminole* to those courts. The rule of *Alden* is evidently intended to

against the disabled are subject only to minimal rational-basis scrutiny); *United States v. Morrison*, 120 S. Ct. 1740, 1755, 1759 (2000) (striking down, in part under *Boerne*, the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67, 91–92 (2000) (holding, under *Boerne*, that Congress's Fourteenth Amendment power is insufficient to overcome state sovereign immunity in an action under the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (holding, in part under *Boerne*, that Congress cannot make the patent laws enforceable as against an infringing state on a theory that the state deprives the patentee of property without due process of law).

5 527 U.S. 706, 712, 758–60 (1999) (holding that Congress lacks commerce power to impose liability on a state in the state's own courts for a violation of federal law; striking down, as against a state employer, the private cause of action provision of the Fair Labor Standards Act).

6 The *Alden* Court uses broad Article I language, but also suggests that Congress has Spending Clause power to extract waivers of immunity from the states as conditions on government spending. See *Alden*, 527 U.S. at 755 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)). It is unclear whether Congress retains other Article I powers to condition access to federal programs, or to federal rights, on waiver.

7 517 U.S. 44 (1996).

8 See *id.* at 47, 76 (striking down the provision of the Indian Gaming Regulatory Act that authorized a tribe to sue a state to compel it to comply with a statutory duty of negotiation); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. at 66–67, 91–92 (holding the Age Discrimination in Employment Act unenforceable as against a state); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. at 647–48 (holding the patent laws unenforceable as against a state); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (holding the trademark laws unenforceable as against a state).

9 Although little used, prior to *Alden* the option of suing a state in its own courts on a federal cause of action was probably fully available. Under the principle of *Howlett v. Rose*, 496 U.S. 356, 383 (1990), state courts were not free, and remain not free, to apply state-law principles of sovereign immunity to bar actions under federal law. To do so would be inconsistent with the Supremacy Clause. In *Howlett*, the particular state immunity rule had become discriminatory, applying only to the claimant with a federal cause of action. *Id.* at 366–79. But the case would probably come out the same way whether or not the immunity were discriminatory. On the general utility of discrimination analysis in supremacy cases, see Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1778–83 (1992).

come into play in the state's courts whenever—indeed, *even though*—the state defendant is also immune in federal court. Thus, Congress is now substantially without commerce power over state violators of federal law in either set of courts.¹⁰

In this Article, I take up features of Justice Kennedy's opinion for the *Alden* Court that seem worthy of the term the law reviews reserve these days for that which is without foundation: "myth." In this I do not mean to heap particular opprobrium upon Justice Kennedy. The *Alden* myths are to be found in earlier opinions and authorities. Expressions and analyses employed by Justice Kennedy date back at least to 1890, to Justice Bradley's unfortunate opinion in *Hans v. Louisiana*.¹¹ It is to *Hans* that we owe the spurious Eleventh Amendment rule that the states are immune from private suit in federal courts even in cases arising under federal law.¹² But although *Hans* was unfounded, it was not as wrong in 1890 as it is now, for reasons that will appear.¹³ So it is astonishing that *Hans v. Louisiana* is still law. In *Seminole Tribe*, the Rehnquist Court majority characteristically spurned a golden chance to rid us of *Hans* and made it even more of an obstacle to justice than it had been before. *Alden* manages to top even that dubious achievement.

I begin by situating *Alden* (a case that came up through state court¹⁴) within the body of analogous jurisprudence governing cases

10 On the current power of Congress to limit or eliminate the jurisdiction of all courts in cases of which it disapproves, see Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 TEX. L. REV. 1405 (2000). For analysis of the power of Congress to vest jurisdiction in state as well as federal courts (which turns out to be another way of describing the power of Congress to vest questionable jurisdiction in federal courts), see Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731 (1995).

11 134 U.S. 1, 20–21 (1890) (holding that the states have Eleventh Amendment immunity from suits even in nondiversity cases arising under federal law). This provenance is also noted, with respect to *Alden*'s law-office history, in John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1094, 1100 (2000).

12 The Eleventh Amendment is explicitly addressed only to diversity cases. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

13 See *infra* notes 86–90 and accompanying text.

14 *Alden* was originally brought in federal court; after the intervening decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the First Circuit Court of Appeals affirmed dismissal on Eleventh Amendment grounds, see *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997). The *Alden* plaintiffs then brought their claim against Maine in state court. See *Alden v. Maine*, 527 U.S. at 712.

in federal courts. I emphasize here certain recent radical changes in preëxisting jurisprudence. I view all this against the background of recent controversy concerning the Eleventh Amendment's meaning. I add my own perspectives and arguments on *Alden* to an already substantial literature.¹⁵

I focus on the particular features of *Alden* that earn the designation of "myth." *Alden* rests on two longstanding theoretical myths: a theory of state sovereignty and a theory of preëxisting states. In the main body of the Article, I analyze and provide counterarguments to these positions. I point out that the Civil War itself must be understood as transforming national power vis-à-vis the states. I also note,

15 For critiques of *Alden*, see, for example, Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-sense*, 49 AM. U. L. REV. 611 (2000); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283 (2000); William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691 (2000); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000); Ana Maria Merico-Stephens, *Of Maine's Sovereignty, Alden's Federalism, and the Myth of Absolute Principles: The Newest Oldest Question of Constitutional Law*, 33 U.C. DAVIS L. REV. 325 (2000); Robert F. Nagel, *Judges and Federalism: A Comment on "Justice Kennedy's Vision of Federalism,"* 31 RUTGERS L.J. 825 (2000); Nowak, *The Gang of Five*, *supra* note 11; John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2000); James E. Pfander, *Once More Unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817 (2000); David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. 753 (2000); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000).

For more conciliatory approaches, see, for example, Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631 (2000); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323 (2000); William P. Marshall, *Understanding Alden*, 31 RUTGERS L.J. 803 (2000); William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and Alden v. Maine*, 75 NOTRE DAME L. REV. 1069 (2000); Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161 (2000); Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000); Michael Wells, *Suing States for Money: Constitutional Remedies After Alden and Florida Prepaid*, 31 RUTGERS L.J. 771 (2000); Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919 (2000); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000).

Some of my earlier reflections on *Alden* appear in Weinberg, *The Article III Box*, *supra* note 10, at 1427–31. At this writing, a splendid seminar has been announced, to be held at Stanford, on *Alden's* sovereignty theory, a main subject of the present Article.

with others, that *Alden*'s rhetoric of doctrinal inevitability is a myth, since *Alden* is in tension with substantial bodies of constitutional jurisprudence. I take up the notion that *Alden* has little significance. I point out that the major alternative remedy relied on in *Alden* is a myth on the facts of *Alden*, a problem which, with one exception, I do not find addressed in other commentary. Moreover, the other remedial options *Alden* purports to leave open can be inadequate or illusory. I also argue that *Alden* cannot be confined to commercial statutory cases in the evident ambit of Article I, but threatens the enforcement of constitutional rights, notwithstanding Congress's Fourteenth Amendment power to remedy civil rights violations. I argue, with others, that it is a myth that state immunity from federal law enforcement can be reconciled with the Constitution, that individual rights can be balanced against a supposed governmental privilege—not to confine or regulate—but to violate them. The conclusion is that the *Alden/Seminole/Hans* dispensation is and has been both intellectually unfounded and unjust.

I. SITUATING ALDEN

In *Alden*, the Supreme Court held that an unconsenting state could not be sued in its own courts for a violation of federal law.¹⁶ *Alden* might be supposed to hold that when state courts administer federal claims they must defer to their own laws on sovereign immunity whenever federal courts would do so. That would be a mistaken reading of *Alden*. *Alden* does not have to do with a state's existing sovereign immunity. Rather, *Alden* fashions a new, distinct, *federal* defense.¹⁷ The new defense, like the Eleventh Amendment, is a "constitutional privilege."¹⁸

16 *Alden v. Maine*, 527 U.S. 706, 712, 758–60 (1999).

17 The Supreme Court, of course, has no general power over the state law of sovereign immunity. It has exercised federal common law-making power to fashion federal defenses, however, even to state claims. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504–13 (1988) (fashioning a new federal common-law defense for military contractors in cases under state products liability law). This power is *a fortiori* in cases raising federal claims; the Court has power to say who shall be liable or not for an infraction of federal law or a constitutional violation. See *Howlett v. Rose*, 496 U.S. 356, 383 (1990) (holding that a state may not selectively shield its school boards from liability for a violation of the Constitution); *Harlow v. Fitzgerald*, 457 U.S. 800, 808–19 (1982) (surveying Supreme Court cases on official immunities for violations of federal civil rights). The *Alden* Court ruled, significantly, not as a matter of the federal common law of state immunity to federal claims, but rather as a matter of constitutional law. A chief difference between these sources of law, of course, is that the latter strips Congress of the power of ordinary legislative override.

18 *Alden*, 527 U.S. at 754.

On first reading, *Alden* can be understood simply as an extension, albeit an extraordinary one, of the Eleventh Amendment—that first successor to the Bill of Rights that is customarily read to render a state immune to suit in federal courts. Justice Kennedy, the author of *Alden*, links the scope of the new defense in state courts to the scope of the Eleventh Amendment defense in federal courts.¹⁹ In other words, in cases after *Alden*, the scope of the immunity it declares will be adjudicated not under the state's view of its own sovereign immunity, but under analogous federal cases on the Eleventh Amendment.²⁰ But it would be saying too much to say that *Alden* is an Eleventh Amendment case. Rather, the *Alden* Court insists that the new immunity it announces emerges from background understandings of state immunity which allegedly preceded the Constitution, rather than from anything in the constitutional text.²¹ The rule of *Alden* is to be found in our unwritten—our implied—Constitution.²² Yet it would be saying

19 See *id.*, at 712–13 (Kennedy, J.) (noting common features of state immunity law and Eleventh Amendment immunity, including the state's power of waiver and the applicability of the immunity defense to private lawsuits only); see also *id.* at 713 (“We have, as a result, sometimes referred to the States’ immunity from suit as ‘Eleventh Amendment immunity.’ The phrase is convenient shorthand . . .”).

20 It is well established that the sovereign trying a case may, in its own courts, define not only its own sovereign immunity, but the immunity of a sister sovereign. For example, it is the federal Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441 (d), 1602–1611 (1994), that determines the scope of immunity of, say, France, in all American courts, *id.* § 1604, rather than French law. Similarly, the scope of immunity of Nevada, say, in an action in California, is not necessarily determined by Nevada's law, but may be determined by California's. See *Nevada v. Hall*, 440 U.S. 410, 425–27 (1978) (holding California free to apply its own law to determine the sovereign immunity of Nevada in a wrongful death suit in California). Federal law on state immunity is unique in one way. The nation projects its view of a state's sovereign immunity beyond the nation's own courts into the courts of that state. This feature of *Alden* is also seen in its aspect of lifting the alleged immunity in the earlier case of *Howlett v. Rose*, 496 U.S. 356, 383 (1990) (holding that federal law preempts a state's discriminatory immunity against federal claims).

21 See *Alden*, 527 U.S. at 713 (Kennedy, J.):

[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

22 *Alden* immunity joins such other features of the unwritten Constitution as the foreign relations power and the power of Congress in admiralty.

too little to say that *Alden* is simply about the background understandings of state immunity that preceded the Constitution. Rather, *Alden*, of course, is more directly about the power of Congress. *Alden* holds that Congress has no commerce power to change this new-found old immunity, precisely because the immunity is constitutionally required. *Alden* extends to state courts the rule of *Seminole Tribe of Florida v. Florida*, the Court's shocking 1996 case stripping Congress of commerce power to expose a state to liability in federal courts.²³

These new blanket rules are intended to shield the unconsenting state from liability. When put together with *Lopez* and *Boerne*, the Rehnquist Court's new general limits on the power of Congress, that purpose and more is substantially accomplished. These developments advance the Rehnquist Court's apparent concern about excessive private litigation against the states,²⁴ as well as the Court's "new federalism" policies diminishing the power of the nation vis-à-vis the states. Almost as importantly, *Alden* deftly erases the Eleventh Amendment, with its inconvenient text, and slides the common law into its place.²⁵ But *Alden*'s narrow holding—denying Congress's commerce power on federalism grounds—in itself, as an abstract proposition—should give us pause, even setting to one side its apparent effect upon the rule of law.

When the Court strikes down an act of Congress in the usual case, Congress can go back to the drawing boards and rewrite the law constitutionally. In such a case, Congress "got it wrong" the first time by invading some individual right; but Congress can still accomplish whatever legitimate end it was trying to accomplish, as long as it avoids the constitutional difficulty. *Alden* is not that sort of case. When the Supreme Court strips Congress of legislative power in circumstances

23 See *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 59–66 (1996) (holding that Congress has insufficient commerce power to abrogate state Eleventh Amendment immunity in federal courts) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

24 See Weinberg, *The Article III Box*, *supra* note 10, at 1420–22 (on "Tort Reform and Constitution Reform;" discussing the Court's distaste for litigation).

25 *Alden*'s technique of substituting the common law for inconvenient statutory text has been seen also, e.g., in the case of *Younger v. Harris*, 401 U.S. 37, 43–54 (1971), in which a common-law doctrine of "Our Federalism" was substituted, in certain civil rights cases, for the inconvenient text of the Anti-Injunction Act, 28 U.S.C. § 2283. The statute threatened to become ineffective to prevent a hemorrhaging of state prosecutions and other cases into federal equity. Cf. *Mitchum v. Foster*, 407 U.S. 225 (1972) (holding the Civil Rights Act of 1871, 42 U.S.C. § 1983, an expressly codified exception to the Anti-Injunction Act). See LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* 695–745 (1994).

in which, as in *Alden*, Congress is infringing no individual right,²⁶ the Court enters the dangerous territory of *Dred Scott v. Sandford*²⁷ or the pre-1937 New Deal cases.²⁸ History does not forgive those cases, precisely because they stripped the legislative branch of power to try to solve pressing national problems. And when the Court strips Congress of power trans-substantively, as it did in *Alden*, the Court must move very cautiously indeed.

A. *The Struggle over Union Gas*

The generalist reader here may be troubled by an antecedent question: *Setting Alden to one side, why isn't Seminole Tribe right? All Seminole Tribe holds is that Congress's commerce power does not enable Congress to undo Eleventh Amendment immunity. But surely Congress has no power at all over the states' Eleventh Amendment immunity, since the Eleventh Amendment is a feature of the Constitution. Why should Seminole Tribe have been surprising? And if Seminole Tribe was not surprising, and the immunity is based on background understandings, why should Alden be surprising, extending the states' constitutional privilege over both sets of courts?* To clarify the answer to this it will be useful at this point to consider a struggle in the Court that furnished the immediate context of *Alden*: the battle over *Union Gas*.

At the time of *Alden*, there had been in place for some time a statutory private right to sue for violation of the Fair Labor Standards Act. Congress eventually extended this right to government workers.²⁹ It is a perhaps regrettable fact that in order to provide minimal protections for all American employees, including people who work for the government, as Congress came to understand, concomitant obligations must be imposed even on state governments. It is difficult to regulate a great national market if a substantial part of that market is exempt. In fact, of course, the state government may well be the largest single employer in a given state. So Congress exposed the

26 For an extended argument on this point, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 171-259 (1980).

27 60 U.S. (19 How.) 393, 450-51 (1856) (Taney, C.J.) (holding that Congress had no power to settle the sectional controversy over slavery in the territories (rendering the Civil War almost inevitable)).

28 See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 322-24 (1936) (holding that Congress had insufficient commerce power to set nationally negotiated labor standards (rendering some of the acute problems of the Great Depression virtually unresolvable by the legislative branch)).

29 See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994)).

states, as employers, to the same potential liabilities to which it exposed other employers. Jurisdiction of these cases was vested in any court of competent jurisdiction, state or federal.³⁰ Did Congress have the power to do all this?

We know that, at least until the Court revisits the question, Congress has substantive lawmaking power over fair labor standards even when the employer is a state. That is the embattled ground the nation claimed in *Maryland v. Wirtz*,³¹ that the states regained for a while in *National League of Cities v. Usery*,³² and narrowly lost again in the *Garcia* case.³³ Under *Garcia*, Congress can require a state as employer to conform to federal labor standards. But can Congress *enforce* those standards against the state? The administration might be reluctant or lack resources to prosecute or to seek injunctions against state officials for every infraction.³⁴ The question, then, is whether Congress can privatize the job, enlisting the plaintiffs' bar in the national enforcement effort. In other words, can Congress subject the state as an employer to *private* suit? That question obviously becomes increasingly important to the extent other enforcement mechanisms are insufficient or compromised in some way.

30 See 29 U.S.C. § 216(b) (1994) (codifying the private cause of action and jurisdictional provisions of the Act).

31 392 U.S. 183, 199–201 (1968) (holding that Congress could extend the Fair Labor Standards Act to state schools and hospitals; noting that professional employees were at that time excluded from the coverage of the statute); see also *United States v. California*, 297 U.S. 175, 185–89 (1936) (sustaining the constitutionality of the Safety Appliance Act as applied to a state-owned railway). Interestingly, in *Wirtz*, Justice Douglas, joined by Justice Stewart, dissented. Douglas complained that the regulations at issue threatened to “overwhelm state fiscal policy.” *Wirtz*, 392 U.S. at 203 (Douglas, J., dissenting).

32 426 U.S. 833, 851–52 (1976) (holding that Congress cannot subject state employers to the provisions of the Fair Labor Standards Act, because to do so would “substantially restructure” public services), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–57 (1985); see also *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (refusing to construe the Age Discrimination in Employment Act to protect a state’s judiciary from mandatory retirement absent clear language in the statute).

33 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–57 (1985) (holding, by a 5:4 vote, that Congress may set labor standards for state government workers, in part on the thinking that the states were involved in the political process leading to the legislation).

34 See *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965) (holding that the states are not immune in actions brought by the United States; holding also that no explicit statutory authorization is necessary); cf. *United States v. California*, 332 U.S. 19, 26–28 (1947). On the problem of insufficient resources for enforcement, see *infra* note 166 and accompanying text.

As far as federal lawsuits are concerned, at the time of *Alden* we already had the answer. In federal courts there could be no private enforcement of federal right as against an unconsenting state. Under the Eleventh Amendment, as interpreted in the much-criticized 1890 case of *Hans v. Louisiana*,³⁵ the state is immune from federal suit even when a case arises under federal law,³⁶ even when a case involves civil rights,³⁷ and even—the language of the Amendment notwithstanding³⁸—when the plaintiff is a citizen of the same state. To be sure, the venerable black-letter rule of *Hans* has been growing in disrepute,³⁹ and ways have been found long ago to limit its force.⁴⁰ But to the extent *Hans* remains effective, it clearly frustrates federal judicial enforcement against the states of federal constitutional and legal norms. What could Congress do about this? The problem is that, given the hierarchical superiority of the Constitution asserted from the start, certainly in *Marbury v. Madison*,⁴¹ Congress simply has no power of legislative revision over anything in the Constitution. None. Zero. (Well, there are one or two peculiar exceptions.⁴²) So at first it was

35 134 U.S. 1, 20 (1890) (holding, under the Eleventh Amendment, in an action against a state by a citizen of that state, that a state may not be sued for a violation of federal law in a case brought in the federal-question jurisdiction of a federal court).

36 That the federal nature of a claim would not take it out of the bar of the Eleventh Amendment had already been established in diversity cases raising claims under federal law. *See, e.g., In re Ayers*, 123 U.S. 443, 507–08 (1887); *Hagood v. Southern*, 117 U.S. 52, 67–71 (1886); *Louisiana v. Jumel*, 107 U.S. 711, 727–28 (1882).

37 *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), is not to the contrary. That case holds only that the Fourteenth Amendment gives Congress power to abrogate the Eleventh Amendment to remedy a state violation of the Fourteenth Amendment, not that the Eleventh Amendment does not count at all in a Fourteenth Amendment case as to which Congress has not spoken. *See id.* at 456–57; *see, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103–23 (1984) (applying the Eleventh Amendment to bar pendent equitable state-law claims against a state hospital in a suit originally raising Fourteenth Amendment rights).

38 Recall that the Eleventh Amendment is explicitly addressed only to diversity cases, cases against a state by a nonresident. *See supra* note 12.

39 *See infra* notes 86–139 and accompanying text (on the “diversity theory” critique).

40 *See infra* notes 75–81 and accompanying text (on *Ex parte Young*); *see also infra* notes 43–45 and accompanying text (on the now-disapproved doctrine of constructive waiver).

41 5 U.S. (1 Cranch) 137, 176–77 (1803) (asserting the superiority of constitutional over statutory text).

42 *See, e.g., Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 210–11 (1972) (holding that Congress has power to go as far as Article III permits in conferring standing, and thus ruling that white tenants aggrieved by the absence of minority tenants in their public housing could, as private attorneys general, raise the rights of the minority tenants in a statutory action, although the Supreme Court might not

thought that Congress could not constitutionally authorize federal suit against a state, except in cases in which it would be possible to condition federal funding, or to condition a state's participation in a federal program,⁴³ upon the state's waiver. Statutory rights or defenses conferred on the state could be seen as conditioned on waiver of immunity from statutory liability. Yet if Congress could require waiver for participation, participation increasingly came to be seen as *tantamount* to waiver. In the end, that the state was subjected to liability under an act of Congress was loosely deemed to *be* a constructive waiver of Eleventh Amendment immunity.⁴⁴ Why was not that in actuality a statutory *abrogation*—as we say—of Eleventh Amendment immunity? In other words, notwithstanding *Hans*, it was becoming increasingly clear that Congress could cut holes in the cloak of state immunity—could “abrogate” it, however counter-intuitive the existence of such power might seem. By the time *Seminole Tribe* was decided, in 1996, not one, but two important cases had established that Congress did indeed have power to trump the Eleventh Amendment.⁴⁵

otherwise find standing in such a case (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972))). *Trafficante* was saved in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that Congress may not exceed Article III requirements in conferring standing to sue). Compare *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (facially sustaining a state English literacy requirement for voting), with *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (sustaining, under Section 5 of the Fourteenth Amendment, an act of Congress banning certain state literacy tests for voting). The strongest example remains the “dry state” cases. Compare *Leisy v. Hardin*, 135 U.S. 100, 125 (1890) (striking down a state prohibition law under the dormant Commerce Clause), with *In re Rahrer*, 140 U.S. 545, 564–65 (1891) (sustaining a state prohibition law under an act of Congress authorizing such state regulation).

43 Until very recently it was also believed that the state could constructively be deemed to have waived its immunity if it participated in a program under federal law, with or even without federal funding. It was also believed that when Congress places clear liabilities on a state, the state should be deemed to have waived immunity. See *Parden v. Terminal Ry.*, 377 U.S. 184, 196–98 (1964), *overruled by* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–87 (1999); cf. *Mathias v. WorldCom Technologies, Inc.*, 121 S. Ct. 1224 (2001) (granting certiorari in part to consider whether a state commission's agreement to participate in implementing a federal regulatory program under the federal Telecommunications Act of 1996 constitutes a waiver of Eleventh Amendment immunity when the federal regulations provide that determinations by the state commission will be reviewable in federal court).

44 *Parden* came to be cited as a case of constructive waiver. The state was seen as wilfully putting itself “under” the statute. In reality, as will be seen shortly, *Parden* was an earlier, stronger version of *Union Gas*.

45 *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5, 23 (1989) (holding that Congress has commerce power to abrogate the Eleventh Amendment by imposing liability on a

To take the last first, toward the end of his life, Justice Brennan made a startling retreat⁴⁶ from a lifelong opposition⁴⁷ to *Hans v. Louisiana*. But the retreat was only strategic.⁴⁸ In *Pennsylvania v. Union Gas Co.*, like a trapeze artist reaching for a second swing, Brennan leaped toward the counterintuitive position that Congress could trump the Eleventh Amendment by ordinary legislation. Congress could achieve this under its broad commerce powers. Brennan threw a bone to his conservative brethren by sternly insisting that Congress would have to provide a clear statement, in the language of the statute, that it intended to abrogate the Eleventh Amendment.⁴⁹ This in fact made the case weaker than his earlier *Parden* case, the major Warren Court case on these issues, which required a clear statement by Congress only of an intention *not* to include states as defendants.⁵⁰

state and incorporating a clear statement of abrogation in the language of the statute); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456–57 (1976) (holding that Congress has Fourteenth Amendment power to abrogate the Eleventh Amendment to remedy a state violation of constitutional right). A third case, *Parden*, 377 U.S. at 196–98 (holding that a state-owned railway was presumed to have waived its immunity under the Federal Employers' Liability Act), was not read with sufficient generality to be classed with *Union Gas* and *Fitzpatrick* as recognizing broad power in Congress.

46 See *Union Gas*, 491 U.S. at 23 (holding that Congress may, under the commerce power, abrogate the Eleventh Amendment by imposing liability upon a state, if it does so in a clear statement in the language of the statute); cf. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (creating the clear statement requirement for congressional abrogations of state Eleventh Amendment immunity).

47 See, e.g., *Atascadero*, 473 U.S. at 261 (Brennan, J., dissenting); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 254 (1985) (Brennan, J., dissenting in part); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 125 (1983) (Brennan, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); *Employees v. Mo. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting); *Yeomans v. Kentucky*, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting from denial of certiorari).

48 See Justice Scalia's appraisal of Justice Brennan's shift in position, *Union Gas*, 491 U.S. at 35–36 (Scalia, J., dissenting):

Justice BRENNAN's plurality opinion purports to assume the validity of *Hans*, and yet reaches the result that CERCLA's imposition of monetary liability is constitutional because Congress has the power to abrogate state sovereign immunity in the exercise of its Commerce Clause power. Justice WHITE, who not merely assumes the validity of *Hans* but actually believes in it, agrees with that disposition.

49 See *id.* at 14–15. Of this concession, Justice Scalia, dissenting in *Union Gas*, snappishly remarked, "If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all . . ." *Id.* at 36.

50 See *Parden*, 377 U.S. at 189–90 (Brennan, J.).

If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules,

But in *Union Gas* the best Justice Brennan could do was to try once more to establish a clear power of abrogation in Congress. And so formidable were Justice Brennan's powers that some two decades after the demise of the Warren Court he was still able to persuade four of his brethren to go along, at least with the result.

In *Union Gas*, Justice Brennan could rely to some extent on a prior case squarely finding power in Congress to trump the Eleventh Amendment, the old Burger Court case of *Fitzpatrick v. Bitzer*.⁵¹ The improbable author of *Fitzpatrick* had been (then) Justice Rehnquist. *Fitzpatrick* held that Congress could override the Eleventh Amendment when acting under its Fourteenth Amendment power.⁵² Section 5 of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation, the provisions of this article."⁵³ Justice Brennan, writing in *Union Gas*, reasoned that one could not meaningfully distinguish the commerce power from the Fourteenth Amendment power which *Fitzpatrick* had recognized.⁵⁴ It is true, as Justice Rehnquist noted in *Fitzpatrick*, that the Fourteenth Amendment is in terms an assertion of national power over the states,⁵⁵ and this perhaps could not as readily be said of the Commerce Clause. On the other hand, if one reads the Tenth Amendment with the *Darby* case⁵⁶ it is

railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately owned common carriers by railroad interstate commerce.

Id. In *Alden*, Justice Kennedy identified *Parden* as "among the first" cases in which the question had arisen whether Congress could impose statutory liability upon a state. *Alden v. Maine*, 527 U.S. 706, 744 (1999).

51 427 U.S. 445, 456–57 (1976) (holding that, subject to a clear statement rule, Congress has power to abrogate the Eleventh Amendment to remedy a state violation of the Fourteenth Amendment).

52 *Id.*

53 U.S. CONST. amend. XIV, § 5.

54 See *Union Gas*, 491 U.S. at 16–17.

55 See *Fitzpatrick*, 427 U.S. at 454–55.

56 *United States v. Darby*, 312 U.S. 100, 123–24 (1942) (Stone, J.) ("Our conclusion [under the Commerce Clause] is unaffected by the Tenth Amendment . . . [which] states but a truism that all is retained which has not been surrendered.").

hard to doubt it. As Chief Justice Marshall early explained, "The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States"⁵⁷ In *Union Gas*, arguing rather persuasively that, in any event, Congress's Article I remedial power needed to extend as far as its Article I substantive power,⁵⁸ Justice Brennan touched on the fact that the states are commercial actors on the largest scale.⁵⁹ To strip Congress of power to control state activities affecting interstate commerce would undermine the commerce power altogether. In other words, the Eleventh Amendment needed to be parsed to conform to our understandings of the Tenth.⁶⁰ In *Union Gas* itself, the violation was one of environmental law, and the state stood before the Court as a major polluter.⁶¹

The fragility of *Union Gas* as precedent was obvious from the outset.⁶² The opinion for the Court, in its operative portion, was only a plurality opinion.⁶³ And Justice Scalia, for one, clearly signaled that he would take the first opportunity to overrule *Union Gas*.⁶⁴ Seven years later, only five years after Justice Brennan's body lay in state in the Supreme Court building, the now-consolidated Rehnquist Court, freed from the influence of Justice Brennan's intellect (and from Justice Brennan's uncanny facility in finding Rehnquist-Court majorities

57 *The Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382 (1821).

58 *See Union Gas*, 491 U.S. at 20–21.

59 *See id.* at 22.

60 For interesting discussion of this relation, see, e.g., George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1989); and Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

61 On this aspect of the case, see William D. Araiza, *Alden v. Maine and the Web of Environmental Law*, 33 LOY. L.A. L. REV. 1513 (2000).

62 *See, e.g., Chavez v. Arte Publico Press*, 59 F.3d 539, 544 (5th Cir. 1995) ("Justice White's concurrence must be taken on its face to disavow" the plurality's theory); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1027 (11th Cir. 1994) (stating that Justice White's "vague concurrence renders the continuing validity of *Union Gas* in doubt").

63 Justice Brennan announced the judgment of the *Union Gas* Court and delivered the opinion of the Court with respect to Parts I and II of the opinion, in which Justice Scalia joined Justices Marshall, Blackmun, and Stevens to form a majority. *Union Gas*, 491 U.S. at 5. But the operative part of the opinion was Part III, in which only Justices Marshall, Blackmun, and Stevens joined. *Id.* Justice White did file an opinion in which he concurred in part, creating a majority for Part III, but he distanced himself from the reasoning of the plurality opinion. *See id.* at 45.

64 *See* Justice Scalia's subsequent opinion in *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 105 (1989) (Scalia, J., concurring) (arguing that the bankruptcy power does not authorize Congress to abrogate the Eleventh Amendment immunity of a state).

for his Warren-Court views), seized an early opportunity to overrule *Union Gas*. This was accomplished in *Seminole Tribe*.⁶⁵ After all, *Union Gas* had not really answered the nagging question, how Congress could, by mere legislation, override anything in the Constitution. Writing for the Court in *Seminole Tribe*, Chief Justice Rehnquist was quick to dispatch *Union Gas*.⁶⁶ But he did not cast doubt upon *Fitzpatrick*, his own earlier case. Rather, he used *Fitzpatrick* to distinguish *Union Gas*. *Seminole Tribe* left intact Congress's Fourteenth Amendment power to trump the Eleventh Amendment.⁶⁷

In part, *Fitzpatrick* had been based on a rather simplistic chronological argument. The Fourteenth Amendment happened *after* the Eleventh, and so its Section 5 grant of power to Congress could be read as authorizing Congress to modify the Eleventh. More fundamentally, the Fourteenth Amendment clearly was intended to effect "a vast transformation"⁶⁸ of the balance between state and federal powers, and thus its fifth section could be read as part of that great transformation. Justice Scalia distinguished *Fitzpatrick* on both grounds in his *Union Gas* dissent.⁶⁹ Responding to this, Justice Brennan had some fun with the dissent's eagerness to read the Eleventh Amendment expansively based on background understandings about sovereign immunity. Those were the background "postulates" that "limit and control," as the Supreme Court once famously said in another Eleventh Amendment case, *Principality of Monaco v. Mississippi*.⁷⁰ Very well. But then, Justice Brennan argued, the Commerce Clause, though preceding the Eleventh Amendment, clearly came *after* those background "postulates."⁷¹ So the commerce power could trump

65 *Seminole Tribe v. Florida*, 517 U.S. 44, 74–76 (1996) (striking down a provision of the Indian Gaming Regulatory Act authorizing federal suit by a tribe against a state to compel performance of the state's statutory duty of good faith negotiation). For a very few among the writings on *Seminole Tribe*, see, for example, Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407 (1999); Ellen D. Katz, *State Judges, State Officers, and Federal Commands after Seminole Tribe* and Printz, 1998 WIS. L. REV. 1465; Andrew I. Gavil, *Seminole Tribe and the Creeping Reemergence of "Dual Federalism,"* 23 OHIO N.U. L. REV. 1393 (1997); and Gordon G. Young, *Seminole Tribe v. Florida*, 56 MD. L. REV. 1411 (1997).

66 See *Seminole Tribe*, 517 U.S. at 59–67.

67 See *id.* at 59.

68 The quotation here is from *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); see also, to similar effect, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), and *Ex parte Virginia*, 100 U.S. 339, 345–48 (1880).

69 See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 41–42 (1989) (Scalia, J., dissenting).

70 292 U.S. 313, 322 (1934).

71 *Union Gas*, 491 U.S. at 18–19.

them. Brennan tossed this off very lightly. As a legal argument its only merit was that it met the opposition's chronological point. But in *Seminole Tribe*, Chief Justice Rehnquist apparently had no ready answer to it. Not until *Alden* would the Court bury this piece of sophistical hand-waving. Yes, the *Alden* Court acknowledged, the background understandings of state sovereign immunity did indeed precede the Constitution. But they also *survived* it.⁷²

Obviously the rule of *Hans v. Louisiana*, barring federal claims against a state in federal court, obstructs the enforcement of federal law. Now recall that constitutional claims almost invariably have to be claims against government. And recall that *Fitzpatrick* does not, by itself, authorize suit against a state for a constitutional violation. Instead, *Fitzpatrick* requires Congress to authorize it; there must be a clear statutory abrogation of Eleventh Amendment immunity. The consequence is that, in the silence of Congress—postponing for one moment the possibility of an officer suit under the doctrine of *Ex parte Young*⁷³—federal courts indeed may not impose even constitutional norms upon the states.⁷⁴ After *Alden*, state court remedial powers are equally impaired.

B. Ex parte Young

Ex parte Young is the great case to which we trace our modern confidence that a federal injunction may issue against a state official acting or threatening to act in violation of the Constitution.⁷⁵ In

⁷² See *Alden v. Maine*, 527 U.S. 706, 712–30 (1999). This unedifying squabble was an artifact of the old canon that when two statutes seem to conflict, later statutes may be presumed to modify earlier ones. Such abstract reasoning is fated to be deployed at a remove from whatever actually is motivating the reasoner.

⁷³ 209 U.S. 123 (1908). See the next segment of this Article for an introductory discussion.

⁷⁴ I have not canvassed all federal civil rights statutes to determine whether any are exclusively grounded on the commerce power; if that is so, it is an additional factor to be taken into account in assessing the *Alden/Seminole* impairment of national policy.

⁷⁵ Today *Young* also lies to remedy government violations of statutes. But *Young* was limited in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984) (holding that federal courts could not enjoin state officials for violations of state law). Another important modern qualification of *Young* is that the injunction may not issue if the defendant is a prosecutor, and the injunction would enjoin her from continuing to litigate a pending state criminal prosecution. See *Younger v. Harris*, 401 U.S. 37, 43–54 (1971). For thorough coverage of the *Younger* doctrine and its refinements, see WEINBERG, FEDERAL COURTS, *supra* note 25, at 695–745. *Ex parte Young*'s equitable remedy protects only against future or ongoing harms. This element of prospectivity was refined in *Edelman v. Jordan*, 415 U.S. 651, 660 (1974) (holding that *Ex parte Young* could not ground actions against a state for arrearages of benefits due, on the reason-

Young, the Court perceived for the first time that a threatened or ongoing constitutional wrong need not be trespassory to be actionable.⁷⁶ The author of *Ex parte Young* was Justice Peckham, who was also the author of that most under-appreciated of Supreme Court opinions—*Lochner v. New York*.⁷⁷ *Young* must have been intended to furnish the remedial counterpart of *Lochner*. Justice Peckham's concern in both cases was to establish a basis for challenging what the Court at that time considered to be unreasonable state regulation of enterprise. And in *General Oil Co. v. Crain*, the Court thought that the requirement of due process must open state courts to an *Ex parte Young* officer suit as well, in cases arising under federal law, if federal courts were unavailable.⁷⁸

The upshot today is that, whether in civil rights suits proper or in business litigation challenging the constitutionality of state regulation, one seeking an injunction against state violations of federal statutory or constitutional law generally can drop the state out of the picture altogether and sue the relevant official instead. Of necessity, the *Ex parte Young* action is an action against the official in her official capacity.

Ex parte Young lives in equity. *Young* is useless if the needed remedy is damages. It is useless even in equity if the prayer is for an order for money on account of past wrongs.⁷⁹ *Young* offers relief for future or ongoing harms only. And because equity acts only *in personam*, the

ing that such moneys would be tantamount to damages from the state treasury, retrospective relief clearly barred by the Eleventh Amendment). For the effect of *Edelman* on the plaintiffs in *Alden*, see *infra* notes 287–90 and accompanying text.

⁷⁶ See *Ex parte Young*, 209 U.S. at 152–53. This insight can convert a contract claim into a constitutional tort and enables a court to order an official to execute payment of monies the state owes or will owe. Today this important power is compromised by the doctrine of *Edelman v. Jordan*.

⁷⁷ *Lochner v. New York*, 198 U.S. 45 (1905). The only thing wrong with *Lochner* was the Court's fatuity in not understanding the effect on a contract of unequal bargaining power. *Lochner* was quite right that Americans must have a right to contract, certainly as to their labor, as the Thirteenth Amendment makes clear; and after *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (gutting the Privileges and Immunities Clause of the Fourteenth Amendment), the only available general textual location was the liberty language of the Due Process Clause. Liberals ought to take *Lochner* at last to their bosoms as the fount of claims it really was. Cf. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (McReynolds, J.) (relying on *Lochner*; recognizing familial, contractual, and other unenumerated rights of substantive due process).

⁷⁸ *Gen. Oil Co. v Crain*, 209 U.S. 211, 230–31 (1908).

⁷⁹ See *Edelman*, 415 U.S. at 660 (holding that *Ex parte Young* could not ground actions against a state for arrearages of benefits due, on the reasoning that such moneys would be tantamount to damages from the state treasury, retrospective relief long held barred by the Eleventh Amendment).

defendant official must be in a position to carry out court orders to conform the government's conduct to law.

This, then, is the still-evolving but traditional⁸⁰ "officer suit" of Anglo-American law. Given the Eleventh Amendment as read in *Hans v. Louisiana*, the rule of law in this country would be severely compromised without it. My august late colleague, Charles Alan Wright, told me that he used to say, in concluding a lecture on *Ex parte Young*, "*Ex parte Young* is what enables us to enforce the Constitution against the states. We must cherish it." At present we are not doing a very good job of cherishing it,⁸¹ but the "officer suit" for an injunction remains the effective mode of private enforcement of law against government.

C. *The Diversity Theory Controversy*

In the last quarter of the twentieth century the position that we have been examining became somewhat fluid as the legacy of the uniquely liberal Warren Court⁸² gave way to steadily conservative judi-

80 Among the more celebrated precursor cases, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (federal official), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). *Young's* chief advance over these forebears lies in Justice Peckham's insight that the threatened violation need not be trespassory. In other words, he saw, albeit in equity, the modern idea of constitutional tort. "The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject-matter." *Ex parte Young*, 209 U.S. at 167.

81 See, e.g., *Mathias v. WorldCom Technologies, Inc.*, 121 S. Ct. 1224 (2001) (granting certiorari in part to consider whether an *Ex parte Young* action will lie against state commissioners for alleged violations of federal law in their consensual implementation of a federal regulatory program under the federal Telecommunications Act of 1996). See also Justice Kennedy's naïve assault on *Young* in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997), and see *infra* notes 330–32 and accompanying text. Justice Kennedy's understanding of the *Young* action at the time of *Coeur d'Alene* was incomplete. *Young* is an official capacity suit or it is nothing. The solution to the problem of the officer suit as an individual capacity suit, the problem presented in *In re Ayers*, 123 U.S. 443 (1887), ought to have been a court order to the official, not to pay out of his own pocket, but to execute the state's payment in his official capacity. *Edelman v. Jordan*, 415 U.S. at 660, debarring court-ordered past payments, while limiting the remedy, did not convert *Young* into an individual capacity action. In *Seminole Tribe*, *Ex parte Young* was disapproved on a theory culled from another context, that Congress had provided instead a comprehensive remedial scheme. One must consult the remedial scheme in *Seminole Tribe* to enjoy the full flavor of this trope. See generally Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495 (1997).

82 But see LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000) (making the case that the Warren Court tended to follow rather than lead mainstream American opinion).

cial appointments. In that time of change a great new scholarly debate arose over *Hans v. Louisiana*.⁸³

A century earlier, *Hans v. Louisiana* had read the Eleventh Amendment to exempt state government from the rule of law in federal courts.⁸⁴ Although Justice Bradley, the author of *Hans*, was somewhat apologetic about this judicial abdication,⁸⁵ he effected this enormity without explanation.⁸⁶ Bradley could not have understood just how improvident this ruling was. In that day, the only considerable item of federal judicial enforcement as against a state was the Contracts Clause.⁸⁷ *Hans* was handed down just before the dawning of the age of federal legislation and well before the modern development of rights-based constitutional jurisprudence. As the Due Process Clause of the Fourteenth Amendment began to assume its now familiar substantive dimension, and—after the New Deal period—the Court began to confront a new and ever enlarging mass of federal statutes and regulations, the *Ex parte Young* officer suit took on its modern centrality. But *Young* notwithstanding, the Court must have begun to see that *Hans* was a debilitating anachronism that needed to be overruled. The Warren Court expanded rights-based litigation, but failed to put paid to *Hans*.⁸⁸ The closest it came to the question, in the *Parden* case, was to confer presumptive power upon Congress to impose liabil-

83 134 U.S. 1 (1890) (holding that the Eleventh Amendment protects states even from suits brought within the federal-question jurisdiction of federal courts by citizens of the same state).

84 *Id.* at 20–21.

85 “To avoid misapprehension,” Bradley wrote,

it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

Id.

86 *See id.* at 21 (“It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals.”). For a contextual explanation, see *infra* notes 125–30 and accompanying text.

87 *See Hans*, 134 U.S. at 20–21.

88 The chance was presented in *Parden v. Terminal Railway*, 377 U.S. 184, 196–98 (1964) (holding that state employers do not have Eleventh Amendment immunity in actions under the Federal Employers’ Liability Act). *See supra* notes 43, 50.

ity upon the states.⁸⁹ As the Burger and Rehnquist Courts labored to place new constraints upon *Ex parte Young*,⁹⁰ the academic debate began to sound a note of urgency.

The Amendment speaks literally only to diversity cases, in which federal questions occur only fortuitously. From the left it was argued that the Eleventh Amendment should not have any bearing at all upon actions enforcing federal law. The difficulty for this pro-enforcement position was that, as Justice Bradley had put it long ago in *Hans*, it seemed to lead to an “anomaly”: “[I]n cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens; though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state”⁹¹ The short answer to this, of course, is that the Amendment should never have had any application to federal claims at all, even in diversity cases. The supposed “anomaly” was no more substantial than a pricked bubble.

From the right, the diversity part of the text was discounted in favor of blanket immunity. This was not difficult to do because when it comes to the Eleventh Amendment, the strict constructionist ideal long ago vanished from the otherwise conservative consciousness. For example, the Amendment has long been held to bar federal actions against a state by a foreign country, although such suits are not mentioned by the Amendment.⁹² The immunity also extends to federal actions by sovereign Native American tribes.⁹³ The Amendment is read to bar not only federal actions against a state by citizens of another state, but by its own citizens, in cases arising under federal law—the principle of *Hans v. Louisiana*. Moreover, although the Amendment speaks only to actions “in law or equity,” it is read to bar actions against a state in admiralty.⁹⁴ And, of course, after *Alden*, rules analogous to these apply in state courts, too, although the text of the Elev-

89 *Parden*, 377 U.S. at 195–96. *Parden*, however, was cited for the proposition that a state could be deemed to have constructively waived its immunity by participation in a federal program. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679–80 (1999) (disapproving the “constructive waiver” doctrine of *Parden*). *Parden* fit this description only in the sense that, by owning a railway and employing workers, the state had put itself within the terms of the statute. See *Parden*, 377 U.S. at 196–98. Thus, *Parden* claimed all the ground Justice Brennan reclaimed in *Union Gas*. Neither case succeeded in overruling *Hans*.

90 See *supra* note 75.

91 *Hans*, 134 U.S. at 10.

92 See, e.g., *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329–32 (1934).

93 See *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 287–88 (1997); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781–82 (1991).

94 *Ex parte New York*, 256 U.S. 490, 497–500 (1921).

enth Amendment refers only to "[t]he Judicial power of the United States."⁹⁵ These are only the more prominent extensions of the text. *Alden* is only the most recent of egregious examples.

Not that the tension between these broad readings on the one hand, and the exigencies of constitutional structure and the rule of law on the other, have failed to produce exceptions as well. There are cases in which an action against a state is permitted notwithstanding the language of the Eleventh Amendment, which does not seem to make room for them. Falling into this category are petitions for Supreme Court review of state-court cases in which the judgment has been for the state—most importantly, cases affirming criminal convictions. Supreme Court review of such cases was saved early on by Chief Justice Marshall, in his great opinion in *The Cohens v. Virginia*.⁹⁶ There could be no other view consistent with the Supremacy Clause and constitutional structure, as Marshall explained.⁹⁷ In *Martin v. Hunter's Lessee*,⁹⁸ Justice Story had made an analogous argument from the Supremacy Clause in cases between private parties. In *The Cohens*, Chief Justice Marshall reasoned that state sovereign immunity in state-court cases raising federal questions for Supreme Court review had been waived when the states submitted themselves to the Constitution "in the plan of the Convention."⁹⁹ To hold otherwise, he wrote, would be to "prostrate . . . the government and its laws at the feet of every State in the Union."¹⁰⁰ The Eleventh Amendment, Marshall insisted, was intended only to protect the states from suits by nonresident creditors, not "to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation."¹⁰¹

95 U.S. CONST. amend. XI; see *supra* note 12.

96 19 U.S. (6 Wheat.) 264, 407–10 (1821).

97 *Id.* at 381–82.

98 14 U.S. (1 Wheat.) 304 (1816) (sustaining the constitutionality of the Supreme Court's statutory jurisdiction to review state court decisions of federal questions, based on the Supremacy Clause and the implications of the Madisonian compromise by which lower federal courts were not established by the Constitution, but put in the power of Congress).

99 This is Alexander Hamilton's formulation, from THE FEDERALIST NO. 81, at 529 (Edward Mead Earle ed., 1940). See *The Cohens*, 19 U.S. (6 Wheat.) at 419–20 (quoting THE FEDERALIST).

100 *The Cohens*, 19 U.S. (6 Wheat.) at 385.

101 *Id.* at 407. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), Chief Justice Jay had taken the same position, arguing that the states lost their sovereign immunity when they submitted themselves to the Constitution. *Id.* at 471. For an inquiry into why both *Hans* and *Alden* relied on Justice Iredell's dissent in *Chisholm* rather than the majority opinion, see Merico-Stephens, *supra* note 15, at 351–52. The short answer to

Other notable exceptions include the rule that the United States may come into its own courts to sue a state, notwithstanding the Eleventh Amendment.¹⁰² In addition, the original jurisdiction of the Supreme Court is held unaffected by the Eleventh Amendment in actions between states,¹⁰³ although the Court has barred actions between states when the plaintiff state is not the real party in interest, but files suit on behalf of its individual resident creditors.¹⁰⁴ It is also hoped, from the left, that there may be a proprietary or market-participation exception to Eleventh Amendment immunity,¹⁰⁵ just as there is under the federal Foreign Sovereign Immunities Act.¹⁰⁶ Indeed, a commercial-transaction exception to the *Alden* rules would have saved the *Alden* plaintiffs' case, or at least made it more difficult for the Rehnquist Court not to. It is also sometimes argued that an action against the state will lie for compensation for the wrongful taking of specific property.¹⁰⁷ Then, too, of course, we know that an action will lie against a state officer for an injunction against a threatened or

this is probably that the Eleventh Amendment put paid to *Chisholm*. The majority's position in *Chisholm* still works only if, like the first Justice Harlan, one believes *Chisholm* was rightly decided.

102 *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965); *United States v. Texas*, 143 U.S. 621, 643–45 (1892). *But cf.* *Smith v. Reeves*, 178 U.S. 436, 446–48 (1900) (holding that the Eleventh Amendment bars a federal suit against a state by a federal corporation).

103 *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 731 (1838).

104 *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883).

105 *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824), is sometimes cited for this proposition. *But see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539–40 (1985) (Blackmun, J.) (arguing that in adjudicating state employment practices the distinction between governmental and non-governmental functions was not administrable).

106 Foreign Sovereign Immunities Act of 1976 § 4, 28 U.S.C. § 1605 (1994) (lifting foreign sovereign immunity for acts arising out of nongovernmental conduct occurring in this country or with direct effects in this country).

107 *See, e.g., United States v. Lee*, 106 U.S. 196, 204, 220–23 (1882) (sustaining the Lee family's claim against the United States for wrongful confiscation of Arlington, the family seat). This position seemed undercut by *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). But in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688–91 (1982), the Court, per Justice Stevens, ruled that the Eleventh Amendment did not bar an admiralty suit against state officials in their official capacity for the return of artifacts discovered by the plaintiffs in undersea exploration. The Supreme Court relied on *Lee* and suggested that *Larson* and *Lee* together mean that relief may not run against the state treasury. For recent developments undercutting this line of argument, *see infra* notes 301–26 and accompanying text.

ongoing violation of federal law by the state—the principle of the great case of *Ex parte Young*.¹⁰⁸

But why was the language of the Eleventh Amendment itself so oddly tied to diversity cases? We know that Congress passed the Eleventh Amendment to override the 1793 case of *Chisholm v. Georgia*.¹⁰⁹ In that case, it was held that the state of Georgia must stand and defend a state-law action on the contract by a nonresident creditor.¹¹⁰ The Court could see no constitutional principle that would immunize a debtor state in a case of that kind.¹¹¹ The sound credit of a state in those days was an item of strong national policy.¹¹² But with the ruling in *Chisholm*, the states saw their scant revenues flowing out of state to unloved bankers in Boston or Glasgow. Georgia's outrage was shared by sister states¹¹³ still struggling under their own burdens of debt.¹¹⁴ With the Eleventh Amendment, Congress simply overrode

108 Sometimes it is said that if a state official acts ultra vires, completely beyond her state-law powers, a federal injunction is available. See *Land v. Dollar*, 330 U.S. 731, 735–36 (1947). A plurality of the Court relied on this concept in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. at 689. But in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Court, per Justice Powell, spoke of this “exception” as operable, if at all, only when a state officer acts “without any authority whatever.” *Id.* at 101 n.11 (quoting *Treasure Salvors*, 458 U.S. at 697). Otherwise, Justice Powell pointed out, a plaintiff could always lift the bar of the Eleventh Amendment by pleading some violation of state, as well as federal, law. *Id.* at 121.

109 2 U.S. (2 Dall.) 419 (1793).

110 *Chisholm* was a citizen of South Carolina. *Id.* at 420.

111 *Id.* at 479.

112 The United States's assumption of the states' Revolutionary War debts furnishes some support for this view. So also does Article III's authorization of federal suit by a nonresident against a state. For the view that Article III contemplated state responsibility for future indebtedness, not existing indebtedness, see, recently, James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1306–08 (1998). Similarly, the Contracts Clause furnishes some evidence in support of the assertion in the text, whether one reads it as protecting resident creditors from debtor relief laws or as protecting creditors generally from state repudiations of public debt. U.S. CONST. art. I, § 10, cl. 1 provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

113 On the reaction of the country to *Chisholm*, see 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: SUITS AGAINST STATES 127–273 (Maeva Marcus ed., 1994) (containing papers filed and arguments in, as well as contemporaneous commentary on, *Chisholm v. Georgia*).

114 The Continental Congress had no means of obtaining revenue except through requisitions on the states. During the Revolution, to meet Congress's requisitions for the army and to provide for their own independent militias, the states incurred fur-

Chisholm on its diversity/state law facts.¹¹⁵ On its face the Amendment is only about the diversity grants in Article III, Section 2;¹¹⁶ indeed, it is couched merely as a rule of construction for cases falling within those heads of diversity jurisdiction. Read literally, the Amendment reflects no intention to interfere with cases arising under federal law, and Chief Justice Marshall so read it in *The Cohens*.¹¹⁷ It can be supposed, in this view, that the Amendment did not more distinctly come to the rescue of the federal-question jurisdiction of federal courts because there was no such jurisdiction at the time and therefore no point in rescuing it. Federal trial courts had no general federal-question jurisdiction until 1875.¹¹⁸ This last argument, however, cuts two ways. In *Seminole Tribe*, the absence of federal-question jurisdiction when the Eleventh Amendment was adopted was thought to excuse the failure of the Amendment to immunize the state in nondiversity

ther debts. The war debts authorized by Congress were assumed by the Confederation in Article XII of the Articles of Confederation; the debts of the Confederation, in turn, were assumed by the United States in Article VI of the Constitution. U.S. CONST. art VI, § 1; ARTICLES OF CONFEDERATION art. XII. As to the state debts of the revolutionary period that had not been authorized by Congress, Alexander Hamilton, as first Secretary of the Treasury, recognized them as war debts; and under his financial plan the national government, now able to impose imposts on foreign goods, more or less assumed those debts in 1790. See FORREST McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 181–88 (1982) (on the 1790 assumption and funding of the entire domestic debt under Hamilton's plan). It remained a concern of the states to avoid payment of certain remaining war and post-war obligations. For example, states had confiscated properties of loyalists, who showed up to claim them. The famous example is Virginia's escheat of the Fairfax Estate, the bone of contention in the great case of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

115 In *Chisholm*, a citizen of South Carolina was suing Georgia in assumpsit to collect a debt. The action was brought in the Supreme Court. 2 U.S. (2 Dall.) at 420 (argument for the plaintiff).

116 U.S. CONST. art. III, § 2 provides:

The judicial Power shall extend to . . . Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

117 *The Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821); see *supra* notes 96–99 and accompanying text.

118 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1994)). I set to one side the abortive attempt of the last Federalist Congress to vest federal-question jurisdiction at the time of the constitutional crisis over the election of 1800. See Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

cases.¹¹⁹ In *Alden*, Justice Kennedy read the narrowness of the text as reflecting the narrowness of the breach that *Chisholm* had made in the solid wall of preëxisting understandings that the states were immune.¹²⁰ Moreover, Justice Kennedy argued, "As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush."¹²¹

The foregoing is a crude general introduction to the debate over the "diversity" theory, so-called, of the Eleventh Amendment. The theory has had overwhelming academic support.¹²² Under this theory, federal law should have been fully enforceable against the states from the beginning, in the diversity jurisdiction of federal courts as well as in state courts. Federal law should have become generally enforceable in actions against states in federal courts with Congress's 1875 grant to federal courts of original general jurisdiction over cases arising under federal law.¹²³ Throughout the post-Reconstruction period the Supreme Court is seen reviewing actions to force Southern states to pay their debts in diversity cases, in actions under the Contracts Clause as well as in state-law actions on the contract.¹²⁴ But as Professor Orth argues, with the Hayes-Tilden Compromise of 1877, Northern troops had to pull out of the South, and as a practical matter federal law became unenforceable against the Southern states.¹²⁵

119 *Seminole Tribe v. Florida*, 517 U.S. 44, 69-70 (1996) (Rehnquist, C.J.): The text dealt in terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.

120 See *Alden v. Maine*, 527 U.S. 706, 723-24 (1999).

121 *Id.* at 724.

122 E.g., William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); 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 (1983).

123 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1994)).

124 See, e.g., *Bd. of Liquidation v. McComb*, 92 U.S. 531 (1875) (officer suit). See generally John Orth, *The Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. L. REV. 11 (1980).

125 JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 55-57 (1987) (arguing that with the withdrawal of

The Court began to permit the states to plead the Eleventh Amendment even in diversity cases raising federal constitutional claims¹²⁶ and eventually even in true federal-question cases brought in the new post-1875 federal-question jurisdiction.¹²⁷ This last development, of course, occurred in the case of *Hans v. Louisiana*.¹²⁸ In this way the Court gave up on its long struggle to make the Southern states pay their debts.¹²⁹ The newly pusillanimous position was nailed down in the fateful case of *Hans v. Louisiana*.¹³⁰

The "diversity" theorists continue to think *Hans* wrong. They think that the Eleventh Amendment should be read as covering only cases like *Chisholm*, cases pleaded under state law. Once restored to this natural reading, the Amendment would leave the states with the general common-law immunity that is appropriate to them. But nothing in the Amendment, and certainly nothing in state sovereign immunity law, would inhibit the enforcement of federal law against the states in either set of courts.¹³¹

federal troops under the Hayes/Tilden Compromise of 1877, Southern state indebtedness became judicially unenforceable as a practical matter, and relating this development to the emergence of the rule of *Hans v. Louisiana*).

126 See, e.g., *In re Ayers*, 123 U.S. 443, 507-08 (1887); *Hagood v. Southern*, 117 U.S. 52, 69-71 (1886); *Louisiana v. Jumel*, 107 U.S. 711, 726-28 (1882).

127 See *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890).

128 See *id.*

129 Civil War debts were not the issue; under the Fourteenth Amendment, those were repudiated. But it appears that in the postwar South there was a strong belief that issuing state bonds for railway construction would yield progress and economic development. With the panic of 1873, Southern states found that they had taken on insupportable new burdens of debt. The story is told in ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 383-84 (1988), and briefly sketched out in William M. Wiecek, "Old Times There Are Not Forgotten": *The Distinctiveness of the Southern Constitutional Experience*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* 159, 184-85 (Kermit L. Hall & James W. Ely, Jr., eds., 1989).

130 *Hans* was not the first case to recognize the weakness of the Supreme Court after the withdrawal of federal troops from the South. Some earlier cases had already recognized state Eleventh Amendment immunity as against federal claims. But those cases were still being brought in the diversity jurisdiction of federal courts, notwithstanding the new 1875 grant of federal-question jurisdiction to federal courts. See cases cited *supra* note 126. Because of the textual limitations of the Eleventh Amendment, these cases need not have been thought dispositive in *Hans*. The Amendment, of course, speaks only to diversity cases. The better result in *Hans* would have been to permit the action to go forward under federal law and to disapprove anything to the contrary in those cases.

131 In state court, state sovereign immunity should collapse under the weight of the Supremacy Clause in a case raising a federal claim, an obvious principle con-

There remain, however, those who cling to the view that not only was *Chisholm* utterly wrong when it was decided; but also that the states would never have ratified the Constitution if it were to cost them their sovereign immunity in the national courts.¹³² The standard narrative of proponents of this view is that *Chisholm* fell on the nation with a “shock of surprise.”¹³³ This is the “profound shock”¹³⁴ or “sovereign immunity” theory, of which *Hans* is the pillar and *Alden* the capstone. This thinking has the merit, at least, of seeming to explain the speed, after *Chisholm*, with which Congress passed the Eleventh Amendment.¹³⁵

Some historians will tell you, however, that if any Eleventh Amendment case should have been surprising, it was not *Chisholm*, but *Hans*. To be sure, federal claims had been dismissed under the Eleventh Amendment before *Hans*, when Contracts Clause claims were brought in diversity cases.¹³⁶ But in definitively holding the states immune from federal suit in all cases, including nondiversity cases not covered by the language of the Amendment, *Hans* confided the enforcement of federal law against a named state to that state’s courts. Chief Justice Marshall, in another context, once considered the propriety of state courts as exclusive forums for those relying on federal law and quickly dismissed the idea: “When we observe the importance which [the] constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist.”¹³⁷

firmed by *Howlett v. Rose*, 496 U.S. 356, 381–83 (1990), notwithstanding that *Howlett* itself involved a claim against a local county rather than the state.

132 See generally Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, *supra* note 122; Marshall, *Fighting the Words of the Eleventh Amendment*, *supra* note 122. For a critique of the diversity theory, see William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

133 The “shock of surprise” language comes from *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (Bradley, J.), and is repeated in *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934) (Hughes, C.J.).

134 The “profound shock” language is that of 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed. 1926). On the speed of enactment of the Eleventh Amendment and the immediacy of its effect, see *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

135 But see Pfander, *History and State Suability*, *supra* note 112, at 1342–43 (arguing that the states’ expectations of immunity from federal suit was only as to the debts that existed in 1787). In this view, the states expected to answer for their after-acquired indebtedness.

136 See cases cited *supra* note 126.

137 *The Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821) (Marshall, C.J.).

D. *Take That, Henry Hart!*

Of all the mistakes that have been made under the Eleventh Amendment, *Hans v. Louisiana* was the big one. Yet even under *Hans*, and even though, as John Marshall's remark illustrates, the adequacy of the state forum has been doubted, the theoretical *existence* of a state forum for federal claims against the states has not been doubted for over a century. Indeed, because Congress has power to strip the inferior federal courts of jurisdiction, the state courts have rightly been perceived, whatever their disadvantages, as the ultimate bastions of Americans' liberties against government. This was the resonant conclusion of Henry Hart, in his celebrated *Dialogue*, read by generations of students of the federal courts.¹³⁸ It is this treasured last resort that *Alden v. Maine* all but denies. And *Alden* holds Congress powerless to do anything about it. In so holding, *Alden* apparently projects the Byzantine jurisprudence of the Eleventh Amendment onto the state courts. I will come back to this problem of the vanishing state forum for federal claims.¹³⁹ But we are now prepared, and it will now be convenient, to examine *Alden* more directly.

II. THE WAGES OF FEDERALISM

A. *Fiscal Fancies: Little Luxuries and Staggering Burdens*

It will be useful at this point to ring in the little problem of the state fisc. A consideration for the *Alden* Court seemed to be the unreasonableness of permitting "raids" on a state's treasury.¹⁴⁰ Justice Kennedy there offered some of the best policy arguments about this to be found in the law reports. Most notably, he pointed out that by imposing or withholding the staggering burdens of litigation, Congress could gain "a power and a leverage over the States that is not contemplated by our constitutional design."¹⁴¹ State treasuries, of course, have long been at the heart of Eleventh Amendment jurisprudence. Money damages against a state have been unavailable in federal courts since the Eleventh Amendment. Moreover, the Court held in 1974 in *Edelman v. Jordan*¹⁴² that even *Ex parte Young*¹⁴³ could not

138 See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

139 See *infra* notes 244-48 and accompanying text.

140 See *Alden v. Maine*, 527 U.S. 706, 719-21 (1999) (describing outraged reaction to *Chisholm*); *id.* at 750 (describing the danger to the autonomy of the states and to dual federalism posed by state liability).

141 *Id.*

142 415 U.S. 651 (1974) (Rehnquist, J.).

143 209 U.S. 123 (1908); see *supra* notes 75-81 and accompanying text.

yield court orders for payment of the past obligations of a state.¹⁴⁴ Court orders for arrearages were too much like damages. Such relief must be prospective only.¹⁴⁵ Actually, anybody with a law school diploma should be able to differentiate damages from arrearages of the kind claimed in *Edelman*. When the disabled, blind, or elderly are arbitrarily denied government benefit money on which they rely (the sort of claim involved in *Edelman*), and when their claims involve, as such claims can, lost subsistence, health, roof, family, the damages can be very large indeed. The lost benefits themselves, on the other hand, simply consist of that to which prevailing claimants were previously entitled. Indeed, to the extent the coercive powers of equity in a given case may be weak, *Edelman* creates the perverse incentive of allowing the state to go on arbitrarily withholding benefits, forcing the disabled plaintiff to litigation again and again for statutory rights that are clear.¹⁴⁶ That difficulty aside, surely there is little practical difference between raids on the state treasury in the form of court orders requiring restitution of withheld benefits and raids on the state treasury in the form of court orders requiring new expenditures. Both will take the form of unbudgeted current liabilities.

In *Alden*, Justice Kennedy, describing raids on the treasury, seemed to have a vision of petulant plaintiffs, selfishly demanding priority for their frivolous claims over the needs of the state's broader electorate. "A general federal power," he wrote, "to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."¹⁴⁷ No doubt civil rights litigation can redirect resources. That can be a real problem in some cases. But the *Alden* plaintiffs were not suing for the kind of seemingly luxurious cossetting that had so offended Justice Kennedy in the then-recent installment of the Kansas City school case, *Missouri v. Jenkins*.¹⁴⁸ There, the plaintiffs were asking the District Court to order the school board to provide them with—among other things—a petting farm, a model United Nations wired for simultaneous translation, and a planetarium.¹⁴⁹ Reading that case one might forget the relation between the demands for

144 *Edelman*, 415 U.S. at 675–77.

145 *Id.* at 677.

146 For the predictable occurrence of such social security litigation against "non-acquiescent" officials, see WEINBERG, *FEDERAL COURTS*, *supra* note 25, at 358–66, and materials there cited.

147 *Alden v. Maine*, 527 U.S. 706, 750–51 (1999).

148 495 U.S. 33 (1990).

149 *See id.* at 77 (Kennedy, J., concurring); *see also Missouri v. Jenkins (III)*, 515 U.S. 70, 80–83 (1995) (Rehnquist, C.J.) (considering the propriety of other, less luxu-

spending so characteristic these days of school desegregation litigation in its declining phase and the Burger Court's refusal decades ago—whether wise or unwise—to authorize interdistrict busing.¹⁵⁰ No longer able to “desegregate” the schools by embracing the white suburbs in busing decrees—the whiteness of the suburbs, in part, reflecting “white flight” from busing decrees—inner-city school districts became rapidly resegregated and black. The expenditures plaintiffs in those districts came to demand and school authorities themselves to seek were a desperate expedient intended to lure white children back.¹⁵¹

A similar problem can be seen in the *Garrett* case,¹⁵² decided just as I was reviewing the first proofs of this Article. There, Chief Justice Rehnquist seemed to take up Justice Kennedy's concern in *Alden* and *Missouri v. Jenkins*, that civil rights claims too often result in orders for frivolous expenditures not high on the electorate's list of priorities. In the course of holding that Congress may not subject a state to suit for discrimination in employment, the Chief Justice wrote: “[I]t would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities.”¹⁵³

But the *Alden* plaintiffs, far from demanding special expenditures, were trying to collect their own *wages*, wages they had worked for and earned.¹⁵⁴ With all due respect to Justice Kennedy, it cannot be a legitimate priority of the people of the state to misappropriate the wages earned by state employees.

rious but expensive improvements); *id.* at 94 (disapproving the use of “magnet” schools to attract students from nonviolating districts).

150 See *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974) (holding, under the Equal Protection Clause, that courts may not order busing of children from or to a school district other than their own without a showing of intentional discrimination on the part of the other district). For a prediction of the then unthinkable retrenchment by the Court in the school cases, see Louise Weinberg, *The New Judicial Federalism*, 29 *STAN. L. REV.* 1191, 1191, 1235–44 (1977).

151 The story of the school desegregation cases is told in WEINBERG, *FEDERAL COURTS*, *supra* note 25, at 879–921.

152 *Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 964 (2001) (holding that Congress's Fourteenth Amendment power is insufficient to overcome state sovereign immunity in an action under the Americans with Disabilities Act; holding also that discriminations against the disabled are subject only to minimal rational-basis scrutiny).

153 *Id.* at 966.

154 There was also a statutory claim for “liquidated damages.” *Alden v. Maine*, 527 U.S. 706, 712 (1999).

In *Alden*, a class composed of Maine's probation workers were suing the state for withholding extra pay for overtime.¹⁵⁵ The minimum wage for overtime labor, like the generic minimum wage, is set by federal law—by the Fair Labor Standards Act.¹⁵⁶ The overtime wage is not the minimum wage, or the average wage, or the prevailing wage. Rather, it is aptly and familiarly described as “time and a half.”¹⁵⁷ Now, someone unfamiliar with the federalism cases might ask what authorizes Congress to set the wages of *state* government employees. The immediate answer, putting to one side the whole history of the commerce power since 1937, is the *Garcia* case.¹⁵⁸ It is *Garcia* that in our time tears down the supposed Tenth Amendment barrier to federal labor standards for state employees.¹⁵⁹ I raised the fact that the action in *Alden* was for earned wages not because of the equities favoring those employees' particular case—or not *only* because of the equities—but also because cases like *Alden*, for some mysterious reason, remain at the center of so much of the Court's federalism jurisprudence.¹⁶⁰ The applicability of the Fair Labor Standards Act was the point of contention in *Usery*¹⁶¹ and in *Garcia*, and was the point of contention in *Alden*. The facts of *Alden*, in short, seem to be generic to federalism cases.

155 *Id.*

156 Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (1994).

157 *See id.* § 207(e)(7) (setting the wage for overtime).

158 *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985) (holding that the Tenth Amendment does not bar Congress from regulating the national labor market even as to state employees) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), itself overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). For a contrarian assertion that it is *Garcia* that is the bad apple in this barrel, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1311 (1997).

159 *But see Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963, 967 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67, 91–92 (2000). *See also Gregory v. Ashcroft*, 501 U.S. 452, 470, 484–85 (1991) (holding, for reasons of federalism, that the Age Discrimination in Employment Act would not be construed to prohibit mandatory retirement of state judges without a clear statement in the language of the statute).

160 Apart from *Alden* itself, and *Garcia* and *Usery*—and the great nationalizing cases of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918))—see recently, for example, *Kimel v. Florida Board of Regents*, 528 U.S. at 91 (reaffirming the rule of *Seminole Tribe* to hold, inter alia, that Congress has no commerce power to abrogate state immunity from private suit in an action under the Age Discrimination in Employment Act).

161 *Nat'l League of Cities v. Usery*, 426 U.S. 833, 840 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

B. *Overshooting the Garcia Target*

A sticking point for the Court, as for Congress, has been the question whether national labor standards are appropriate in any event.¹⁶² From the point of view of, say, a rural employer in the 1930s, it might have seemed simply unreasonable to be required to pay city-style money to a rural workforce of largely (at that time) undereducated rural workers. The New Deal labor laws failed to include many of those workers, perhaps for that reason.¹⁶³ I gave a talk on *Alden* recently at a conference of state supreme court justices. After the talk the Chief Justice of the Supreme Judicial Court of Maine—what luck!—rose to his feet to explain why, in *Alden*, his court had held the state immune. The Maine judges were not overly concerned about their state's sovereign immunity, which was waived for Maine's own actions for wages. But they felt strongly that the federal statutory overtime wage, "time-and-a-half," was simply unreasonable when applied to probation workers in Maine.

It is commonly suggested that the real target of *Alden* was *Garcia*.¹⁶⁴ Arguably, *Alden* is intended to let its inflated Eleventh Amendment analogy do the work of the submerged Tenth Amendment. After all, the first casualty of restricted enforcement of national policy is national policy. That is what lends such a note of fatuity to the *Alden* Court's suggestion that the states remain subject to federal law.¹⁶⁵ Take the *Alden* situation itself. Congress concluded that a private cause of action was necessary under the Fair Labor Standards Act; Congress specifically found that, as a practical matter, the Labor Department could not enforce the statute, given the volume of infractions.¹⁶⁶ If the statute, then, is to be substantially unenforced against state employers without the private cause of action, national labor policy is weakened in proportion to the states' share of the labor market.

162 Consider the thinking that gave us *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (Day, J.) (holding that Congress had insufficient commerce power to prohibit interstate transportation of the products of child labor). "The goods shipped are of themselves harmless. . . . [T]he mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control." *Id.* at 272; see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 297 (1936) (holding that Congress had insufficient commerce power to bind a mining company to wages and hours standards that in part were negotiated nationally).

163 See David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 119 (1993).

164 See, e.g., Chemerinsky, *The Hypocrisy of Alden*, *supra* note 15, at 1299 ("Alden effectively overrules *Garcia* and reinstates *National League of Cities*"); Merico-Stephens, *Of Maine's Sovereignty*, *supra* note 15, at 328-29.

165 See *Alden v. Maine*, 527 U.S. 706, 756 (1999).

166 See *id.* at 810 (Souter, J., dissenting); S. REP. NO. 93-690, at 27 (1974).

It means very little to say that the states remain subject to federal fair labor standards. *Garcia* becomes a paper tiger.

But this view of *Alden* misses fire, not because *Alden* is not so bad, but because *Alden* is worse. *Alden* applies to Article I legislation of all kinds, not merely the Fair Labor Standards Act. *Alden* truly is a major development.

III. THE MAGIC MOUNTAIN: A MYTHICAL THEORY OF FEDERALISM

In ruling as it did, the *Alden* Court was like a mountain climber, struggling for footholds on a precipitous slope. The case is one long scrabble for theory. With his *cri de coeur* on fiscal federalism, Justice Kennedy reached for a theory of sovereign immunity to support it. But for this he needed, in turn, a foothold in a theory of state sovereignty—which seemed to require that he descend to a theory of state preëxistence. But in the end it appears there was no sure footing in any of this.

A. *The Myth of Sovereign Immunity and the Constitutional "Concept of States"*

Transparently, there is no textual argument for *Alden*. *Alden* is about state courts, and the Eleventh Amendment speaks to federal courts.¹⁶⁷ On the other hand, it is hardly news when the Eleventh Amendment will not support the result in an Eleventh Amendment case. The Eleventh Amendment has not been supporting results in Eleventh Amendment cases for over a century.¹⁶⁸ All the same, the departure from the text in *Alden* is so extreme, so unprecedented, that it helps us to understand why Justice Kennedy, in the end, did not actually base *Alden* on the Eleventh Amendment. While *Alden* reads like an Eleventh Amendment opinion, in the end *Alden* simply lets the Eleventh Amendment go. The Court finds, instead, that the Constitution's concept of "states"¹⁶⁹ reflects a natural-law principle of state sovereign immunity, well understood at the time of the Founding,¹⁷⁰ a

167 The text reads as a rule of construction vis-à-vis "[t]he Judicial power of the United States," requiring that that judicial power "shall not be construed" to extend to actions against a state by a citizen of another state. U.S. CONST. amend. XI.

168 See *supra* notes 92-108 and accompanying text.

169 See, e.g., *Alden*, 527 U.S. at 713 (citing cases, and citing U.S. CONST. art. III, § 2; art. IV, §§ 2-4; art. V; amend. X).

170 There was some reasoning along these lines also in the recent *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996) (holding Congress without commerce power to enforce federal law against a state in federal court) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

principle confirmed by both the Tenth and the Eleventh Amendments. At first blush, the argument looks rather convincing. One habitually supposes that a state has sovereign immunity at common law. But even if that is so, that immunity is a creature of state, not federal, law.¹⁷¹ And it turns out that this antique immunity principle is less certain than appears. Justice Souter, dissenting in *Alden*, finds that the only sovereign immunity at the time of the Founding was in the Crown.¹⁷² Moreover, Justice Kennedy does not say how it is, if the constitutional concept of a "state" imports a federal constitutional privilege of sovereign immunity, and if that immunity was presumed at the time of the Founding, that judges far closer in time to the Founding than the Rehnquist Court—the judges that decided *Chisholm v. Georgia*, for instance—did not see a constitutionally-required sovereign immunity where the *Alden* Court finds it. Even as late in the day as *Hans v. Louisiana*, the first Justice Harlan, concurring separately, could state a belief that *Chisholm* was sound when decided.¹⁷³ Nor does Justice Kennedy explain—if state immunity is such a deep-rooted constitutional understanding—how it is that, in the two centuries since the Founding, no one has ever suspected that states had a federal immunity in their own courts.

In a striking passage in *Alden*, Justice Kennedy argues that the preëxisting sovereign immunity of the states must have been understood in state as in federal courts, or the *Ex parte Young* officer suit would not have been needed.¹⁷⁴ But surely it would have been more accurate to say that it was the lack of federal-question jurisdiction at first,¹⁷⁵ and the decision in *Hans v. Louisiana* later, not state sovereignty, that blocked federal claims against the states in federal courts, as is shown by the occasional attempt to litigate Contracts Clause

171 *Cf. Nevada v. Hall*, 440 U.S. 410, 426–27 (1979) (holding that there is no federal constitutional principle of state sovereign immunity in state courts).

172 *Alden*, 527 U.S. at 764 (Souter, J., dissenting) ("The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; 'antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states.'" (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 207, at 149 (5th ed. 1891))).

173 *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

The comments made upon the decision in *Chisholm v. Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.

Id.

174 *See Alden*, 527 U.S. at 747 (quoting extensively from *Gen. Oil Co. v. Crain*, 209 U.S. 211 (1908)).

175 *See supra* note 118 and accompanying text.

claims against the states in diversity.¹⁷⁶ As for state courts, in light of the Supremacy Clause, it seems reasonably clear today if it has not been in the past that in state courts state immunities must give way to federal liabilities. That is the clear implication of *Howlett v. Rose*.¹⁷⁷ The thinking in *Crain's Case*,¹⁷⁸ that state courts adjudicating federal rights in equity may not deem an *Ex parte Young* officer suit to be one against the state, suggests that a federal, rather than a state, definition of immunity has long pertained when federal rights are pursued in state court. Given the Contracts Clause, and considering the Supremacy Clause, it appears that whatever sovereign immunity from federal suit the states had at the time of the Articles of Confederation was surrendered "under the plan of the Convention," just as John Marshall said it was.¹⁷⁹

We will have more to say about the supposed immunity of the states before the Founding as we proceed.

B. *Our New Antebellum Constitution*

More urgently, there is the grand fact of the Civil War. We have very different constitutional understandings now, after the Civil War, than we had at the time of the Founding. At the Founding we "split the atom of federalism;"¹⁸⁰ but the Civil War transformed it. Recall that, in *Union Gas*, Justice Brennan took hold of the chronological principle of *Fitzpatrick v. Bitzer*¹⁸¹ and argued that, if state sovereign immunity is natural law,¹⁸² preëxisting the Constitution, then the Commerce Clause, coming *later* in time, obviously trumps it.¹⁸³ Under the commerce power, then, Congress *could* abrogate state sovereign immunity, just as it can under the Fourteenth Amendment.¹⁸⁴

176 See *supra* note 36.

177 496 U.S. 356 (1990).

178 *General Oil Co. v. Crain*, 209 U.S. 211, 225-27 (1908), which was decided the same day as *Ex parte Young*, held that the *Young* officer suit should not be deemed to be a suit against the state when state courts adjudicate federal rights.

179 *The Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 352 n.b (1821); see *supra* note 99 and accompanying text. This view gains some support from the unquestioned power of the United States to sue a state. See, e.g., *United States v. Mississippi*, 380 U.S. 128 (1965); *United States v. Texas*, 143 U.S. 621 (1892).

180 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.").

181 427 U.S. 445 (1976); see *supra* notes 68-72 and accompanying text.

182 See *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-35 (1765)).

183 *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-17 (1989).

184 *Id.* at 16-17; see *supra* notes 51-61 and accompanying text.

Justice Kennedy's reply to this was that the federal principle of state immunity conveniently survived the Constitutional Convention.¹⁸⁵ Yet even if that is so, after *Fitzpatrick* it is not possible to say that state immunity survived the Fourteenth Amendment. And since the Eleventh Amendment was a casualty of the Civil War to that extent, why is it not dead as a constitutional principle for all purposes? The nation, after all, *won* the Civil War. The states lost. And that is so no matter what enumerated power of Congress is sought to be exercised. The Court is mistaken if it believes that the constitutional consequences of the Civil War can be cabined in the Civil War Amendments.

C. *The Myth of the State as the True Sovereign*

If the state had some primordial *sovereign immunity*, it must have been in some sense *sovereign*, as the *Alden* Court sees. The *Alden* Court therefore espouses a theory of state sovereignty at the time of the Founding. But *Alden's* theory seems painfully at odds with the Constitution's own theory of sovereignty and the familiar Federalist argument based on that theory. *Alden's* theory of sovereignty is markedly inattentive to a great legacy, the nationalizing Federalist narrative bequeathed to us by the Founders and more directly by the Marshall Court. Chief Justice Marshall laid out the Federalists' theory of sovereignty in the most eloquent of his opinions, *McCulloch v. Maryland*.¹⁸⁶ When *McCulloch* was savaged in a series of newspaper attacks,¹⁸⁷ Marshall rose to its defense, something he did for no case before or after *McCulloch*, publishing his series of essays by "A Friend of the Union" and "A Friend of the Constitution."¹⁸⁸ Marshall's view in *McCulloch*

185 See *supra* notes 68–72 and accompanying text.

186 17 U.S. (4 Wheat.) 315 (1819).

187 The chief author was Spencer Roane, whom Thomas Jefferson would almost certainly have appointed to the Chief Justiceship had not the previous president, John Adams, scooped him with the appointment of John Marshall. See BERNARD SCHWARZ, *A HISTORY OF THE SUPREME COURT* 53 (1993) (referring to 10 *THE WRITINGS OF THOMAS JEFFERSON* 140 (Paul Leicester Ford ed., 1899)); see also Note, *Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall*, 66 HARV. L. REV. 1242, 1258 (1953) (repeating the story as supposition). But see MARGARET E. HORSNELL, *SPENCER ROANE: JUDICIAL ADVOCATE OF JEFFERSONIAN PRINCIPLES* 33–34 (1986) (expressing a doubt about this history).

188 See GERALD GUNTHER, *JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND* (1969) (describing Professor Gunther's discovery of the authorship of Marshall's "A Friend of the Constitution" letters to the press). For a recent account of Marshall's secret authorship, see Charles F. Hobson, *Editing Marshall*, 33 J. MARSHALL L. REV. 823, 847–48 (2000):

Another critical moment in the Court's history was the controversy over the decision in *McCulloch v. Maryland*, which flared with particular intensity in

and in the essays was Alexander Hamilton's view,¹⁸⁹ and it was to become Abraham Lincoln's view as well. To Marshall, the sovereign was hardly the states—it was "We the People."¹⁹⁰ It was "We the People" who ordained and established the Constitution, not "We the States."

Against this, concededly, there is the fact that the states "consented to" the Constitution, as that document itself closes by declaring.¹⁹¹ This consent, however, is patently a two-edged sword. It might signify retained sovereignty, but it might also signify, as Chief Justice Marshall suggested in *The Cohens*,¹⁹² that the states had submitted themselves in the plan of the Convention to federal supremacy—including potential liabilities on their future indebtedness¹⁹³ to private parties for violations of federal law. The more serious counterargument, at first blush, is that the Constitution came into effect only after it was ratified in nine states, as provided by Article VII. But Chief Justice Marshall dealt a fatal blow to that argument as well. Ratification, notably, was not by the state legislatures, but by conventions of "the people" within each state. As Marshall put this in *McCulloch*:

Virginia during the spring and summer of 1819. So vehement were the newspaper attacks on that opinion that Marshall himself was provoked to reply with a series of essays, concealing his identity under the pseudonyms "A Friend to the Union" and "A Friend of the Constitution." In [separate] letters to Story and Washington, [Marshall] identified the Court's principal antagonists—Virginia judges William Brockenbrough and Spencer Roane—and disclosed his own authorship of the "Friend" essays. . . . In 1969, Professor Gerald Gunther brought [this] to light. . . . This public defense of the Supreme Court was an extraordinary, even risky, undertaking by the sitting Chief Justice, who took special care to keep his authorship secret. His unprecedented personal intervention was a measure of his deep alarm that the attacks on *McCulloch* were the opening wedge of a meditated attack on the Constitution and Union.

189 See SAMUEL J. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON: ARCHITECTS OF THE AMERICAN CONSTITUTION 165–91 (1964) (arguing that *McCulloch*'s theories of sovereignty and union represent the greatest influence of Hamilton's thinking on John Marshall).

190 For a concise intellectual history of the theory of popular sovereignty in the colonial period, see CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 143–47 (1953).

191 See U.S. CONST. art. VII.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names.

Id. (preceding the list of signatories) (emphasis added).

192 See *supra* notes 99–101 and accompanying text.

193 See *supra* note 112 and accompanying text.

It is true, they [the People] assembled in their several states—and where else should they have assembled? . . . [W]hen they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.¹⁹⁴

The state sovereignty theory at the heart of *Alden* is antithetical to this illustrious tradition and, indeed, to the Constitution itself.

D. States of Imagination: The Mythical Theory of the Preexisting State

The *Alden* Court's picture of states, sovereign states, that preexisted the nation—a picture that, admittedly, seems to be very widely shared—is ahistorical. The colonies obviously could have had no existence as “sovereign” states until after their declared or *de facto* independence from the Crown. It is true that some of the colonies did individually declare their independence. But every colony that did so acted at the request of and in deference to the Continental Congress.¹⁹⁵ Congress certainly preceded the states.

Moreover, the Union preceded both. As Abraham Lincoln pointed out in his First Inaugural Address, “The Union is much older than the Constitution.”¹⁹⁶ Although Lincoln understood that the

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

195 See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993), and especially pages 200–06 on “How the States Were Created.” See generally JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* (1979). And see the useful collection of current essays in *INVENTING CONGRESS: ORIGINS AND ESTABLISHMENT OF THE FIRST FEDERAL CONGRESS* (Kenneth R. Bowling & Donald R. Kennon eds., 1999).

196 Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in VI COMPLETE WORKS OF ABRAHAM LINCOLN* 169, 174 (John G. Nicolay & John Hay eds., 1905).

The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was “to form a more perfect Union.”

Id. Interestingly, a great Virginian, John Marshall, vividly testified, in his brief autobiographical memoir, to a fidelity to the Union that predated the Revolution and informed his boyhood:

I had grown up at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom;—when patriotism and a strong fellow feeling with our suffering fellow citizens of Boston were identical;—when the maxim “united we stand, divided we fall” was the maxim of every orthodox American; and I had imbibed these sentiments so thoroughly [sic] that they constituted a part of my being. I carried them

Union formally came into being with the Declaration of Independence, he believed that the people of the colonies had been informally but indissolubly bound to each other in Union—Americans all¹⁹⁷—even before the quarrel with England, back, back into the dim past, as far back as the “mystic chords of memory” could sound or bind.¹⁹⁸ We were already becoming a nation, *e pluribus unum*, far back

with me into the army where I found myself associated with brave men from different states who were risking life and everything valuable in a common cause believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and congress as my government. I partook largely of the sufferings and feelings of the army. . . .

JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH 9–10 (John Stokes Adams ed., 1937).

197 The phenomena, for example, of the multi-colony Committees of Correspondence and the Sons of Liberty, in the period leading up to the Revolution and continuing into the revolutionary period, are strong evidence of this feeling. See, e.g., Letter from Christopher Gadsden to Boston Committee of Correspondence (Charlestown, S.C., June 28, 1774), in *THE WRITINGS OF CHRISTOPHER GADSDEN 1746–1805*, at 100, 100–01 (Richard Walsh ed., 1966):

At the Desire of the Gentlemen whose names you'll see in an Advertisement in the inclosed paper who have been requested to receive the Donations offer'd in this Colony for the Benefit of such Poor persons in Boston whose unfortunate Circumstances occasion'd by the Operation of the Late Unconstitutional Act of the British Parliament may be thought to stand in need of immediate Assistance, we have the Honour to send you the inclosed Bill of Lading for 194 whole and 21 bbls. rice laden by us on board the Sloop Mary, John Dove, Master for Salem there to be delivered to your order and disposed of *in any manner* that you may judge most conducive to the above mention'd Intention of the Donors. . . . We beg leave to assure you that the people of this Colony sincerely Sympathize in the most feeling Manner with their Brethren at Boston and are well convinced that their Steadiness and Spirit in the Common Cause of America has brought upon them that . . . Vengeance the effect of which they are now suffering.

See also *id.* at 66:

[T]he friends of liberty here are all as sensible as our brethren to the Northward, that nothing will save us but acting together. The Province that endeavours to act separately will certainly gain nothing by it; she must fall with the rest, and not only so, but be deservedly branded besides with ever lasting infamy.

Id. (quoting a Letter from Christopher Gadsden to William Samuel Johnson and Charles Garth (Charleston, S.C., Dec. 2, 1765)).

198 See Lincoln, *supra* note 196, at 185:

Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature.

These old shared recollections included shared struggles to dispossess the Indians, to free ourselves from our new-world theocracies and bigotries, and to deal with the self-

in our colonial past. And when we fought the revolution, we fought it together. Shortly after the close of the Civil War, Lincoln's First Inaugural Address found an echo in Chief Justice Chase's opinion for the Court in *Texas v. White*.¹⁹⁹

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation.²⁰⁰

The states came into formal existence as *states* only when the nation came into formal existence, with Congress's adoption of the Declaration of Independence. States and nation were simultaneous creations. At that point this country received its name, the United States of America, and at that same point the constituent "states" of the United States came into being, in Chief Justice Chase's rather metaphysical formulation, as "states in Union."²⁰¹ And it seems reasonably clear that the states, as states, from this beginning, were never more than quasi-sovereign, continuing always to hold themselves in some sense in deference to Congress as they had from the moment the First Continental Congress came together.

In this limited sense, as states in Union, it is true that the states did have some existence before the Constitution of 1789, although it was hardly an independent or sovereign existence. We see them at first during the Revolution, failing to meet their requisitions for the miserable provision of the Continental Army and later, under the Articles of Confederation, unable to govern themselves, falling into debt and quarrels and civil disorder.²⁰² It is certainly true that under Article II of the Articles of Confederation, the states purported to "retain" their "sovereignty."²⁰³ But no such clause survived the Constitutional Convention, notwithstanding Justice Kennedy's insistence in *Alden*

inflicted but intensifying problem of white and black slavery, North and South. See generally, e.g., SEVENTEENTH-CENTURY AMERICA: ESSAYS ON COLONIAL HISTORY (James Morton Smith ed., 1959); ROSSITER, *supra* note 190; V.F. CALVERTON, THE AWAKENING OF AMERICA (1939).

199 74 U.S. (7 Wall.) 700, 724–25 (1868) (Chase, C.J.) (holding the Union perpetual and indissoluble; setting at naught the purported secession of Texas; ruling that those creditors who dealt with the rebel state could take nothing).

200 *Id.*

201 *Id.* at 725.

202 For a comprehensive modern treatment of the period, see RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789 (1987).

203 ARTICLES OF CONFEDERATION art. II. "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this

that somehow a constitutional principle of state sovereign immunity did. The Tenth Amendment reserves a residuum of "powers," not "sovereignty," to the states. Sovereignty is an item for which the Constitution finds a very different repository—in "the people."²⁰⁴

As for the asserted sovereign immunity of these supposedly preëxisting sovereign states, neither the Articles of Confederation nor the Constitution makes the slightest reference to it. Justice Souter, dissenting in *Alden*, points out that, even in the period of the Articles of Confederation, some states did not recognize sovereign immunity as a defense even to common-law claims. Some even prohibited the defense in their own constitutions or waived it by legislation.²⁰⁵ Yet of course some states during that period did recognize the common-law defense of sovereign immunity. But the defense had its source in state, not federal, law. What matters, however—although Justice Kennedy's opinion for the Court does not seem to notice the difficulty—is that it would not be possible to say with any confidence that those early "immunity" states would have interposed the defense *in a federal case*. There was very little federal law at the time of the Articles, and there were no federal courts, save for a single court reviewing admiralty cases coming from the state courts.²⁰⁶ And of course under the Articles of Confederation there was no Contracts Clause, or any other constitutional clause likely to ground a constitutional claim against a state. So it is only for the sake of argument that we could assume that those states recognizing the defense of sovereign immunity would have applied it in a federal case.

True, the theory of the Articles of Confederation was that the nation was a loose "confederation" of, or "compact" among, quasi-sovereign states. And even if Article II of the Articles of Confederation, purporting to retain state sovereignty, was as tautological as the Tenth Amendment is held to be,²⁰⁷ it still might be supposed that the main

Confederation expressly delegated to the United States, in Congress assembled." *Id.* But the states already existed "in Union" at this time.

204 See *supra* notes 186–94 and accompanying text.

205 See *Alden v. Maine*, 527 U.S. 706, 769–70 (1999) (Souter, J., dissenting).

206 See HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787* (1977).

207 For Article II of the Articles of Confederation, see *supra* note 203. The character of the Tenth Amendment as a "truism" is laid down in *United States v. Darby*, 312 U.S. 100, 124 (1941), and reaffirmed, more or less, in *New York v. United States*, 505 U.S. 144, 156–57 (1992). In *New York*, Justice O'Connor, for the Court, used some sleight of hand with *Darby*, doing for the Tenth Amendment what the Court would later do for the Eleventh:

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as

part of sovereignty remained lodged in the states, and only the residuum was left to the weak nation. But it was the whole point of the Constitution, as everybody knows, to correct the mistaken theory of the Articles of Confederation. The very purpose of the Constitution was to make it possible for the nation to govern effectively, notwithstanding the powers and immunities of the states. The Constitution has a Supremacy Clause. It has a Supreme Court. And Congress has power to create federal courts and to regulate interstate commerce. In ditching the Articles of Confederation for the Constitution, the idea was to form "a more perfect Union," not "more sovereign states."

What sovereignty, at all events, could the states have retained under the Articles, however impotent the nation, that would have survived the Constitution? The nation's powers could not have derived from delegations of state sovereignty, as they do from the consent of the People. No state, then or now, ever could have had any sovereign power over the interstate commerce or the foreign relations of the nation. Although a state then as now might *carry on* interstate commerce, the state never could have had any sovereign power over the interstate commerce of the nation, and today can affect interstate commerce only if presenting no obstacle to national policy. Although a state, then as now, might carry on its *own* foreign relations, no state then or now can carry on the foreign relations of the United States.²⁰⁸ Then as now, no state can make a separate treaty.²⁰⁹ No state today can enact foreign relations law in conflict with federal law.²¹⁰ And by analogous reasoning, any sovereign "immunity" "retained" by a state at the Founding could be exercised today if, and only if, consistent with national enforcement policy.

Nor were the powers delegated to the nation in the Constitution delegated by the states, as is often said, but rather by "the Constitution."²¹¹

we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Id.

208 *See, e.g.,* *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968) (preempting an Oregon statute regulating the extent to which a foreign national could inherit land in Oregon, based on whether the foreigner's country would permit an American to inherit).

209 U.S. CONST. art. I, § 10, cl. 1; ARTICLES OF CONFEDERATION art. VI.

210 *See, e.g.,* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (preempting Massachusetts' sanctions against Burma for human rights violations).

211 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

To be sure, there are two sides to most stories, and the story we have been retelling is only the Federalist side of the story. But I should have thought the Antifederalist side of the story was, or ought to have been, laid to rest with the brave, deluded Confederate dead.

E. Calhoun's Ghost

So the *Alden* Court has given us dubious constitutional interpretation grounded on dubious theory. The Court's theory of state sovereignty seems an exercise in nostalgia for the good old days under the Articles of Confederation—a theory that sounds more like John C. Calhoun than the Founding Fathers. It was Calhoun, echoing the Kentucky and Virginia Resolutions of 1798,²¹² who taught that the states could “interpose” themselves between the people and federal law, and who advanced a program for state “nullification” of federal law²¹³—ideas that would be preached again by the diehard segregationists of the 1950s. It was Calhoun who offered the subversive and spurious teaching that if such “interposition” and “nullification” failed, each state, in its own constitutional convention, had a unilateral right to secede from the Union, without regard to the constitutional amendment process—an idea repudiated by Abraham Lincoln in the First Inaugural Address.²¹⁴ These doctrines, I should have thought, have been as thoroughly discredited as any in our history.²¹⁵

212 See Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, reprinted in 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 540 (2d ed. 1907); James Madison, *Virginia Resolutions of 1798*, reprinted in 4 *id.* at 528. The story of the Resolutions is nicely told in H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994). For resolutions opposing the Kentucky and Virginia Resolutions, see WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 264–65 (1986) (citing the resolutions of Massachusetts, Rhode Island, and Vermont).

213 Under Calhoun's proposal, if three-fourths of states “nullified,” this would be tantamount to constitutional amendment, and federal law would be nullified everywhere. See John C. Calhoun, *The South Carolina Exposition and Protest* (1828) (report to the South Carolina legislature), reprinted in 10 *THE PAPERS OF JOHN C. CALHOUN* 442 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977). For additional background, see Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1305 n.41 (1997).

214 See Lincoln, *supra* note 196, at 173 (“I hold that, in contemplation of universal law and of the Constitution, the Union of these States is perpetual. . . . It is safe to assert that no government proper ever had a provision in its organic law for its own termination.”).

215 The ultimate settlement of the issue is to be read in the case of *Texas v. White*, 74 U.S. (7 Wall.) 700, 726, 735–36 (1868) (holding that Texas could not unilaterally secede from the Union, and acts undertaken by Texas when in a state of rebellion were nullities; therefore, Texas could invoke the original jurisdiction of the Court, and was entitled to the proceeds of bonds negotiated for goods during the Civil War;

F. *The Myth of Retained Sovereignty: The Tenth Amendment and the "Conditions" of Ratification*

In *Alden*, casting about for some mooring in the constitutional text, Justice Kennedy seemed to sense an insufficiency for the purpose in "the constitutional concept of a state." So he grasped at the straw of the Tenth Amendment. He found that his state sovereignty theory was "confirmed" not only by the Eleventh Amendment, but also by the Tenth.²¹⁶ In fact he relied if anything more heavily on the Tenth. But it is very hard to fall back on the Tenth Amendment to legitimize *Alden*. In over two centuries of constitutional history, no one has ever said or thought that the Tenth Amendment imports any notion of state immunity from suit.²¹⁷

And here the Court's historical discussion seems particularly unpersuasive. It is true that some state ratifications of the Constitution purported to be conditioned on retention of state immunity. But that was the fact for two states only, New York and Rhode Island.²¹⁸ Recall that, when returning their ratifications, a number of states recommended or prayed for various sorts of amendments to the Constitution. Then as now these tacked-on admonitions were read as merely precatory. Very few of these earnest prayers for amendment made the final cut.²¹⁹ Madison culled twelve from nearly forty of the most frequently-made such requests, and only ten of these made it into the Bill of Rights. State sovereign immunity was not among these. It is not in the original Constitution of 1787, and it is not in the Bill of Rights. I do not want to be terribly textualist about this, but, as Justice Scalia might say about some cited conclusion in a House report, state sovereign immunity was not part of the final deal as reflected in the text. That is probably one of the reasons a majority of the Supreme Court decided against the state in *Chisholm v. Georgia*,²²⁰ why *Chisholm* was

and those creditors who traded with Texas during its period of rebellion could take nothing). See also *Hart v. White*, 80 U.S. (13 Wall.) 646, 649-52 (1872) (holding that, Georgia never having left the Union, her attempted secession in no way excused her from her obligations under the Impairment of Contracts Clause; not citing *Texas v. White*, understandably, since the two opinions' ultimate conclusions as to state liability were inconsistent).

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

217 See *id.* at 762-63 (Souter, J., dissenting).

218 See 1 JONATHAN ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 329 (1996) (1836) (as to New York); *id.* at 336 (as to Rhode Island).

219 For James Madison's view that none of these requests could be read as conditioned on a right of withdrawal, see Letter from James Madison to Alexander Hamilton (July 20, 1788), reprinted in *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 120 (Michael Kammen ed., 1986).

220 2 U.S. (2 Dall.) 419 (1793).

probably right when it was decided, and why the first Justice Harlan thought *Chisholm* was right when it was decided.²²¹ And that is among the reasons why not only *Alden*, but also *Hans v. Louisiana*, was and remains wrong.

One of the things the Framers did care about, as most of us understand the history today, was rescuing the public and private credit of the country and protecting rights of property. These policies cannot be vindicated if the government is immune from suits for money.²²² No polity can enjoy public credit and at the same time indulge the luxury of a government unanswerable to suit by its creditors. Unlike the chimera of sovereign immunity, state *liability* is part and parcel of the Constitution. The Contracts Clause²²³ speaks directly to the concern that debtor states pay their obligations,²²⁴ as does Article III, Section 2, authorizing federal jurisdiction over such suits. And the Supremacy Clause contemplates enforcement of state obligations in state as well as federal courts.

IV. THE MYTH OF THE SEAMLESS WEB

A. *The Myth of the Background Understandings*

Alden, then, gives us a constitutionalized federal common law of sovereign immunity which makes little theoretical or historical sense. To make matters worse, federal common law on this occasion "moves" with what Holmes would have called a "molar" rather than a "molecular" motion.²²⁵ After *Alden* one feels a rather massive tectonic shift in the jurisprudence. The case makes a deep and radical change, in considerable tension with prior law.²²⁶ Justice Kennedy does a creditable job of "reconciling" cases along hitherto unnoticed lines of opportu-

²²¹ See *supra* note 173.

²²² But see, e.g., *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (holding that officer suits will not lie for court orders to release past moneys owed, because such moneys are similar to damages from the state treasury); *In re Ayers*, 123 U.S. 443, 506-07 (1887) (holding that an officer suit cannot lie for money owed on the contract, since the state is the real party in interest, and the officer cannot pay).

²²³ U.S. CONST. art. I, § 10, cl. 1.

²²⁴ See, for the early understanding that the Clause embraced public contracts, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

²²⁵ See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.")

²²⁶ See, e.g., Pfander, *Once More Unto the Breach*, *supra* note 15, at 819 ("*Alden* represents a challenge to much of the existing learning in the field.")

nity, but one is left with the sense that after *Alden* one's understandings must undergo substantial and complex transformations.

To begin with, there is *Nevada v. Hall*,²²⁷ holding that there is no constitutional principle of state sovereign immunity. That was a curious case in which California took jurisdiction over a private tort claim against the state of Nevada. The Supreme Court, by Justice Stevens, found nothing either in the Eleventh Amendment, or in general preëxisting background understandings, that made state sovereign immunity in a state court somehow a principle of constitutional law. But in *Alden*, Justice Kennedy found it easy to distinguish these holdings. He simply pointed out, quite correctly, that the forum in *Nevada v. Hall* was the court of a sister state, not the defendant state's own court. Justice Stevens, writing for the Court in *Nevada v. Hall*, had repeatedly drawn the distinction himself.²²⁸ Justice Kennedy was apparently unaware that this easy distinction undercuts *Seminole Tribe* and *Hans v. Louisiana*. After the Court has relied on this argument, *Alden*'s crucial preëxisting "understandings," which are confirmed by the Tenth Amendment and graven in constitutional stone, cannot be used coherently to play the role of the Eleventh Amendment in *federal courts*, because *Alden* is about a sovereign's immunity *in its own*. More fundamentally, nothing in the distinction between a state's own courts and another state's courts gets at the refusal of the Court in *Nevada v. Hall* to find any principle of state sovereign immunity at all—whether within the Constitution, or underlying it. *Nevada v. Hall* specifically rejected the argument that constitutional principles underlying Eleventh Amendment immunity protect a state in a state court.²²⁹

227 440 U.S. 410 (1979).

228 See *Alden v. Maine*, 527 U.S. 706, 738 (1999) (citing *Hall*, 440 U.S. at 414). It is generally true that a sovereign is immune only to the extent the forum's law is willing to recognize its immunity. For example, the immunity *vel non* of, say, France in American courts is determined not by French law, but by an act of Congress. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602–1611 (1994).

229 See *Nevada v. Hall*, 440 U.S. 410, 420–21 (1979) (specifically refusing to extend Eleventh Amendment coverage to the states); *id.* at 418–19 (rejecting the argument that there is some constitutional principle of state sovereign immunity); *id.* at 416–17 (noting the superior claim of the forum sovereign to determine the immunity of another sovereign, an idea which in the context of federal supremacy would seem to translate to the principle of *Howlett v. Rose*, see *supra* note 177, *infra* notes 234–35 and accompanying text); *id.* at 415 (rejecting the fiction that the King could do no wrong); *id.* at 414 & n.5 (also finding no federal statutory immunity for the states).

B. *Castle in the Sky: Alden's Mythical "Constitutional Structure"*

To *Alden's* critics, *Alden* also seems to be in tension with a substantial body of jurisprudence that forms a keystone in the structure of the constitutional law of courts. Although *Alden's* critics are right about this, they are wrong about an important piece of the puzzle, the Supremacy Clause. The Supremacy Clause is an essential element in the constitutional design, but it is the one such element with which *Alden* can be reconciled. This has not been widely understood. *Alden's* double-barreled attack on substantive federal law enforcement and on the power of Congress to make substantive federal law enforceable have perhaps obscured the picture. A due positivism ought to alert us to the fact that *Alden's* new constitutional privilege is federal, not state, law. There is no offense to the Supremacy Clause when a federal defense frustrates a federal claim.

The sense of dislocation an educated lawyer has in reading *Alden* is nevertheless very real. *Alden* cannot readily be reconciled with the old structural understandings of which the supremacy of *substantive* federal law is a key feature. *Alden* blasts a hole in this structure, the size of which can be measured not by the obvious damage to national policy—that is a separate problem—but from the absence in that theoretical structure now of a theoretical state forum for federal statutory claims against a state.

One sees these understandings in the Madisonian compromise of 1787—the feature of Article III that establishes not the inferior federal courts, but only Congress's power to establish them,²³⁰ thus impliedly requiring the preexisting state courts to be open for the protection of federal rights. One sees them in the adjudicatory structure laid out under Article III by Justice Story in *Martin v. Hunter's Lessee*²³¹ and by Chief Justice Marshall in *The Cohens*. This is the struc-

230 But see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 43 (1995) (arguing that at the time of the Founding the structural implications of the Supremacy Clause and the Madisonian compromise were not widely perceived and that many in that generation thought federal courts necessary precisely because they did not believe state courts could take jurisdiction over cases arising under federal law). At all events by the time of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the true position was sufficiently clear to Joseph Story, as it remained in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 589–90 (1833). (I should explain, for the generalist reader, that "the Madisonian compromise" is a modern reference to the failure of the Constitution to establish the inferior federal courts, coupled with the grant to Congress of power to do so. The term seems to have been coined by Professor Redish. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 54 (1975)).

231 14 U.S. (1 Wheat.) 304 (1816).

ture described in well-known language in *Claflin v. Houseman*:²³² "The laws of the United States are laws in the several States, and just as much binding on the . . . courts thereof as the State laws The two together form one system of jurisprudence, which constitutes the law of the land for the State" ²³³

It is this structure, this grand constitutional design, this single system of jurisprudence, that is in tension with *Alden*. The most recent important manifestation of the old understandings is the case of *Howlett v. Rose*.²³⁴ In *Howlett*, in a full-dress opinion by Justice Stevens, the Court held, under the Supremacy Clause, that a state could not cloak a school board with sovereign immunity in an action in the state's own courts to enforce the federal Civil Rights Act of 1871.²³⁵ Think of it: state immunity in state court trumped by federal supremacy and federal law. Although *Alden* is not about civil rights, *Howlett* seems to inhabit a world that could not have *Alden* in it, and it is *Howlett* that fits the preëxisting structural understandings, not *Alden*. It is true that, in *Howlett*, immunity is a matter of state law and, under *Alden*, can also be a matter of federal law. But the principle of federal supremacy destroyed the immunity defense in *Howlett*. It cannot do that after *Alden*.

In *Alden*, Justice Kennedy purported to make short shrift of *Howlett*. Neglecting for the moment the fact that *Alden* was a federal, not a state, privilege, he pitched on another argument. The defendant in *Howlett*, he quite rightly pointed out, was only a school board, a creature of the county, not the state.²³⁶ Such a defendant would be open to suit in federal court as well.²³⁷ But why should that make a difference, if the sovereign state in its own courts *under its own law* could define school boards as arms of the state rather than the county and thus save school boards the trouble of complying with federal law? The weakness of the Court's distinction is revealed in the way courts below are reading *Alden* and *Seminole Tribe*. Given the Court's radical new thinking on the whole question, lower federal courts are indeed

232 93 U.S. 130 (1876).

233 *Id.* at 136-37.

234 496 U.S. 356 (1990).

235 42 U.S.C. § 1983.

236 *Alden v. Maine*, 527 U.S. 706, 740 (1999).

237 *See id.*; *see also* *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (holding counties and lesser subdivisions of the state not entitled to Eleventh Amendment immunity).

applying the immunity of the state to counties and, yes, to school boards.²³⁸

The true and important distinction between *Howlett* and *Alden* derives from the fact that the immunity in *Alden* has its source in federal, not state, law. I do not mean to point up the obvious consequence that because *Alden* immunity is a constitutional privilege, Congress cannot destroy it. Rather, I want to stress a great moral we can take from this distinction: that, after all, *Howlett*, in theory, in principle, does survive *Alden*. Not for the trivial reason that in *Howlett* the defendant was a county, but because of the principle of *Howlett* that is worth preserving in the long run: that state-law defenses to federal law, even the state-law defense of sovereign immunity, must fall, under the Supremacy Clause.

Howlett follows from the classic case of *Testa v. Katt*.²³⁹ *Testa* involved a federal statutory claim and in that way more closely resembled *Alden*. *Testa* stands for the proposition that, under the Supremacy Clause, a state must adjudicate a federal claim, at least if it adjudicates similar state claims. A state may not discriminate against a litigant solely on the ground that she relies on federal law.²⁴⁰ Yet *Alden* authorizes the state, as a matter of federal law, in the teeth of this settled understanding, to close its doors to a federal claim against the state and even to discriminate against the litigant relying on such a claim. In *Alden* itself, Maine was discriminating against a federal claim in precisely the manner forbidden by *Testa*. Justice Kennedy acknowledged that Maine courts would sometimes take cognizance of an action for wages against the state, under Maine's own common law, but not under federal statutory law.²⁴¹ Justice Kennedy shrugged off such choices as incidental to state sovereignty.²⁴² He might have argued, further, that to force a state to adjudicate a federal case *against itself*, in order to avoid discrimination between claimants having similar state and federal claims, would be to hold that a state's having law similar to federal law could produce a "constructive waiver" of its sov-

238 For a useful review of recent cases in the lower courts, see Ronald D. Wenkart, *The Eleventh Amendment, Sovereign Immunity and Its Impact on School Districts*, 147 WEST'S EDUC. L. REP. 15 (2000).

239 330 U.S. 386 (1947).

240 See, e.g., *F.E.R.C. v. Mississippi*, 456 U.S. 742, 775-76 n.1 (1982) (O'Connor, J., concurring & dissenting); *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4 (1950); *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934); *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387 (1929); *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 58 (1912); *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876).

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

242 *Id.*

ereign immunity—a concept that the Court had rejected in the same term, in the *College Savings Bank* case.²⁴³ Yet that reflection may more easily suggest to the reader that the doctrine of constructive waiver is sound, than that discriminatory state door-closing rules are acceptable simply because the state is the party defendant and the claim is under federal law.

Alden undermines another central feature of the dual-court structure. *Alden* has the bizarre but serious consequence of creating a new kind of door-closing rule, the novelty of which is that the inadequacy of one set of courts will *not* trigger compensatory concurrent jurisdiction in the other, but just the opposite—surely an unfamiliar configuration in our law. One thinks of the bodies of statute and case law, too multifarious to be set out in anything more concise than a casebook on federal courts, that condition denials of federal jurisdiction or abstentions from the exercise of federal jurisdiction on the adequacy of the alternative state forum.²⁴⁴ In *Alden*, of course, the doors to all courts are closed simultaneously. There is no alternative forum.

To be sure, the Court in the past has on at least one other occasion reached a blanket ouster of jurisdiction, state and federal, with as little attention to textual authorization as we see in *Alden*. I refer to the Court's iron enforcement of the Federal Arbitration Act.²⁴⁵ Today, under that statute, an "agreement" of the parties to arbitrate, however unbargained-for,²⁴⁶ must be strictly enforced in state as in federal courts,²⁴⁷ although the Act pertains only to federal courts. If the analogy is incomplete, it is only because in some sense the "con-

243 See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), with respect to its doctrine of constructive waiver).

244 Consider, for example, the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1994), forbidding injunctions against a state tax where "a plain, speedy and efficient remedy may be had in the courts of such State." See also, for example, the Johnson Act of 1934, 28 U.S.C. § 1342 (1994), forbidding injunctions against a state agency when, inter alia, "a plain, speedy and efficient remedy may be had in the courts of such State."

245 9 U.S.C. § 4 (1994).

246 See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33–35 (1991) (holding in a Title VII case that the plaintiff alleging discrimination in employment was bound by an arbitration clause in the rules of the New York Stock Exchange, which rules were incorporated only by reference in boilerplate in the employment contract). More recently, see *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1308–11 (2001), in an employment discrimination action, narrowly construing the Act's exclusion of employment contracts as limited to transportation workers.

247 See *Southland Corp. v. Keating*, 465 U.S. 1, 11–17 (1984) (holding that the Federal Arbitration Act, though intended to govern only in federal courts, is binding in all courts for all contracts in interstate commerce).

sent” of the parties, at least, however fictitious, legitimizes these ousters—an advantage that the *Alden* plaintiffs did not enjoy. And of course there is the further distinction that arbitration just might result in a full recovery.²⁴⁸

It is ironic, in view of the magnitude of *Alden*'s departure from settled structural understandings, that in *Alden* Justice Kennedy had the temerity to say (*twelve times*, by my count) that the Court based its decision not only on constitutional history, but on the constitutional “structure.”²⁴⁹ We have yet to complete our examination of *Alden*'s version of constitutional history.²⁵⁰ But despite the twelve repetitions about “structure,” the Court had no convincing way of linking *Alden* to the relevant structural features of the Constitution. The Court's only sound structural point was that the Constitution recognizes the existence of the states as well as the nation. But to read immunity into that fact is hardly more convincing than to read liability into it. When Congress imposes liabilities upon the states, we understood, and *Howlett v. Rose* confirmed, that state sovereign immunity would be swept away in state court by operation of the Supremacy Clause. We reasoned this way, in part, *because*, under *Hans v. Louisiana*, the same result would not necessarily follow in federal court. As we have seen, one of the reasons *Alden* had to fashion a *federal* privilege is, precisely, that the Supremacy Clause defeats the actual preëxisting immunity of a state in its own courts—its immunity under its own law.²⁵¹

The structural understandings I have been describing were profoundly internalized before *Alden*, even among the Court's most conservative members. Let me reproduce here a recent statement of these understandings by none other than Justice Clarence Thomas:

Nor can a desire for “intrastate uniformity” permit state courts to refuse to award relief merely because a federal court could not grant such relief. As petitioners note, it was not until 1875 that Congress provided any kind of general federal-question jurisdiction to

248 Blanket ouster seems too blunt an instrument to protect state dignity and autonomy. The state's credit depends on its conformity to law, and it should be an advantage to the state to try its liabilities in its own courts. See Jackson, *Seductions of Coherence*, *supra* note 15, at 700; Shapiro, *The 1999 Trilogy*, *supra* note 15, at 754; Marshall, *Understanding Alden*, *supra* note 15, at 809.

249 *Alden v. Maine*, 527 U.S. 706, 713, 724, 733, 728, 733, 741, 748, 752, 754, 758, 759, 760 (1999).

250 See *infra* notes 267–75 and accompanying text.

251 Contrary to these structural understandings, the *Alden* Court adopted the spurious argument from symmetry advanced in the court below. “If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims.” *Alden v. State*, 715 A.2d 172, 174 (Me. 1998).

the lower federal courts. . . . Because of the Supremacy Clause, state courts could not have refused to hear cases arising under federal law merely to ensure “uniformity” between state and federal courts located within a particular state.²⁵²

To all of this entrenched wisdom, Justice Kennedy in *Alden* offered up the reply made available to him by his convenient federalization of the defense. Federal substantive law no longer has the advantage over state immunity that the Supremacy Clause once provided. After *Alden*, an act of Congress imposing liability upon an unconsenting state, as upon other market participants, comes with a built-in discount: “When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.”²⁵³ The operative words here are “constitutional sovereignty.” Justice Kennedy is playing trumps.

Yet a position that removes a class of claims from the jurisdiction of all courts, like a belled cat, sounds its own warning. It must depend, for due process, upon the existence of alternative viable ways in which those claims can be heard. That is a problem to which I will return shortly.

C. *The Anti-Commandeering Embarrassment*

The *Alden* Court suggested that in opening states to liability in their own courts, Congress unconstitutionally attempted to “commandeer” the state courts, in violation of the anti-commandeering principle of *Printz v. United States*²⁵⁴ and of *New York v. United States*.²⁵⁵

A power to press a State’s own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.²⁵⁶

What moved Justice Kennedy to attempt to sweep state courts under the Tenth Amendment’s proscription of “commandeering” was his vision of a state judge hijacked by some disgruntled individual and hamstrung by the imperatives of federal law, forced in the state’s own

252 *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 588–89 (1995) (Thomas, J.).

253 *Alden*, 527 U.S. at 732.

254 521 U.S. 898 (1997).

255 505 U.S. 144 (1992); *see also* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842); *see supra* note 3.

256 *Alden*, 527 U.S. at 749 (Kennedy, J.).

courts to impose a governance upon the state antithetical to the state's own views. This fear of a collapse of state autonomy also lay at the heart of the first Justice Harlan's dissent in *Ex parte Young*.²⁵⁷ If *Ex parte Young* became established law, Justice Harlan warned, it

would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were "dependencies" or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land.²⁵⁸

And yet Justice Harlan's warning was rejected and unheeded. The litigation he feared then is what we think of today, in the typical case, as civil rights litigation. It is enforcement of the Constitution against a state, envisioned as early as the Contracts Clause, and insisted upon in the Fourteenth Amendment's "No state shall," enforcement we rightly expect in state courts as in federal. Without such enforcement against state as well as local officials our nation might still be scarred by statutory apartheid. Nor can there be any important distinction, given the Supremacy Clause, between the "commandeering" of state courts in constitutional injunction cases under *Brown v. Board of Education* and in statutory cases even for monetary relief like *Alden v. Maine*. It is not much better for the nation to be scarred by state exploitation of labor than by state racial discrimination.

Concededly, much in the anti-commandeering idea, even in this context, commends it. A nation imposing liability upon a state in the state's own courts may escape blame and shift costs. In the *New York* case, the "blame" part of this argument interested Justice O'Connor. She fretted that when the nation conscripts the states into its service, lines of political accountability can become blurred.²⁵⁹ But that concern has doubtful salience in the context of the power of Congress over state courts.²⁶⁰ That is because, to begin with, the Constitution itself establishes the state courts' obligation under the Supremacy Clause to enforce applicable federal law.²⁶¹ The Constitutional com-

257 209 U.S. 123, 168 (1908) (Harlan, J., dissenting).

258 *Id.* at 175.

259 *See New York*, 505 U.S. at 177.

260 *See*, for a policy analysis on this point, Marshall & Cowart, *State Immunity*, *supra* note 15, at 1089.

261 U.S. CONST. art. VI, cl. 2.

mand is specifically binding upon state judges,²⁶² on their oath,²⁶³ without regard to any possible confusion about political accountability—or of shifted costs, for that matter. No doubt a state judge might fail of reelection for following federal law. If so, that is a reason to advocate an independent appointed state judiciary, not a reason to advocate the frustration of federal policies. For these sorts of reasons, the Court in *New York* carefully excluded state courts from its anti-commandeering principle.²⁶⁴

But, quoting copiously from *New York*, Justice Kennedy in *Alden* further muddied the waters: “The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”²⁶⁵ But there could be no issue of regulation of the state *qua* state in *Alden* or in any analogous Article I case. In these cases, the states are not singled out for regulation in their sovereign capacities, but rather treated indistinguishably from all other participants in the national markets. Maine here was regulated under the Fair Labor Standards Act only as an *employer*, not as a state.²⁶⁶

V. OUR ANTIFEDERALIST FOUNDERS

I am hardly the only writer who has paused to warn the reader about the misuse of authority from the Founding by the *Alden* Court.²⁶⁷ Alexander Hamilton, the staunchest of Federalists, and one of the greatest political theorists the world has ever known, is taken by

262 *Id.*:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(emphasis added).

263 U.S. CONST. art. VI, cl. 3: “[J]udicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .” (including, of course, Art. VI, cl. 2).

264 *New York*, 505 U.S. at 178–79.

265 *Alden v. Maine*, 527 U.S. 706, 714 (1999) (quoting *New York*, 505 U.S. at 166).

266 Justice Blackmun’s argument in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545–47 (1985), that judges cannot draw these sorts of distinctions does not temper the force of this observation, since Blackmun employed the argument to justify blanket state liability, not immunity.

267 See, e.g., Nowak, *The Gang of Five*, *supra* note 11, at 1099; James G. Wilson, *The Eleventh Amendment Cases: Going “Too Far” with Judicial Neofederalism*, 33 *LOV. L.A. L. REV.* 1687, 1704–05 (2000).

the *Alden* Court²⁶⁸ as yielding the ground of state immunity from suit and even urging the proposition. Hamilton is quoted as writing:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.²⁶⁹

Justice Kennedy in *Alden* does not scruple to make use even of John Marshall, that nationalist intellectual giant. John Marshall appears in *Alden* as a states' rights enthusiast. We return with Justice Kennedy to the Virginia ratifying convention, where it has fallen to young John Marshall to defend Article III from attacks by Patrick Henry and George Mason:

With respect to disputes between *a state and the citizens of another state*, [federal] jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant. . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.²⁷⁰

The reader should understand that what the *Alden* Court is supplying here is law-office history. These are quotations selectively culled from contexts in which the revered speakers were making salesmanly assurances about the federal *diversity jurisdiction, in ordinary state-law actions on contracts*. But what of the possibility of claims under

²⁶⁸ See *Alden*, 527 U.S. at 716–17.

²⁶⁹ *Id.* (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)). See generally JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT (1999) (arguing, inter alia, that Alexander Hamilton, for example, did not rely upon the arguments he had made in *The Federalist Papers* when, for example, writing his celebrated *supra* Report on the Bank of the United States).

²⁷⁰ 3 ELLIOT, *supra* note 218, at 555–56.

federal law? John Marshall made quite clear the Federalist view on that very different question when, as Chief Justice, he explained that nothing in the Eleventh Amendment or in state sovereign immunity generally could prevent the enforcement of federal law. That was in the case of *Osborn v. Bank of the United States*.²⁷¹ “[E]ven if the State be a party, that circumstance would not oust the jurisdiction of the Court, in a case arising under the constitution and laws of the Union. There the nature of the controversy, and not the character of the parties, must determine the question of jurisdiction.”²⁷² In an action to enforce federal law, then, we know that John Marshall would have deferred not one whit to the Eleventh Amendment or to any other version of state immunity. And this is what Alexander Hamilton, from whom Chief Justice Marshall derived much of his thinking, meant in *The Federalist No. 81*, when he said that a state was immune, unless it surrendered its immunity *in the plan of the Convention*.²⁷³ So it appears that the *Alden* Court’s supposed authorities need not influence us.

To be fair to Justice Kennedy, in *Alden* he is only following the law-office history provided by Justice Bradley in *Hans v. Louisiana*,²⁷⁴ much of which was picked up in the same way in cases like *Principality of Monaco v. Mississippi*.²⁷⁵

VI. THE MYTH OF ALDEN’S INCONSEQUENCE

Some commentators have taken the position that *Alden* does not matter, or does not matter very much.²⁷⁶ When the subject is federal-

271 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.).

272 *Id.* at 798.

273 See THE FEDERALIST NO. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

274 See 134 U.S. 1, 12–13 (1890).

275 See 292 U.S. 313, 323–26 (1934) (Hughes, C.J.).

276 For one of the more adroit presentations of this view, see Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741 (2000). An important part of this argument is an attack on the “process” theory of the *Garcia* case, the argument that because the states are represented in Congress, judicial review of legislation in the name of federalism is not needed. *Id.* at 747–50; see also Marshall, *Understanding Alden*, *supra* note 15, at 820 (“Process federalism, as envisioned in *Garcia*, however, has failed.”). The controversy over “process” theory and states’ rights is an interesting one, but there is a short answer to the whole question. In the context of *Alden* and *Florida Prepaid*, what was at stake was not national power over essentially local concerns, but unquestioned national power that had been extended over the states, not only to give evenhanded and more uniform effect to national policy, but to do so on behalf of previously neglected individual rights. If only for this reason, it is hard to make an outright argument that *Alden* was positively a good thing. *But see, e.g.,* Wells, *Suing States for Money*, *supra* note 15, at 800 (arguing

ism, or some other airy abstraction, for all I know they may be right. When the subject is the rights of individuals, I would respectfully suggest that a constitutional democracy cannot afford to be disregarding. If in your mind structural principles, in the abstract, trump individual rights, we must agree to disagree; but there is a very good argument that American courts sit to remedy violations of the rights of individuals—and of states as well, when they act as individuals and are treated unjustly. The one thing an American court ought not to do, I should have thought, is to protect a lawless government at the suit of an individual whom that government has wilfully injured.

A. *A Little Problem of Due Process*

In *Marbury v. Madison*, Chief Justice Marshall drew from the well-springs of the common law, when, following Blackstone, he insisted that wherever there is a legal right, there is a remedy; that the government may not “sport away the vested rights of others;”²⁷⁷ that to leave government wrongdoing unremedied would be to cause our nation to lose the name of a government of laws and to invite the opprobrium of other nations.²⁷⁸ Whatever the shape of, or reasonable limitations on, constitutional remedies may be, our modern constitutional understandings spring from that same great tradition, and we tend to feel that denials of judicial relief from government invasions of individual right must raise questions of due process. *Alden* raises acute issues of due process because *Alden* is about more than state courts, just as it is about more than the Fair Labor Standards Act. The *Alden/Seminole/Hans* padlock closes all courts to very nearly all federal statutory claims against a state—the denial is both trans-jurisdictional and trans-substantive.

Under this new dispensation there is no inquiry, in the past so much a part of other door-closing doctrines, into the question whether an adequate state forum is available when the federal door is to be closed, or an adequate federal forum is available when the state door is to be closed. This omission may, by itself, constitute one of the most stunning changes in interjurisdictional doctrine in our time. One of *Alden*'s earlier companion cases, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²⁷⁹ preserving an in-

that *Alden* is a “positive development” because it “reaffirmed” the due process principle of *Reich v. Collins*).

²⁷⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

²⁷⁸ *Id.* at 163.

²⁷⁹ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding the patent laws unenforceable as against a state); *see also* *Coll.*

fringing state from patent liability in federal court, was almost as unnerving as *Alden* itself, simply because federal jurisdiction in patent infringement cases happens to be exclusive. *Alden* tightens the screws on this coffin; after *Alden* it would seem that Congress cannot fix the due process problem by allocating to the state courts a concurrent jurisdiction over intellectual property cases. These cases, then, are an invitation to the states to “sport away the vested rights” of individuals²⁸⁰—a license to steal.²⁸¹

I am put in mind of a very different case in the nineteenth century, the grand old case of *United States v. Lee*.²⁸² There, the federal authorities had seized Arlington, the late seat of the Lee family, ostensibly for failure to pay taxes in the right amount, although Lee’s widow had tendered payment in full.²⁸³ At the suggestion that the United States was immune from liability for this wrongful taking, the Court, by Justice Miller, ringingly refused to let the government get away with it.

All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

....

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government

...²⁸⁴

Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding the trademark laws unenforceable as against a state).

280 *Marbury*, 5 U.S. (1 Cranch) at 166.

281 In Fair Labor Standards Act cases, we see this authorized taking of people’s money very clearly. Ironically, in some of these cases the Supreme Court is forcing the immunity upon state courts that rejected it. See, e.g., *Ark. Dept. of Educ. v. Jacoby*, 144 L. Ed. 2d 789 (1999) (vacating and remanding, 962 S.W.2d 773 for reconsideration in light of *Alden*); see also *Dep’t of Pub. Safety v. Whittington*, 144 L. Ed. 2d 790 (1999) (same).

282 106 U.S. 196 (1882).

283 *Id.* at 197.

284 *Id.* at 220–21 (Miller, J.):

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. . . .

Shall it be said . . . that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which

In a talk I gave at a faculty colloquium on *Alden* at the University of Texas,²⁸⁵ I posed the rhetorical question, "Can the states just take the money?" My esteemed colleague and co-panelist, Doug Laycock, responded that it was the very purpose of sovereign immunity to permit a state to "take the money." He went so far as to say that to him *Alden* was an unsurprising development. But surely, whatever the purpose of sovereign immunity, until *Alden* the Constitution would have protected us from state deprivations of property without due process of law.

Mindful of this, the *Alden* Court purported to leave in place a number of alternative remedies. Justice Kennedy confidently assured us that a traditional officer suit is still available,²⁸⁶ citing *Ex parte Young*. But that is not true. An officer suit cannot succeed in an action against the state for back wages. Under the doctrine of *Edelman v. Jordan*,²⁸⁷ *Ex parte Young* is unavailable in claims for retrospective relief.²⁸⁸ Back wages would be foreclosed. Justice Kennedy pointed out that an officer may be sued for damages in her individual capacity.²⁸⁹ But no one on a government salary could pay the state's debt to an entire class of workers. Only if the state indemnifies the officer would this remedy work. But possible indemnification by the state is an option over which a court could exercise no control. And what is the likelihood that a state, standing on its immunity in order to deprive a class of workers of wages due them, would suddenly change its mind and pay, after all? It does not go too far, then, to say that, without the private cause of action Congress provided in the Fair Labor Standards Act, state employees have no realistic recourse. This analysis holds good across a spectrum of possible state actions stripping individuals of the protections of federal law. *Alden* has not only handed the states a license to steal, but, more generally, an authorization to put at risk.²⁹⁰

When we are talking about a license to steal, the constitutional proscription against "takings," and related theories, might seem to of-

has a just claim to well-regulated liberty and the protection of personal rights.

285 Faculty colloquium on "Federalism and the Eleventh Amendment," held at the University of Texas School of Law, Sept. 3, 1999.

286 *Alden v. Maine*, 527 U.S. 706, 756-57 (1999).

287 See *supra* notes 142-46 and accompanying text.

288 This point is also noted by Professor Meltzer. See Meltzer, *State Sovereign Immunity*, *supra* note 15, at 1016.

289 *Alden*, 527 U.S. at 757.

290 For pre-*Alden* discussion, see John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295 (1989).

fer some control. But due process under Rehnquist Court cases will mean—at most—that the state must furnish some remedy under its *own*, not federal, law,²⁹¹ as long as the state furnishes some “meaningful backward-looking relief.”²⁹² If that is the position, *Alden* has the net effect, at best, of confiding the plaintiff to her remedies under state law, perhaps inferior state law, whenever she seeks relief in a money case against the state. If the plaintiff’s case is a matter of copyright, with scant exceptions she cannot look to state law for relief. The federal copyright law explicitly preempts state law the moment a copyrightable work is fixed in tangible form.²⁹³ So *Florida Prepaid* has left the copyright plaintiff with doubtful access to any “meaningful, backward-looking relief.” Can this be due process? If we confine our inquiry to some other sort of intellectual property case, as to which the field is held not to be completely preempted, the picture is not much brighter. Suppose, in the *Florida Prepaid* sort of case, that the state is infringing an individual’s patent or other intellectual property rights. *Florida Prepaid* seals off the federal court. The plaintiff comes to state court and, of necessity, pleads the state common law of unfair competition. Notwithstanding *Alden*, the plaintiff survives a motion to dismiss, relying on the Due Process Clause. But under state law, the customary federal remedies for misappropriation of intellectual property are unavailable. Statutory damages, regurgitation of profits, destruction of infringing articles, attorney’s fees—any of those modes of redress can disappear. In other words, the plaintiff will have only the process that is due under state law, not complete relief, certainly not the relief Congress provided. In such a case the state is not, as the *Alden* Court said, still “subject” to federal law; and the costs will fall on the very class that federal law was intended to protect. Meanwhile, the state will retain benefits of its misappropriation. What sort of incentive is this?

Alden also can lead to novel varieties of strategic thinking. Compare the following two hypotheticals. Suppose, in the *Alden* situation, that Maine withholds from its employees the disputed “half” in “time-and-a-half.” Federal law cannot be enforced. Under Maine law, there may well be an action for wages wrongfully withheld, and the plaintiffs might seek to collect the lost “half.” But Maine may plead sovereign

291 *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 592 (1995) (holding that a state-law remedy in lieu of an action under § 1983 would be permissible in state court in the special circumstances of a suit to challenge an unconstitutional state tax).

292 *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990); see also *Nat’l Private Truck Council*, 515 U.S. at 588–92.

293 17 U.S.C. § 301(a) (1994).

immunity under Maine law, as we know from *Alden* that Maine is likely to do. At this point, due process as well as the Supremacy Clause presumably pry open the state court's doors, forcing the state to give "meaningful backward-looking relief."²⁹⁴ The workers collect the wages due them under federal law.

But now compare with that the following situation. Suppose that Maine withholds *all* these employees' overtime pay. Maine's own common-law action for wages would clearly be held to be "meaningful, backward-looking relief."²⁹⁵ Yet Maine's remedy, unlike the Fair Labor Standards Act, does not provide for time-and-a-half for overtime, but only for "time." In such a case, the state is not, as the *Alden* Court said, still "subject" to federal law, but only to state law, and the costs will be borne by the very class the federal legislation was intended to protect.²⁹⁶ And with this possibility open, the state has a perverse incentive to withhold 100% of the overtime wages due.

In *Alden*, Justice Kennedy brushed aside the argument from due process. The plaintiffs were relying upon *Reich v. Collins*, a tax case in which the Court had held that the state could not simply take the money and run.²⁹⁷ The state had to supply remedies. And it would not do to promise remedies and then take them away—to play "a shell game with remedies," as I commented elsewhere.²⁹⁸ Justice Kennedy purported to distinguish *Reich* as a case in which the state's obligation flowed directly from the Due Process Clause.²⁹⁹ But when a state takes one's property, of course an obligation arises under the Due Process Clause, in *Alden* as in *Reich*.³⁰⁰

294 *McKesson*, 496 U.S. at 31; cf. *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226–30 (1908) (suggesting that due process requires adjudication in state court of claims against the state, if federal courts are closed to those claims).

295 *McKesson*, 496 U.S. at 31.

296 If the Court does not recognize the challenge to due process flowing from *Alden* and its companion cases, it is hard to see how any difference can be made by the Leahy bill, Intellectual Property Protection Restoration Act of 1999, S. 1835, 106th Cong. (1999). The bill is intended to overcome the problem of state takings of intellectual property posed by *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (holding the patent laws unenforceable as against a state). See, for an early consideration of the problem, Mitchell N. Berman et al., *State Accountability for Violation of Intellectual Property Rights: How to "Fix" Florida Prepaid and How Not To*, 79 TEX. L. REV. (forthcoming 2001) (manuscript on file with the author). But the Fourteenth Amendment power exercised in the Leahy bill has already been rejected for that purpose in *Florida Prepaid*, 527 U.S. at 630.

297 *Alden v. Maine*, 527 U.S. 706, 740 (1999).

298 Weinberg, *The Article III Box*, *supra* note 10, at 1428.

299 *Alden*, 527 U.S. at 740.

300 For a fuller exposition of this argument, see Weinberg, *The Article III Box*, *supra* note 10, at 1428–29.

For example, in *Florida Prepaid*, the patent case coming up from the federal courts in the same term as *Alden*, the Supreme Court, relying on the Eleventh Amendment, denied a patentee a remedy against an infringing state.³⁰¹ This, even though, as the Court specifically held, Congress had clearly amended the patent laws to abrogate the states' Eleventh Amendment immunity.³⁰² But the Court had already held that Article I was not a source of legislative power to abrogate state immunity—recall that that had happened in the *Seminole Tribe* case.³⁰³ So Congress, under its Article I powers, now, incredibly, cannot make a state liable for patent infringement. Of course, there is always *Ex parte Young*. But *Young* can yield only an injunction against future infringement. It cannot yield retroactive compensation for a deprivation of property rights. In other words, a state university, with impunity, can now deprive an owner of intellectual property of her federal statutory rights. It seems obvious that this will deprive her of her constitutional rights³⁰⁴ at the same time.³⁰⁵

The urgent question then becomes whether Congress's Fourteenth Amendment powers can be summoned up to mend this breach in due process. And indeed, the patentee in *Florida Prepaid* did argue that the defendant state had deprived it of property without due process of law.³⁰⁶ One might have supposed that Section 5 of the Fourteenth Amendment, given *Fitzpatrick v. Bitzer*, arms Congress with all the power it needs to abrogate state immunity from such a constitutional claim. And Chief Justice Rehnquist, for the *Florida Prepaid* Court, did acknowledge that a patent might be property.³⁰⁷ But he doubted—I daresay to the astonishment of the informed reader³⁰⁸—

301 527 U.S. at 647.

302 *See id.* at 635.

303 *See Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996).

304 I refer here to rights against deprivations of property not for public use.

305 See the bill proposed by Senator Leahy, Intellectual Property Protection Restoration Act of 1999, S. 1835, 106th Cong. (1st Sess. 1999), a bill “[t]o restore Federal remedies for violations of intellectual property rights by States, and for other purposes;” *id.* at § II(a)(11)(A) (finding that *Seminole Tribe*, *Florida Prepaid* and *College Savings Bank* together “have the potential to deprive private intellectual property owners of effective protection for both their Federal intellectual property rights and their constitutional rights under the fifth and fourteenth amendments of the United States Constitution”).

306 *See Florida Prepaid*, 527 U.S. at 637.

307 *Id.*

308 *See, e.g.*, 145 CONG. REC. S10,359 (daily ed. Aug. 5, 1999) (statement of Sen. Arlen Specter) (deploring *Florida Prepaid* as an “absurd and untenable state of affairs”); 145 CONG. REC. S8069–70 (daily ed. July 1, 1999) (statement of Sen. Patrick Leahy) (emphasizing that there should not be “one law for private universities, libraries, and educational institutions” and another for “State-run institutions”).

that a constitutional problem of any scale existed.³⁰⁹ In part, this doubt of the Chief Justice was not only that state infringements of patent rights are sufficiently widespread, but also that they invariably rise to the dignity of constitutional as well as statutory violations.³¹⁰ This sort of thinking is important to the Chief Justice, who has long labored to disabuse the civil rights bar of a stubborn (and, to my thinking, correct) conviction that a government's wrongdoing is necessarily of constitutional dimension.³¹¹

The attack has focused on the bare Due Process Clause—the unadorned allegation of a deprivation without due process—and has proceeded on three fronts. First, cases like Justice Rehnquist's *Parratt v. Taylor*³¹² hold that when "deprivations" are not authorized by state law and occur in an unplanned way,³¹³ they are not necessarily violations of due process. The state need only provide the process that is due—some post-deprivation remedy, like an action in tort. Today it is unlikely that an unauthorized and random deprivation of liberty will be identified as a violation of due process if a post-deprivation state remedy, particularly an action in tort, is available.³¹⁴ Second, in cases

309 See *Florida Prepaid*, 527 U.S. at 645–48. But see, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (plurality opinion) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). Moreover, even supposing the Chief Justice's somewhat dated sources are good, it is not a necessary conclusion from them that there is little misappropriation. A paucity of filed claims as easily suggests that legislation has been effectively deterrent as that it addresses an unreal problem.

310 See *Florida Prepaid*, 527 U.S. at 640–41.

311 See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) (Rehnquist, C.J.) ("[T]he Due Process Clause of the Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." (citing *Daniels v. Williams*, 474 U.S. 327, 335–36 (1986) (Rehnquist, J.); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (Rehnquist, J.); *Martinez v. California*, 444 U.S. 277, 285 (1980); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (Rehnquist, J.)); see also, e.g., *Dalton v. Specter*, 511 U.S. 462, 472 (1994), *reh'g denied*, 512 U.S. 1247 (1994) (Rehnquist, C.J.) ("Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution."). See generally WEINBERG, *FEDERAL COURTS*, *supra* note 25, at 1060–77.

312 451 U.S. 527, 544 (1981) (Rehnquist, J.) (finding no due process violation in a negligent deprivation of a prisoner's property, given the availability of a state tort remedy).

313 *Id.* at 541 ("random and unauthorized").

314 But deprivations in disregard of state procedural protections may still be held to violate the Due Process Clause. See, e.g., *Zinnermon v. Burch*, 494 U.S. 113, 138 (1990) (Blackmun, J.) (holding it a denial of due process that state mental hospital officials treated the plaintiff as if applying for voluntary commitment, denying him

like Justice Rehnquist's *Daniel v. Williams*,³¹⁵ the Court has taken the position that mere negligence will not support a due process claim; the alleged deprivation must be intentional. Third, Chief Justice Rehnquist argues that some intentional torts by governmental officials are, in their nature, ordinary state-law torts,³¹⁶ or ordinary statutory violations,³¹⁷ and that the Constitution does not speak to those sorts of cases.

Against this background, the Chief Justice found it easy to conclude in *Florida Prepaid* that occasional state infringements of patents did not amount to violations of the Fourteenth Amendment. That, in turn, meant that Congress was without sufficient basis for the exercise of its Fourteenth Amendment powers.

This insistence that if Congress is calling upon its Fourteenth Amendment powers, it can act only on a basis of widespread constitutional violation, rather than a rational basis, was an application of the stringent tests of "proportionality and congruence" that now limit Congress, under the important case of *City of Boerne v. Flores*.³¹⁸ Given *Boerne* and *Seminole* and *Florida Prepaid* and *Alden*, do further efforts by Congress to protect intellectual property from state infringement have any likelihood of meaningful success? That question is grounded in elementary considerations of fair play and substantial justice, but these cases seem to answer it in advance, and the answer is "No."³¹⁹ An extension of concurrent jurisdiction over federal intellectual property cases to the state courts would run into *Alden v. Maine*, of course.

On the other hand, there might be something in some version of the proposed bill tentatively circulated by Senator Patrick Leahy.³²⁰

the pre-deprivation procedural protections state law provided for involuntary commitments).

315 *Daniels v. Williams*, 474 U.S. 327, 335–36 (1986) (Rehnquist, J.) (holding that a prisoner's personal injuries caused by a prison official's mere negligence could not support a claim under the Due Process Clause).

316 *See, e.g.*, *Paul v. Davis*, 424 U.S. at 694, 701 (Rehnquist, J.) (holding a defamatory police circular not actionable under § 1983).

317 *See, e.g.*, *Dalton v. Specter*, 511 U.S. 462, 472 (1994) (Rehnquist, C.J.) (explaining that not every statutory violation by an official is a constitutional violation).

318 521 U.S. 507, 529 (1997) (holding, under Section 5 of the Fourteenth Amendment, that an act of Congress under the § 5 power must be congruent with and proportional to a found pattern or likelihood of constitutional violation).

319 For recent writing on the problem of enforcement of federal intellectual property rights after *Florida Prepaid*, see, for example, *Symposium*, 33 *Lox. L.A. L. Rev.* 1275 (2000).

320 Intellectual Property Protection Restoration Act of 1999, S. 1835, 106th Cong. (1999) (proposing "To restore Federal remedies for violations of intellectual property rights by States, and for other purposes").

Under this proposal, Congress, acting under its Fourteenth Amendment power, requires the states to waive immunity from suit in order to gain access to the protections of federal law for the state's own intellectual property. It is unclear whether the Court would sustain this exercise of Fourteenth Amendment power, since the Court has already held, in *Florida Prepaid*, that there is an insufficient basis for exercise of Fourteenth Amendment power in this context.³²¹ But that to one side, why is not the most likely outcome of such legislation that the states would cheerfully *decline* to opt into the protections of federal law, deciding instead to create a patchwork of disuniform little patent acts giving them some measure of protection under state law?³²² Or they could simply choose to rely on their existing common law of misappropriation and unfair competition. But even if some version of the Leahy Bill did patch up the gaping hole in federal intellectual property law without such unintended consequences, its technique is not necessarily going to be duplicable in the contexts of state violations of other federal laws grounded in Article I.

Should some version of Senator Leahy's proposal fail of enactment or, if enacted, meet the fate that befell the Religious Freedom Restoration Act,³²³ there is a remaining possibility of justice, and poetic justice at that. If, in the wake of *Alden* and *Seminole Tribe*, the widespread pattern of infringement that the *Florida Prepaid* Court failed to identify under the *Boerne* standards begins to emerge, would not that fresh pattern empower Congress under the Fourteenth Amendment?³²⁴

321 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999).

322 Cf. *Goldstein v. California*, 412 U.S. 546, 571 (1973) (declining to hold that California's law against piracy of music was preëempted by national copyright policy). A proliferation of little antitrust statutes appeared, for example, in the wake of the Supreme Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (denying rights under the Sherman Act to indirect purchasers). These state statutes were held not preëempted by national antitrust policy. See *California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989) (sustaining state indirect-purchaser statutes as not preëempted by the rule of *Illinois Brick*). For background on copyright preëmption, see WEINBERG, FEDERAL COURTS, *supra* note 25, at 201-09; for background on *ARC America*, see *id.* at 159-61; Weinberg, *The Federal-State Conflict*, *supra* note 9, at 1760-72, 1783-84.

323 42 U.S.C. §§ 2000bb-1 to -4 (1994). The Act was struck down as a violation of the principle of separation of powers. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Congress had attempted to heighten the tier of scrutiny prescribed by the Court for state denials of religious exemptions from generally applicable neutral laws. See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (requiring only minimal rational-basis scrutiny).

324 Professor Meltzer has suggested that narrow legislation authorizing access to federal courts for damages suits against infringers be grounded on a showing of wide-

One might hope that a future Supreme Court, regretting the step taken in *Florida Prepaid*, could find that *Florida Prepaid* gave too little consideration to the Copyright Clause of Article I, Section 8.³²⁵ The Copyright Clause is a source of specific power to encourage science and the useful arts and to establish the uniform rights of intellectual property necessary to that national policy. The Court should have seen that the Copyright Clause speaks with sufficient power to distinguish intellectual property cases from the general run of commercial cases.³²⁶ In some future case, a future Supreme Court might be willing to say that the states submitted themselves "in the plan of the Convention" to liability for infringements of intellectual property rights. But for now *Florida Prepaid* covers all of that ground and clearly extends *Seminole* to the Copyright Clause. Any *arrières pensées* await an uncertain future at best.

The new *Alden/Seminole* regime is largely limited in its force and effect to commercial statutory claims in the typical ambit of Article I. But this limit, if it is thought to protect civil rights, may be no limit at all. Several of our civil rights laws, particularly laws protecting against private discriminatory conduct, have been tested, not under Section 5 of the Fourteenth Amendment, where they would almost certainly fail to survive under *The Civil Rights Cases*,³²⁷ even if they survived under *Boerne*, but under the commerce power.³²⁸ If *Alden* and *Seminole* do not seem to be a real threat to civil rights legislation, the saving feature is not to be found in those cases, but rather in the fortuity that the *Ex parte Young* officer suit, ineffective to remedy past takings of personal property,³²⁹ retains utility in civil rights cases on other theories. On the other hand, apparently the prospective relief *Ex parte Young* is supposed to provide is not working very well either. A new inability of the trial judiciary to understand *Ex parte Young* as a permis-

spread denials of relief under state law. Statement of Daniel Meltzer before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, United States House of Representatives (July 27, 2000). To be sure, such arguments were held insufficient to support the Violence Against Women Act, *U.S. v. Morrison*, 120 S. Ct. 1740, 1759 (2000); see *supra* note 4.

325 U.S. CONST. art. I, § 8.

326 For agreement on this point see Shapiro, *The 1999 Trilogy*, *supra* note 15, at 755.

327 109 U.S. 3, 23–25 (1883) (holding that Congress's Fourteenth Amendment power is over state, not private, action). For the most recent casualty of *The Civil Rights Cases*, see *United States v. Morrison*, 120 S. Ct. 1740 (2000).

328 See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (sustaining the Place of Public Accommodations Act under Congress's commerce power).

329 See *supra* notes 287–90 and accompanying text.

sible official-capacity action also cannot be helping,³³⁰ whether attributable to political hostility to civil rights enforcement or to sheer ignorance or to confusion with the Court's official-capacity/individual-capacity jurisprudence in damages cases. The Supreme Court itself seems increasingly inhospitable to the *Young* device. In *Coeur d'Alene*,³³¹ for example, Justice Kennedy took occasion to launch this astonishing attack upon *Ex parte Young*:

To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.³³²

It is a pity that Justice Kennedy perceives principles in the Eleventh Amendment, but not in the Due Process Clause, that are not to be sacrificed. It is ironic that Justice Kennedy does not perceive the Court as undermining vested federal rights in what may well seem to the reader a "reflexive" assault on the means of vindicating them. It is regrettable that the Rehnquist Court, even more actively than had been anticipated, is subordinating federal rights to the states' illegitimate interests—for what else can they be?—in violating them.

³³⁰ See, for a recent example, *Power v. Summers*, 226 F.3d 815, 820–21 (7th Cir. 2000) (Posner, J.) (instructing the district court, in an action against officials of a state university for retaliatory withholding of merit raises, that an *Ex parte Young* action for an injunction against future violations of the plaintiff professors' First Amendment rights was proper and should not have been dismissed). For a determinedly crabbed recent reading of *Ex parte Young*, see *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001) (denying judicial power to order state officials to furnish Medicaid-authorized services they were withholding from indigent children; justifying the result by relying on pre-*Young* case law; arguing strongly, in the teeth of cases to the contrary, that legislation under the Spending Clause is not judicially enforceable, and even suggesting that Congress lacks power to make such legislation judicially enforceable).

³³¹ *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

³³² *Id.* at 270.

As Professor Jackson has said, "The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars."³³³

CONCLUSION: TWO BAD MELODRAMAS, ONE LAST ACT

Alden is the last act, not only of this bad melodrama, but of another springing from a somewhat different impulse; and the two must be seen together to be understood. The *Hans/Seminole/Alden* story must be understood against the background of the *Lopez/Boerne/Alden* story. The message is that Congress does not have the capacity to govern this country with which, we supposed, the Founders endowed it, the power that Chief Justice Marshall made plain, that the Civil War paid for in blood, and that the post New Deal Court, we imagined, finally acknowledged.

There are very few silver linings in these clouds. It is always possible that a state will itself see the advisability of waivers of immunity, at least with respect to the claims of contract creditors.³³⁴ Political considerations, and the expectations of a civil society, while no substitute for the rule of law, can yield state responsibility in the occasional case. But changing the Supreme Court's new dispensation of approved government lawlessness must await action by Congress. Yet the options are few. The Article V amendment process is not a realistic strategy. For the most part, Congress may well be limited, in efforts to constrain

³³³ Jackson, *Principle and Compromise*, *supra* note 15, at 953.

³³⁴ The state prospers when, for the sake of its good credit, it stands by its own undertakings and submits them to the rule of law. That is a proposition that the democracies have been trying to explain to underdeveloped nations for decades. The *Hans* Court counted on state waiver:

The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself.

Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Bradley, J.).

the lawless state, to the narrow opportunities presented by its power to condition spending.³³⁵

What we can say with some confidence is that *Alden* is not only intellectually insupportable, as I have been mainly arguing, but it is simply wrong. Of course federalism is a vital part of the Constitution. But *Alden* fails to respect federalism in its true meaning. The Supreme Court has been insufficiently mindful of James Madison's important insight, that our dual federalism gives us a double guarantee of freedom.³³⁶ It is a noble idea, one of the finest expressions of the Jeffersonian view. Madison contemplated that if the national guarantor should become heedless of individual rights, or should be rendered impotent to protect them, then that *other* guarantor of liberty, the state, would have powers to protect—"secure"—them. Thus, at the very least, the existence of the states is a guarantee to provide what the nation may be unable to provide: law, or remedies, or courts. *Alden* breaks this pledge.

We have seen that the Court's new citadel of state immunity is constructed on shoddy foundations: "federalism" without its reason and "sovereignty" without the people. And within the citadel, more a bunker than a citadel, the states can hunker down, if they like, free from the constraints of enforceable federal law, to enjoy what they can take from their own populations. The garish new structure is a most hurtful scar on the constitutional landscape. Yet it appears most unlikely that the needed assault upon this citadel can be mounted in our lifetime.

335 See *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987) (holding that objectives not thought to be within Article I's enumeration may nevertheless be attained through the use of the spending power and the conditional grant of federal funds). The *Alden* Court left this option open. See *Alden v. Maine*, 527 U.S. 706, 755 (1999) (citing *South Dakota v. Dole*, 483 U.S. 203 (1987) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.")).

336 "In the compound republic of America, the power surrendered by the people is . . . divided. . . . Hence a double security arises to the rights of the people." THE FEDERALIST NO. 51, at 339 (James Madison) (Edward Mead Earle ed., 1940); cf. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (O'Connor, J.). For my Madisonian views, see, for example, Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295 (1997).