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PLEDGING A NEW ALLEGIANCE: AN ESSAY ON SOVEREIGNTY AND THE NEW FEDERALISM

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This Essay explores an emerging vision of federalism and its implementation in recent state immunity cases.[1] Those recent cases reflect, I believe, not just a legal interpretation of the Tenth and Eleventh Amendments, but a coherent understanding of our governmental system and its relationship with citizens. Beyond that, I believe, these decisions also reflect a sense of personal allegiance to certain aspects of that system. Attacks on the historical, textual, or precedential basis for the majority's rulings fall on deaf ears, because the attacks cannot shake the Justices' loyalty to what they conceive to be the American system of government.

Indeed, at the possible risk of seeming to over-dramatize its novelty, we might even imagine a new Pledge of Allegiance that would better reflect current constitutional doctrine. The New Federalist pledge might read something like this: "I pledge allegiance to the flag of the United States of America, and to the republics for which it stands, one Federal System under God, indivisible, with liberty and justice for all." Obviously, this is not quite the version of the pledge

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1 My focus will be on cases involving sovereign immunity from suit, but I will also discuss sovereign immunity from "commandeering." For background on both issues, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 519–66, 879–94 (3d ed. 1999). A particularly good introduction to the 11th Amendment and its tangled jurisprudence can be found in Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1. For historical background on the concept of sovereignty in American constitutionalism, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987), and H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 848 (1993).

that most of us learned as school children,[2] but it brings home the essentials of the New Federalism now embraced by a majority of the Justices.

The revamped pledge highlights several ways in which the majority's vision of America differs from the familiar. Allegiance belongs, not to "the Republic," but to the country's fifty-one republics, state and federal—not to the Nation alone, but to the system of federal and state power. Still, there are similarities—the flag continues to represent an indivisible union of states, not the several states as a mere federation; the federal system encompasses not only a role for the states but also a very powerful one for the federal government; and perhaps most importantly, the system remains committed to "liberty and justice for all." Thus, the Court is focused on three goals: upholding the states as republics worthy of allegiance, maintaining the established balance of federal and state power, and defending constitutional rights—"liberty and justice for all," as defined by the Court itself—against threats from either level of government.[3]

This Essay explores how the Court has struggled with the tensions inherent in this vision: the need to uphold the dignity of the states without undermining national unity, the difficulty of confining both state and federal governments to their existing spheres of authority without undercutting either one, and the need to prevent immunity claims from fatally compromising individual rights. In particular, recent sovereign immunity decisions fall neatly into place within this framework. An unsympathetic oberver might consider these tensions to be largely of the majority's own making, but if we take these tensions as given, the Court's efforts to manage them are worthy of respect. Parts I–III of this Essay discuss the three main tenets of the New Federalism creed and show how they are faithfully mirrored in current Eleventh Amendment doctrine. The Essay closes by considering the future of the New Federalism, or more bluntly, whether these new, more dispersed loyalties will overcome the old pledge of allegiance to the United States as "One Nation" rather than "One Federal System."

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2 *See* 36 U.S.C. § 172 (1994). The phrase "under God" is a Cold War era addition. *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118–22 (1996).

3 For purposes of this Essay, I am putting to the side the question of whether the Court will successfully be able to apply the New Federalism as a principled limit on national power. *See* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999).

I. *"THE REPUBLIC FOR WHICH IT STANDS"*: STATES AND REPUBLICAN SELF-GOVERNMENT

For the student of constitutional history, much of the rhetoric in recent Supreme Court opinions is startling. Rather than echoing Alexander Hamilton, James Madison, and John Marshall, the Court's language often seems more reminiscent of the views of their opponents.[4] But it would be a mistake to view the current Court simply as an apostle of "states' rights." Rather, concern about states' rights is part of a more complex worldview. That worldview also attaches importance to maintaining the current balance of power between state and federal government, as well as to protecting individual constitutional rights.

Perhaps the most striking aspect of the Court's recent federalism opinions is the majority's reverential language toward the states. In his opinion in *Alden v. Maine*,[5] Justice Kennedy says that the Constitution reserves to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."[6] A few paragraphs later he quotes the Federalist Papers on the "residual and inviolable sovereignty" of the states,[7] adding that they "are not relegated to the rule of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."[8] He also characterizes as "startling even today" a statement by one of the Framers that the state governments should be subordinate to the federal government.[9]

Speaking for four of the five members of the *Alden* majority in an earlier case, Justice Thomas used even more sweeping language about the states. In his *Term Limits* dissent, he said that the "ultimate source

4 *See* Vicki C. Jackson, Coeur D'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENTARY 301 (1998) [hereinafter Jackson, *Federal Courts*]; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2195 (1998) ("[Justice Scalia's] theory of dual sovereignty . . . is fundamentally at variance with principles of constitutionalism that date at least to *McCulloch v. Maryland* . . . .") [hereinafter Jackson, *Federalism*]; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 634, 678–79 (1993) (contrasting Justice O'Connor's views with those of the Marshall Court); *see also* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 636–37 (1995) (discussing Justice Thomas's theory of state sovereignty).

5 119 S. Ct. 2240 (1999).

6 *Id.* at 2247.

7 *Id.* (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

8 *Id.*

9 *Id.* at 2252.

of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole"—adding that "the people of the several States are the only true source of power."[10] Even today, he seemed to indicate, state sovereignty is primary: "the people of each State retained their separate political identities,"[11] and the "very name 'congress' suggests a coming together of representatives from distinct entities."[12]

Taken at full value, this language would suggest very little difference between the Constitution and the Articles of Confederation that preceded it. Although, as we will see, this language is subject to several limiting principles, it also vividly expresses the Court's allegiance to the states as co-sovereigns. Nor is this new-found respect for the states merely window-dressing. For instance, the Court's faith in the states as primary centers for republican self-government[13] is reflected in its flat ban on "federal commandeering" of state legislators and administrators.[14]

Recent Eleventh Amendment decisions also bear the imprint of this tenet of the New Federalism. The decisions are replete with references to the dignity of the states, a dignity that would be offended if they were freely subject to suit by mere individuals.[15] Justice Kennedy's effort to justify sovereign immunity explicitly invokes norms of republican self-government: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen."[16] Thus, the perceived mandate to protect the "dignity" of the states from being sullied by certain kinds of litigation stems from their unique role in republican self-govenrment. The state sovereignty tenet of the New Federalism also helps account for some of the exceptions to sovereign immunity. To some extent, local governments may

10 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846–47 (1995) (Thomas, J., dissenting).

11 *Id.* at 849.

12 *Id.* at 857–58.

13 *See* Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994) (explaining the relationship between recent federalism decisions and republicanism).

14 *See* Printz v. United States, 521 U.S. 898 (1997) (holding that Congress cannot impose even a modest ministerial duty on low-level state officials); New York v. United States, 505 U.S. 144 (1992) (holding that even a compelling national interest could not justify commandeering of state legislature).

15 *See* Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000).

16 Alden v. Maine, 119 S. Ct. 2240, 2265 (1999).

participate in the project of republican self-government by the people of each state.[17] But they shine only in a reflected light. In the New Federalist view, only states as such have genuine constitutional stature. Recall Justice Thomas's emphasis on the sovereignty collectively reposing in the people of each state. Unlike the thirteen original states, no city government has ever had a pretense to independent sovereignty.[18] Moreover, cities are not truly subjects of *self*-government: all of their decisions (and even their continued existence as separate legal entities) are subject to the control of the population of the state as a whole, acting through the state legislature. Thus, it is understandable that the Court has no quarrel with the traditional rule conferring immunity on state governments, but not local governments.[19]

The *Alden* Court also accepted the traditional exception for suits against states by the federal government. This exception, too, fits with the notion of fifty-one sovereign republics. For as the Court points out, the federal government is not unique in its authority to sue the other "sovereigns." The states can also sue each other under the Supreme Court's original jurisdiction. Thus, each of the "members of the federal system"—the federal government and the fifty states—has the right to bring suit against others "as an alternative to extralegal measures."[20] Hence, according to the Court, a waiver of sovereign immunity as against other members of the federal system was implicit in the "plan of the Constitution."[21]

Thus, the concept of state-level sovereignty has real doctrinal consequences rather than being merely a rhetorical flourish. But if it is a mistake to dismiss the significance of this rhetoric, it is also a mistake to expect a revolution in American government, for there are two other tenets that go far to moderate the implications of the New Federalism.

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17 *See Printz*, 521 U.S. at 933 (striking down federal statute imposing affirmative duties on local law enforcement officials).

18 Notably, the seminal case establishing the absence of municipal 11th Amendment immunity, *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), held that a county "is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state," citing in support of this proposition only *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889). Once other municipalities were compared with the District of Columbia, the game was up: the District is more like a colony than a sovereign.

19 *See Alden*, 119 S. Ct. at 2266. In contrast to the organs of state government such as state legislators and governors, local officials are unmentioned in the constitutional text.

20 *Id.* at 2267.

21 *Id.* at 2269.

II. *"ONE FEDERAL SYSTEM"*: MAINTAINING THE BALANCE OF STATE AND FEDERAL POWER

In *Alden*, the Court stressed that federal statutes authorizing suit against the states were a relatively recent innovation, with little precedent before the "last generation."[22] Similarly, the Court characterized the "commandeering" statutes as unique, unprecedented innovations with no roots in American history.[23] Thus, the Court has positioned itself as the defender of the "traditional" constitutional structure—traditional as of about 1970 or so—against dangerous efforts to upset the balance of power between the federal government and the states. Indeed, this concept of "balance" is central to the recent revival of federalism.[24]

Arguably, the most startling of the recent federalism rulings was *United States v. Lopez*,[25] the first decision since the New Deal to hold that Congress had exceeded its regulatory powers under the commerce clause.[26] But even in *Lopez*, the Court was quite careful to stress that it saw itself as preserving the existing balance of power rather than rolling back federal power. Chief Justice Rehnquist's majority opinion separated the post-New Deal caselaw into several categories and concluded that the statute before the Court did not fall into any of the existing categories. Thus, he portrayed the ruling as a refusal to expand federal power beyond already recognized bounds, rather than as a reduction in federal authority.[27] Justice Kennedy's crucial concurrence, joined by Justice O'Connor, concluded that the statute "upsets the federal balance" by invading a traditional area of state regulation outside of the commercial arena that is the focal point of modern federal regulation.[28] Only Justice Thomas indicated any desire to call into question the doctrinal basis for the New Deal and subsequent economic regulations, and he wrote only for himself.[29]

The unwillingness of the Court to challenge what it views as the existing order is clearly expressed in *Alden*. While stressing the need to respect the states as "joint participants in a federal system," Justice Kennedy spoke in the same breadth in *Alden* of the "ample means"

22 *Id.* at 2261.

23 *See* New York v. United States, 505 U.S. at 161–69; Printz v. United States, 521 U.S. 898, 905–11 (1997).

24 *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 135–43.

25 514 U.S. 549 (1995).

26 *See* Lessig, *supra* note 24, at 128.

27 *Lopez*, 514 U.S. at 558–59.

28 *Id.* at 576–80, 583 (Kennedy, J., concurring).

29 *Id.* at 584–90 (Thomas, J., concurring).

available to enforce federal law.[30] "Congress," he said, "has vast power but not all power."[31] Nothing in the opinion, or in other recent majority opinions, indicates any disposition toward a serious challenge of that "vast power." Instead, the New Federalist Justices as a group seem to conceive of themselves as defending the status quo, preserving only the limits on that "vast" federal power that have been respected through most of the post-New Deal era, and protecting those limits against the recent threat of an omnipotent nationalism. This may be bad history—after all, the Court is writing in an era whose recent political history bears the heavy imprint of a Reagan, not a Roosevelt. Nevertheless, there is no reason to doubt the sincerity of the majority's self-proclaimed effort to maintain the modern balance of power. Indeed, in at least some areas—such as the dormant Commerce Clause—the Court has remained quite aggressive in limiting state authority in the name of national interests.[32]

The Court continues to acknowledge the paramount need for adequate enforcement of federal law. In *Alden*, the Court lists no fewer than five mechanisms for enforcing federal law against states: grants of federal funds in return for waivers of immunity, suits by the federal government itself, individual suits under statutes implementing the Fourteenth Amendment, suits against state officers for injunctive relief, and individual damage suits against state officers.[33] Hence, the Court concluded, "[t]he principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the states," providing "ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause."[34]

In sum, the Court views the federal system as one where federal law is paramount within its sphere, but with implementation mechanisms that are tempered by an appreciation for the state role in the system. In *Alden* itself, the Court did not believe that the interest in enforcing federal law was seriously at stake. After all, Justice Kennedy said, the United States had not found the federal interest sufficiently

30 *Alden*, 119 S. Ct. at 2268.

31 *Id.*

32 *See, e.g.*, Camps Newfound v. Town of Harrison, 520 U.S. 564 (1997) (holding that charitable exemption statute violated dormant Commerce Clause); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) (holding ordinance requiring solid waste from town to be processed at town's transfer station unconstitutional in violation of the Commerce Clause).

33 *Alden*, 119 S. Ct. at 2267.

34 *Id.* at 2268.

important to "justify sending even a single attorney to Maine to prosecute this litigation."[35]

III. *"With Liberty and Justice for All"*: Protecting Individual Rights

If the majority were truly on a crusade to limit federal power and resurrect the states' rights doctrines of an earlier era, it might take serious aim at the bevy of post-New Deal decisions that drastically limit state power. Yet a casual glance at any recent volume of the *United States Reports* or at the annual supplement to any constitutional law casebook reveals the contrary. Although the Rehnquist Court obviously has a more conservative bent than the Warren Court or even the Burger Court, it remains enthusiastic about limiting state power when individual rights are at stake. Even a casual newspaper reader knows that the Court has taken action against the states in fields ranging from free speech[36] to land use regulation[37] to political redistricting[38] and affirmative action.[39] The Court's interest in states' rights ends at the point where its commitment to individual rights begins.

The same is true of the Court's view of congressional power: federalism restrictions on that power end precisely where Congress undertakes to enforce the Court's constitutional rulings.[40] When those judicially defined individual rights are at stake, federalism goes by the wayside. Thus, even the anti-commandeering principle may well bow

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35 *Id.* at 2269.

36 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding city hate speech ordinance violated the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (holding state prohibition of flag burning violated the freedom of speech).

37 *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that permission to rebuild house could not be conditioned on transfer of easement absent compensation); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that landowner may recover for taking by land use regulation).

38 *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995) (holding that state redistricting plan violated equal protection); Karcher v. Daggett, 462 U.S. 725 (1983) (holding state reapportionment statute unconstitutional under U.S. CONST. art. 1, § 2).

39 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that city affirmative action plan violated equal protection); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding city schoolteacher layoff plan protecting racial minorities unconstitutional as violation of equal protection).

40 The word "precisely" is important here. As *City of Boerne* shows, the Court believes that congressional power to protect individual rights means the power to protect those rights as defined by the Court itself, not Congress's conception of "liberty and justice for all." *See* City of Bourne v. Flores, 521 U.S. 507 (1997).

to Congress's enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments, as does the state's sovereign immunity.[41]

The Court has made particular efforts to reconcile its attachment to sovereign immunity with protection of individual rights. Three exceptions to sovereign immunity jointly operate to prevent sovereign immunity from wiping out the individual's constitutional rights. First, as pointed out earlier, individuals may obtain prospective relief against states and damages against state officials and local governments for violations of federal law.

Second, due process requires that states provide a damage remedy for certain injuries to individuals.[42] For instance, states may well have a duty to provide a remedy for deliberate patent infringements by state instrumentalities.[43] Sovereign immunity also provides no shield against state liability for regulations that in effect take private property without just compensation.[44]

Third, when protecting what the Court defines as a constitutional right, Congress may override state immunity entirely.[45] "When Congress enacts appropriate legislation" to enforce the Fourteenth Amendment, "federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution."[46] Admittedly, the Court takes seriously the limitation of congressional power, in this formulation, to enforcement of *judicially recognized* constitutional rights. It also takes seriously its responsibility to ascertain whether such a dire response as abrogating state immunity is necessary.[47] (It is apparently for the Court, not for Congress, to define the meaning of "liberty and justice for all.") But

41 *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 119–33.

42 *See* Alden v. Maine, 119 S. Ct. 2240, 2259 (1999).

43 *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2208 (1999) ("Only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.") In the case before it, however, the Court found "scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Id.* at 2210.

44 *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

45 Such suits may be heard in state as well as federal court. *Cf.* Howlett v. Rose, 496 U.S. 356 (1990) (preventing use by state court of nonconstitutionally based immunity to bar 42 U.S.C. § 1983 (1994) suit brought against school board in state court).

46 *Alden*, 119 S. Ct. at 2267.

47 *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999).

when state sovereignty really does stand as a significant barrier to individual rights, state sovereignty rather than individual rights must give way. In summary, as much as the New Federalist Justices revere state sovereignty, they view the states as only part of an overall system of government that also includes "vast" federal powers and vigilant federal protection of constitutional rights. Their ultimate allegiance is to the state and federal republics as part of a modern federalist system, constrained as a whole by individual rights.

Once the conceptual framework of the New Federalism is in place, the contours of sovereign immunity doctrine become clearly understandable. In working out the limits of state sovereign immunity, the Court has sought to uphold what it views as the unique constitutional status of the states without unduly sacrificing the supremacy of federal law or the sanctity of individual constitutional rights. Rather than a hodgepodge of rules and exceptions, we can see recent decisions as forming a coherent body of doctrine. While the resulting doctrine is no doubt subject to criticism on many grounds, it is hard to see how the Justices could have done much better given their somewhat conflicting normative commitments—to state sovereignty, federal supremacy, and individual rights.

IV. WHITHER FEDERALISM?

Based on its own standards for constitutional interpretation, the Court's recent state immunity decisions do not fare well. As Carlos Vázquez has observed, there is a "rare unanimity" among legal scholars that the Eleventh Amendment decisions are unsupported by original understanding.[48] The constitutional text is equally unsupportive, providing protection for states against only a small class of suits and only in federal court.[49] Nor does precedent provide powerful support for the Court's position.[50] Much the same is true of the anti-commandeering decisions, which proclaim state immunity from responsibility for implementing federal programs. There is not a word in the Con-

48 *See, e.g.*, Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Immunity*, 98 YALE L.J. 1 (1988); John E. Nowak, *The Scope of the Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1983, 1684 (1997).

49 "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.

50 *See Alden*, 119 S. Ct. at 2269–85 (Souter, J., dissenting); Seminole Tribe v. Florida, 517 U.S. 44, 100–16 (1996) (Souter, J., dissenting).

stitution that prohibits such commandeering.[51] Nor is there any reason to believe that the Framers were opposed to commandeering; on the contrary, they seemed to count on it as part of their plans for the new government.[52] And again, such precedent as existed was unhelpful, to say the least.[53]

The five New Federalists on the Court seem blissfully unconcerned by the cogency of these conventional legal critiques. No doubt, the latest round of decisions will be subject to equally blistering legal criticism, which the majority will no doubt complacently ignore.

Not only does the majority seem oblivious to conventional legal arguments, but the Court also seems at most half-heartedly attentive to functional concerns. In *Alden*, Justice Kennedy struggles in vain to find some practical function for sovereign immunity.[54] The Court's expressed concern has been protecting the state fisc.[55] As Justice Kennedy rather delicately puts it, sovereigns are supposed to be bound only by their consciences in honoring their own contracts.[56] To put it less delicately, the Union was composed of would-be deadbeats who wished to maintain the option of defaulting on their debts.[57] But in

51 For this reason, the New Federalism decisions resemble the much maligned privacy decisions of an earlier time. *See* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1090–91 (1997) (comparing *Printz* with privacy cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965)). A particularly trenchant critique can be found in Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199.

52 As Vicki Jackson explains, the historical scholarship is divided on the question of whether the federal government could commandeer state legislatures, but more united on the view that commandeering of state executives was actually contemplated by the Framers. *See* Jackson, *Federalism*, *supra* note 4, at 2199; *see also* Erick M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power:* New York v. United States *Revisited*, 15 CONST. COMMENTARY 355 (1998) (discussing Framers' contemplation that federal government would retain power to raise funds through requisitions); Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953 (1999) (arguing that *Printz* Court distorted historical record). Even before *Printz* was decided, substantial historical work had been done on this issue, which the majority ignored. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

53 *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (upholding a requirement that state utility agencies consider energy conservation issues); Testa v. Katt, 330 U.S. 386 (1947) (upholding a requirement that state courts hear federal causes of action).

54 *Alden*, 119 S. Ct. at 2262–65.

55 *See* Vázquez, *supra* note 48, at 1727–28.

56 *Alden*, 119 S. Ct. at 2248.

57 On the connection between the 11th Amendment and state debt repudiation, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

modern credit markets, this is a dubious privilege, as many a defaulting foreign sovereign has discovered when it tried to obtain new credit.[58] Immunity also protected states against unexpected tort liability, no doubt, but this too is less significant in the modern world where liability insurance is readily available. In the end, the Court seems left only with its faith in the innate sovereign dignity of state governments.[59] This veneration of state governments—rather than history, precedent, or policy—is the mainstay of the New Federalism. The inherent dignity of state governments is not an intuitive truth for all of us.[60] But apparently it is an intuitive matter—more than that, a matter of faith—for five Justices. Like any other credo, theirs is resistant to analysis and critique, for it rests on emotions such as allegiance and respect rather than on a close reading of history and precedent. It is not that the Justices are oblivious to text, history, and precedent. Rather, they can read those sources only through the lens of their constitutional faith—of the constitutional vision to which they have pledged their allegiance.

Federalism is not an emotionally gripping issue for most people today. As a result, the Court's federalism revival does not seem to have aroused great public interest, so far as I can tell. Yet, the issue has become more salient with each decision: to owners of intellectual property who have no federal remedy for infringement,[61] to state employees who cannot collect overtime because of *Alden*, to gun control

58 *See* Richard Cantor & Frank Packer, *Determents and Impacts of Sovereign Credit Ratings*, F.R.B.N.Y. ECON. POL'Y REV., Oct. 1996, at 37, 40 (stating that defaulting sovereigns "suffer a severe decline in their standing with creditors"). Presumably, states that fail to waive their immunity or provide other adequate assurances against default pay a penalty in terms of interest rates.

59 The Court's policy analysis also seems lacking in other respects. For instance, in *Alden*, the Court finds it significant that enforcement actions by the federal government on behalf of individual employees are politically accountable. *See Alden*, 119 S. Ct. at 2267 (holding that suits by federal government "require the exercise of political responsibility for each suit prosecuted against a State"). The upshot is that whether a state employee receives overtime pay to which he or she is legally entitled will depend on political considerations—which will no doubt include the state's allotment of electoral votes, its political alignment, the significance of the public employee union in the electoral calculus, etc. This is not a savory picture, nor is it one redolent of the rule of law.

60 Living as I do in a state where the current governor is best known nationally for his earlier career as a boa-wearing professional wrestler, perhaps it is not surprising that the idea of inherent state dignity does not strongly resonate for me.

61 *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999).

advocates unhappy with *Printz*,[62] and so forth.[63] Thus, federalism issues are likely to receive more attention in connection with future judicial appointments. What happens once federalism issues do receive greater attention, of course, depends on prevailing public attitudes toward state and federal governments.

Although the New Federalism is a deviation from our recent constitutional past, it may or may not be the wave of the future. In a world without important international threats or domestic economic crises, the appeal of the federal government may fade, with power diffusing upward to international organizations and downward to state and local governments. If so, popular loyalty to the federal government may also wane. But that, of course, is only one possible scenario. In the long run, the future of the New Federalism will depend less on the technical arguments of legal scholars than on the temper of the American people. In particular, it will depend on whether the American people prefer to pledge their allegiance to "One Nation" or to a "Federalist System" of interlinked republics.

62 Printz v. United States, 521 U.S. 898 (1997).

63 On the "and so forth" list, religious organizations dismayed by the demise of RFRA in *City of Boerne*, 521 U.S. 507, would rank high.