RECENT DEVELOPMENT

Immunity as an Essential Element of Statehood

_Alden v. Maine_, 199 S. Ct. 2240 (1999)

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Introduction

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. Constitution, Amendment XI

Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.

—Justice Kennedy, in _Alden v. Maine_¹

On its face, the Eleventh Amendment appears to constitute a narrow jurisdictional bar, preventing federal court assertions of diversity jurisdiction when a state is the named defendant in a suit.² Nonetheless, in a series of decisions over the past century, the Supreme Court has gradually extended the scope of the Amendment; today, it stands for the broad


¹ 119 S. Ct. 2240, 2263 (1999).

² See, e.g., 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).
proposition that states enjoy sovereign immunity from lawsuits initiated by private citizens seeking monetary damages. The Court's decision last Term in *Alden v. Maine* is the most recent manifestation of this proposition. In *Alden*, the Court declared that Congress cannot abrogate state sovereign immunity from federal claims in state courts by creating private causes of action pursuant to its Article I powers, such as its interstate commerce authority. In so deciding, the Court did not rely on the Eleventh Amendment alone, but also on a robust vision of federalism believed to be inherent in a constitutional structure of dual sovereignty.

The decision in *Alden* has diminished the capacity of Congress to vest private citizens with federally enforceable rights against state governments. In a variety of contexts in which Congress has legislated, from environmental protections to economic and social rights, individuals will no longer be able to use monetary damages to force states to be accountable. The Court's elimination of this essential remedial tool is also significant as a further step toward a new regime where states' rights trump the powers of the federal government.

Part I of this Recent Development briefly reviews the Court's sovereign immunity jurisprudence, Supreme Court battles over principles of federalism in Fair Labor Standards Act litigation (the federal statute at issue in *Alden*), and the procedural history of *Alden* itself. Part II addresses the majority and dissenting opinions in *Alden* and also considers companion sovereign immunity decisions addressing private claims brought under patent and trademark laws. In Part III, this Recent Development examines several issues raised by the Court's decision in *Alden* and charts the future of federalism jurisprudence in the realm of sovereign immunity. This Recent Development concludes that the Court based its holding in *Alden* on a misconception of the relationship between the federal and state governments, relying upon a purely formalistic model of dual sovereigns occupying discrete spheres of authority. It suggests, instead, that the constitutional federal structure is better understood as one in which governments are inextricably intertwined with one another, sharing power, responsibility, and authority—in the words of one political scientist, a "marble-cake" rather than a "layer cake federalism."!

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I. Background and Procedural History

A. An Abbreviated History of Eleventh Amendment Jurisprudence

Congress adopted the Eleventh Amendment in the 1790s in response to *Chisholm v. Georgia*, in which the Supreme Court had allowed a federal court to hear a suit brought against the State of Georgia by a citizen of another state.\(^6\) The Amendment, as adopted, altered the original constitutional grant of jurisdictional authority to the federal courts in Article III.\(^7\) Nearly a century later, in *Hans v. Louisiana*,\(^8\) the Supreme Court fundamentally reconceived the Eleventh Amendment. In *Hans*, a unanimous Court held that the Eleventh Amendment barred federal courts from hearing a Louisiana citizen’s claim that the state had defaulted on loans and thus violated the Contracts Clause of the federal Constitution.\(^9\) Although the text of the Amendment does not bar suits against a state by its own citizens, the *Hans* Court nevertheless concluded that confining itself to a plain reading of the Amendment’s words would have produced an “anomalous result.”\(^10\) In the early twentieth century, the Court continued to extend state sovereign immunity to cover suits in admiralty\(^11\) (though the Eleventh Amendment mentions only suits in law or equity) and suits by foreign nations\(^12\) (though the text of the Amendment precludes only suits by foreign citizens). These issues largely reflected problems of private law, particularly related to debtor/creditor relations.

A cascade of post-New Deal congressional legislation dealing with national economic and social concerns, however, has changed the dimensions of the Court’s inquiry into sovereign immunity. Over the past thirty years, the Court has grappled with the modern question of whether Congress may abrogate a state’s Eleventh Amendment immunity through the affirmative exercise of its legislative powers. In 1976, the Court held in *Fitzpatrick v. Bitzer*\(^13\) that sovereign immunity is limited by the enforcement authority granted to Congress by the Fourteenth Amendment,\(^14\) pur-

\(^6\) 2 U.S. (2 Dall.) 419 (1793).

\(^7\) “The judicial Power shall extend to ... Controversies between a State and Citizens of another State ... and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” U.S. Const. art. III, § 2, cl. 1.

\(^8\) 134 U.S. 1 (1890).

\(^9\) That provision states: “No State shall ... pass any ... Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10, cl. 1. The plaintiff in *Hans* brought suit pursuant to the federal statute enacted in 1875 that provides for general federal question jurisdiction. See *Hans*, 134 U.S. at 9.

\(^10\) *Hans*, 134 U.S. at 10. The Court voiced concern over permitting a citizen of the same state to sue in federal court, while the Eleventh Amendment, by its terms, precluded citizens of different states or foreign countries from suing. See id.

\(^11\) See *Ex parte* New York, 256 U.S. 490 (1921).

\(^12\) See *Monaco v. Mississippi*, 292 U.S. 313 (1934).


\(^14\) ”The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5.
suant to which legislation such as the Civil Rights Act of 1964, as amended, was enacted.\(^{15}\) The Court has found Congress’s abrogation of state immunity through its Commerce Clause authority a more controversial question. Although a plurality of the Court held in 1989 that Congress could abrogate state immunity pursuant to its Commerce Clause authority,\(^{16}\) the Court overruled itself seven years later in *Seminole Tribe of Florida v. Florida.*\(^{17}\) In *Seminole Tribe,* the Court declared that Congress lacked the power to subject states to suit in federal court under federal laws passed pursuant to its Commerce Clause authority.\(^{18}\)

**B. The Fair Labor Standards Act and the Contours of Federalism**

Among the most significant of the laws affected by the *Seminole Tribe* decision is the Fair Labor Standards Act of 1938 ("FLSA").\(^{19}\) FLSA requires that employers pay their workers a minimum wage and compensate overtime work at one and a half times their hourly wage.\(^{20}\) As originally enacted in 1938, FLSA applied only to private employers.\(^{21}\) Through amendments to the statute in 1961, 1966, and 1974, Congress gradually extended the protections of FLSA to cover virtually all state governmental employees.\(^{22}\)

After initially upholding the amended FLSA as a valid exercise of Congress’s commerce power,\(^{23}\) the Court, by a five-to-four vote, reconsidered its view in *National League of Cities v. Usery.*\(^{24}\) Writing for the Court, Justice Rehnquist emphasized that "there are limits upon the power of Congress to override state sovereignty."\(^{25}\) Justice Rehnquist did not articulate these limits beyond a generalized appeal to the "federal

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\(^{15}\) See *Fitzpatrick,* 427 U.S. at 453 n.9, 456.

\(^{16}\) See *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989) (holding that Congress, in enacting environmental cleanup legislation pursuant to the Commerce Clause, could abrogate state sovereign immunity, the Eleventh Amendment notwithstanding).

\(^{17}\) 517 U.S. 44 (1996).

\(^{18}\) See *id.* Although the statute at issue in *Seminole Tribe,* the Indian Gaming Regulatory Act, was passed under the Indian Commerce Clause, the Court drew an equivalence between the Indian Commerce Clause and the Interstate Commerce Clause. See *Seminole Tribe,* 517 U.S. at 62–63; see also U.S. Const. art. I, § 8, cl. 3 (stating that Congress has power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").


\(^{20}\) Overtime hours are defined as hours worked in excess of forty per week. See 29 U.S.C. § 207(a).

\(^{21}\) The Court sustained FLSA against an early challenge that it exceeded the scope of Congress’s authority under the Interstate Commerce Clause. See *United States v. Darby,* 312 U.S. 100 (1941).


\(^{23}\) See *Maryland v. Wirtz,* 392 U.S. 183 (1968) (holding that the 1961 and 1966 amendments to FLSA applied against state employers).

\(^{24}\) 426 U.S. 833 (1976).

\(^{25}\) *Id.* at 842.
system of government embodied in the Constitution," but it would appear that the only textual anchor available to justify such limits on Congressional power is the Tenth Amendment. To the extent that FLSA's minimum wage and overtime compensation requirements "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," Justice Rehnquist concluded, the restrictions exceeded Congress's authority under the Commerce Clause.  

Fewer than ten years after National League of Cities, the Court once again reversed itself, five-to-four, in Garcia v. San Antonio Metropolitan Transit Authority. Justice Blackmun, in his opinion for the Court, observed that the courts' attempts to employ the "traditional governmental functions" test to carve out a sphere of state sovereignty exempt from FLSA's requirements had proved "unworkable" and "inconsistent with established principles of federalism." Justice Blackmun asserted that the "principal means . . . to ensure the role of the States in the federal system lies in the structure of the Federal Government itself;" thus, the states should look to the "national political process" rather than the federal judiciary to vindicate claims of state sovereignty. Notably, Justice Rehnquist, writing in dissent, expressed confidence that the Court would return to the National League of Cities model of federalism.

C. The Alden Lawsuit

Against the backdrop of this history of FLSA, in 1992, in Mills v. Maine, ninety-six current and former state probation and parole officers filed suit against the State of Maine in a federal district court for violation of their rights under FLSA. Under FLSA, the officers sought to recover unpaid compensation for overtime hours worked, as well as equivalent liquidated damages pursuant to the statute. While the case

26 Id. at 852.
27 The Tenth Amendment states: "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." U.S. Const. amend. X.
30 Id. at 531.
31 Id. at 550.
32 Id. at 557.
33 See id. at 580 (Rehnquist, J., dissenting) (referring to the "principle [in National League of Cities] that will, I am confident, in time again command the support of a majority of this Court"); see also id. at 589 (O'Connor, J., dissenting) ("I would not shirk the duty acknowledged by National League of Cities and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.").
34 See Mills v. Maine, 118 F.3d 37, 41 (1st Cir. 1997).
35 See Brief for Petitioners at 1, Alden v. State, 715 A.2d 172 (Me. 1999) (No. 98-436); see also 29 U.S.C. § 216 (b).
was pending, the Supreme Court decided *Seminole Tribe of Florida v. Florida.* Referring to *Seminole Tribe*, the district court in *Mills* dismissed the probation officers’ claims under FLSA. The First Circuit upheld the district court's ruling on appeal.

The plaintiffs then refiled their FLSA claims in Maine state court in August of 1996. The state superior court dismissed the claims on grounds of sovereign immunity. The Maine Supreme Court upheld the superior court’s decision, declaring that, just as Congress may not permit private citizens to sue a state in federal court, so too it cannot require a state court to hear the same federal law claims against the state. Though neither the terms of the Eleventh Amendment nor Supreme Court doctrine had ever stated explicitly that the Amendment “protect[ed] the states from suit in their own courts,” the Maine Supreme Court interpreted a line of Eleventh Amendment cases, culminating in *Seminole Tribe*, to hold that the Amendment “reflects but one aspect of the states’ inherent, more sweeping immunity from suits brought by private parties.” This overarching principle of sovereign immunity, the Maine Supreme Court concluded, foreclosed the probation officers’ FLSA suit in state court.

The probation officers then petitioned the Supreme Court for certiorari.

In 1998, the Arkansas Supreme Court reached the opposite conclusion in *Jacoby v. Arkansas Department of Education, Vocational and Technical Education Division.* In this case, employees of the State Department of Education sued that agency for failure to pay overtime compensation. The Arkansas court held that, while the Eleventh Amendment removed federal jurisdiction over citizen suits under FLSA, the terms of the Amendment did not provide for immunity in state courts.

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38 See *Mills*, 118 F.3d 37; see also id. at 49 (citing federal district court cases dismissing private FLSA actions for want of subject matter jurisdiction). The First Circuit rejected the contention that Congress had enacted FLSA to enforce the protections of the Fourteenth Amendment. See id. at 44–49.
40 See id.
41 See id. at 173–74. The Maine Supreme Court added that “[t]o hold otherwise . . . would effectively vitiate the Eleventh Amendment.” Id. at 174.
43 *Id.*
44 See id. The court also concluded that Maine had not waived its immunity to suit under FLSA. *See id.* at 175–76.
46 See *Jacoby*, 962 S.W.2d at 773–74.
47 See id. at 775.
48 See id. (“We hold that the Eleventh Amendment does not grant states immunity in their own courts . . .”) The Arkansas Supreme Court cited for support *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 204–05 (1991). In *Hilton*, the Court, per Justice Kennedy, held that the Federal Employers’ Liability Act (“FELA”) creates a valid right
The court further held that the Supremacy Clause of the federal Constitution required state courts to hear such claims despite Arkansas’s assertion of sovereign immunity under its state constitution.\textsuperscript{49} The Arkansas Department of Education then petitioned the Supreme Court for certiorari.

Based on both the declared need to resolve this conflict between the Arkansas and Maine supreme courts and the importance of the issue, the Supreme Court granted certiorari in \textit{Alden}.\textsuperscript{50}

II. The Alden Decision

A. Justice Kennedy’s Majority Opinion

In \textit{Alden v. Maine},\textsuperscript{51} the Supreme Court, in a majority opinion by Justice Kennedy,\textsuperscript{52} held five to four that Congress cannot exercise its Article I powers to permit private citizens to sue nonconsenting state governments for damages in state courts.\textsuperscript{53} Describing the issue presented as a question of first impression,\textsuperscript{54} Justice Kennedy declared that the sovereign immunity of states “neither derives from nor is limited by” the Eleventh Amendment’s text,\textsuperscript{55} but rather may be inferred from the “history, practice, precedent, and the structure of the Constitution.”\textsuperscript{56}

Justice Kennedy stated that the Founders intended a system in which the states “retain the dignity . . . of sovereignty,”\textsuperscript{57} and federal and state governments hold “concurrent authority over the people.”\textsuperscript{58} Justice Kennedy identified this sovereignty as a constitutional principle of the Tenth Amendment.\textsuperscript{59} According to the Court, the Founders believed that immunity from private suits was essential to maintaining state dignity.\textsuperscript{60} By this view, Congress created the Eleventh Amendment in determined response of action in state court against a state railroad. \textit{See Hilton}, 502 U.S. at 201–07.\textsuperscript{61}

\textsuperscript{49} \textit{See Jacoby}, 962 S.W.2d at 775–78; \textit{see also id.} at 775 (quoting \textit{Ark. Const.} art. V, \textsection 20 (“The State of Arkansas shall never be made a defendant in any of her courts.”)).


\textsuperscript{51} 119 S. Ct. 2240 (1999).

\textsuperscript{52} Justice Kennedy’s majority opinion was joined by Chief Justice Rehnquist and Associate Justices O’Connor, Scalia, and Thomas.

\textsuperscript{53} \textit{See Alden}, 119 S. Ct. at 2246.

\textsuperscript{54} \textit{See id.} at 2260.

\textsuperscript{55} \textit{Id.} at 2246.

\textsuperscript{56} \textit{Id.} at 2266.

\textsuperscript{57} \textit{Id.} at 2247.

\textsuperscript{58} \textit{Id.} (quoting Printz v. United States, 521 U.S. 898, 919–20 (1997)).

\textsuperscript{59} \textit{See Alden}, 119 S. Ct. at 2247. (“Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.”).

\textsuperscript{60} The Court described in detail statements made by Alexander Hamilton, James Madison, and John Marshall in debates over ratification of the Constitution. \textit{See id.} at 2248–49.
to the Court’s 1793 decision in *Chisholm v. Georgia*, which, to the “profound shock” of the country, authorized a lawsuit under Article III against the State of Georgia. Justice Kennedy claimed that the Eleventh Amendment did not, as its terms suggest, merely negate the offending words of Article III, Section 2, upon which the *Chisholm* Court had relied in upholding federal jurisdiction. Rather, it served “to restore the original constitutional design,” thereby preserving the immunity enjoyed by the states prior to entry into the Union. The Court reasoned that the federalist system did not permit Congress to override state sovereign immunity through Article I or the Supremacy Clause. Somewhat circularly, Justice Kennedy sought to defeat the argument that the Supremacy Clause requires state courts to entertain private citizen-suits authorized by federal laws like FLSA by declaring that the Supremacy Clause applied only to federal laws that “accord with the constitutional design.” The Court found that the prevailing original understanding was that states could assert sovereign immunity in their own courts. Accordingly, early Congresses did not authorize private suits against states without their consent. In addition, various Court decisions throughout the years assumed that “[s]tates retain their immunity from private suits prosecuted in their own courts.” Justice Kennedy distinguished a 1991 case in which the Court held that a state railroad employee could sue his employer under the Federal Employers’ Liability Act (“FELA”), the Eleventh Amendment notwithstanding. The structure of American fed-

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61 *Id.* at 2250 (quoting CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926)). The ratification of the Amendment occurred within several years after *Chisholm* was decided. See JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 66–67 (1987).

62 *Alden*, 119 S. Ct. at 2251.

63 *See id.* at 2252.

64 *See id.* at 2255–56 (“[N]either the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States’ immunity from suit in federal court.”), *But see id.* at 2267 (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress may abrogate state immunity pursuant to exercise of its § 5 power to enforce the Fourteenth Amendment)).

65 *Id.* at 2255 (citing Printz v. United States, 521 U.S. 898, 924 (1997)). Justice Kennedy said the argument that Congress can abrogate state immunity through its Article I powers was decisively met in Seminole Tribe and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999) [hereinafter College Savings Bank] (holding that states did not constructively waive sovereign immunity by voluntarily engaging in federally regulated conduct, such as interstate commerce). See *Alden*, 119 S. Ct. at 2255.

66 *See id.*, 119 S. Ct. at 2260 (arguing that silence of supporters and “ardent opponents” of the Constitution “suggests the sovereign’s right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.”).

67 *See id.* at 2261. The Court explained that congressional statutes passed in recent decades authorizing citizen suits “are of such recent vintage” that “almost two centuries of congressional avoidance of the practice” was more descriptive of the “constitutional tradition.” *Id.* (citing Printz, 521 U.S. at 918).

68 *Alden*, 119 S. Ct. at 2262.

eralism inherent in the Constitution, Justice Kennedy argued, demands respect for the dignity of states, and congressional authorization of private suits against states denigrates that dignity "regardless of forum." Since the federal government retains sovereign immunity in both federal and state courts, Justice Kennedy observed, the states are entitled to "a reciprocal privilege." The Court concluded that, while states have an obligation to obey valid federal laws, it would assume "the good faith of the States."  

B. Justice Souter's Dissent

Justice Souter, who had previously dissented in Seminole Tribe, authored a scathing dissent in Alden that accused the Court of imposing a "natural law" conception of statehood. Reaffirming his opposition to the Seminole Tribe decision along similar lines, Justice Souter asserted

J.). In Hilton, Justice Kennedy stated that: (1) the Court would, on the basis of stare decisis principles, adhere to its earlier holding, in R.B. Parden v. Terminal Ry. of the Alabama State Docks Dep't, 377 U.S. 184 (1964), that FELA applied to state-owned railroads, see Hilton, 502 U.S. at 201-02; and (2) that the Court's decision in Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987), holding that Congress may abrogate state immunity only by making a clear statement, did not apply because "the Eleventh Amendment does not apply in state courts," Hilton, 502 U.S. at 204-05 (internal citations and quotation marks omitted). In Alden, Justice Kennedy sought to distinguish his opinion in the earlier case by indicating that Hilton was based on the holding "[a] generation earlier" in Parden. Alden, 119 S. Ct. at 2258. Hilton, Kennedy continued, was "litigated and decided in the wake of Union Gas, and before this Court's decisions in New York, Printz, and Seminole Tribe."

Alden, 119 S. Ct. at 2258. Rather than reading Hilton as determining whether Congress may validly enact laws subjecting states to suits in their own courts, Justice Kennedy characterized the scope of his prior opinion diminutively:

[T]he decision is best understood not as recognizing a congressional power to subject nonconsenting States to private suits in their own courts, nor even as endorsing the constructive waiver theory of Parden, but as simply adhering, as a matter of stare decisis and presumed historical fact, to the narrow proposition that certain States had consented to be sued by injured workers covered by the FELA, at least in their own courts.

Id.

70 Alden, 119 S. Ct. at 2264 ("Private suits against nonconsenting States, however, present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'") (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

71 Alden, 119 S. Ct. at 2264. Furthermore, the Court appeared to rebuke the Arkansas Supreme Court's approach implicitly by noting that states are entitled to "order the processes of . . . governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts." Id. at 2265.

72 Id. at 2266.


74 See Alden, 119 S. Ct. at 2269 (Souter, J., dissenting). As in Seminole Tribe, Justice Souter was joined in his dissent by Justices Ginsburg and Breyer. Justice Stevens, who had issued a separate dissenting opinion in Seminole Tribe, also joined his dissent.

75 Id. at 2270.

76 See id. at 2269. See Seminole Tribe, 517 U.S. at 100 (Souter, J., dissenting).
that the Court had illegitimately constitutionalized sovereign immunity as a right reserved under the Tenth Amendment as an incident of statehood.\textsuperscript{77} Justice Souter began with an extensive review of the historical origins of sovereign immunity in both the English and continental legal traditions,\textsuperscript{78} arguing that, in the American colonies, sovereign immunity was merely a common law prerogative,\textsuperscript{79} not a constitutional requirement. Further, the dissent took issue with Justice Kennedy’s structural argument. Beginning with Justice Kennedy’s premise that state and federal governments have distinct spheres of authority,\textsuperscript{80} Justice Souter concluded that “Maine is not sovereign with respect to the national objective of the FLSA,” and that the Supremacy Clause “requires the Maine courts to entertain this federal cause of action.”\textsuperscript{81} Here, Justice Souter emphasized the distinction between the sovereign immunity of the English monarch in the Anglo-Saxon legal tradition and the “dignity” of state governments, a concept “inimical to the republican conception” of government.\textsuperscript{82} Justice Souter opposed the originalist tone of the majority opinion, suggesting that the Framers’ surprise at state subjection to suit by private parties should be accorded no more deference than the Framers’ shock at the vast national intervention Congress exercises under its Commerce Clause authority.\textsuperscript{83} The Justice noted that, because the Secretary of Labor lacks the resources to provide effective enforcement, underenforcement of FLSA’s protection of state employees would be the practical consequence of the Court’s decision.\textsuperscript{84} Finally, in line with his dissent in \textit{Seminole Tribe},\textsuperscript{85} Justice Souter admonished the Court for Lochnerizing the federalism landscape.\textsuperscript{86} He concluded that “the Court’s late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.”\textsuperscript{87} In both instances, the Court has

\textsuperscript{77} See \textit{Alden}, 119 S. Ct. at 2269–70.
\textsuperscript{78} See id. at 2270–73.
\textsuperscript{79} See \textit{id.} at 2275. See generally \textit{id.} at 2271–87 (recounting Justice Souter’s more detailed description of historical events).
\textsuperscript{80} See \textit{id.} at 2288 (citing \textit{U.S. Term Limits, Inc. v. Thornton}, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (describing the splitting of “the atom of sovereignty” between the federal and state governments)).
\textsuperscript{81} \textit{Alden}, 119 S. Ct. at 2288.
\textsuperscript{82} \textit{id.} at 2289.
\textsuperscript{83} See \textit{id.} at 2291. “The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes.” \textit{Id.}
\textsuperscript{84} See \textit{id.} at 2292–93. Justice Souter suggested that, given the 4.7 million employees of the several states, meaningful enforcement of FLSA had been rendered extraordinarily difficult.
\textsuperscript{85} See \textit{Seminole Tribe of Florida v. Florida}, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (“The majority today, indeed, seems to be going \textit{Lochner} one better.”).
\textsuperscript{86} See \textit{Alden}, 119 S. Ct. at 2294–95.
\textsuperscript{87} \textit{id.} at 2295.
advanced a particular socio-political vision at the expense of the democratic political process.

C. Companion Sovereign Immunity Cases

In a related set of cases handed down on the same day as *Alden*, the Court also decided, five-to-four, that Congress could not subject states to suit by private citizens under federal patent and trademark statutes. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, Chief Justice Rehnquist, writing for the Court, declared that a federal patent law could not abrogate state sovereign immunity if passed pursuant to Congress's Article I authority to regulate commerce rather than Congress's power to enforce the Due Process clause of the Fourteenth Amendment. Although the patent holder in *Florida Prepaid* asserted that Congress passed patent laws to effectuate due process protections of property against State deprivation, Chief Justice Rehnquist rebuffed this argument. Instead, the Chief Justice wrote that, in order to pass "appropriate legislation" pursuant to Section 5 of the Fourteenth Amendment, Congress must satisfy certain new criteria. In accordance with these new criteria, the Court, when reviewing such legislation, would have to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, . . . 'judged with reference to . . . historical experience'" underlying the legislation. Applying these rules to the patent case, the Court concluded that a due process deprivation would result "only" if the State provided patent holders inadequate remedies or no remedy at all. Hence, Chief Justice Rehnquist invalidated the Congressional purpose of providing remedies that are more convenient or of national uniformity.

In a twin case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Justice Scalia declared that the federal

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89 In 1992, Congress passed the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271 (b), 296 (a) (1994), to provide a clear statement of congressional intent to abrogate state sovereign immunity. See *Florida Prepaid*, 119 S. Ct. at 2203; see also, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (delineating a clear statement rule: "Congress may abrogate the States' . . . immunity . . . only by making its intention unmistakably clear in the language of the statute.").
90 At issue in the patent case was whether a Florida state entity had infringed the College Savings Bank's financing methodology for a type of certificate of deposit. See *Florida Prepaid*, 119 S. Ct. at 2202–03.
91 Chief Justice Rehnquist acknowledged that "[p]atents . . . have long been considered a species of property." *Florida Prepaid*, 119 S. Ct. at 2208.
92 Id. at 2207 (quoting City of Boerne v. P.F. Flores, 521 U.S. 507, 525 (1997)).
93 *Florida Prepaid*, 119 S. Ct. at 2208.
94 See id. at 2209.
Trademark Remedy Clarification Act ("TRCA") could not abrogate state immunity. After rejecting the argument that this trademark law reflects Congressional enforcement of the Fourteenth Amendment, Justice Scalia focused on the suggestion that Florida's participation in interstate commerce, by offering for-profit investment opportunities to consumers, constituted either an implied or a constructive waiver of Florida's sovereign immunity. Justice Scalia declared that the decision in Seminole Tribe conclusively set aside the theory of constructive waiver.

Justice Scalia analogized state sovereign immunity to individual constitutional rights such as trial by jury, rights for which "courts indulge every reasonable presumption against waiver."

III. Analysis

Alden is a deeply flawed decision, both in its reasoning and in its broader implications. First, by disrupting the structure of remedies designed by Congress to address violations of federal law, Alden creates rule-of-law concerns. Second, Alden marks an unwarranted departure from the previously dominant theory underlying the Court's federalism jurisprudence, namely that the national political process is better suited to protect state governments from federal overreaching than is an unworkable, heightened judicial scrutiny. Third, Alden vitiates the Supremacy Clause's foundational requirement that state courts apply federal law as the supreme law of the land. Fourth, the Court in Alden transforms the forum allocation theory of the Eleventh Amendment underlying Seminole Tribe and similar cases in favor of constitutionalizing a broad right to state sovereign immunity. Fifth, the Alden decision represents the advance of the Rehnquist Court's ideological agenda of curbing federal legislative power over states.

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97 See College Savings Bank, 119 S. Ct. at 2233.

98 See id. at 2223-25 (stating that neither freedom from false advertising nor right to be secure in business interests constitutes a protected property right).

99 See id. at 2226. This theory first appeared in R.B. Parden v. Terminal Ry. of Alabama State Docks Dep't, 377 U.S. 184 (1964) (holding that Alabama, by owning and operating a railroad in interstate commerce, constructively waived its immunity from suit under FELA). College Savings Bank expressly overruled "[w]hatever may remain of [the] decision in Parden." College Savings Bank, 119 S. Ct. at 2228.

100 See College Savings Bank, 119 S. Ct. at 2229-30.

101 Id. at 2229 (quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937)). Justice Scalia also noted that the federal government does not waive impliedly its own sovereign immunity. See College Savings Bank, 119 S. Ct. at 2229.
A. Inadequacy of Remedies for Violation of Federal Laws

In light of Alde n, private citizens may only partially enforce federal laws passed pursuant to the Commerce Clause. Although traditional immunity doctrine bars citizens from suing state governments for monetary damages, the Ex parte Young doctrine has permitted citizens to enforce laws prospectively through suit against state officers in their individual capacities for violation of federal law. Through its decision in Alde n, the Court has limited the remedy under Young, however, to prospective injunctive relief; retrospective monetary relief no longer remains available. Though the federal government still may sue on behalf of citizens for money damages, as Justice Souter observed, the government’s enforcement resources are quite limited.

This situation has created a perverse set of incentives. Once sovereign immunity has removed damages as an option, plaintiffs’ attorneys, often working on contingencies, have much lower incentive to represent clients in FLSA claims. At the same time, state governmental agencies have less motivation to follow federal law because state officials face relatively few consequences. Reliance on the good faith of the states, a notion introduced by Justice Kennedy, may not be feasible. Presumably, Justice Kennedy was not engaging in naive optimism but rather putting his faith in the political accountability of state officials to their local population. Violations of federal law, however, are likely to be individual in nature, and, as such, are more likely to be vindicated by court adjudication than in the arena of public opinion. Indeed, given the limited number of plaintiffs in private suits against states, it is in the self interest of most voters to save tax revenue by opposing state remedies for violations of federal rights. These factors degrade the rule of law’s fundamental tenet: where there is a legal right, there must be a legal remedy.

There is a remaining alternative avenue for holding states accountable for violations of federal law, but it is impracticable. The United States, in its own name, may sue a state government in federal court for violation of federal laws like FLSA. This method is theoretically sound

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102 Ex parte Young, 209 U.S. 123 (1908).
104 See supra note 84 and accompanying text.
105 But see Hutto v. Finney, 437 U.S. 678, 691–93 (1978) (suggesting that attorneys’ fees are ancillary to retrospective injunctive relief approved in Edelman).
106 See supra note 71 and accompanying text.
107 See, e.g., Alden v. Maine, 119 S. Ct. 2240, 2293–94 (1999) (Souter, J., dissenting) (“If he has a right, and that right has been violated, do the laws of his country afford him a remedy?”) (quoting Marbury v. Madison, 1 Cranch 137, 162 (1803)); see also Carlos Manuel Vazquez, What Is Eleventh Amendment Immunity?, 106 YALE L.J. 1683, 1685 (1997) (“Th[e] rule-of-law ideal has rightly been said to entail the existence of judicial remedies for the violation of legal rights.”).
108 Article III provides for federal court jurisdiction in all cases or controversies where the United States is a party. See U.S. CONST. art. III, § 2; see also Jonathan R. Siegel, The
but fiscally unrealizable. In fact, Congress has provided for citizen suits in part to ameliorate the financial burden on the federal government to enforce federal laws.109

B. The National Political Process and the Protection of the States

In Garcia, the Court recognized the vitality of the national political process in protecting states’ rights, drawing partly on Professor Wechsler’s claim that the structure of the federal government, including a bicameral legislature composed of Representatives and Senators of the several States, leads to the protection of state interests in Congress.110 By contrast, far from encouraging states to resort to politics, the decision in Alden rewards states for seeking judicial action to delineate the contours of federalism. Alden thereby continues a trend illustrated in College Savings Board by Scalia’s reference to sovereign immunity as a “fundamental right,” like the right to trial by jury.111

Even if states do hold constitutional rights against the federal government, the Supreme Court’s federalism jurisprudence reveals a troubled and unstable history of enforcing such rights. The Court’s incoherent decisions in Maryland v. Wirtz,112 overruled by National League of Cities v. Usery,113 overruled by Garcia v. San Antonio Metropolitan Transportation Authority,114 exemplify the Court’s dismal record in this regard and lend support to the Wechsler formulation.115 The Court suffers from a manifest institutional incapacity to chart the course of federalism. Admittedly, although states no longer have the power over the national gov-


109 See, e.g., Alden, 119 S. Ct. at 2293 (Souter, J., dissenting) (“Facing reality, Congress specifically found, as long ago as 1974, ‘that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily.’”) (quoting S. Rep. No. 93-690, at 27 (1974)) (explaining FLSA citizen suit provision); see also Joanne C. Brant, The Ascent of Sovereign Immunity, 83 Iowa L. Rev. 767, 815 (1998) (“This approach is likely to screen out a significant number of viable claims, and will strain an already tight federal litigation budget, which has never contemplated that the Department of Labor would serve as the front line of FLSA enforcement.”).

110 See generally Herbert Wechsler, Political Safeguards of Federalism, 54 Colum. L. Rev. 543 (1954).

111 See supra note 101 and accompanying text.


115 See, e.g., Frank B. Cross, Essay: Realism About Federalism, 74 N.Y.U. L. Rev. 1304, 1322 n.96 (1999) (“This history does not hold out much promise for the Court’s ability to develop and adhere to a principled, nonideological doctrine of federalism.”). Professor Cross also cites the Eleventh Amendment congressional abrogation cases for this proposition. See id. (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), overruling Pennsylvania v. Union Gas, 491 U.S. 1 (1989)).
erment that they enjoyed at the Founding, they still play an essential role in national politics because of political party organization by state, administration of law along state lines, structural organization of politics around "units of territory," and a culture of federalism. These and other factors continue to generate political and social forces that ensure states significant influence in the formulation of national policy. Notably, most of the law that reaches the lives of everyday citizens is the law of the states, and there is little in the way of a movement for federal preemption of state law. The political influence of the states with respect to the national government is quite substantial. The states, therefore, have the ability to protect their own "dignity"—a central concern of Justice Kennedy in Alden. This ability is sufficient to render the judicial creation of immunity doctrines that extend beyond the narrow immunity required by the terms of the Eleventh Amendment an unnecessary interference with the constitutional balance between federal and state power.

C. The Supremacy Clause

The Supremacy Clause of the Constitution also demands that federal law, including citizen suit provisions, be maintained in state courts. The Clause states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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." In Testa v. Katt, the Supreme Court held that the Supremacy Clause required Rhode Island courts to hear a lawsuit by one private party against another under the federal Emergency Price Control Act, notwithstanding Rhode Island's policy of not hearing suits it considered penal (such as those under the Act at issue). Applying the holding in Testa, it is clear that an analogous state constitutional policy of sovereign immunity (such as that asserted by Arkansas in Jacoby) should not withstand the power of the Supremacy Clause. Justice Kennedy none-

116 Some of the structural transformations include the passage of the Sixteenth Amendment, allowing for a federal income tax, and, more importantly, the Seventeenth Amendment, which took the election of Senators out of the hands of state legislatures and placed it directly with the people. See U.S. Const. amends, XVI, XVII. In addition, the power of the Presidency has grown dramatically in the decades during and since the New Deal administration of Franklin Delano Roosevelt. See, e.g., Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421 (1987) (describing the growth of presidential power).
117 Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1520-60 (1994) (describing these factors as determining an essential role for states in present day national politics).
118 U.S. Const. art. VI, cl. 2.
120 See id. at 394.
121 See supra note 65 and accompanying text.
theless distinguished *Testa* from *Alden*, arguing that the Supremacy Clause governs only those federal laws consistent with the constitutional sovereign immunity principle laid out in *Alden*.122 To overcome the plain words of the Supremacy Clause, Kennedy relied on questionable historical evidence. If the Eleventh Amendment was the source of the state sovereign immunity claimed here, a better argument might be made; for the Eleventh Amendment, enacted after the Supremacy Clause, might be seen to modify it in some way.123 Because the Eleventh Amendment itself concerns only the "Judicial Power of the United States," Justice Kennedy was unable to make such an argument.124

D. The Eleventh Amendment as a Forum Allocation Provision

Both the majority and dissent in *Alden* treat *Seminole Tribe* and *Alden* as standing or falling together. Whereas Justice Kennedy pointed to the anomaly that would result if *Seminole Tribe* precluded federal court jurisdiction over citizen suits but permitted state court suits,125 Justice Souter asserted in his dissent that this anomaly resulted from the *Seminole Tribe* holding itself, which he now would reject.126 This approach is understandable, as the voting alignment was precisely the same in *Alden* as in *Seminole Tribe*. If *Seminole Tribe* is (or must be) treated as authoritative, however, there remains a compromise approach that preserves the purposes behind the Supremacy Clause while giving cognizance to the functional purpose of federalism.

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122 See *Alden* v. *Maine*, 119 S. Ct. 2240, 2255-56 (1999) ("When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.").

123 Compare Kennedy's opinion in *Alden* with Chief Justice Rehnquist's analysis in *Seminole Tribe*. In *Seminole Tribe*, Rehnquist sought to differentiate between Congress's power under the Interstate Commerce Clause and the Section 5 enforcement power of the Fourteenth Amendment, indicating that while the latter clause, "adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," Congress's plenary power under the Interstate Commerce Clause underwent diminution by virtue of the ratification of the Eleventh Amendment. *Seminole Tribe* of Florida v. Florida, 517 U.S. 44, 65-66 (1996). *See also Pennsylvania* v. *Union Gas*, 491 U.S. 1, 42 (1989) (Scalia, J., concurring in part and dissenting in part) ("Nothing in this reasoning justifies limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."). Therefore, the Eleventh Amendment does not reach the power of Congress to require state courts to hear federal claims. Any background understanding of state sovereign immunity is antecedent to the Supremacy Clause, which places affirmative obligations on state courts to interpret and apply federal law. *Seminole Tribe*, 517 U.S. at 65-66.

124 U.S. Const. amend. XI.

125 See supra note 10 and accompanying text.

126 See *Alden*, 119 S. Ct. at 2288 n.33 (Souter, J., dissenting) ("The anomaly is that *Seminole Tribe*, an opinion purportedly grounded in the Eleventh Amendment, should now be used as a lever to argue for state sovereign immunity in state courts, to which the Eleventh Amendment by its terms does not apply.").
Justice Thurgood Marshall, concurring in *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*,\(^{127}\) suggested such an approach. In *Employees*, the Court held that, as Congress had not explicitly stated its intent to abrogate state immunity under FLSA (at that time) to permit suit in federal court, no such intention would be presumed. Though Marshall agreed that the suit could not go forward in federal court, he asserted that the employees could bring suit in state courts. As he phrased the question, "[t]he issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals."\(^{128}\) Thus, said Justice Marshall, the Eleventh Amendment served as "nothing more than a regulation of the forum in which these petitioners may seek a remedy."\(^{129}\)

Under the Marshall approach, the federal structure, as embodied in the Eleventh Amendment, serves to enhance local democracy. The states, in Justice Brandeis's famous formulation, can serve as laboratories of democracy.\(^{130}\) Such an approach promotes flexible, localized judicial enforcement of federal law.\(^{131}\) Suits would proceed differently in state courts in at least two important respects. First, state judges, often elected to their position, would preside over the cases and remain accountable to the state electorate. Second, state procedural rules would be controlling, a system which could potentially reduce administrative costs for state government attorneys.

Justice Powell's opinion in *Pennhurst State School & Hospital v. Haldeman*\(^{132}\) provides further support for this position. The *Pennhurst* Court held that the Eleventh Amendment barred federal courts from hearing state law claims brought against state officers under pendent jurisdiction.\(^{133}\) Justice Powell raised the fear that if a federal court could hear state law claims against states, that same federal court could award money damages against a state.\(^{134}\) This particular concern, Powell sug-

128 *Id.* at 293–94.
129 *Id.* at 298.
130 See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
131 There are many reasons that nationally uniform judicial enforcement, joined by the salary and lifetime tenure provisions of Article III, may be superior to state court enforcement of federal law. Where the States are defendants in private actions, however, and the Eleventh Amendment, as interpreted in *Seminole Tribe*, comes into play, thereby closing the federal courts to such claims, there are reasons to think that state dignitary interests are adequately served by allowing federal claims to be brought in state court.
133 See *id.* Although the plaintiffs had brought suit against Pennsylvania state officers, the Court determined that the state law claims ran against the state itself, as the state was the real party in interest. See *id.* at 103–19.
134 See *id.* at 120.
gested, militated towards state courts alone hearing monetary claims against a state.

Similar issues, it would appear, arise when Congress attempts to provide private citizens with a right of action for monetary damages against a state. Like Pennhurst, the Court in Seminole Tribe blocked private parties from suing states for money damages in federal court. Nonetheless, Seminole Tribe framed the issue as one of federal court jurisdiction.135 Neither Seminole Tribe nor, indeed, Alden suggest that a state is absolutely immune from the reach of federal law, for both cases acknowledge that the United States itself may sue a state for money damages on behalf of those wronged by state violations of federal law. For the reasons mentioned above, however, there is less of an affront to the dignity of states when such suits proceed in state court.

It may be argued that while having state law claims proceed in state court in no way undermines a state's sovereignty, because a state is free to immunize itself against those claims, the same cannot be said for federal claims.136 The Supremacy Clause constitutes the response to this sovereignty differential. While it is true that a state's dignity suffers to the extent that a federal claim may be heard against it at all, the forum allocation purpose of the Eleventh Amendment extends virtually every other courtesy to the state, not the least of which is a home field advantage in all private claims against it. The alternative that Alden advances, constitutionalization of state sovereign immunity, not only has no support in the text of the Constitution, but also fundamentally undermines the supremacy of federal law. Indeed, the Supremacy Clause contemplates that both federal and state courts will engage in concurrent interpretation of federal law, but that Congressional enactments will constitute the "supreme Law of the Land."137

E. Judicial Curbing of Federal Legislative Power over States

The Alden case significantly advances the Rehnquist Court's efforts to increase substantive state sovereignty. The combination of Seminole Tribe and Alden closes the doors of both federal and state courthouses to enforcement of federal law by private citizens. After the decisions in Florida Prepaid and College Savings Bank, sovereign immunity doctrine has grown exponentially. The criteria laid out in the latter cases for qualifying under the Fitzpatrick exception to state sovereign immunity (i.e., under the Fourteenth Amendment's enforcement power) will further limit the reach of federal statutes.

136 Alden does not appear to authorize a state to assert its immunity under its state constitution, but rather through a judicially created federal constitutional right of state sovereign immunity newly found in the structure of the Constitution.
137 See U.S. CONST. art. VI, cl. 2 ("the Judges in every State shall be bound thereby").
Following such a path, the Court recently decided, in *Kimel v. Florida Board of Regents*,\(^{138}\) that Congress did not validly abrogate state sovereign immunity in the Age Discrimination in Employment Act ("ADEA"), because Congress could only prohibit age discrimination by state actors under the Commerce Clause, not under Section 5 of the Fourteenth Amendment.\(^{139}\) Subsequently, the Court has instructed two federal appeals courts to reconsider their decisions upholding Congress's abrogation of state immunity in the Equal Pay Act as appropriate legislation to enforce the Equal Protection Clause by promoting wage equality across gender lines.\(^{140}\) Similarly, provisions of the Americans with Disabilities Act and the Civil Rights Act of 1964, if located solely within Congress's authority to regulate commerce, also may not pass muster under these new criteria for inclusion pursuant to the enforcement power of Section 5 of the Fourteenth Amendment.\(^{141}\)

These Eleventh Amendment cases form part of a mosaic of states' rights initiatives constructed by the Rehnquist Court over the past several years. The resulting patchwork of immunity rules serves to bolster the advancement of states' rights. *United States v. Lopez*\(^{142}\) placed the first limits on Congress's Commerce Clause power in over sixty years,\(^{143}\) while *Printz v. United States* declared that Congress cannot "commandeer" state law enforcement resources to effectuate its handgun control purposes.\(^{144}\) Together, this chain of cases stands not only for their sub-


\(^{139}\) *Id.* at *11-*17. The Court decided *Kimel* by the same five-to-four majority as *Allen, Florida Prepaid, and College Savings Bank*. Writing for the Court, Justice O'Connor argued that ADEA's remedies against states were disproportionate to the unconstitutional conduct because the Court's Equal Protection Clause jurisprudence does not preclude much age discrimination, *see id.* at *16*, and that Congress had not "identified any pattern of age discrimination by the States" justifying "reasonably prophylactic legislation." *Id.* Because of the close proximity of the Court's decision in *Kimel* to the publication deadline of this volume, a more comprehensive analysis of that case is not possible at this time.


\(^{141}\) *Compare, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (cited in *Kimel*, 2000 WL 14165, at *11*) (holding that ADEA is a valid exercise of Congress's power under the Commerce Clause) *with* Heart of Atlanta Motel v. United States, 379 U.S. 241, 261-62 (1964) (holding that Civil Rights Act of 1964 was valid under Commerce Clause); *see also* Brant, *supra* note 109, at 769-70. Note that Brant's conclusion that the Americans with Disabilities Act and Civil Rights Act of 1964 may not fall within the ambit of § 5 of the Fourteenth Amendment applied the criteria from City of Boerne v. Flores, 521 U.S. 507 (1997), a decision amplified first by *Florida Prepaid* and *College Savings Bank*, and now by *Kimel*.


\(^{143}\) Prior to *Lopez*, the Supreme Court had not cut back on Congress's Commerce Clause power since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

stantive legal propositions, but also for a larger symbolic principle that Congress must, at every turn, respect the Rehnquist Court's vision of state autonomy.

Conclusion

In its federalism jurisprudence, the Rehnquist Court has pursued a policy of reactionary constitutionalism. By turning back the clock on the New Deal transformation, the Court has asserted its conception of a federal structure in which the national governmental authority will gradually submerge under the banner of state dignity. In stark contrast to the attitude of the post-1937 Court, which declared the Tenth Amendment a "truism" with no operative effect, the Rehnquist Court envisions a Tenth Amendment with teeth. Such an Amendment is analogous to a set of substantive due process rights for states, or an opportunity for the Court to exercise its preference for, as one newspaper editorial has proclaimed pithily, "[s]tates over people."  

Some observers have noted the failure of the Burger and Rehnquist Courts to succeed in a judicial counterrevolution with regard to civil rights in the areas, for example, of protection of minorities and abortion rights. In the area of federalism, however, the Rehnquist Court has achieved a solid five vote majority to curtail the power of the national government. In addition to substantive law decisions, the Court, more quietly but with greater import, has decided jurisdictional cases, prominently including state sovereign immunity decisions culminating most recently in Alden, which threaten to curtail the enjoyment of economic and social rights conferred by Congress since the New Deal.

145 See, e.g., 2 Bruce Ackerman, We the People: Transformations 255–78 (1998) (describing the New Deal as a constitutional moment of higher lawmaker).
146 United States v. Darby, 312 U.S. 100, 124 (1941) (stating that "the amendment states but a truism that all is retained which has not been surrendered.").
147 States Over People, St. Louis Post-Dispatch, June 25, 1999, at B6.