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ARTICLES

Of *Maine*'s Sovereignty, *Alden*'s Federalism, and the Myth of Absolute Principles: The Newest Oldest Question of Constitutional Law

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> [T]he question respecting the extent of the powers actually granted [to the federal government by the Constitution], is perpetually arising, and will continue to arise, as long as our system shall exist.
>
> Chief Justice Marshall, *McCulloch v. Maryland*[1]

INTRODUCTION

Welcome to the mystical world of Supreme Court federalism. You are about to enter an abstruse and bewildering labyrinth of categorical principles discernible only to five spellbound members of our current Supreme Court. The spell was cast upon them by a sophist named *National League of Cities v. Usery*, which gave national prominence to the modern doctrine of substantive federalism.[2] In *National League of Cities*, a bare majority of the Supreme Court held that Congress could not regulate areas of traditional state-government functions even if Congress was empowered under Article I to regulate identical private conduct.[3] But toward the end of a hard-fought federalism battle, wherein process defeated substance, *National League of Cities* languished in the archives of Supreme Court legacy.[4]

But to the astonishment of many, the specter of *National League of Cities* and its substantive federalism limitations have come back to haunt us. Although reincarnated under the name of *Alden v. Maine* and deceptively wearing what may seem a different constitutional vestment, the zeal for states' rights expressed in *National League of Cities* has been resuscitated.[5] In *Alden*, a five-member ma-

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[1] 17 U.S. (4 Wheat.) 316 (1819).

[2] *See* 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *National League of Cities* was one of the first modern state-immunity cases. It addressed whether Congress had the power under the Commerce Clause to enforce the terms of the Fair Labor Standards Act ("FLSA") against the states. *See National League of Cities*, 469 U.S. at 836-37. In considering whether Congress could obligate the states to comply with the FLSA's wage and hour provisions, the Court examined the permissible scope of Commerce Clause power vis-à-vis the states. The Court concluded that certain areas of "traditional government functions" were beyond the scope of Commerce Clause regulation on grounds of federalism and the Tenth Amendment, even if the Constitution permitted Congress to regulate identical private conduct under the same statute. *See id.* at 852.

[3] *See National League of Cities*, 426 U.S. at 833.

[4] *See Garcia*, 469 U.S. 528, 528 (1985) (overruling *National League of Cities* decision).

[5] 119 S. Ct. 2240 (1999). Of course, the birth of *Alden* should be no surprise to followers of the Court's federalism. *Alden*'s birth was anticipated by its close family members. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Idaho v. Coeur D'Alene Tribe, 521 U.S. 261

jority held that states have a constitutional right of sovereign immunity that Congress cannot abrogate, even with legislation undergirded by the Commerce Clause.[6]

The substantive limitation on the exercise of permissible congressional power announced in *National League of Cities* proved judicially unmanageable, and nine short years after its creation was replaced by a more pragmatic approach. In *Garcia v. San Antonio Metropolitan Transit Authority*, another bare majority of the Court held that the political process, rather than judicially created substantive limitations, ought to delineate the borders in the federal-state debate.[7]

National League of Cities' untimely death at the hands of *Garcia* provoked an intense division in the Court's federalism barracks. The four dissenters were distressed over having lost the institutional prerogative to demarcate what areas of state activity Congress was permitted to regulate. The *Garcia* dissenters, two of whom were in the *Alden* majority,[8] thus promised fourteen years ago that states' rights federalism would return.[9] And it has, with a vengeance.[10] It is seeking reparations for its induced moribund

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(1997); Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

[6] *See Alden*, 119 S. Ct. at 2291.

[7] *See* 469 U.S. 528 (1985). The Court revisited the issue of Congress's power to impose the obligations of the FLSA on the states was revisited in this case. *See id.* at 530. The new majority concluded that the state sovereignty principles laid down in *National League of Cities* had been impracticable and impossible to apply. *See id.* at 557. Accordingly, the Court held that whatever limits federalism provides with respect to the sovereignty of the states, these limits, rather than defined by judicial fiat, ought to be left to the political process wherein the states are represented at the national level. *See id.* at 556. In *Garcia*, the *National League of Cities* majority lost the vote of Justice Blackmun, who had voted with the *National League of Cities* majority nine years earlier. *See id.* at 529.

[8] Justices Rehnquist, O'Connor, and Powell all filed dissents in *Garcia*. *See id.* at 557-89. The *Alden* majority was composed of Justices Kennedy, who wrote the majority opinion, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist. *See Alden*, 119 S. Ct. at 2246.

[9] Justice Rehnquist, dissenting, pledged that the principles of federalism announced in *National League of Cities* would "in time again command the support of the majority of this Court." *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). Justice O'Connor, in an uncharacteristically acrimonious dissent joined Justice Rehnquist in promising that the "Court will in time again assume its constitutional responsibility" in adjudicating federalism issues and taking a position in "defining the scope of the state autonomy protected by *National League of Cities*." *Id.* at 589 (O'Connor, J., dissenting).

[10] *See, e.g., Alden*, 119 S. Ct. 2240 (1999); Idaho v. Coeur D'Alene, 521 U.S. 261 (1997); Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991).

condition. Armed with new constitutional standing and encouraged by an energized Tenth Amendment and equally vigorous Eleventh Amendment, federalism is taking center stage anew, ready to engage in doctrinal and conceptual warfare once more. But the new battle begins with severe theoretical and practical limitations.

At issue in *Alden* was the ability of private parties to sue state government employers in state courts for violation of the wage and hour provisions of the Fair Labor Standards Act ("FLSA").[11] Relying on precedent, structure, history, and the Tenth and Eleventh Amendments, the *Alden* majority categorically held that Congress was precluded from subjecting the states to private causes of action without their consent.[12] The *Alden* majority, thus, conferred explicit constitutional rank to sovereign immunity, an immunity that is now unalterable by Congress.

Notwithstanding this substantive limitation, the Court concluded that the supremacy of federal law was still considered an important constitutional principle that could be vindicated in other forms. For example, the Court suggested, Congress could choose to direct the executive branch to sue the states, that citizens still could sue state officials under the doctrine of *Ex Parte Young*,[13] and, alternatively, that Congress could purchase waivers of sovereign immunity.[14]

Alden's merger of substantive and process considerations to limit legitimate[15] congressional power shows a Supreme Court ambivalently committed to the supremacy of federal law, an ambivalence that yields an incomprehensible and unworkable new hybrid of federalism. This Article refers to the Court's new approach as mystical categorical federalism. It is mystical because the Court's new approach to federalism has a quality of conviction that is unsup-

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[11] *See Alden*, 119 S. Ct. at 2246.

[12] *See id.* at 2240.

[13] *See id.* at 2267 (holding that state official who violates law is not entitled to sovereign immunity enjoyed by state, and, thus, private individual may sue official carrying out illegal state policy); *Ex Parte* Young, 209 U.S. 123, 145-46 (1908) (holding that immunity of state officials does not extend to prospective relief). The *Ex Parte Young* doctrine is limited by *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 268-74 (1997).

[14] *See Alden*, 119 S. Ct. at 2263.

[15] I say "legitimate" because the validity of the FLSA was not at issue in *Alden*. Certainly, one could argue that this characterization begs the very question I suggest the Court is out to answer: is the FLSA legitimate federal law as applied to the states? To the extent the Court has not yet reached this issue, I assume for purposes of discussion that the law is legitimate.

ported by concrete evidence. In other words, it lacks origins more substantial than the Court's current policy preferences. And it is categorical because of its unyielding pronouncements on what the Constitution mandates.

In spite of the peremptory contention that *Alden's* majority determined what the structure of the Constitution mandates, we still are in search of the holy grail of federalism two hundred years after the ratification of the Constitution and, as the wisdom of Chief Justice Marshall suggests, probably always will be.[16] To be sure, in seeking the answer to the "oldest question of constitutional law,"[17] the ideological camps at the Supreme Court are still at war, bitterly divided.[18] Left standing after the *Alden* dust settled was a rejuvenated states' rights formalism, devoid of substantive content or of helpful limiting principles. In *Alden* a five-member majority arrogated to itself the extraconstitutional power of determining which cases belong in the courts, which state defendants really are the "the state" and which are not,[19] and which remedies are available in those cases *Alden* does permit.[20] The newest, oldest question of constitutional law requires the Court to resolve whether judicially imposed substantive limitations or process-based limitations are appropriate for limiting federal power and to justify this determination with an intellectually honest theory, capable of being applied in a coherent manner.

Alden's mystical federalism leaves the states free to violate federal law with no judicial oversight.[21] Further, *Alden* leaves the lower

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[16] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[17] New York v. United States, 505 U.S. 144, 149 (1992) (referring to federalism as "perhaps our oldest question of constitutional law"); *see also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (evaluating Justice O'Connor's interpretation of federalism in *New York*).

[18] Indeed, a close analysis of the federalism discourse in the Supreme Court closely resembles the deliberations of the Federalists and anti-Federalists during the ratification debates. *See generally* THE DEBATE ON THE CONSTITUTION, PARTS I & II (Bernard Bailyn ed., The Library of America, New York 1993) [hereinafter THE DEBATE] (compiling numerous historical documents addressing debates occurring during ratification of Constitution). Perhaps the Court has forgotten that the anti-Federalists lost the ratification debates.

[19] *See* Printz v. United States, 521 U.S. 898, 930 (1997) (stating that CLEOs are agents of state and, thus, suit against state official is suit against state itself); University of Cal. v. Doe, 519 U.S. 425, 429 (1997); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 45-51 (1994).

[20] *See* Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 274 (1997) (plurality opinion) (stating that *Young* action would be unnecessary because Idaho courts were open to hear case).

[21] *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2223-26 (1999) (finding that "arm of the state" of Florida violated Lanham Act by engaging in misrepresentation of its financial products). In *Florida Prepaid*, the Court held

courts and Congress bewildered because of its inability to articulate and follow a coherent theory that would help to predict where the balance might be struck between federalism values and the imperatives and primacy of federal law.[22] It has become clear to lower courts, charged with the obligation of implementing the Court's federalism, that the majority's bright line tests are unhelpful in sustaining a coherent theory of federalism, much less one that preserves the functional and normative values the Court purports to

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that Florida was immune under the Trademark Remedy Clarification Act because Congress lacked the power under Section 5 of the Fourteenth Amendment to abrogate sovereign immunity. *See id*; *see also In re* NVR, 189 F.3d 442, 453-54 (4th Cir. 1999) (finding Maryland and Pennsylvania immune from federal jurisdiction under Bankruptcy Act because debtor required payment from state treasuries). The court in *NVR*, however, found that the Eleventh Amendment did not apply to "local taxing authorities." *See In re NVR*, 189 F.3d at 454. The *NVR* court, exemplifying the conundrum created by *Alden*, stated, "Although federal law may reign supreme in the bankruptcy context, the federal courts do not necessarily reign supreme over an unconsenting state's treasury." *Id.* at 453. The *NVR* court also struggled with the substance versus process question. *See id.* at 449-50. The court considered whether the proceeding was a "suit" against the state precluded by the Eleventh Amendment or simply an application of the Bankruptcy Act where the state is a passive observer and the court just decides whether a debtor is entitled to an exemption from taxes. *See id.* at 449-53.

[22] *See* Judge Alex Kozinski, *Introduction: Constitutional Federalism Reborn*, 22 HARV. J.L. & PUB. POL'Y 93, 94 (1998) (stating that Court's uncertain pronouncements on substantive federalism "reveal[] the Court's inability to articulate with any precision what the limits to Congress's power are or should be" and that "[t]his inability leaves judges like me struggling with very little guidance to figure out what the limits of Congress's power are"). Circuit courts have differed on the issue of whether or not federal district courts have jurisdiction over Age Discrimination in Employment Act ("ADEA") claims brought against states. *Compare* Humenansky v. Regents of Univ. of Minn., 152 F.3d 822, 823-25 (8th Cir. 1998) (finding states immune from ADEA's reach), *with* Cooper v. New York Office of Mental Health, 162 F.3d 770, 776-77 (2d Cir. 1998) (holding that Eleventh Amendment does not deprive district courts of jurisdiction over ADEA claims against states), *vacated*, 67 U.S.W.L. 3614 (Jan. 18, 2000), *and* Davis v. Board of Trustees, 162 F.3d 770, 776-77 (2d Cir. 1998) (holding that Eleventh Amendment did not deprive district courts of jurisdiction over ADEA claims against state), *vacated*, 67 U.S.W.L. 3614 (Jan. 18, 2000). The Court revisited the application of the ADEA to the states this Term in *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (holding that states have immunity from ADEA). The circuit courts have been unable to agree whether the Driver's Privacy Protection Act ("DPPA") can be applied properly against states in federal court. *Compare* Condon v. Reno, 155 F.3d 453, 463-65 (4th Cir. 1998) (striking down as unconstitutional DPPA, that prohibits states from revealing information from drivers' license applications, on structural grounds established by *Printz* and *New York*), *rev'd*, 120 S. Ct. 666 (2000), *with* Travis v. Reno, 163 F.3d 1000, 1006-08 (7th Cir. 1998) (upholding application of DPPA to states), *and* United States v. Oklahoma, 161 F.3d 1266, 1270-72 (10th Cir. 1998) (upholding DPPA). Lower courts have also been divided on the issue of whether or not states are immune from suits brought under the False Claims Act. *Compare* United States *ex rel.* Stevens v. Vermont, 162 F.3d 195, 207-08 (2d Cir. 1998) (finding that states not immune under False Claims Act or under qui tam provisions permitting private parties to sue states on behalf of United States), *cert. granted*, 67 U.S.L.W. 3717 (U.S. June 24, 1999), *with* United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 870, 886 (D.C. Cir. 1999) (holding that state is not "person" under False Claims Act and, therefore, state cannot be sued at behest of private parties).

advance through categorical pronouncements,[23] or one that is at least consistent with rule-of-law values.[24]

This Article examines the fundamental incongruities made explicit by *Alden* and suggests that a narrow conservative majority on the Court is positioned to return substantive federalism to the federal-state landscape. The Article's mission is not to present a new theory of federalism,[25] but to encourage a colloquy about reconceptualizing the way we think about federalism in light of the rule-of-law crisis created by the Court's mystical categorical federalism. This Article proposes that we understand the Court's federalism as a basic political problem to which a political solution may be appropriate.

This Article further suggests that a bare conservative majority in the Court has invoked unreflective absolutes to rationalize what is ultimately a delicate balance among several competing theories of state power.[26] Ironically, the Court's approach increases the federal bureaucracy at the expense of state power, eliminates the effectiveness of the federal government to remedy state transgres-

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[23] In *Gregory v. Ashcroft*, for example, Justice O'Connor described the value of "indestructible states" in instrumental and normative terms. *See* 501 U.S. 452, 458 (1990). She stated that preserving state autonomy yielded several benefits to the people: "[D]ecentralized government . . . will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458. Justice O'Connor also believed that a healthy federalism reduces "tyranny" and enhances individual liberty. *See id.* Even if we take at face value Justice O'Connor's description of the benefits that state autonomy produces, it is unclear how shielding the states from suit promotes any of these values. Rather, it could be argued that immunizing states from private causes of action for violation of federal law detracts from these lofty goals. One need go no further than the facts of *Alden* to realize that Maine's refusal to comply with the provisions of the FLSA does nothing to advance the individual liberties of the plaintiffs in *Alden*, or to make Maine more responsive to its citizens' needs.

[24] The phrase "rule-of-law" refers to two distinct but interrelated concepts. First, in the words of Justice Marshall, the rule-of-law requires that in a democratic society there be a remedy for every violation of an existing right: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803). Second, in a society guided by a rule-of-law ideal, we ought to expect predictable and consistent rulings from the nation's highest Court.

[25] I would not presume to resolve in one law review article the theoretical enigma federalism presents. I do hope, however, to provoke a discussion about federalism's options in light of the Supreme Court's new categorical federalism jurisprudence.

[26] That the four dissenting members of the *Alden* Court vigorously disagreed with the majority's conceptualization of the absolute character of federalism limitations should shed some light on the myth of those categorical principles. *See* Alden v. Maine, 119 S. Ct. 2240, 2270-71 (1999).

sions of valid social policy by the most efficient means, and deprives citizens of effective remedies against violations of federally created rights. Perhaps most importantly, the majority's approach is not authoritatively supported by either the text or the structure of the Constitution.

This Article proceeds in five parts. Part I sketches the doctrinal history that paved the way for *Alden's* absolutism. Part II examines *Alden*, and analyzes and critiques the Court's doctrinal, historical, and structural justifications for bracing up sovereign immunity as a constitutional right unalterable by Congress. Part III suggests that the normative force of federalism lies in recognizing the changing dynamics of local and national governance, rather than on formalist arguments that advance state autonomy for its own sake.

Part IV explores two alternative interpretations of *Alden*. This Part explores whether the Court intended for federalism to be about substantive limitations on congressional power or about process-based limitations on that power. Whether *Alden* signifies a new era in substantive federalism or whether it simply puts procedural limits on legitimate congressional power is, of course, of immense relevance. It signifies the difference between a state's absolute immunity from liability and private litigants' ability to seek a remedy for violations of federal law. This Part suggests that the Court's apparent goal is to redefine federal-state boundaries by imposing judicially crafted substantive limitations, *National League of Cities* style. The categorical nature of the Court's mystical federalism is simply irreconcilable with a process-based interpretation.

Part IV criticizes the Court's absolutism and suggests that the process-based limitations *Alden* proposed are inconsistent with the supremacy of federal law and are unsatisfactory solutions to the rule-of-law crisis.[27] They are unsatisfactory because they rest on

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[27] I term it a crisis because of the large number of federal statutes that will now remain unenforced in the absence of affirmative congressional intervention in the form of funded waivers, an option that the government lawyers suggested would be almost impossible to pursue. *See* Linda Greenhouse, *States Are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1, A24 (stating that government lawyers argued that federal agencies such as Department of Labor are not equipped to sue states for each complaint made). The federal government will now be solely responsible for suing states under the Americans with Disabilities Act ("ADA"). *See* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (holding that Congress lacks power to enact Title II of ADA). There are many other federal statutes under which only the federal government will be able to sue the states. *See, e.g.*, Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994); Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1994);

doctrinal fictions vulnerable to augmentation, constriction, or profligacy, rather than on a sustainable and defensible theory that can provide predictable guideposts for systematizing our behavior, preferences, and political choices. Doctrinal fictions merely serve as a vehicle for advancing the Court's normative theory that a core area of protected state authority exists.

Part V proposes a political response to the Court's challenge: statutorily expand the original jurisdiction of the Supreme Court to the full limit of Article III. This political response to the Court's transparent ideological preference, this Article argues, is both appropriate and functionally expedient to force the Court to rethink, or at least to clarify, its posture on immunity and federalism. The constitutional role Article III assigns to the Court, and the role accepted as necessary since *Marbury v. Madison*, justifies this response to force the Court to reassume its constitutional duty.

This Article concludes that nothing in the structure of federalism mandates the result the Court achieved in *Alden*. If congressional power is authorized, then the means chosen to implement it ought not to be subject to a second tier of scrutiny.[28] As Hamilton explained, the moment the Framers decided to establish a national government, they recognized that it should be vested with all the authority necessary to execute its duties.[29] As one commentator has noted, if the federal government has the power to impose legal obligations on the states, the need for a judicially enforceable remedy for a violation of these obligations is not an abstraction conceptually difficult to seize.[30]

I. THE GENEALOGY OF *ALDEN V. MAINE*: MYSTICAL CATEGORICAL FEDERALISM

The Constitution does not define state power, or sovereignty, and does not delineate which areas are presumptively within the

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Bankruptcy Act, 11 U.S.C. §§ 101-1330 (1994); Public Health Service Act, 42 U.S.C. §§ 201-300 (1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994); Trademark Act, 15 U.S.C. §§ 1051-1127 (1994); Copyright Act, 17 U.S.C. § 511. (1994); False Claims Act, 31 U.S.C. §§ 3729-3731 (1994); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1994).

[28] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324 (1819).

[29] *See* THE FEDERALIST NO. 23 (Alexander Hamilton); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, 193-94 (1996) (summarizing Hamilton's arguments for unrestricted federal power within certain domains).

[30] *See* Carlos Manuel Vázquez, *Night & Day:* Coeur D'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 9 (1998).

exclusive domain of the states. Answering what those areas encompass requires resorting to the structure of the Constitution. In this structure the *Alden* Court found suggestions,[31] implications,[32] and assumptions[33] that clearly result in a constitutional state sovereign immunity privilege.[34] These claims can be examined more closely by first discussing the doctrinal parentage of *Alden*. A brief look at the Court's mystical federalism reveals the ideological essence of most decisions involving state-federal powers. It also reveals that the current majority understands the sovereignty of the states to confer upon them an immunity from liability for their violations of federal law.

The judicial struggle to define federalism limits dates back to the dawn of the new republic. Prior to the New Deal, the Court took on a staunch states' rights position that led to the invalidation of numerous federal statutes.[35] The focus during this era was not on

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[31] *See Alden*, 119 S. Ct. at 2244. "In light of the overriding concern regarding the States' war-time debts, together with the well known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence [with respect to the immunity of the states in their own courts] is most instructive. It *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." *Id.* at 2260 (emphasis added). How the Court knows that these attributes of the Constitution's opponents result in their "silence" necessarily codifying a constitutional injunction is unknown. The Court further stated that "the theory and reasoning of our earlier cases suggests the States do retain a constitutional immunity from suit in their own courts." *Id.* at 2262.

[32] *See id.* at 2247. "The [Tenth] Amendment confirms the promise implicit in the original document: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people.' . . . . The States thus retain 'a residuary and inviolable sovereignty.'" *Id.* (citations omitted).

[33] *See id.* at 2253. "'The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.'" *Id.* at 2253 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239, n.2 (1985)).

[34] *See id.* at 2269. "[H]istory, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits [brought by the federal government] but not [to those brought by private citizens]." *Id.*

[35] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 310-11 (1936) (holding that act taxing coal sales but granting tax reductions for companies that agreed to certain wage and hour regulations exceeded Congress's taxing power because it amounted to penalty, not tax); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down a federal statute regulating the hours and wages of employees as a purely local matter exceeding congressional power); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 363 (1935) (striking down mandatory federal pension plan for railroad workers as exceeding congressional power); Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918) (striking down statute regulating child labor on grounds that it infringed on state powers and exceeded congressional authority), *overruled by* United States v. Darby, 312 U.S. 100 (1941); United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (striking down application of Sherman Act to state monopolies because it encroached on state powers).

whether Congress had validly enacted statutes, but on whether such statutes infringed on state sovereignty. The Court's prevailing assumption was that there was a defensible enclave of state immunity that was exempt from federal power. The assumption that a core area of state activity is beyond the reach of congressional power necessarily implies that Congress lacks plenary legislative authority. In other words, by adopting an assumption of state immunity, the Court approached the federalism inquiry with the balance already tilted in favor of the states.

The Court quickly abandoned this assumption at the emergence of the New Deal and returned to a presumption of constitutionality for all congressional legislation, overruling many of its state sovereignty decisions.[36] In response to a political backlash from the executive and legislative branches, the Court slowly began legitimating congressional power to address the social and economic problems of the time. Culminating with *Wickard v. Filburn*,[37] the Court no longer asked whether a particular statute infringed on state sovereignty, but whether it was enacted within the scope of congressional power.[38] Since *Wickard*, the Court largely abandoned any efforts to curtail congressional power under the Commerce Clause.

The Court revisited federalism-based restrictions in 1976 with its decision in *National League of Cities v. Usery*.[39] In addressing whether Congress had the power to impose the obligations of the FLSA upon the states, the Court was still faced with the challenge that the pre-New Deal Court confronted: the Constitution provides little guidance about a proper scope of state authority or about a state's right to be free from congressional regulation.[40] But, then-Justice Rehnquist reframed the issue in *National League of Cities* by drawing a formal distinction between the issue of congressional power generally and the issue whether the Constitution also limits

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[36] *See, e.g., Darby*, 312 U.S. at 116-17 (rejecting any Tenth Amendment limitation on congressional power and thereby overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937) (upholding Congress's power to regulate unfair labor practices and criticizing *E.C. Knight*).

[37] 317 U.S. 111, 132-33 (1942) (holding that Congress could regulate local consumption of farmer's own wheat because aggregate of consumption could affect interstate commerce).

[38] *See* H. Geoffrey Moulton, *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 855 (1999).

[39] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[40] *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1323 (1997).

congressional power when it affects the "attributes of sovereignty" that each state possesses.[41]

The distinction drawn by Justice Rehnquist reembraced the state immunity presumption. This presumption, in turn, positioned the *National League of Cities* majority to assert that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[42] The majority considered the level of wages a state pays its employees a "traditional government function" and, thus, held that Congress exceeded its Article I powers by enforcing the FLSA against the states.[43] Congress may not regulate the level of wages a state pays its employees, the Court asserted, because the decision comprises "'functions essential to [their] separate and independent existence.'"[44]

Justice Rehnquist offered no textual or historical support for this remarkable normative assertion. In reality, not only have states continued their separate and independent existence under the FLSA and a host of other federal statutes, but some would argue they are more "separate and independent" than ever, courtesy of the Supreme Court.

In a dissenting opinion, Justice Brennan eloquently pointed to the majority's flawed analysis in *National League of Cities.* Justice Brennan argued that when Congress exercises a legitimate power, it does not matter whether the regulation affects states: "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[45] Justice Brennan further argued:

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[41] *See* 426 U.S. at 845, *overruling* Maryland v. Wirtz, 392 U.S. 183 (1968) (holding that FLSA applies to public employees). "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens but to the States as States." *Id.*

[42] *Id.*

[43] *See id.* at 833.

[44] *Id.* at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 19 L. Ed. 101, 104(1868))).

[45] *Id.* at 860 n.3 (Brennan, J., dissenting) (quoting Maryland v. Wirtz 392 U.S. 183, 196-97 (1968)).

> [A] judicial finding that Congress had not unreasonably regulated a subject matter of "commerce" brings to an end the judicial role. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[46]

Justice Brennan further analogized the Court's opinion in *National League of Cities* to the "line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930s."[47]

Justice Brennan's argument is more persuasive than the majority's. As has been widely observed, *National League of Cities*' normative differentiation between proprietary and governmental functions was hopelessly chaotic and too incoherent to be helpful at any level.[48] Indeed, the distinctions proved to be "unsound in principle and unworkable in practice."[49] More importantly, *National League of Cities*' assumptions and methodology revealed an overreaching judicial interpretation of unstated structural principles that restrain democratic preferences.[50]

This recognition led a different majority only nine years later in *Garcia* to reject the state immunity limitation.[51] *Garcia* abandoned *National League of Cities*' states' rights approach for practical and

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[46] *Id.* at 861 (Brennan, J., dissenting) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[47] *Id.* at 868 (citing Carter v. Carter Coal Co., 298 U.S. 238 (1936)); *see also* United States v. Butler, 297 U.S. 1, 74-75 (1936) (striking down as unconstitutional Agricultural Adjustment Act on grounds that Congress may not use its tax and spend powers to address issue of national concern); Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918)) (striking down statute regulating child labor on ground that it infringed on state powers reserved under Tenth Amendment).

[48] *See* Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism,"* 18 HARV. J.L. & PUB. POL'Y 175, 179 (1994).

[49] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 224 n.44 (1980); Dean Alfange, Jr., *Congressional Regulation of the "States Qua States": From* National League of Cities *to* EEOC v. Wyoming, 1983 SUP. CT. REV. 215, 218-19; Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1006 (1993); Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1636 (1994).

[50] *See* Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 680 (1999) (stating for reasons of legal process and democratic theory unelected and "unaccountable judiciary has no legitimate authority to overrule decisions of the majoritarian branches" without grounding such decision in text of Constitution it is empowered to enforce).

[51] *See Garcia*, 469 U.S. at 545-48.

ideological reasons. *Garcia* concluded that the "traditional government function" test was impossible to apply with intellectual honesty, as it was difficult to define what areas fell within this immunity enclave.[52] The Court also recognized that federalism was simply judicially unmanageable. Whatever limits federalism entailed, the Court concluded that they ought to be left to the political process, wherein each state's interests are presumptively represented at the federal level, rather than to judicially crafted limitations.[53] The Court, thus, held that the FLSA could constitutionally bind the states as employers. *Garcia* has been interpreted as a declaration that the Tenth Amendment imposes no substantive limitations on Congress's power to regulate the states.[54]

But the Court's members change and so do its inclinations. A judicial uneasiness quickly grew from the broadness and hands-off approach of the "political process federalism" model adopted in *Garcia*.[55] Indeed, although it was deferential in its pronouncements, even the *Garcia* majority was unwilling to abandon all judicial control over the functioning of the political process as a safeguard of federalism.[56] The Court had left an opening, if slight, to permit itself to intercede if there were "possible failings in the national political process."[57] The Court's consternation over yielding to Congress in all matters relating to the sovereignty of the states grew, and as its members changed, so did its institutional role on federalism. The Court slowly began to restrict *Garcia*'s deferential method by intermeshing limitations on congressional action that affected the states.

A tentative renewed judicial management of federalism germinated from this discomfort. Since 1985, the Court erected substan-

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[52] *See id.*

[53] *See id.* at 550-52. The *Garcia* case adopted Professor Weschler's political process theory as later refined by Professor Choper. *See id.*; JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[54] *See* Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1704 n.97 (1997).

[55] *See, e.g.*, Massey, *supra* note 48, at 195. In *Garcia*, the Court held that the limits imposed by federalism should be left to the political process. The Court reserved the right to intervene only in those cases where it could be shown that the political process had failed. *See Garcia*, 469 U.S. at 556-57.

[56] *See Garcia*, 469 U.S. at 556-57.

[57] *Id.* at 554.

tive barriers to congressional action in *South Carolina v. Baker*[58] and clear-statement procedural hurdles in *Gregory v. Ashcroft*.[59] As these substantive federalism brakes on congressional power gained momentum, so did the Court's willingness to intervene in other areas of federal-state relations.

In *New York v. United States* a five-member majority introduced the anticommandeering limitation on federal power.[60] Striking down as unconstitutional the take-title provision of the Federal Low-Level Radioactive Waste Policy Amendment Act,[61] the *New York* majority, led by Justice O'Connor, gave vitality once again to the Tenth Amendment. The Court held that the structural federalism limitations, as exemplified by the Tenth Amendment, prohibited Congress from forcing the states to legislate according to federal standards.[62] Federalism prohibited Congress from so commandeering the legislative processes of the states, even if Congress

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[58] 485 U.S. 505, 512-13 (1988) (rejecting South Carolina's contention that Congress had exceeded its power under Commerce Clause by eliminating tax exemption on interest received from state-issued bonds but acknowledging that room existed for judicial review if political process principle of *Garcia* demonstrated that Congress acted so as to leave state "politically isolated and powerless"); *see also* Massey, *supra* note 48, at 190-91 (discussing the substantive nature of limits that *Baker* placed on Congress).

[59] 501 U.S. 452, 460-61 (1991). At issue in *Gregory* was whether Congress could prohibit Missouri from forcing its judges to retire by age 70 under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1988). The Court did not resolve the question because it concluded that Congress had not intended for the ADEA to apply to state judges. *See Gregory* 501 U.S. at 464. Rather, the Court required Congress to speak with "unmistakable clear language" when it intended to alter the "'usual constitutional balance between the States and Federal Government.'" *Id.* at 460-61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[60] *See* 505 U.S. 144 (1992). The *New York* case challenged the constitutionality of the "take-title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j (1988). *See New York*, 505 U.S. at 153-54. The take-title provision forced the states either to take title to nuclear waste generated within the state or to comply with the provisions of the Act. *See* 42 U.S.C. § 2021e(d)(2)(c) (1988); *New York*, 505 U.S. at 153-54. The Act established deadlines by which states had to resolve the nuclear waste disposal problem, either by themselves or in cooperation with other states. *See New York*, 505 U.S. at 153-54. That is, the Act required states to regulate how to dispose of their nuclear waste or be statutorily deemed the owner of such waste, which status would make the state liable for any damages the owner or generator of the waste incurred as a result of the state's failure to take title. *See id.* at 174-75.

The Court held that the take-title provision of the Act was unconstitutional because it violated principles of federalism protected by the Tenth Amendment. *See id.* at 176-78. In the Court's view, federalism prohibited Congress from forcing the states to regulate, even if Congress could directly regulate the activity: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166.

[61] *See id.* at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(C)).

[62] *See id.* at 188.

could have regulated the hazardous waste producers itself, because such compulsion impermissibly interfered with state sovereignty.[63]

The decision was startling in the face of the deference accorded Congress in the previous seven years. Although the legislation at issue in *New York* was the result of extensive negotiations between the states in the manner of interstate compacts, the Court ignored this political reality to overturn parts of the Act. The *New York* majority, however, disingenuously failed to overrule *Garcia.* Instead, it limited *Garcia* to federal laws that regulate the states as part of a larger group of regulated parties[64] (without explaining why this distinction mattered) rather than shifting back to limit all regulation of the states.[65] That is, *New York* left Congress free to regulate the states as market participants. No issue arose in the case as to the availability of a forum to remedy state transgressions of valid federal law.

The tentative rebirth of substantive federalism found no firmer authoritative footing in *New York* than it had in *National League of Cities.* The only constitutional source the *New York* majority asserted for its anticommandeering rationale was the Tenth Amendment, which says nothing about such a limitation.[66] And, as has been extensively treated elsewhere, the opinion's historical foundations and structural justifications simply do not support the Court's categorical rule.[67] As Part II explains in greater detail, the historical evidence fails to sustain a presumption of state sovereignty that trumps plenary congressional power.[68]

But the impetus established by *New York,* now offering a doctrinal substructure for state sovereignty, seduced a new conservative majority of the Court further to limit congressional power. In 1996 this limitation took the form of sovereign immunity. In *Seminole Tribe of Florida v. Florida,* the Court confronted Congress's power under Article I to abrogate a state's sovereign immunity and sub-

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[63] *See id.* at 176-77.

[64] *See* Vázquez, *supra* note 54, at 1704.

[65] According to Professor Powell, the majority opinion was concerned with Justice O'Connor's autonomy of process principle whereby the Court focuses its federalism inquiry on "protecting the integrity of state processes rather than [on] creating a substantive realm of state legislative autonomy." Powell, *supra* note 17, at 650.

[66] *See New York,* 505 U.S. at 155-59.

[67] *See, e.g.,* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?,* 95 COLUM. L. REV. 1001, 1006-07 (1995); Moulton, *supra* note 38, at 876-78; Powell, *supra* note 17, at 681; Yoo, *supra* note 40, at 1357-91.

[68] *See infra* notes 119-210 and accompanying text.

ject it to private causes of action.[69] The issue seemed unremarkable, for in 1989 the Court had held in *Pennsylvania v. Union Gas* that Congress indeed had that power.[70] But the Court's makeup since *Union Gas* had changed. Justices Brennan, Marshall, and Blackmun had retired, and the dissenters in *Union Gas*, now joined by Justice Thomas, thus decided to overrule *Union Gas*, holding that Congress lacked the power to abrogate state sovereign immunity after all.[71]

The specter of undefined "sovereign attributes" invoked in *National League of Cities* reentered the scene in *Seminole Tribe*.[72] The Seminole tribe sued Florida and its governor, seeking an order requiring the state to negotiate in good faith a gaming compact as required by the Indian Gaming Regulatory Act (IGRA).[73] Congress had expressly abrogated Florida's Eleventh Amendment immunity in the Act, but Florida defended on grounds that the suit was precluded by the Eleventh Amendment.[74] The Court struck down the good-faith provision as unconstitutional.[75] Overruling *Union Gas*, the *Seminole Tribe* majority held that Congress lacked the power under Article I to overrule a state's sovereign immunity even if it had the power to enact the IGRA: "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[76]

Seminole Tribe's assertion of sovereign attributes was broad, categorical, and unmistakably reminiscent of *National League of Cities*-style formalism. Although it would have been sufficient in *Seminole Tribe* for the Court to hold that the Eleventh Amendment precluded suits against unconsenting states, the Court reframed the issue as one involving Congress's power to impose obligations on

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[69] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

[70] 491 U.S. 1, 14-15 (1989).

[71] *See Seminole Tribe*, 517 U.S. at 61-62. The impetus was provided by *New York*. Although the rule of *Pennsylvania v. Union Gas* was the binding interpretation on Congress's power to abrogate sovereign immunity, Florida used the authority of *New York* to argue in *Seminole Tribe* that such power violated the Tenth Amendment. *See id.* at 61 n.10.; *Union Gas*, 491 U.S. at 5.

[72] *See Seminole Tribe*, 517 U.S. at 54, 68.

[73] *See id.* at 47. Congress has plenary power over Indian gaming as set forth in the Indian Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3.

[74] *See Seminole Tribe*, 517 U.S. at 52.

[75] *See id.* at 72-73.

[76] *Id.* at 72.

an unconsenting state.[77] The Eleventh Amendment, the Court said, is important "not so much for what is says, but for the presupposition . . . which it confirms."[78] This "presupposition" has two parts: (1) "that each state is a sovereign entity in our federal system" and; (2) "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[79] In *Seminole Tribe*, only the second attribute of sovereignty was at issue. The Court did not have an opportunity to decide what it meant to be a sovereign entity in a federal system nor what limitations on congressional powers that category would entail. The dissenting opinions elegantly pointed out the flawed doctrinal and historical supporting evidence for the majority's analysis, as did other commentators.[80]

One year later in *Printz v. United States*, the Court hinted that substantive federalism would receive renewed attention, thus rendering relevant *Seminole Tribe*'s suggestion that the definition of a sovereign entity had important implications in the federalism debate.[81] At issue in *Printz* were the interim provisions of the Brady Handgun Violence Prevention Act.[82] The Act required local law enforcement officers to conduct background checks on prospective gun purchasers.[83] Two law enforcement officers challenged the constitutionality of the Act on federalism grounds. The Supreme Court agreed with the officers and struck down the Act as

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[77] *See* Vázquez, *supra* note 54, at 1715-16 (commenting that Court used fancy footwork to reach *Pennsylvania v. Union Gas* issue because Court could have easily sustained suit against governor without deciding whether suit against state required dismissal).

[78] *Seminole Tribe*, 517 U.S. at 72 (citing Blatchford v. Village of Noatak, 501 U.S. 775, 779 (1991)).

[79] *Id.*

[80] *See id.* at 88-93, 95-98 (Stevens, J., dissenting); *id.* at 100-85 (Souter, J., dissenting); Robert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole *Decisions*, 96 COLUM. L. REV. 2213 (1996); Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997); Kit Kinports, *Implied Waiver After* Seminole, 82 MINN. L. REV. 793 (1998); Daniel J. Meltzer, *The* Seminole *Decisions and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1 (1996); Gregory J. Newman, *The* Seminole *Decision's Effect on Title IX Claims: Blockading the Path of Least Resistance*, 46 EMORY L.J. 1739 (1997); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After* Seminole Tribe, 46 UCLA L. REV. 161 (1998); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW.U. L. REV. 819 (1999); Vázquez, *supra* note 54.

[81] *See* 521 U.S. 898 (1997).

[82] 18 U.S.C. §§ 921-925A (1994).

[83] *See id.* § 922.

an impermissible exercise of congressional power because it interfered with state sovereignty.[84]

Writing for the majority in *Printz*, Justice Scalia started his analysis by proposing that the United States is a system of dual sovereignty in which it is acknowledged the states retained "a residuary and inviolable sovereignty."[85] Although recognizing that neither the Tenth Amendment nor any other constitutional provision called for the result the Court was to reach, Scalia noted that the structure of our Constitution provided "essential postulates" that control the issue.[86] This structure "presupposes the continued existence of the states."[87] This continued existence implies that "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[88] The Court concluded that these doctrinal iterations supported a categorical rule of state immunity.[89]

Printz suggests that *Garcia* may no longer be good law. It may be as inappropriate for Congress to dictate to the states the level of wages it ought to pay its employees as it would be for Congress to direct the local law enforcement officers to carry out federal law. Once again, however, the Court was spectacularly unconcerned with stare decisis and failed to address the implications of *Garcia* on its analysis. The *Printz* Court instead based its authoritative foundations on those set forth in *New York*, which itself was at odds with *Garcia*, and ignored the incoherence of embracing both lines of cases.[90]

Finally, in *Idaho v. Coeur D'Alene*, the Court held that the Eleventh Amendment barred injunctive relief against state officials in Idaho because the suit was the functional equivalent of a quiet title

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[84] *See Printz*, 521 U.S. at 933.

[85] *Id.* at 917 (quoting THE FEDERALIST No. 39 (James Madison)).

[86] *Id.* at 918 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

[87] *Id.* at 919 (quoting Helvering v. Gerhardt, 304 U.S. 403, 414 (1938)).

[88] *Id.* at 928 (citing Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868)).

[89] *See id.* at 933.

[90] The foundational authority and unarticulated theory of *Printz* received criticism, as did *New York*, *Seminole Tribe*, and *National League of Cities* before it. *See* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commander State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 72-74 (1998) (criticizing *Printz* Court's interpretation of constitutional and theoretical sources of federal power to commandeer states); *see also* Caminker, *supra* note 67, at 1006-07; Andrew S. Gold, *Formalism and State Sovereignty in* Printz v. United States*: Cooperation by Consent*, 22 HARV. J. L. PUB. POL'Y 247 (1998); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998); Moulton, *supra* note 38, at 876-78; Powell, *supra* note 17, at 681; Yoo, *supra* note 40, at 1357-91.

action, for which a decision on the merits would implicate Idaho's sovereign interests in the Coeur D'Alene submerged lands.[91] Although the Coeur D'Alene tribe brought an *Ex Parte Young* action, the Court refused to permit that procedural vehicle to overcome the potential impact on the sovereign attributes of Idaho.[92] Relying on its mystical federalism doctrine, and *Seminole Tribe* in particular, the Court concluded: "When suit is commenced against a state officials . . . the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake . . . . Indeed, the suit in *Young*, which sought to enjoin the state attorney general from enforcing state law, implicated substantial state interests."[93]

In a classic non sequitur, given that *Young* did permit the injunction sought notwithstanding the substantial interests at stake,[94] the Court declared that *Seminole Tribe* established that the Coeur D'Alene tribe could not similarly obtain its injunction.[95] The majority opined that "the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."[96] Rather, it continued, "The course of our case law indicates the wisdom and necessity of considering, when determining the applicability of the Eleventh Amendment, *the real affront to a State of allowing a suit to proceed.*"[97] The problem with this approach is that it has no authoritative foundation other than the current majority's notion of what a "real affront" to a state looks like. Although Justice Kennedy's plurality opinion on the revisionist account of *Young* was not joined by Justices Scalia, O'Connor, or Thomas, Justice O'Connor's plurality fully agreed that the sovereign interests of Idaho were implicated and the Eleventh Amendment, thus, precluded the suit.[98]

These cases reveal a Supreme Court willing to limit congressional power for state sovereignty's sake — a limit defined by judi-

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[91] *See* 521 U.S. 261, 264 (1997).

[92] *See id.*; *see also* Blatchford v. Native Village, 501 U.S. 775, 781-82 (1991) (holding that the Eleventh Amendment bars suits against the states brought by Indian tribes).

[93] *Coeur d'Alene*, 521 U.S. at 269.

[94] *See Ex Parte* Young, 209 U.S. 123, 168 (1907).

[95] *See Coeur d'Alene*, 521 U.S. at 269-70.

[96] *Id.* at 270 (limiting *Ex Parte Young* to instances where no state forum is available).

[97] *See id.* at 277 (emphasis added).

[98] *See id.* at 288-97 (O'Connor, J., concurring in part and concurring in judgment) (stating that federal court was using wrong forum but disagreeing that absence of state forum is basis for federal jurisdiction).

cial politics and ideology, rather than by constitutional text or history. As a result, substantive federalism's defining principles and its corresponding limiting standards (if there are any) are for the Court to define on an ongoing basis, depending on the number of votes it can muster for a desired result. The mystical quality of these unarticulated limiting standards and ephemeral sovereign attributes renders them susceptible of as many personifications as there are litigants willing to identify them. As if directing a play without a script, the Supreme Court has decided, on an ad hoc basis, which characters are relevant to the unfolding story. Lacking an explicit or coherent focus, this audition process results in eccentric attempts by litigants[99] and lower courts[100] to identify the main story line.

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[99] In *Summit Medical Associates, P.C. v. Pryor*, for example, the state of Alabama characterized its interest in "regulating late term abortions of viable fetuses" as a sovereign one. 180 F.3d 1326, 1338 (11th Cir. 1999). At issue in this case was the constitutionality of Alabama's Partial Birth Abortion Ban of 1997. *See id.* at 1329. A group of doctors sued the attorney general and the governor seeking an injunction against the enforcement of what they claimed was an unconstitutional law. *See id.* The government defended on grounds of Eleventh Amendment immunity. *See id.* The Eleventh Circuit rejected the Eleventh Amendment claim on the grounds that no "property" interests of Alabama were involved as was the case in *Coeur D'Alene*, but stated that a declaratory judgment would not prevent the state from regulating late-term abortions in other ways. *See id.* at 1340. The *Summit Medical* court noted, in contrast, that in *Coeur D'Alene* the rights regarding the submerged Idaho lands would have been finally resolved but for Eleventh Amendment immunity. *See id.* This is just one example of the many cases that are sure to follow, testing the limits of the *Ex Parte Young* limitations and forcing some defining principles for "special sovereign interests." The Eleventh Circuit could have easily held that the prerogative to regulate partial-birth abortion was a special sovereign interest over which federal courts had no jurisdiction. Nothing in *Coeur D'Alene* or the other mystical federalism decisions would have prevented this result.

[100] *See, e.g.*, Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1430 (11th Cir. 1998) (including one dissenting opinion for each member of three judge panel), *aff'd*, 120 S. Ct. 631 (2000). In *Kimel*, Judge Edmondson speculated that "good reason exists to doubt . . . that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment." *Id.* at 1430. A plurality in *Kimel* found that Congress properly enacted the Americans with Disabilities Act under Section 5 of the Fourteenth Amendment and had clearly abrogated states' sovereign immunity. *See id.* at 1433. Chief Judge Hatchett dissented from the portion of the opinion that found that the ADEA did not provide unmistakable clear language to abrogate the Eleventh Amendment. *See id.* at 1435 (Hatchett, J., concurring in part and dissenting in part). Judge Cox disagreed that both the ADA and the ADEA were proper exercises of the powers permitted by Section Five of the Fourteenth Amendment. *See id.* at 1444-45 (Cox, J., concurring in part and dissenting in part). Judge Cox believed that *City of Boerne v. Flores* indicated that Congress lacked the power to enact either the ADA or the ADEA under the Fourteenth Amendment. *See id.* at 1445-45. He further reasoned that the "ADEA confers rights more extensive than those the Fourteenth Amendment provides . . . [and that] Congress did not enact the ADEA as a proportional response to any widespread violation of the constitutional rights of the elderly." *Id.* at 1446-47. He concluded that age and disability are not protected classes and that states can therefore discriminate against these groups if the state action passes the rational basis test. *See id.* at 1447-48. The ADEA,

II. *ALDEN* AND THE MYTH OF ABSOLUTE SOVEREIGNTY

Alden reached the correct result if one follows the Court's mystical federalism line of cases and ignores the *Garcia* line of cases. *Seminole Tribe* held that Congress lacks the power to abrogate sovereign immunity to subject the states to the jurisdiction of Article III courts.[101] If *Seminole Tribe* was correctly decided, then it is at least anomalous for Congress to have the power to abrogate sovereign immunity in state courts but not in Article III courts. In other words, if under federalism it offends a state's dignity for Congress to subject it to suit in a federal tribunal, that offense is compounded when Congress mandates that the cause of action be heard in an unconsenting state's tribunal.

Although the result in *Alden* may be doctrinally defensible, the mystical federalism on which this doctrine is based is not. *Alden* made explicit what *New York*, *Printz*, *Seminole Tribe*, and *Coeur D'Alene* left implicit: the essential sovereign attributes of the states have

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however, "was enacted to combat all arbitrariness, unconstitutional or not." *Id.* at 1447. Because the ADEA is not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, Judge Cox thought that Congress should not have abrogated the Eleventh Amendment immunity. *See id.* at 1448.

The *Kimel* majority did not consider whether Congress had the power under Section 5 of the Fourteenth Amendment to enact the ADEA, but rather considered only whether it had made its decision to abrogate immunity unmistakably clear. *See id.* at 1430 (citing Dellmuth v. Muth, 491 U.S. 223, 228 (1989)). The ADEA makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his [or her] compensation, term, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a)(1) (1994). Congress included as the definition of employer, "a State or political subdivision of a State." *Id.* § 630(b)(2) (1994). The Act provides explicitly that employers who violate the statute are subject to liability and injured persons are entitled to equitable relief. *See id.* § 626(b) (1994). Finally, "[i]n any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . ." *Id.* § 626(c)(1). Three other circuit courts found that Congress had made the "unmistakable clear statement" to abrogate the states' Eleventh Amendment immunity. *See* Hurd v. Pittsburgh State Univ., 109 F.3d 1540, 1544 (10th Cir. 1997); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 695 (3d Cir. 1996); Davidson v. Bd. of Governors, 920 F.2d 441, 443 (7th Cir. 1990). The *Kimel* court found that including the states as employers under the ADEA did not provide the sufficiently clear language that states could be sued in federal court as a result of violations of the ADEA.

For additional commentary on the limits of federalism, see Kozinski, *supra* note 22, at 94, stating that the Supreme Court's uncertain pronouncements on substantive federalism, "reveal the Court's inability to articulate with any precision what the limits to Congress's power are or should be. This inability leaves judges like me struggling with very little guidance to figure out what the limits of Congress's power are."

[101] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996).

constitutional status.[102] As sketched in Part I, the cases that gave *Alden* its foundation have nevertheless failed to articulate a coherent theory of sovereignty or federalism or to give authoritative support for their categorical pronouncements.[103] *Alden* is, thus, built on a house of cards that may suffer the same fate as *National League of Cities* with the next change in the Court's membership. And, as with all houses of cards, the collapse of one card threatens to topple the rest.

Alden's story is innocuous enough. A group of probation officers sued the state of Maine alleging that Maine had violated the overtime provisions of the FLSA.[104] Plaintiffs sought compensation and liquidated damages. Maine's defense throughout was that sovereign immunity precluded this action in any court.[105] After jousting through an agonizing seven-year procedural contest, characteristic of all FLSA actions filed in the wake of *Seminole Tribe*,[106] the Court granted certiorari to resolve the important question presented: whether Congress has the power under Article I of the Constitution to subject unconsenting states to private causes of action for damages in their own courts.[107] Thus framed, the answer for the majority was inexorable: categorically no.

In an opinion written by Justice Kennedy, the *Alden* majority first confirmed that the Constitution's structure, history, and the authoritative interpretation of the Court's Eleventh and Tenth Amendment cases made clear that states enjoyed a fundamental

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[102] *See* Alden v. Maine, 119 S. Ct. 2240, 2246-47 (1999). *Alden* would not have arisen but for *Seminole Tribe* and *Printz*. *Alden* would have been litigated in the federal courts and a result on the merits of the action would have ended the lawsuit. In light of *Seminole Tribe* and *Printz*, however, the plaintiffs were forced to seek state court as an alternative forum.

[103] It is not the main point of this Article to argue that *Seminole Tribe* and the federalism cases dating back to *New York* were decided incorrectly. This subject has been treated extensively elsewhere. However, it is impossible to read *Alden* in isolation, for its very authority and staying power depends on the legitimacy of the arguments advanced in its support, which are anchored explicitly in these lines of cases.

[104] *See Alden*, 119 S. Ct. at 2246.

[105] *See id.*

[106] The plaintiffs in this case originally filed the action in 1992 in the United States District Court for the District of Maine. *See id.* at 2243. While the suit was pending, the Court decided *Seminole Tribe*, which led to a dismissal of all pending FLSA actions on grounds of sovereign immunity. *See id.* Plaintiffs then filed this action in Maine state court. *See id.* The trial court dismissed the action on the grounds of sovereign immunity, and the Maine Supreme Judicial Court affirmed on the same grounds. *See id.* The Court granted certiorari in November 1998 to resolve the "importan[t] . . . question presented and the conflict between courts." *Id.*

[107] *See id.* at 2246.

sovereign right to be immune from suit.[108] The Court admitted that the Eleventh Amendment is "something of a misnomer," as it does not facially preclude the kind of suit brought by the *Alden* plaintiffs.[109] But it maintained that *Seminole Tribe*, *Printz*, the Tenth Amendment, and *Federalist No. 39* explain that states "retain 'a residuary and inviolable sovereignty,'" even in areas in which the federal government is competent to legislate.[110] As a result, "[t]hey are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."[111] Citing *Federalist No. 39*, the Court explained that this status as a sovereign necessarily exempts the states "within their respective spheres, [from] the general authority" of the federal government, just as the federal government is exempt from the authority of the states.[112]

Having confirmed that states retain essential attributes of sovereignty, of which immunity from suit is just one manifestation, the Court discussed the doctrinal and historical justifications and concluded that Congress lacked the power to force Maine to defend a suit in its own courts.[113]

A. *An Examination of* Alden's *Doctrinal Justifications*

The majority began its analysis by asserting that the "generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."[114] The Court's

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[108] *See id.* at 2246-47.

[109] *Id.* at 2246.

[110] *Id.* at 2247 (quoting THE FEDERALIST No. 39 (James Madison)). *But see* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 1840-41 (1995) (Kennedy, J., concurring) (stating that "[t]he States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere"). *U.S. Term Linits* was another case in which the majority, this time composed of Justices Breyer, Souter, Ginsburg, Stevens, and Kennedy, disagreed with the minority's interpretation of text, structure, and history in holding that the Constitution did not permit states to impose term limits upon congressional representatives.

[111] *Alden*, 119 S. Ct. at 2247.

[112] *Id.* This last explanation opens the door to a full challenge to the continued validity of *Garcia*. At least in isolation, the Court's extensive reliance on THE FEDERALIST No. 39 and *Printz*, permits the *National League of Cities* argument that the federal government is precluded from regulating the states as states.

[113] *See id.* at 2257 (citing Printz v. United States, 521 U.S. 898, 927 (1997)). The *Printz* Court categorically held that states retain certain "sovereign capacities" protected by the Tenth Amendment that Congress cannot touch through legislation. *See Printz*, 521 U.S. at 927.

[114] *Alden*, 119 S. Ct. at 2247. "Sovereign dignity," of course, is a compound of two ideologically and politically charged terms, and these terms are of the Court's own creation. The

principal doctrinal authorities for this conclusion were *Hans v. Louisiana*,[115] *Seminole Tribe*,[116] and Justice Iredell's dissent in *Chisholm v. Georgia*.[117] These sources, however, have problematic foundations of their own.

First, there is important disagreement about what Justice Iredell meant in *Chisholm*.[118] Commentators have pointed out that Iredell, a Federalist himself, was concerned solely with construing the Judiciary Act of 1789, not with articulating a states' right theory of federalism.[119] It was Justice Bradley in *Hans* who created the official version of American history, relying on his interpretation of Iredell's dissent rather than on any authoritative source in the constitution or in the debates.[120] Professor Orth explained:

> [I]n a cadenced sentence that ended not only his brief statutory review [of the Judiciary Act of 1875,] but also his entire exposition of the official version of *Chisholm*, Justice Bradley announced: "In view of the manner in which that decision was received by the

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Court has used the term "sovereign" in many different forms, charging it with varying degrees of substance. It is not a self-defining term, and neither is "dignity," but both have taken on an irrefutable presumption of states' rights formalism in the context of mystical federalism.

[115] 134 U.S. 1, 2248 (1890); *see id.* at 2248 (quoting Hans v. Louisiana, 134 U.S. 1, 16 (1890)).

[116] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); *see Alden*, 119 S. Ct. at 2254 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55-56 (1996)). The majority also relied on Blackstone's *Commentaries*. *See Alden*, 119 S. Ct. at 2248 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-35 (1765)). While Blackstone is deemed authoritative on the meaning of English common law and political theory, he was not a colonist or a Framer of the Constitution. *See id.* at 2247-48 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437-46 (1793) (Iredell, J., dissenting)). The *Alden* Court acknowledged that the American people rejected certain aspects of English political theory, but concluded that sovereign immunity was not one of these. *See id.* at 2248.

[117] 2 U.S. (2 Dall.) 419 (1793); *see also Alden*, 119 S. Ct. at 2247 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437-46 (1793) (Iredell, J., dissenting)).

[118] *See Alden*, 119 S. Ct. at 2279-85 (Souter, J., dissenting) (stating that none of *Chisholm*'s five opinions purport to grant federal constitutional status to state sovereign immunity doctrine); *Seminole Tribe*, 517 U.S. at 100-05 (Breyer, J. and Souter, J., dissenting).

[119] *See* Christopher T. Graebe, *The Federalism of James Iredell in Historical Context*, 69 N.C. L. REV. 251, 266-68 (1990); John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia (1793), 73 N.C. L. REV. 255, 266 (1994) (explaining that Iredell was Federalist, not anti-Federalist, and that he had not propounded states' right theory of sovereignty).

[120] *See* Orth, *supra* note 119, at 259-60. It was Justice Bradley's opinion in *Hans v. Louisiana* that characterized Justice Iredell's dissent as an authoritative interpretation of what history and structure mandated in terms of state immunity that gave Iredell's dissent a historical influence of its own. *See id.* at 257-60. Justice Souter points out that Justice Iredell was "cautious" in his reasoning that an action in assumpsit would not lie against Georgia. *See Alden*, 119 S. Ct. at 2282. Moreover, even Justice Iredell understood sovereign immunity as a common-law doctrine rather than as an unchanging sovereign right. *See id.*

> country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard." Thus was the official version of this chapter of American legal history established.[121]

A scrutiny of Iredell's discussion in *Chisholm* reveals that he embarked on his analysis recognizing that there was no congressional authorization to exercise jurisdiction over Georgia; instead, he contemplated whether Article III permitted an inherent jurisdiction.[122] The main concern for Iredell was whether the Court could, under the Constitution, exercise jurisdiction over a common-law cause of action when Congress had not given it that authority.[123]

The *Alden* majority never explained why it dismissed the majority opinion in *Chisholm* while paying blind obedience to Iredell's dissent.[124] Presumably, the *Chisholm* jurists had an opinion on what the meaning of sovereignty was at the time of the ratification.[125] Chief Justice Jay, for example, stated that "the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each state in the people of each state."[126] The Chief Justice also reasoned that Georgia had a limited sovereignty in a national democracy and that it had consented to suit by making itself a party to the national compact.[127] Justice Blair concluded that the Framers of Article III intended the Supreme Court to have jurisdiction over a state as a defendant.[128] Justice Wilson stated that the question of Supreme Court jurisdiction over Georgia could be answered by asking whether "the People of the United States form a Nation," concluding that the people had vested power on the Supreme Court to assert jurisdiction over Georgia.[129]

Alden's starting point is, thus, flawed at least because it failed to acknowledge other interpretations permissible from the doctrinal text on which it relies. Simply stating that the Eleventh Amend-

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[121] *Id.* at 259 (quoting Hans v. Louisiana, 134 U.S. 1, 1-19 (1890)).

[122] *See* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against the State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1431 (1975).

[123] *See* Orth, *supra* note 119, at 267-69.

[124] *See Alden*, 119 S. Ct. at 2282-84.

[125] *See* Chisholm v. Georgia, 2 U.S. 419, 471 (1793).

[126] *Id.*

[127] *See id.*

[128] *See id.* at 450.

[129] *See id.* at 453.

ment adopted Justice Iredell's dissent, as authenticated by Justice Bradley in *Hans*, does not shed light on the meaning and reach of sovereign immunity, much less provide persuasive authority for an intractable constitutional rule. It simply begs the question: What does the Eleventh Amendment mean?[130]

The Eleventh Amendment is deceptively simple: "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 States, or by Citizens or Subjects of any Foreign State."[131] Much has been written about the chaotic history of the Eleventh Amendment.[132] From its enactment as a response to *Chisholm v. Georgia*[133] to its most unyielding inter-

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[130] *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, 1035 (1983) (disagreeing that Eleventh Amendment prohibits federal courts from exercising jurisdiction over private citizens' suits against states); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) (stating that Eleventh Amendment's interpretation is confusing and is largely based upon judge-made law); Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 5 (1988) (recognizing that courts are divided on fundamental meaning of Eleventh Amendment); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 61-67 (1989) (recognizing different interpretation of Eleventh Amendment); Nowak, *supra* note 122, at 1415-16 (explaining that Supreme Court has been unclear on Eleventh Amendment constraints on Congress); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1321 (1998) (recognizing that explanatory statutes vary widely among states); Vázquez, *supra* note 54, at 1694 (noting that Supreme Court "has elaborated a complex jurisprudence" under Eleventh Amendment).

[131] U.S. CONST., amend. XI.

[132] *See, e.g.*, Martha A. Field, *The Eleventh Amendment and Other Immunity Doctrines*, 126 U. PA. L. REV. 515 (1978) (analyzing *Chisolm* Court's interpretation of Eleventh Amendment); Fletcher, *supra* note 130, at 1038-63 (providing overview of Eleventh Amendment law); Gibbons, *supra* note 130, at 1895-1941 (describing history of Eleventh Amendment); Massey, *supra* note 130, at 61-67 (stating that Eleventh Amendment doctrine can be better explained by Tenth Amendment); Nowak, *supra* note 122, at 1433-41 (noting role of political party divisions and newspaper journalism in passage of Eleventh Amendment). *See generally* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987) (tracing history of Eleventh Amendment).

[133] *See* 2 U.S. (2 Dall.) 419 (1793). Essential to an understanding of *Chisholm* is the political backdrop of the times. The 1783 peace treaty with Britain guaranteed that British creditors would recover their revolutionary war debts. It was critical for the emerging republic to honor this portion of the treaty both as a necessity to establishing credibility in its foreign policy and to persuade the British to abandon frontier posts in the Northwest Territory. *See* Massey, *supra* note 130, at 98. At issue was the collection of a revolutionary war debt against the state of Georgia. *See Chisholm*, 2 U.S. at 419. The suit was brought by a citizen of South Carolina as executor of the estate of the creditor. *See id.* After a series of procedural misadventures, the suit was filed originally in the Supreme Court. *See id.* Georgia failed to respond, asserting sovereign immunity and challenging the Court's jurisdiction. *See id.* The Supreme Court asserted jurisdiction over Georgia and held that "the Constitu-

pretation yet in *Seminole Tribe of Florida v. Florida,* the Eleventh Amendment mushroomed from a simple explicit prohibition on specific types of lawsuits to an unrecognizable doctrine constitutionalizing the states' sovereign immunity.

The origins of the Eleventh Amendment's expansive interpretation stem from *Hans v. Louisiana.*[134] *Hans* involved a suit brought against the State of Louisiana by a Louisiana citizen, who was seeking to enforce the terms of his bond consolidation contract.[135] Louisiana had amended its constitution to repudiate payment on all existing bonds.[136] The trial court dismissed the suit on Eleventh Amendment grounds, and the issue before the Court was "whether a state can be sued in a circuit court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the constitution or laws of the United States."[137]

The Court held that the Eleventh Amendment barred the suit. Although acknowledging that precedent and the text of the amendment only dealt with suits brought by citizens of different states than the state being sued, the Court was troubled by the anomaly resulting from barring foreign citizens from suing a state, but permitting a state's own citizens to do so.[138] Relying on the overruling of *Chisholm, Federalist No. 81,*[139] and on Justice Bradley's

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tion vests a jurisdiction in the Supreme Court over a State, as defendant, at the suit of a private citizen of another state." *Id.* at 420. The Court gave Georgia one year to respond or suffer a default judgment. *See id.* at 480.

[134] 134 U.S. 1 (1890). Prior to *Hans,* interpretations of the Eleventh Amendment were rather narrow. In *United States v. Peters,* for example, Chief Justice Marshall held that a suit in admiralty against a Pennsylvania official for the recovery of funds was not precluded by the Eleventh Amendment. *See* 9 U.S. (5 Cranch) 115, 139 (1809). In *Georgia v. Madrazo,* the Court reaffirmed that suits in admiralty were not barred by the Eleventh Amendment. *See* 26 U.S. (1 Pet.) 110, 113 (1828). In *Cohens v. Virginia,* Justice Marshall again stated that "a case arising under the constitution or laws of the United States is cognizable in the Courts of the Union, whoever may be the parties to that case." 19 U.S. (6 Wheat.) 264, 383 (1821). He interpreted the Eleventh Amendment literally as applying only to diversity cases. *See id.* at 348-49.

[135] *See Hans,* 134 U.S. at 1.

[136] *See id.* at 2-3.

[137] *Id.* at 9.

[138] *See id.* at 10 (citing Louisiana v. Jumel, 107 U.S. 711, 763 (1883)); *In re* Ayres, 123 U.S. 443, 503-07 (1887); Hagood v. Southern, 117 U.S. 52, 67-68 (1886).

[139] *See Hans,* 134 U.S. at 13. The *Hans* Court quoted *The Federalist Papers*:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the

own interpretation of Justice Iredell's dissent dealing with the sovereign immunity of the states,[140] *Hans* concluded that the judicial power of the United States did not extend to suits by citizens against their own state.[141] But Justice Bradley never discussed the power of Congress to grant Article III courts authority to hear causes of action against the states, as expressly permitted under Article III.[142] As noted earlier in this Article, moreover, Justice Bradley did not rely on any constitutional source or persuasive historical argument to support his historical view of the Eleventh Amendment.

Due to its broad pronouncement, *Hans* cleared the path for a hyperactive immunity doctrine. In *Monaco v. Mississippi*,[143] the Court further expanded the notion of state sovereign immunity beyond the words of the Eleventh Amendment itself. The Court asserted that the text of the amendment did not exhaust the limitations on suits against states:

> Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention."[144]

The Court never closely examined whether the compromises reached at the Constitutional Convention imply that sovereign immunity was understood to yield to legitimate congressional power.[145] As explained below, the plan of the Convention — the

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states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation and need not be repeated here.

THE FEDERALIST NO. 81 (Alexander Hamilton).

[140] *See Hans*, 134 U.S. at 10-14.

[141] *See id.* at 20-21.

[142] *See generally id.* The legacy of *Hans* shows that courts have treated it as creating a Tenth Amendment immunity defense, although the Tenth Amendment was not implicated in the case. *See* Massey, *supra* note 130, at 142. In fact, Massey notes, the decision makes much more sense as a Tenth Amendment decision than it does as an Eleventh Amendment one. *See* Massey, *supra* note 48, at 187-88.

[143] 292 U.S. 313 (1934).

[144] *Id.* at 322-23 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

[145] *See generally Hans*, 134 U.S. at 1-21. Professor Pfander suggests that Article III's grant of original jurisdiction over state parties to the Supreme Court effectuates a waiver of im-

desire to "form a more perfect union" than what existed under the Articles of the Confederation[146] — reasonably permits the inference that sovereign immunity took second place to an enumerated congressional power.

Hans and *Monaco v. Mississippi* have been severely criticized as wrongly decided cases that should be overruled.[147] Scholars generally agree that *Hans* and *Monaco* rest on merely a judicial discomfort with the plain text of the Eleventh Amendment rather than on

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munity under "the plan of the convention." James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 588 (1994).

[146] In creating the Constitution, the Framers sought to create a more effective national government than the ineffective government that existed under the Articles of the Confederation. The Framers' goal was to empower the national government to obtain national solutions to national problems. The goal was unreachable prior to 1787 precisely because the states, independent from each other and from the union, were thought to exercise their sovereign powers unwisely. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 516-25 (1969); RAKOVE, *supra* note 29, at 163; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1992) (discussing shifts in colonial American thinking regarding sovereignty).

[147] Justices Brennan, Marshall, Blackmun, and Stevens, now joined by Justices Souter, Breyer, and Ginsburg, have relentlessly attacked *Hans* and have called for its demise. *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240, 2283 (1999) (Souter, J., dissenting); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100-85 (1996) (Souter, J., dissenting); Pennsylvania v. Union Gas Co., 491 U.S. 1, 36 (1988) (Scalia, J., dissenting) ("Better to overrule *Hans*, I should think, than to perpetuate the complexities that it creates . . . ."); Welch v. Texas Dep't of Highways, 483 U.S. 468, 496-97 (1987) (Brennan, J. dissenting); Papasan v. Alain, 478 U.S. 265, 293 (1986) (Brennan, J., dissenting); Green v. Mansour, 474 U.S. 64, 78 (1985) (Brennan, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 299-301 (1985) (Brennan, J., dissenting); *see also* Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 495-96 (1989) (adopting Justice Marshall's apparent belief that *Hans* was wrongly decided); Field, *supra* note 132, at 525-27 (discussing difficulties with position adhered to in *Monaco*); Fletcher, *supra* note 130, at 1040 (criticizing as unworkable broad constitutional prohibition against suing states in federal court established in *Monaco*); Gibbons, *supra* note 130, at 2003-04 (characterizing *Hans* as misrepresentation of Eleventh Amendment that continues to distort federal-state relations); Jackson, *supra* note 80, at 498 (arguing that "correctness of *Hans* has long been questioned, by scholars and judges alike, as unwarranted by the constitutional text and as unduly restrictive of federal judicial power to vindicate the supremacy of federal law"); Powell, *supra* note 17, at 689 (stating that language in *Monaco* reducing state governments to bodies with no independent governmental significance is unconstitutional); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260, 1270-71 (1990) (arguing that drastic change in legal landscape from *Swift* to *Erie* called into question the *Hans* Court's ruling making it ripe for overruling); Vázquez, *supra* note 54, at 1694 (noting that most scholars argue that *Hans* was "fundamentally mistaken and should be reversed"). *But see* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346-48 (1989) (discussing explanations that support textual interpretation of Eleventh Amendment and discounting diversity theory); Orth, *supra* note 119, at 257-60 (criticizing diversity explanation); *see also* Massey, *supra* note 130, at 64-67 (describing history of *Hans* decision); Nowak, *supra* note 122, at 1431-35 (concluding that history and purpose of Eleventh Amendment demonstrate that Supreme Court has properly limited scope of federal jurisdiction).

a compelling theoretical principle rooted in the Constitution. Yet this judicial conception of state sovereign immunity provided the basis for the Court's holding in *Seminole Tribe,* which in turn permitted the holding in *Alden.*[148]

The *Alden* majority reviewed selected passages and interpretations of the Eleventh Amendment's ratification, *Hans,* Iredell's dissent in *Chisholm,* and *Federalist No. 39,* to declare:

> Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."[149]

But when the historical authorities on which a court relies are too inconclusive to be of meaningful assistance or provide persuasive support for a constitutional holding, a court's "'use' of history is nothing but a normative conclusion decorated with quotations from the founders."[150] The cases on which the *Alden* majority relied rest on questionable authority. That is, the doctrinal authority amounts to a mere intuition that a faithful application of the amendment's explicit text would be anomalous.

B. An Examination of Alden*'s Historical Justifications*

1. The Debate over Sovereign Immunity

Historical evidence does not help the *Alden* Court because it both supports and refutes a categorical conception of immunity's meaning.[151] History always has, and always will be, unconvincing

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[148] *See Seminole Tribe,* 517 U.S. at 67-69 ("For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment . . . .") (citing, inter alia, Principality of Monaco v. Mississippi, 292 U.S. 313, 321-23 (1934), and Hans v. Louisiana, 134 U.S. at 17).

[149] *Alden,* 119 S. Ct. at 2253 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239 (1985)). The Court had to bootstrap to cite *Atascadero. Atascadero* hardly qualifies as an authoritative interpretation of the framers' intent.

[150] H. Jefferson Powell, *Rules for Originalists,* 73 VA. L. REV. 659, 689 (1987).

[151] *See, e.g.,* Massey, *supra* note 130, at 67-72 (describing current interpretations of Eleventh Amendment); *see also* Redish, *supra* note 50, at 680; James E. Viator, *Give Me That Old-*

support for any categorical conception of state immunity. To be sure, sovereignty was the issue over which the American Revolution was fought.[152] According to the leading historian of the American Revolution, the nature of sovereign power, which is final, indivisible, and unqualified, and its location were the notions that preoccupied the colonists on the eve of the American Revolution.[153] The governmental theory of parliamentary supremacy carried into the debates preceding the American Revolution.[154] One of the main questions over the ratification of the Constitution was the scope and nature of the states' remaining sovereignty.[155] But this idea of sovereignty was largely an amorphous one for the new colonists.[156] The one certain thing they rejected was the English system.

Little historical evidence reveals what the general understanding of state sovereign immunity was when the Constitution was adopted.[157] The discourse during the Convention focused on reaching a middle ground between a sovereign power supreme in

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Time Historiography: Charles Beard and the Study of the Constitution, Part II, 43 LOY. L. REV. 311 *passim* (1997) (discussing works of historians that studied the Constitution).

[152] *See* BAILYN, *supra* note 146, at 198 ("As James Madison later noted, 'the fundamental principle of the Revolution was, that the Colonies were coordinate members with each other and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign.'"); JACK P. GREENE, PERIPHERIES AND CENTER, CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 182 (1986). Professor Greene presents historical evidence that "the effort to resolve [the ambiguity over how to divide state and federal power], to solve the ancient problem of how in an extended polity to distribute authority between the center and the peripheries, was the primary focus of American constitutional thought during the 1780s." *Id.* at 182.

[153] *See* BAILYN, *supra* note 146, at 200. Professor Bailyn explains that the notion of sovereignty embraced by Englishmen in the mid-1700's was a 100-years young concept. *See id.* at 198. It had first emerged during the English Civil War, he explains, and was later established as a canon of Whig political thought in the Revolution of 1688. *See id.* The idea of one indivisible, final, single power, which was a law unto itself came to England in the sixteenth-century writings that sought to justify the supremacy of the monarchy. *See id.* at 200-01. Jean Bodin's theories of sovereignty during this period were especially influential; they were permeated with moral and legalistic qualities and not based on naked force. *See id.* at 198-99. Thomas Hobbes was a key political philosopher who changed the conceptions of sovereignty theories containing moral and legal dimensions to one addressing the "state of nature" and the need to compel obedience. *See id.* at 199.

[154] *Id.* at 201. The Parliament was conceived as a "body absolute and arbitrary in its sovereignty; the creator and interpreter, not the subject, of law; the superior and master of all other rights and powers within the state." *Id.*

[155] *See* WOOD, *supra* note 146, at 529.

[156] *See* BAILYN, *supra* note 146, at 202-03; *see also Alden*, 119 S. Ct. 2240, 2273-75 (Souter, J., dissenting) (finding that development of conception of sovereignty was "complex and uneven" in colonial times and that, in 1776, "the locus of sovereignty was still an open question").

[157] *See* Massey, *supra* note 130, at 93.

every respect and a sovereign power having no control over the colonies.[158] The American definition of a pragmatic principle of sovereignty, a middle ground, derived from the discussions of what Parliament could do with respect to the American colonies. The main focus was to devise a "theoretical justification for dividing sovereign power."[159] The federalist tradition was, thus, born of the colonists' efforts to translate into constitutional language a different version of the parliamentary authority they had known from colonial life.[160]

Colonial life did not involve considering whether Congress would be permitted to create private causes of actions against the states. Rather, state ratifying conventions and Framers' letters and speeches on sovereign immunity reveal that liability for revolutionary war debts was the main, and perhaps only, concern at the time.[161] In other words, the political concerns then were centered on the fear from Tory suits and the unwarranted assumption of Article III jurisdiction in the absence of congressional authorization, not on a free-standing conception of sovereign immunity.[162]

The undeniable historical backdrop for a discussion of sovereign immunity is the enforcement of the 1783 peace treaty between Britain and the United States.[163] In this treaty, the colonists agreed to honor their war debts by not frustrating British creditors' efforts to collect money, and the British agreed to evacuate all military posts and leave behind all slaves.[164] The southern states disagreed with the provisions of the new treaty, and they alone retaliated by imposing statutory impediments to the collection of these war debts.[165] At the time of the debates, the central anti-Federalist concern revolved around the British creditors' seeking payment, while the federalist concern was the threat to the new republic's survival

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[158] *See* BAILYN, *supra* note 146, at 217.

[159] *Id.* at 219.

[160] *See id.* at 229.

[161] *See* Nowak, *supra* note 122, at 1428, 1438. Professor Nowak explains that the major discussions about Article III and jurisdiction over states occurred in the ratifying conventions of Pennsylvania, Virginia, and New York. One can see that the concern there centered on obligating the states to pay the revolutionary war debts and nothing more. *See id.* at 1424-29, 1438.

[162] *See* Nowak, *supra* note 122, at 1424-29; *see also* THE DEBATE, PART I, *supra* note 18, at 160-61.

[163] *See* Nowak, *supra* note 122, at 1438.

[164] *See id.*

[165] *See id.*

if it failed to honor its peace treaty with Britain.[166] A sense of immediacy attended both concerns, and the literature reflects this one-dimensional focus on war debts.[167]

As previously mentioned, the Eleventh Amendment was passed to counteract the Court's assertion of jurisdiction over Georgia in *Chisholm*, and *Chisholm*, of course, involved an attempt to collect a revolutionary war debt.[168] Citing the Eleventh Amendment as support for a broad immunity from liability, therefore, does not inform a proper historical understanding. Some scholars argue that there is evidence in the ratification debates that a broad immunity from liability was rejected.[169] Others point out that so little debate accompanied the ratification that the Federalists did not consider the Eleventh Amendment to preclude the exercise of congressional power.[170] Rather, "[T]he amendment was a product of federalist political prudence and congressional compromise. The Federalists were concerned about rising Republican clamor in the states for a new constitutional convention to advance extreme states' rights positions. . . . To avoid the calamity of a convention, the Federalists conceded the Eleventh Amendment."[171]

The *Seminole Tribe* majority agreed that political prudence was the historical thrust of the Amendment. Chief Justice Rehnquist conceded:

> The text [of the Amendment] dealt in terms only with the problem presented in *Chisholm*; in light of the fact that the federal courts did not have federal question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it

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[166] *See id.* at 1438-41.

[167] *See, e.g.*, THE DEBATE, PART I, *supra* note 18, at 160-61, 443-44.

[168] *See* Massey, *supra* note 130, at 111 (citing CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 56-57 (1972)).

[169] *See* Massey, *supra* note 130, at 112. For example, Massey cites the proposal of Representative Sedgwick of Massachusetts, one of the states supporting Georgia's position, as evidence that the ratifiers did not intend a broad immunity from liability. *See id.* The relevant portion proposed, "that no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." *Id.* (citing CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1922)). Massey also notes, however, that it is unclear whether Sedgwick actually introduced this resolution. *See id.* at 112 n.264.

[170] *See* Nowak, *supra* note 122, at 1440-41.

[171] Massey, *supra* note 130, at 113.

> seems unlikely that much thought was given to the prospect of federal question jurisdiction over the States.[172]

The *Seminole Tribe* majority nevertheless was not impeded by this realization and found constitutional support for its holding.[173]

2. *The Federalist Papers*

The Federalist Papers provide no firmer support for *Alden* than does the doctrinal evidence. The *Alden* majority centered its attention on *Federalist Nos. 39* and *81* for historical support. There are two objections to the Court's reliance on these historical materials. One is based on the pragmatic observation that *The Federalist Papers* does not objectively define the Framers' unstated constitutional principles; rather, they were political propaganda designed to persuade the colonies to ratify the new Constitution.[174] In other words, they were written in political terms with utilitarian objectives in mind.

The second objection is textual. Even if *The Federalist Papers* were dispositive, they contain no persuasive evidence that immunity from liability is what the Framers intended — much less a desire to restrict the scope of express Article I powers through the prism of state sovereignty. Both the textual and pragmatic objections find support in the *Alden* majority's failure to explain why self-selected passages of *The Federalist Papers* have any more relevance or authori-

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[172] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69-70 (1996). This is a spectacular statement made by a conservative majority that adheres to text and original understanding in all matters constitutional.

[173] *See id.* at 74-76; Nowak, *supra* note 122, at 1428. Professor Nowak explains, for example, that Professor Jacobs argued the following:

> Whether the Constitution would have been ratified in the absence of assurances that the state would not be suable, cannot be ascertained. But in any case, the legislative history of the Constitution, hardly warrants the conclusion . . . that there was a general understanding at the time of ratification, that the states would retain their sovereign immunity.

Id. (citing CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 40 (1972)). Professor Warren, on the other hand, contended that Hamilton's response in *Federalist No. 81* helped ratify the Constitution because it appeased fears of private causes of action. *See id.* (citing C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1922)).

[174] *See* Massey, *supra* note 130, at 95.

tative value than the thoughts of other contemporary writers like James Wilson, whose thoughts the Courts dismissed outright.[175]

Federalist No. 39 simply cannot support the weight the Court imputes to it. Madison left Philadelphia unconvinced that the classic problem of *imperium in imperio* had been resolved.[176] Madison understood the political nature of federalism and sought to explain it in pragmatic terms in *Federalist No. 39*.[177] That is, he believed that if there was an overlap between the powers of the states and of the federal government, then the preservation of federalism would depend on cooperation between the two spheres and on an understanding that the messy reality of America's new form of government could not be neatly divided by a simplistic formula of either state or federal sovereignty.[178] The task of policing the boundaries between these two competing powers and mapping federalism's uneven terrain, Madison believed, should be left to Article III courts.[179]

Madison addressed the anti-Federalist objection that the Constitution should have preserved the federal form and regarded the Union as a confederacy of sovereign states. Instead, the anti-Federalists framed a national government that regards the Union as a consolidation of the states.[180] He responded that there was a mixed "federal-national" character to the new government.[181] "[I]f the Government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation

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[175] *See* Alden v. Maine, 119 S. Ct. 2240, 2252-53 (1999) (stating that Wilson and Randolph's statements were "rejected" by Eleventh Amendment without any authority for such historical declaration). Justice Kennedy believed that Randolph and Wilson represented a "radical nationalist vision of the constitutional design," which he believed ought to be discarded. *See id.* at 2252. It is unclear, however, why the radical states' rights view he proposes deserves any more weight. In *Printz v. United States*, Justice Scalia selectively rejected Hamilton's writings. *See* 521 U.S. 898, 915 n.9 (1997). In a footnote, Justice Scalia rejected Justice Souter's reading of *Federalist No. 27* as permitting commandeering of the state executive because to accept Justice Souter's interpretation "would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was 'from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution.'" *Id.* (citation omitted).

[176] *See* RAKOVE, *supra* note 29, at 53 (citing Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 10 PAPERS OF MADISON 211 (1977)).

[177] *See id.* at 161-62.

[178] *See id.*

[179] *See id.* at 176.

[180] *See id.* at 162.

[181] *See* THE FEDERALIST NO. 39 (James Madison), *reprinted in* THE DEBATE, PART II, *supra* note 18, at 29.

to the *extent* of its power."[182] The government is national because it is supreme over all persons and things which are the lawful object of its power.[183] And with respect to "communities united for particular purposes," the power is vested partly in the general government and partly in the municipal legislatures.[184] With respect to communities, all local authorities are subordinated to the supreme, which may be abolished at its pleasure.[185] The municipal authorities, in turn, are sovereign within their own sphere and cannot control the federal government anymore than it can control them.[186] When these relationships are understood, Madison tells us, one recognizes that the character of the government is not national in this respect, but federal, "since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[187] Where to strike the balance between these two spheres is left to a federal judiciary.[188] But this should not be of concern because the federal judiciary, Madison assumed, will not make partial decisions, but will act with due regard to the Constitution.[189]

Madison, therefore, not only did not discuss sovereign immunity in *Federalist No. 39*, he did not imply that the residuary (as opposed to total) sovereignty includes a state's constitutional right to evade legitimate congressional power. Moreover, Madison insisted that the Constitution's approach to federalism, defined as divided sovereignty between the states and the federal government, could not be defined by any categorical axiom.[190] Even an expansive reading of Madison's views on this subject does not support the conclusion the Court extricated from it.

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[182] *Id.* at 31.
[183] *See id.*
[184] *See id.*
[185] *See id.*
[186] *See id.*
[187] *Id.*
[188] *See id.*
[189] *See id.*
[190] Madison wrote to Daniel Webster:

> The actual system of Government for the United States is so unexampled in its origin, so complex in its structure, and so peculiar in some of its features, that in describing it the political vocabulary does not furnish terms sufficiently distinctive and appropriate, without a detailed resort to the facts of the case.

Letter from James Madison to William Webster (May 27, 1830), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 84, 85 (Worthington 2d ed. 1884).

But the *Alden* majority is oblivious to the historical evidence that might yield a different interpretation from the one it reached. The Court acknowledged that the text of the Eleventh Amendment, standing alone, is incapable of supporting the construction that the Court historically had given it.[191] In support of its revisionist reading in *Alden*, the Court "looked to 'history and experience, and the established order of things' . . . rather than '[a]dhering to the mere letter' of the Eleventh Amendment . . . in determining the scope of the States' constitutional immunity from suit."[192] The Court derived "history and experience, and the established order of things" from *Hans* and *Seminole Tribe*.[193] Therefore, the history that confirms constitutional immunity is that created by judicial fiat, the experience is the anomaly of *Hans*, and the established order of things was authenticated by *Seminole Tribe* — grandiloquent evidence indeed for an immutable constitutional directive.

Even if the doctrinal evidence alone were persuasive, states' immunity from suit has no independent basis in the context of the debates considering the fears expressed there. The Federalists were proposing a new form of government, and the anti-Federalists opposed this new federal structure. The Federalists' arguments, therefore, were focused not on explaining the meaning of each individual constitutional provision with precision, but to countering the anti-Federalists' critiques of the proposed plan.[194] The explanations, or defenses, were essentially political in nature, not legal. Clearly, sovereign immunity was in the mind of the Framers, but their concept for the future of the republic is anything but categorical.[195] The *Alden* Court's failure to consider alternative views of what immunity meant in 1787 seriously compromises *Alden*'s persuasiveness.

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[191] *See* Alden v. Maine, 119 S. Ct. 2249, 2254 (1999) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1996), and Hans v. Louisiana, 134 U.S. 1, 15 (1890)) ("To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisolm*.").

[192] *Id.* at 2253 (citing Hans v. Louisiana, 134 U.S. 1, 13-14 (1890)).

[193] *See id.*

[194] *See* Pfander, *supra* note 145, at 627.

[195] *See, e.g.*, Redish, *supra* note 50, at 679 (commenting that there were too many Framers, with many different points of view, agendas, and motivations, to reasonably infer single, coherent and controlling intent).

3. Other Historical Evidence

Persuasive historical evidence suggests that the Framers intended to curtail the federal courts' power to assume jurisdiction over the states in the absence of congressional authorization, not to eliminate Congress's authority to hail the states into court. Professor Nowak suggests that the ostensible inconsistencies between *Federalist No. 81* and *Federalist No. 80* can be reconciled by understanding that the Framers were concerned about the judicial assumption of jurisdiction in the absence of congressional authorization.[196] That is perhaps why the text of the Eleventh Amendment states that the judicial power "shall not be construed," which is an adjudicative function exercised only by the judiciary.[197] In other words, "The Federalists never suggested that Congress should be forbidden from using the federal courts as a means of enforcing federal law if it felt that this was the most effective method to execute its authority."[198] The *Alden* majority recognized that the Framers' concern was that "Article III might be used to circumvent state-court immunity."[199]

But the *Alden* majority failed to recognize that strikingly absent from *The Federalist Papers* and the ratification debates is a discussion of the power of Congress, as opposed to the unwarranted assumption of jurisdiction by Article III courts, to subject the states to suit when appropriate.[200] That the states retain an area of autonomy, free from congressional dictates, is hardly a controversial principle, but it does not follow that legitimate congressional power is subject to the mandates of sovereignty for sovereignty's sake.

Other writers of the time confirm that the idea of sovereignty was not a fixed, clear conception. Fabius, for example, opined that under the new Constitution:

> [T]he government of each state is, and is to be, sovereign and supreme in all matters that relate to each state only. It is to be subordinate barely in those matters that relate to the whole; and it

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196 *See* Nowak, *supra* note 122, at 1429.

197 *See id.* at 1422-30.

198 *Id.*

199 Alden v. Maine, 119 S. Ct. 2240, 2261 (1999).

200 *See, e.g.*, Nowak, *supra* note 122, at 1430.

> will be their *own faults* if the several states suffer the federal sovereignty to interfere in things of their respective jurisdictions.[201]

Others thought that the sovereignty of the states should yield to the federal government, but only as far as "may be necessary for the good of the whole."[202] The article *A Citizen of America* suggested the answer to divided sovereignty:

> This legislature must have exclusive jurisdiction in all matters in which the states have a mutual interest. There are some regulations in which all the states are equally concerned — there are others, which in their operation, are limited to one state. The first belongs to Congress — the last to the respective legislatures. No one state has a right to supreme control, in any affair in which the other states have an interest, nor should Congress interfere in any affair which respects one state only. This is the general line of division, which the convention have [sic] endeavored to draw, between the powers of Congress on the rights of the individual states.[203]

James Wilson dealt most effectively with the anti-Federalist state sovereignty question as an objection to the new national Constitution.[204] As some scholars have pointed out, Wilson advocated that the power remained with the people as the fountains of government.[205] Indeed, "Unless the people were considered as vitally sovereign, . . . we shall never be able to understand the principle on which this system was constructed."[206] For others, the key issue to federalism was not "how the political influence of the states would be protected in the national government . . . . [but] how the anticipated rivalry of these two levels of government could be resolved short of overt . . . coercion."[207]

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[201] JOHN DICKINSON, FRIENDS OF THE CONSTITUTION: THE LETTERS I-III (1797), *reprinted in* FRIENDS OF THE CONSTITUTION, WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, at 57-69 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter FRIENDS OF THE CONSTITUTION].

[202] ROGER SHERMAN, THE LETTERS: I-II, Dec. 18 & 25, 1788, *reprinted in* FRIENDS OF THE CONSTITUTION, *supra* note 201, at 263, 267.

[203] Noah Webster, *A Citizen of America, An Examination into the Leading Principles of the Federal Constitution* (1787), *reprinted in* FRIENDS OF THE CONSTITUTION, *supra* note 201, at 373, 388.

[204] *See* WOOD, *supra* note 146, at 530 (quoting James Wilson).

[205] *See id.* at 530, 599; Amar, *supra* note 147, at 456; *see also* RAKOVE, *supra* note 29, at 163.

[206] WOOD, *supra* note 146, at 530 (quotation omitted).

[207] RAKOVE, *supra* note 29, at 171 (emphasis omitted).

In 1787, therefore, it was recognized:

> [There is] not only a divergence of opinion on the issue of sovereignty, but a lack of clarity in the meaning of the term itself. Indeed, the word "sovereignty" was often used in two different senses — one referring only to the federal nature of the polity and the constitutional division of power between the state and national governments, and the other referring to who or what possesses the fundamental and absolutely final authority in the regime.[208]

A contemporary commentator also noted:

> [The] most profound "original understanding" behind the Constitution of 1787 was that it represented a fundamental change in government structure [from what the colonists knew], and one which was better designed to build a nation. . . . This purpose contemplates how the country will look in the future rather than how it looked in 1787.[209]

It is no comfort to conclude that the Court's reliance on the historical and doctrinal evidence may have been incorrect. Although the Court justified the existence of a state's right to sovereign immunity on sources that are incapable of sustaining that conclusion, that immunity, now recognized, stands independent of those sources.[210]

C. An Examination of Alden*'s Structural Justifications: Federalism*

The Court's mystical federalism rests on two normative premises: first, that there is an intrinsic value to state autonomy for state autonomy's sake, and second, that there are unstated structural limitations to legitimate congressional power. These premises, however, are not found in the text of or in the compromises that went into the drafting of the Constitution.[211] The Court neverthe-

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[208] FRIENDS OF THE CONSTITUTION, *supra* note 201, at 163.

[209] Jackson, *supra* note 90, at 2233.

[210] *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 913 (1994).

[211] *See* Moulton, *supra* note 38, at 850-51 (noting that "the lines drawn in *Lopez*, *New York*, and *Printz*," that "value in state level norm-setting" and condemn Congress's "demonstrat[ion] that it cannot be trusted to leave suitable decisions to the states" are "unsupported by Constitutional text, structure, or history").

less spoke of essential sovereign attributes as if they had tangible substance and were so well defined that any informed reader could readily point to them. This is, of course, a myth. In adopting these premises, the Court also presumed that there is something inherently dubious about the exercise of congressional power if it affects the states in any form.[212] Therefore, by embracing a presumption of state sovereignty in a federalist system, the Court has formed its own conception of what structure our government should take.[213] In other words, what the dissent and the majority make from text and history depends on the prior assumptions each makes about federal-state relations.[214] The Court's holding, therefore, is not based on an interpretation of what the Constitution means; it is instead a normative statement of what the majority thinks it ought to mean.

The Court's analysis is, thus, flawed at its inception. The *Alden* Court discussed federalism in light of the "settled doctrinal understanding" that confirms the states' sovereign immunity derives from the structure of the Constitution and the implications in the constitutional design.[215] Presumption in hand, the question for the Court was whether in a federalist system Congress had the power under Article I to abrogate this immunity.[216] Because immunity is paramount, only compelling evidence that the states surrendered this immunity to Congress under the plan of the Convention would suffice to grant the federal government that power.[217]

The *Alden* majority believed no such compelling evidence existed. Although Article I delegates to Congress the power to legislate and Article VI provides that Congress's laws shall be the supreme law of the land, this recognition "does not foreclose a State

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[212] *See* Powell, *supra* note 17, at 639 (stating that Justice O'Connor's approach assumes that federal government must respect state governments as independent law-making processes even where federal government has authority to preempt state laws).

[213] *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 876-77 (1976) (Brennan, J., dissenting) (stating that courts do not have authority to conform governmental structure to what they conceive of as desirable), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[214] *See, e.g.*, Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 80 (1995) (stating that interpretation of text and history depend on prior assumptions made about distribution of powers between federal and state governments).

[215] *See* Alden v. Maine, 119 S. Ct. 2240, 2254 (1999).

[216] *See id.* at 2246.

[217] *See id.* at 2255 (citing Blatchford v. Native Village, 501 U.S. 775, 781 (1991)); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1996).

from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power."[218] Although two express constitutional prescriptions should suffice as "compelling evidence" in the absence of contrary constitutional text, the Court concluded that to so find would be irreconcilable with *Hans* and its progeny.[219] And so *Hans* rears its unsightly head once again to facilitate the ideological bootstrapping the Court is so determined to turn into an intractable constitutional decree.

After acknowledging, as it must, that Congress possesses the power to enact the Fair Labor Standards Act, the Court must then shift its inquiry so that the result it wants to reach is more easily obtainable. The inquiry now is: "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."[220] This approach requires a total disregard for *Garcia*'s controlling deference to the political process to make such determinations.[221] In one doctrinal maneuver, the Court reoriented the focus into requiring an additional constitutional source for the selected implementation of otherwise permissible federal law. And still, it refused to overrule *Garcia.*

The Court reasoned that the "essential principles of federalism and . . . the special role of the state courts in the constitutional design," justified this two-step inquiry.[222] "By 'split[ting] the atom of sovereignty,' the founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'"[223] The Court thus concluded that permitting Congress to "assert authority over a State's most fundamental political processes, [would] strike[] at the heart of the political accountability so essential to our liberty and republican form of government."[224] Congress, therefore, cannot command the state

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[218] *Alden*, 119 S. Ct. at 2255.

[219] *See id.*

[220] *Id.* at 2255-56.

[221] It bears repeating that *Garcia* held that the judiciary is ill-equipped to draw the lines in the federalism tension. Rather, the political process is a better candidate for setting the limits on congressional power when that power is used to regulate the states. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

[222] *Alden*, 119 S. Ct. at 2244-45.

[223] *See id.* at 2265 (citations omitted).

[224] *Id.*

courts, even if it would be permitted to regulate them, for an anomaly would result from permitting Congress to wield greater power over the state courts than what the Court has pronounced Congress to have over federal courts. In the Court's opinion, the principle of sovereign immunity as it has evolved in judicial opinions "strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States."[225] And the unstated balance, thus expressed, becomes explicit with the majority's thumb on the side of state sovereignty.

As many scholars have observed, however, federalism is not simply a naked protection of an indefinable area of state autonomy.[226] The contours of constitutional federalism are simply undecipherable from the text of the Constitution.[227] What is decipherable, and over which little disagreement exists, is that federalism is a political deal between governments, and for this deal to be successful it must be pragmatic and dynamic.[228] Historical documents illuminate four essential points about federalism. First, the Framers of the Constitution established a system of federalism in response to the shortcomings of the Articles of Confederation.[229] Second, there is a need for plenary federal authority in certain crucial areas of national concern. Third, the possibility of concurrent national and state action in other areas was an institutional factor to preserve. And fourth, "a comparison of the responsibilities and advantages that each would possess" under the Constitution was an important aspect to continued structural integrity.[230] "As Madison and Hamilton perhaps best appreciated, the truths of federalism lay as much in its details as in its grand premises."[231]

Federalism is a spectacularly pliable and an inherently political concept. Because of this, it cannot support a categorical rule. The

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[225] *Id.* at 2268 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984)).

[226] *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 501 (1995); Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 829 (1998); Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System*, 45 U. KAN. L. REV. 971, 974 (1991); Moulton, *supra* note 38, at 851.

[227] *See, e.g.*, Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 4 (1987) (noting that text of Constitution does not have rational and objective definitions).

[228] *See* Jackson, *supra* note 90, at 2228.

[229] *See* Levy & McAllister, *supra* note 226, at 974.

[230] *See id.*; RAKOVE, *supra* note 29, at 193.

[231] RAKOVE, *supra* note 29, at 189.

colloquy about federalism involves a predetermined selection of a particular ideological or political viewpoint. As one scholar has said, "Important issues of national policy are debated in terms of the proper allocation of power between federal and state governments."[232] Federalism is also a concept that can mean all things to all people. Conservatives invoke it to curtail federal efforts, and liberals invoke it to vindicate individual liberties.[233] Over two hundred years since its formation, the system of federalism still engenders dissonance over its boundaries and its practical application.

III. TOWARD NONMYSTICAL, NONCATEGORICAL FEDERALISM

Nonmystical federalism should recognize that there is a changing perception of federal and state parameters, and that the two need not be synonymous with national or local governance.[234] This approach would prompt inquiries into the role of states as sources of nationalizing activity and into distinguishing decentralization from claims of individual state autonomy and governance[235] for autonomy's own sake. As Professor Chemerinsky has suggested, we should look to a functional answer to the federalism quagmire. We should ask, "When is it necessary or preferable to regulate at the national level rather than on a decentralized basis?"[236]

For example, for both the Federalists and the anti-Federalists, the object of government was to promote the public good.[237] The debate focused on what form would best achieve this goal, not on whether the goal itself was the object of the revolution. The Framers' confidence in constitutionalism stemmed from their belief in the competence of organizational government machineries for solving social and political problems.[238] For example, Hamilton explained in *Federalist No. 80*:

> The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the

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[232] Chemerinsky, *supra* note 226, at 501.

[233] *See id.*

[234] Judith Resnick, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 475 (1996).

[235] *See id.* at 475-76 (1996).

[236] Chemerinsky, *supra* note 226, at 534.

[237] *See* WOOD, *supra* note 146, at 506-24 (describing Federalist and anti-Federalist goals).

[238] *See* THE FEDERALIST NO. 80 (Alexander Hamilton); *see also* Chemerinsky, *supra* note 226, at 517 (stating that Justice O'Connor's position assumes that voters cannot determine when states act under federal compulsion).

> interests of the union, and others with the principles of good government . . . . No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them.[239]

This function should be the focus of the Court's federalism analysis.[240] Indeed, any theory of federalism is useless unless it explains, and is related to, the function of government.[241] There is nothing incompatible between a state's accountability in federal court for transgressions of validly enacted federal law and their continued status as semi-autonomous entities. Federalism accommodates these competing, yet complementary concerns.

Regardless of the theory of federalism applied, nothing in its structure mandates the result the Court achieved in *Alden*. If congressional power is authorized, then the means chosen to implement it ought not be subject to a second tier of scrutiny.[242] As Hamilton explained, the moment we decided to establish a national government, we recognized that it should be vested with all the authority necessary to execute its duties.[243] If the federal government has the power to impose legal obligations on the states, the need for a judicially enforceable remedy for a violation of these obligations is not an abstraction conceptually difficult to seize.[244]

But *Alden* reflects that the Court's treatment of state sovereignty is unduly autocratic. It reconceptualizes the structure of our republic from one where the power resides in the people to one where the principle of state sovereignty trumps all other objectives.[245] But the point of law is to deter violations, and the purpose of a remedy in the civil context is to redress violations of the law.[246]

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[239] THE FEDERALIST NO. 80 (Alexander Hamilton).

[240] *See, e.g.* Hermann Heller, *The Nature and Structure of the State*, 18 CARDOZO L. REV. 1139, 1140 (1996) (stating that proper analysis should consider state's purpose).

[241] *See id.* at 1143.

[242] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324-25 (1819).

[243] *See* RAKOVE, *supra* note 29, at 193 (citing THE FEDERALIST NOS. 9-10 (Alexander Hamilton)).

[244] *Cf.* Vázquez, *supra* note 30, at 9 (explaining that when government has power to impose legal obligations directly on individuals, there is corresponding need for enforcement of those obligations). There is no distinction between individuals and states as it pertains to the authority to impose obligations with the corresponding need to enforce those obligations.

[245] *See* Heller, *supra* note 240, at 1181-83 (discussing theories of state's purposes).

[246] *See* Vázquez, *supra* note 30, at 20-21.

The Court in *Alden* implies that all federal legislation ought to be subject to a second level of scrutiny to determine whether Congress has the power to implement the statute in the manner chosen. If the Constitution requires that standard, then we ought to be able to identify where this extraordinary proposition is articulated beyond the Court's ipse dixit.

The Court's unsupported presumptions, in turn, revive one of the Framers' main political quandaries. A pervasive concern about the novel governmental organization the Framers were proposing in 1787 was that it seemed to present a government of two sovereigns, an impossibility in political theory. The Framers thus understood that federalism could survive criticism only to the extent that it could be distinguished from the classic belief that *imperium in imperio* was an illogical and irresolvable solecism.[247] The label "dual sovereignty," unqualified, fails to acknowledge that the states and the federal government are not equal sovereigns, an equality that the Court's formalism espouses. There is no parity between the power of the federal government and that of the states.[248] Congress can accomplish a vast variety of objectives that the states are prohibited from executing.[249] Consequently, dual sovereignty cannot imply symmetry in the exercise of power, nor can it imply a limitation on the exercise of delegated ones.[250] But by embracing a theory of sovereign equilibrium between the federal government and the states, the Court's mystical federalism model is strikingly similar to the theory of *imperium in imperio* that so concerned the Framers.

To have any meaning, the Court's federalism model must identify its theoretical and instrumental justifications; it must identify what values in federalism it is advancing by choosing one construction over another.[251] Currently this descriptive role is impossible.

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[247] BAILYN, *supra* note 146, at 223-25.

[248] *See* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 206-07 (1997).

[249] *See id.* at 206-08.

[250] *See id.*

[251] *See* Chemerinsky, *supra* note 226, at 501 (noting that Court has never articulated values underlying federalism as to justify or explain why particular form of federal legislation would undermine important values embodied in this elusive concept, such that it must be struck down); *see also* City of Boerne v. Flores, 521 U.S. 507, (1997); Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, (1997); Printz v. United States, 521 U.S. 898, (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, (1996); United States v. Lopez, 514 U.S. 549, (1995); New York v. United States, 505 U.S. 144, (1992).

As one scholar has commented, the problem with the Court's discussions of federalism is that it has justified its conclusions on the ground that federalism dictates the results, rather than that federalism is an important value to be weighed and considered.[252] An example of this is seen in the Court's failure to determine the value of state immunity versus the value of accountability for violations of federal law.[253]

The great wisdom of federalism is that state and federal governments have different competencies, and that wisely apportioning responsibilities to each can yield meaningful benefits in terms of both citizen satisfaction and governmental efficiency.[254] Federalism's structural shield should be geared not toward the protection of the states, but to creating the conditions necessary to encourage effective implementation of legitimate government power.[255]

IV. SUBSTANTIVE OR PROCESS-BASED LIMITATIONS?

Regardless of the federalism theory *Alden* ultimately espouses, practically, it creates a remedial quagmire in ensuring state compliance with federal law. The predicament exists because both substantive limitations and process-based ones are arguably consistent with *Alden* and mystical federalism, and the Court is ambivalently committed to the supremacy of federal law. Either understanding is problematic in the absence of a coherent theory to support it.

For example, if state immunity is a proxy for litigation strategy, there is no defensible explanation for the Court's rulings. A restriction on the remedies the legislature may employ to implement a statute is effectively indistinguishable from a limitation on the scope of permissible congressional power.[256] The Court does not advance the goals of federalism by forcing Congress to follow one semantic route instead of the other in the name of structural priorities.[257] What this formalistic detour accomplishes, rather, is an

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[252] *See* Chemerinsky, *supra* note 226, at 510.

[253] *See id.*

[254] *See* Moulton, *supra* note 38, at 852 (recognizing that federalism creates more effective national government than Articles of Confederation).

[255] *See id.* at 852.

[256] *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 358 (1993) (discussing inexistent dichotomy between limitation of remedy and scope of substantive right).

[257] *See id.*

increase in the cost of running the government and the inefficiency of requiring Congress to impose its will upon the states in a procedurally restrained fashion.[258] This understanding renders state sovereignty a formality, which is not the status the current majority understands it to have.

On the other hand, if state sovereignty has substantive content, then any theory justifying it ought to be able to explain the discernible limits of federal law's reach. Yet, experience has shown that a free-standing notion of state sovereignty is incapable of being managed judicially in an intellectually honest manner, so ad hoc articulations are offered in this area. Why, then, is the Court insistent on requiring circuitous methods of state compliance with federal law? The answer cannot be that the Court reveres state sovereignty above all else. The answer might be that the Court is once again struggling with limiting congressional power but finds itself lost amidst a puzzle of federalism that is impossible to resolve at the judicial level.

The lack of clarity in the Court's mystical federalism permits litigants, both state and private parties, to choose from the federalism menu whether to frame the issues in terms of substance or of process. Both approaches are defensible, but each are problematic from a rule-of-law perspective, if for no other reason than the divergence between the values protected by each. If the state litigant wants to challenge the substance of federal law, as most states engaged in litigation will do, then the litigant will rely on *Printz*'s Tenth Amendment structural federalism protection. *Alden* solidifies this reliance, as it turned what was once only an Eleventh Amendment protection in *Seminole Tribe* into a general structural protection based not only on the Eleventh Amendment, but also on the Tenth Amendment and principles of federalism.[259] This emerging reach for substance can be seen in *Printz*'s caveat that Eleventh Amendment distinctions between states and municipali-

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[258] *See* Massey, *supra* note 48, at 177 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991) and New York v. United States, 505 U.S. 144 (1992)). Professor Massey comments that if federalism is truly only about process, then it is reduced to a set of "etiquette tips for foxes entrusted with the job of guarding the henhouse. The hens may all be missing in the morning, but so long as the fox has observed the proper protocol nobody will inquire of the bulge in the fox's stomach." *Id.* at 179; *see also* Jackson, *supra* note 90, at 2233-35 (criticizing categorical rule that prohibits *Printz* federal directives in favor of federalism-based limits on national legislation).

[259] *See* Alden v. Maine, 119 S. Ct. 2240, 2244, 2247, 2263-66 (1999).

ties do not apply when general guarantees of sovereignty are implicated under the Tenth Amendment.[260]

Private parties, on the other hand, can frame the issue in terms of process. They can argue that although *Printz* categorically reaffirmed *New York v. United States*'s anticommandeering principle,[261] *Alden* reassured us that states must still comply with federal law and that *Ex Parte Young* suits, and perhaps qui tam suits, are appropriate procedures for challenging state noncompliance.[262] Their argument would continue that challenging the supremacy of federal law as applied to the states is not the next step the justices should take. Rather, federal law remains supreme provided that the federal government follows proper procedures when applying its laws to the states.

But if process were the sole concern of *Alden*, then *Printz*, *Seminole Tribe*, and *Coeur D'Alene* are merely statements of federalism etiquette rather than building blocks of a new constitutional federalism that protects the states absolutely from federal overreaching. But, at the very least, *Printz* suggests that the process model is question-begging, for as Justice Scalia firmly asserted, the threshold question in the area of federal-state relations is always whether the federal law is valid before the interest of the Supremacy Clause is triggered.[263] The answer to that question, *Printz* suggests, must embrace a state immunity assumption. In other words, the question is whether the Tenth Amendment imposes substantive limitations on Congress's power to regulate the states, which remain autonomous within their sphere of authority, rather than whether Congress has the power to enact the legislation at issue.[264]

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[260] *See* Printz v. United States, 521 U.S. 898, 931 n.15 (1997).

[261] *See id.* at 933.

[262] *See Alden*, 119 S. Ct. at 2263. Whether mystical federalism allows for qui tam suits will be resolved next Term. The Court has accepted for review the question of whether a private party, even though representing the United States, can overcome the prohibitions of the Eleventh Amendment by bringing a qui tam suit against a state. *See* United States *ex rel.* Stevens v. Vermont, 162 F.3d 195, 207-08 (2d Cir. 1998), *cert. granted*, 67 U.S.L.W. 3717 (U.S. June 24, 1999) (No. 98-1828) (holding that states are not immune under False Claims Act and qui tam provisions permitting private parties to sue states on behalf of United States). *But see* United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 870, 874 (D.C. Cir. 1999) (holding that under False Claims Act, state is not "person" who could be sued by private parties).

[263] *See* 521 U.S. at 933, 935 (finding that portions of Brady Act violate Tenth Amendment).

[264] *See id.* at 926.

A process-based rationale, this Article suggests, does not provide a satisfactory explanation for *Alden*, *Seminole Tribe*, and *Coeur D'Alene*. Although in *Printz* and *New York* the Court may have been concerned with Congress's commandeering methods of imposing national law on the legislative and executive branches of the states, *Alden, Seminole Tribe, and Coeur D'Alene* reflect a more deeply seated ideological belief in the abstract sovereignty of the states than any anticommandeering or process-based rationale could support. This is so because there is no intelligible, conceptual distinction between an immunity-from-suit, an immunity-from-commandeering, or an immunity-from-certain-processes. Commandeering and process-based limitations are concepts to which the Court can easily turn to prohibit the substance of legislation beyond the manner of its implementation.

For example, although *Alden* reconfirms the availability of *Ex Parte Young* actions as well as the vulnerability of those state agencies that are not considered arms of the state, *Printz* made no such distinctions for purposes of the Tenth Amendment, and *Coeur D'Alene* rejected a suit against a state official. The *Printz* majority stated that the distinction between local state officials or agencies was not of constitutional significance when the issue is one of state sovereignty,[265] and the *Coeur D'Alene* plurality reminded us that "special sovereign interests" always weigh in the determination of whether to permit a *Ex Parte Young* action.

On their own terms, the options seemingly available under the Court's current framework are unacceptable and unhelpful. They are unacceptable because an increased federal bureaucracy runs counter to the expressed values the Court seeks to promote: limited federal power and increased state autonomy. They are unhelpful because the doctrines left standing are incapable of being applied in a coherently objective manner by legislators, states, and lower courts.

A. *The* Ex Parte Young *Solution?*

Ex Parte Young retains vitality, to the extent it does, solely to ameliorate the harsh rule-of-law effect of *Hans*. To be sure, the Court openly has acknowledged that *Young* is a fiction, crafted as a neces-

[265] *See id.* at 930 (arguing that distinction raised by dissent "cannot be a constitutionally significant one").

sary vehicle to vindicate the supremacy of federal law.[266] The facts of *Ex Parte Young* exemplify the doctrinal gymnastics the Court had to adopt to find its way around *Hans* and the doctrinal Eleventh Amendment, an observation which exposes the doctrine's vulnerability.

Stockholders sought an injunction against a railroad and the Minnesota attorney general preventing these parties from adopting and enforcing new railroad rates mandated by Minnesota law.[267] The legally mandated rates were substantially below the current rates. Plaintiffs claimed that the Minnesota law was unconstitutional because it deprived the stockholders of their constitutional rights of due process and equal protection.[268] Attorney General Young defended on Eleventh Amendment grounds by arguing that the court had no jurisdiction over him, as the suit against him was really a suit against Minnesota, and Minnesota had not consented to be sued in federal court.[269]

The Supreme Court rejected Young's Eleventh Amendment argument. It held that when a state official seeks to enforce an unconstitutional act, it is not acting under the authority of the state, and, thus, the Eleventh Amendment does not apply.[270] When an officer of the state acts illegally, the "[s]tate has no power to impart to him any immunity from responsibility to the supreme authority of the United States."[271] And, thus, the *Young* fiction was born.

The *Alden* majority, as did *Seminole Tribe*, *Printz*, and *Coeur D'Alene* before it, invoked *Ex Parte Young* in response to dissenting arguments that federal law would be rendered impotent when a state interposes its sovereign immunity. It is unclear, however, how a legal fiction can overcome the categorical command that states are

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[266] *See* Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II), 465 U.S. 89, 105 (1984) (describing *Ex Parte Young* as "fiction"); *see also* Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 269 (1997) (citing Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II), 465 U.S. 89, 114 (1984)) (acknowledging that *Young* is nothing more than "fictional distinction between the official and the State"); Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L. J. 1123, 1135-37 (1989); Laura S. Fitzgerald, *Beyond* Marbury: *Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 425-427 (1999).

[267] *See Ex Parte* Young, 209 U.S. 123, 128-30 (1907).

[268] *See id.* at 130.

[269] *See id.* at 130-31. The circuit court enjoined Young from enforcing the rate statute. Young sought and obtained an alternative writ from a Minnesota state court. The circuit court found Young in contempt. *See id.* at 132-34.

[270] *See id.* at 159-60.

[271] *Id.*

immune from suit by private parties or that they retain some undefined core area of sovereignty that Congress cannot touch. Mystical federalism instead permits special sovereignty interests to lurk in the background to be pulled out of the judicial hat whenever the Court believes that a suit is not really against an official at all, but somehow offends this unknowable set of attributes preserved by the Tenth Amendment.[272]

For example, in *Seminole Tribe* the Court rejected the tribe's argument that it could proceed under *Ex Parte Young* and sue the governor of Florida to obligate him to negotiate with the tribe in good faith.[273] The majority justified the unavailability of a *Young* action on the grounds that when Congress lays out a legislative scheme to enforce a statutory right, a court should not lift the Eleventh Amendment bar against an officer in a manner inconsistent with the legislative scheme.[274] The legislative scheme, however, was struck down as unconstitutional, rendering the availability of *Young* suits a moot point. The Court's rhetorical deference to congressional choice of means sounds rather hollow in the context of *Seminole Tribe.*

In *Coeur D'Alene,* Justice Kennedy's splintered plurality opinion further limited the availability of *Young* suits, although the claim brought by the Coeur D'Alene tribe was the paradigmatic *Young* suit; the tribe sued a state official seeking prospective injunctive relief to prevent him from violating federal law.[275] The Coeur D'Alene tribe sued state officials seeking an injunction to prevent them from regulating the submerged lands in the Coeur D'Alene navigable waters. Idaho wanted to zone the area as recreational, but the tribe claimed ownership to those lands by virtue of an executive order signed by President Grant in 1873 and ratified by Congress in 1891. The tribe, thus, sought federal injunctive relief asking for a declaration that the lands belonged to it and any exercise of Idaho's authority over the land would violate federal law. The Court concluded that the suit was really one to quiet title against the state and was thus precluded under *Seminole Tribe.*[276]

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[272] *See supra* note 99.

[273] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 45 (1996).

[274] *See id.* at 74.

[275] *See* Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 297 (1997) (Souter, J., dissenting).

[276] *See id.* at 281; *see also* Edelman v. Jordan, 415 U.S. 651 (1974) (holding that Eleventh Amendment barred retrospective relief even if named defendants were state officials); *In re* Ayres, 123 U.S. 443, 507-08 (1887) (holding that plaintiff could not sue state officials in

The Court was concerned that the state's sovereign interests in submerged lands would render the Court's interference impermissibly intrusive.[277]

That a state would lose its jurisdiction over tribal lands in deference to federal law is unremarkable given the scope of the federal government's power over tribal lands.[278] It is hardly open to question that the Constitution grants Congress plenary power over this subject. It is thus "not an obvious reason to prefer the exercise of state, rather then federal judicial power."[279] On the contrary, for the Court to declare that Congress, which has an explicit textual power to enact legislation and choose the means of implementation, is unable to overcome federalism's underlying assumptions as defined by the Court, is absurd. It permits the Court, which has no constitutional power to so declare, to unilaterally determine which actions the structure does permit.[280]

Moreover, given the Court's unpredictability on this issue and its failure to articulate a coherent doctrine, *Ex Parte Young* is unhelpful on its own terms. Regardless of how the doctrine has evolved, *Young* itself involved the injunction against an unconstitutional state law rather than a remedy to redress a violation of a federally created right. There is a substantive distinction. Under the *Young* structure, one could argue, the constitutional problem was the supremacy of federal law over a conflicting state law. The Court was asked to enjoin the state official from enforcing the state's law. It is a different matter altogether to force a state to comply with federal law, for such compulsion requires the state to take affirmative steps.[281] And, in *Young*, the Court proceeded from the assumption

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federal court to force state to perform its contract); Louisiana v. Jumel, 107 U.S. 711, 727-28 (1883) (holding that absent state's consent to suit, plaintiff could not sue state officials in charge of state's purse).

[277] *See Coeur D'Alene*, 521 U.S. at 269. Justice Kennedy's plurality opinion was joined only by the Chief Justice. *See id.*, 521 U.S. at 262. Justice Kennedy called for a more radical change to *Young* actions, including calling for a case-by-case balancing approach measuring the federal interests against the degree of state sovereignty intrusion. *See id.* at 279-80. Justice O'Connor, joined by Justices Scalia and Thomas, rejected this approach. *See id.* at 293-97.

[278] *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. COMMENT. 301, 313 (1998).

[279] *Id.*

[280] *See generally* Fitzgerald, *supra* note 266, at 407-18 (stating that Supreme Court "based its jurisdictional exception to state sovereignty on no affirmative legal principle — constitutional, statutory, common law, or otherwise").

[281] *See id.* at 463.

that the Minnesota law was unconstitutional. To reach the merits of this question, the Court had to recognize that it has subject matter jurisdiction to adjudicate. If the Eleventh Amendment imposes a jurisdictional bar, however, mystical federalism would preclude the Court from ever reaching the merits, as was the case in *Alden*, *Seminole Tribe*, and *Coeur D'Alene*.

So *Alden*'s placating assurance on the continued vitality of *Young* actions is deceptive. Because the Court has failed to clarify which sovereign attributes or interests are worthy of immunity, remaining, as always, unknowable and undefined, the dilemma persists that all *Young* actions can bring the *Coeur D'Alene* and *Alden* implicit substantive limitation into play. That is, the state may argue that "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."[282] The Court categorically precluded end-runs around the Eleventh Amendment:

> To interpret *Young* to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, [reaffirmed in *Seminole Tribe*], that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. . . . Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.[283]

B. Purchase of Waivers: The South Dakota v. Dole *Option*

The *Alden* majority, citing to *South Dakota v. Dole*,[284] suggested that Congress is unrestricted in its purchase of waivers of immunity through its Spending Clause powers, even if it cannot create causes of action through its commerce power.[285] The validity of this assertion remains to be examined. Until recently, the limits on Con-

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[282] Hawaii v. Gordon, 373 U.S. 57, 58 (1963).

[283] *Coeur D'Alene*, 521 U.S. at 270.

[284] 483 U.S. 203 (1987).

[285] 119 S. Ct. 2240, 2267 ("Nor does the Federal Government lack the authority or means to seek the states' voluntary consent to private suits.") (citing South Dakota v. Dole, 483 U.S. 203 (1987)).

gress's spending power were a relatively unimportant issue in the federalism debate because of the commerce power's broad scope. The government rarely found a need to base its legislation on the Spending Clause. With the Commerce Clause severely debilitated in the context of state regulation, however, Spending Clause issues became immensely significant in the continuing federalism epic.[286]

Article I, Section 8, Clause I of the Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." *United States v. Butler*[287] was the last case to hold that Congress's conditional grant violated the Spending Clause. In *Butler*, the Court struck down the Agricultural Adjustment Act, which imposed a processing tax on cotton and used the revenue to compensate farmers who had agreed to reduce their acreage.[288] The Court struck it down on the grounds that the Tenth Amendment showed that Congress did not have the power to regulate agricultural production.[289] The Court rejected the government's argument that voluntary cooperation obtained through the Spending Clause is constitutional: "The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. . . . The power to confer or withhold unlimited benefits is the power to coerce or destroy."[290]

Since 1987, with its *Dole* decision, the Supreme Court has adhered to the principle that when Congress conditions receipt of federal monies upon an affirmative action on the part of the state (waiver of sovereign immunity for example), it may do so only when the condition is related to a federal interest in "particular national projects or programs."[291] *Dole* upheld a federal law requiring each state to adopt a twenty-one-year-old minimum drinking age in exchange for highway funds. Although finding the funded mandate constitutional, the Court articulated four restrictions on the spending powers. First, the spending power must be exercised in pursuit of the general welfare, and the Court should defer to

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[286] *See, e.g.*, Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987) ("If the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed.").

[287] 297 U.S. 1 (1937).

[288] *See id.* at 78.

[289] *See id.* at 68.

[290] *Id.* at 71.

[291] *See* South Dakota v. Dole, 483 U.S. 203, 207-08 (1987) (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

congressional judgment in this area.[292] Second, Congress must explain the conditions it attaches to the funds unambiguously to enable the states to "exercise their choice knowingly, cognizant of the consequences of their participation."[293] Third, the condition must be related to the federal interest in particular national projects or programs, as unrelated conditions may be illegitimate.[294] And fourth, other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[295]

A waiver of sovereign immunity is arguably always related to the national project or program concerning the legislation, for a waiver entails the law's very enforcement. In *New York* and *Printz*, for example, the Court distinguished between laws that commandeer and laws that encourage, noting that the latter are not barred by the Constitution.[296] But as Justice O'Connor noted in her *Dole* dissent, absent a relatedness requirement that ties congressional spending with the object of the legislation, Congress would be able to "regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."[297] Moreover, even if a relatedness nexus exists, the Court may further inquire whether the condition is coercive, whether it violates some other constitutional provision (the Tenth Amendment for example), and whether Congress has expressed the condition unambiguously.[298]

Dole, then, presents an incomplete alternative to the rule-of-law crisis. Although *Dole*'s funded mandate approach may provide a preliminary doctrinal answer, it is inconsistent with the absolutism the Court has adopted on state sovereignty. Coercive conditional grants impose no lesser threat to the dignity, sovereignty, or vitality of a state as cosovereign than does the creation of a private cause of action. Congress's use of its spending power to impose conditions on federal grants raises the same sort of problems that intru-

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[292] *See id.* at 207-08.

[293] *Id.* at 207.

[294] *See id.* at 207-08.

[295] *See id.* at 208.

[296] *See* Carlos Manuel Vázquez, Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1319 (1999).

[297] *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting).

[298] *See id.*; *see also* Massey, *supra* note 48, at 177.

sive abrogation of sovereign immunity and commandeering legislation do.[299]

To permit Congress to accomplish through the Spending Clause what the Court said it is categorically prohibited from doing as a result of the Tenth Amendment presents serious doctrinal problems for the Court.[300] *Alden*'s suggestion, in theory, could open the doors for a nationalistic agenda if that agenda were economically feasible. Asking the federal government now to fund a national effort of state litigation is unreasonable in practice and incoherent in theory. Such an agenda erodes state power while forcing federal power to become bloated beyond recognizable proportions.

Alden cannot embrace the consequences of its federalism theory, and this inability suggests that the theory is a poor foundation for any doctrine of state autonomy.[301] The weakness lies in the Court's failure to provide any principled reason why an exemption for conditional grants makes any sense in light of its concern for protecting state autonomy at all costs and of shrinking congressional power.[302] And, from a practical standpoint, the Chief Justice lacks Justice O'Connor's support for a broad reading of the Spending Clause, which is inconsistent with mystical federalism.[303]

It is unlikely that the current conservative majority will remove itself from policing the federalism boundaries, even in the face of its extremely deferential approach to all Spending Clause legislation. The Court could easily decide that the choice to participate in the federal program is no choice at all. As the Court recognized in *Butler*, voluntary cooperation is but a myth: "The power to confer or withhold unlimited benefits is the power to coerce or destroy. . . . The asserted power of choice is illusory, . . . [the state is really] given no choice, except a choice between the rock and the whirlpool."[304] One commentator has suggested that permitting Con-

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[299] *See* Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending Conditions*, 4 CORNELL J.L. & PUB. POL'Y. 482-85 (1995).

[300] *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1919-21 (1995).

[301] *See* Hills, *supra* note 226, at 829.

[302] *See id.*

[303] *See* Baker, *supra* note 300, at 1920. "[I]f the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of a 'federal government of enumerated powers' will have no meaning." *Id.* at 1920 (citing South Dakota v. Dole, 483 U.S. 203, 217 (1987)); *see also* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 41-42 (1998) (discussing role of judicial review in enforcing federalism).

[304] United States v. Butler, 297 U.S. at 70-72 (1936).

gress unrestrained regulatory power through the Spending Clause raises the same kind of problems that the unconstitutional conditions doctrine does.[305] Because sovereign immunity now enjoys the status of a constitutional privilege, thus not waivable by Congress, it is questionable whether Congress could purchase a waiver of that constitutional right.[306]

If we accept that federalism is a theory of political organization, why should efficiency not be one of its distinguishing attributes? Budgetary and organizational restrictions to deal with the Court's reconceptualized doctrine ought to be a consideration. But the rigidity of the Court's new sovereignty model prevents the federal government, sovereign in its own sphere, from creating effective enforcement and policing mechanisms to assure compliance by the states.[307] The Court's new theory, thus, effectively stands federalism on its head; the federal government is precluded from effectively exercising against the states its validly authorized power.[308] The states are able to circumvent, or at least frustrate, the authority the people conferred on Congress, thereby undermining substantive legitimacy in the name of vapid formalism.[309] On the other hand, to the extent the federal government can enforce substantive restraints on the states outside of its own or state courts, the immunity-from-suit insulation guarantee of *Alden* is rendered a rather hollow guarantee of a state's sovereignty.[310]

V. THE ORIGINAL JURISDICTION OF THE SUPREME COURT

If one agrees that *Alden* and its legacy are problematic, then perhaps a political and functional response to the Court's dogmatism is appropriate. Statutorily expanding the original jurisdiction of the Supreme Court to the full limit of Article III can result in an immediate solution, and this congressional activism is an appropriate response to undue judicial activism that imposes substantive limitations on congressional legislation.[311] The court-packing plan

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[305] *See* Baker, *supra* note 300, at 1921.

[306] *See id.* at 1923-24.

[307] *See* Martin H. Redish, *Constitutionalizing Federalism: A Foundational Analysis*, 23 OHIO N.U. L. REV. 1237, 1245-46 (1997).

[308] *See id.*

[309] *See id.*

[310] *See id.* at 1247.

[311] *See, e.g.*, Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of The Federal Courts-Opposition, Agreement, and Hierarchy*, 86 GEO. L. J. 2445, 2448-49 (1998).

of the 1930s, for example, is credited with reversing the Court's trend to strike down much needed New Deal legislation. A similar political response can at the least force the Court to clarify, if not retreat from, its mystical federalism.

The original jurisdiction of the Supreme Court extends to two types of cases: those involving states as parties and those "affecting Ambassadors, other public Ministers and Consuls."[312] Congress's authority to make the Court's jurisdiction original and exclusive in certain types of cases "has existed since the Judiciary Act of 1789, and has never been questioned by [the] Court."[313] The grant of original jurisdiction over controversies involving states is expressed in mandatory terms. Forcing the Court to exercise it would be consistent on both structural and textual grounds and would implement the Framers' intent that states be bound by federal law and held accountable for its violation.[314]

The Judiciary Act of 1789 provided for such exclusive jurisdiction:

> [T]he supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive, jurisdiction.[315]

Construing this provision of the Judiciary Act in an action brought by the United States against Texas, the Court explained that "unless a state is exempt altogether from suit by the United States," the Constitution not only permits, but requires the Supreme Court to take cognizance of the suit.[316] The Court rejected Texas's argument that it could not be sued by the United States, finding instead

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[312] U.S. Const. art. III, § 2 (stating that "in all Cases in which a State shall be a Party, the Supreme Court shall have original jurisdiction."). *Id.* The Judiciary Code enables this jurisdiction by providing: "(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States; (b) the Supreme Court shall have original but not exclusive jurisdiction of: . . . (2) All controversies between the United States and a State . . . ." 28 U.S.C. § 1251 (1994).

[313] Pfander, *supra* note 145, at 565 (quoting Mississippi v. Louisiana, 506 U.S. 73, 78 n.1 (1992)); *see also*, Amar, *supra* note 147, at 453-63 (discussing whether Judiciary Act of 1789 gave Court original jurisdiction over mandamus cases).

[314] *See, e.g.*, Pfander, *supra* note 145, at 617-18.

[315] United States v. Texas, 143 U.S. 621, 643 (1892) (quoting Federal Judiciary Act of 1789).

[316] *See id.* at 644.

that the states had consented to that assertion of jurisdiction in the plan of the convention.[317]

The executive and legislative branches have an interest in having the Court clarify the precise implications of its theory. Congressional manipulation of the federal courts' jurisdiction in response to disfavored judicial trends is certainly not unprecedented.[318] Congress has enacted a multitude of statutes in direct response to Court rulings.[319] The Eleventh Amendment is but one example.

One could object to this suggested solution on prudential grounds.[320] For example, it is arguably undesirable to tax the Court

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[317] *See id.* at 646.

[318] Certainly there are practical political impediments to such a statutory expansion of the Court's original jurisdiction. The political reality is that, at least for the time being, we have an executive branch with the Democratic party in control and a legislative branch with the Republican party in control. An argument could be raised that it is politically unfeasible for a Republican-controlled Congress to enact legislation that would be theoretically geared to narrowing the new states' rights formalism. Congress is not a monolith, however. It is conceivable that pressure from voters to force Congress to address the rule-of-law problem created by *Alden* could create some compromises in the political struggle. *See* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1178-80 (1997).

Just as Congress is not a monolith, neither are the voters. Pressure from interest groups should not be discounted. The scope of this Article does not permit an exploration into the different interest groups that would have an interest in a political solution to the Court's judicial activism. I invite those interested in further exploring this topic to test the validity of my thesis. Corporations, to cite but one example, would have an interest under CERCLA, to be able to implead states as potentially liable for damages in clean up cases. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613; Pennsylvania v. Union Gas, 491 U.S. 1, 11-13 (1988).

[319] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 508 (1997) (striking down Religious Freedom Restoration Act, which Congress enacted in response to *Department of Human Resources v. Smith*, 494 U.S. 872 (1990), as unconstitutional exercise of congressional power). For a comprehensive discussion of modern congressional responses to disfavored federal court results, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures From the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984) [hereinafter Clinton, *Guided Quest*]; John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, (1997); Jackson, *supra* note 311, at 2248; Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589 (1998); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L. J. 1 (1997).

[320] I recognize that this subject is much more complex than this Article seems to acknowledge. My goal is not to trivialize or to ignore the doctrinal, practical, and theoretical complexities inherent in statutorily expanding the Court's Article III duties. Rather, my

with exercising its original jurisdiction when its institutional function is more importantly discharged through its discretionary appeals docket. The practical implication of crowding the Court's docket with trials involving states, thus leaving less room for important exercises of appellate jurisdiction, need not be a problematic consideration. The executive branch can choose which cases it will file in the Supreme Court as an original matter and which it will file in the lower courts. It can bring test cases designed to force the Court to clarify its position on the permissibility of congressional power to regulate the states in a variety of areas.

Certainly, the federal government could accomplish the same result by suing a state in a federal district court; however, the need for compelled clarification on the Court's position on state immunity issues renders the option of original and exclusive jurisdiction politically expedient and economically desirable. The desire to avoid doctrinal and legislative confusion, as well as wasteful litigation to attempt to clarify those confusions, at the very least justifies this move. The Court would be forced to clarify the substance of its mystical federalism sooner rather than later, which would promote a more coherent doctrine than what currently exists. Moreover, if the suit were brought in the lower courts, the Court's appellate jurisdiction would remain discretionary, and the Court could continue to evade resolving the jurisdictional problem that it created.

This political response would challenge the Court's mystical federalism and its jurisdictional self-dealing.[321] It would simply ask the Court to exercise its structural role seriously. First, traditional understanding of Article III is that Congress has substantial power over the jurisdiction of federal courts and may grant them the entire jurisdiction that Article III permits.[322] Second, in exercising this power Congress would call on the court to clarify the law.[323] Third, from the Court's formalist perspective, no other tribunal could pay tribute to the sovereign dignity of a state as can the Supreme Court. Fourth, it is wholly consistent with any theory of federalism and separation of powers for Congress to vest the Court

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goal is to offer a starting point of discussion on one of the alternatives I see available after *Alden*.

[321] *See* Fitzgerald, *supra* note 266, at 425-27.

[322] *See* Harrison, *supra* note 319, at 209.

[323] *See* City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (stating that Congress's power extends only to enforcing preestablished rights and not to defining these rights).

with the mandatory jurisdiction of Article III.[324] At the very least, Congress can force the Court to engage in more responsible decision making, whatever the substantive result.

CONCLUSION

Mystical federalism, this Article has shown, contains an unstated conflict about values. But the manipulation of unarticulated absolute sovereign principles as a shield against legitimate federal power is a myth; absent a recognition of the legitimacy of both spheres of power, federalism is nothing more than a unclad political choice bandaged in the garb of an inexorable constitutional directive.[325] In other words, to embrace a state-enclave immunity is to make a judgment about the nature of federalism prior to engaging in a thoughtful process about the values federalism protects. *Alden* has done this, and state sovereignty has emerged as a value for its own sake.

This political choice is inappropriate for the Supreme Court to make covertly, and it is likewise mistakenly elevated as an unwavering constitutional command. If Congress's lack of power may be inferred from the structure of the Constitution, then the structure of the constitution must explain the nature of that power — or the lack thereof. Yet, the Court's approach to answering this question is not mandated by the Constitution any more than the existence of constitutional sovereign immunity is. The Court's inferences that state power cannot be abrogated in the absence of a textual source raises the question why should substantive justice not be accomplished by tipping the balance towards the federal government's interest in a given case.

That states retain undefined powers, even if Congress were constitutionally permitted to abrogate sovereign immunity, does not challenge the premise that federalism protects the states as semisovereign entities; it simply challenges where that line ought to be drawn. The line-drawing business is a serious enterprise that the Court ought to approach with more deference to the values implicated and the equivocal historical evidence than it has been willing to use.

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[324] *See, e.g.*, Clinton, *Guided Quest*, *supra* note 319, at 749-50.

[325] *See, e.g.*, Kathryn Abrams, *On Reading and Using the Tenth Amendment*, 93 YALE L. J. 723, 743 n.78 (1984) (arguing that in introducing "sovereignty," which is nowhere to be found in Constitution, Supreme Court chose to use one theory of state power over another).