ARTICLES

REDEFINING THE RELATIONSHIP BETWEEN THE STATES AND THE FEDERAL GOVERNMENT: A FOCUS ON THE SUPREME COURT'S EXPANSION OF THE PRINCIPLE OF STATE SOVEREIGN IMMUNITY

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I. INTRODUCTION

The United States Supreme Court has handed down a number of decisions over the past decade that have markedly altered the relationship between the states and the national government in the American federal system. These decisions have enhanced states' rights by defining more broadly the constitutional limitations on the national government to act in a manner that infringes upon the rights of the states. One specific line of cases has focused on the principle of governmental immunity from litigation and the role of that principle in defining the relationship between the states and the federal government. The cases falling within this line of authority have limited congressional power by restraining the ability of the federal legislature to authorize private actions for damages against the states without their consent for the states' violation of federal law.

This article focuses upon the Supreme Court's recent expansion of the principle of state sovereign immunity at the expense of congressional authority. The article considers the Court's development of the doctrine of state sovereign immunity in the course of several decisions handed down by the Court between 1996 and 2001, with particular focus on two recent decisions, *Kimel v. Florida Board of Regents*[1] and *Board of Trustees v. Garrett*.[2] The article examines the Court's basic underlying determination, that "fundamental postulates implicit in the constitutional design"[3] itself, create a state sovereign immunity, an immunity

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[1] 528 U.S. 62 (2000).

[2] 531 U.S. 356 (2001).

[3] Alden v. Maine, 527 U.S. 706, 729 (1999).

separate from the Eleventh Amendment[4] and applicable more broadly than the text of that Amendment would otherwise indicate.

The article reviews the Court's declaration of a constitutional limitation upon Congress' ability to abrogate state sovereign immunity under Article I of the Constitution.[5] The article then highlights both the Court's expression of Congress' general ability to affect state sovereign immunity under Section 5 of the Fourteenth Amendment[6] and, more importantly, its explanation of what constitutes "appropriate legislation," i.e., the constitutionally permissible basis for Congress' abrogation of state immunity under that section. This explanation goes to the heart of the recent *Kimel* and *Garrett* sovereign immunity decisions and serves to limit Congress' ability to legislate under Section 5.

The article also considers the broader, more practical impact of the Court's expansion of state sovereign immunity. In considering that impact, the article highlights several general matters of concern. First, the expansion of state sovereign immunity is being driven today in a very dramatic fashion at the highest level by the thinnest of Court majorities. The expansion, therefore, may be fleeting,[7] and may end with the next appointment to the Court. Second, the Court has failed to find a textual home within the Constitution for its doctrine of sovereign immunity. The accuracy of the historical basis the Court offers for the

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[4] U.S. CONST. amend. XI.

[5] U.S. CONST. art. I.

[6] U.S. CONST. amend. XIV, § 5.

[7] Volatility has marked the federalism question in the past. For example, a strong element of volatility marked the Court's review of federalism claims in the 1970s and 1980s. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (5-4 decision) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)), *overruled by* Garcia v. San Antonio Metro. Transit Authority., 469 U.S. 528 (1985) (5-4 decision). The *Usery* decision represented the first instance since the New Deal era's *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), in which the Court struck down on federalism grounds an Article I Commerce Clause act. *Usery*, in striking down the legislation, held that the law improperly intruded into the area of "traditional governmental functions" preserved to the states. 426 U.S. at 852. The Court in *Garcia* overruled *Usery*, stating that the Court has "no license to employ freestanding conceptions of state sovereignty," 469 U.S. at 550, and that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. For an excellent analysis of *Garcia*, with a particular focus on the notion that the political process should serve as the prime protection of the states in the federal system, see Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: the Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). Field's article includes an analysis of Wechsler's classic 1954 article on the availability of state political process participation as protection for the states from federal encroachment. *Id.* at 106-10 (discussing Herbert Wechsler, *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)). For an excellent review as to the changing American perceptions regarding federalism, see John Minor Wisdom, *Foreward: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984).

existence of "fundamental postulates implicit in the constitutional design,"[8] which is necessary to support the Court's notion absent a textual home, is subject to reasonable dispute. Third, the Court promotes the doctrine of sovereign immunity at a time when the doctrine is generally disfavored. Fourth, the non-deferential approach the Court advances in these cases toward Congress' fact finding and ultimate policymaking raises questions regarding the Court's degree of respect for the democratic, political process. As a whole, its decisions suggest that the Court simply lacks due regard for the institution of Congress itself. Finally, the article concludes that the ultimate, practical impact of the Court's sovereign immunity jurisprudence has been to enhance states' rights at the direct expense of private citizens by cutting off aggrieved parties' damage claims against the states.

II. THE BASIC MODERN FEDERALISM JURISPRUDENCE WITH WHICH THE SUPREME COURT HAS LIMITED FEDERAL AUTHORITY

Before focusing on the Supreme Court's recent expansion of the principle of state sovereign immunity, the article briefly reviews the major federalism cases of the past decade that have considered the constitutional limitations on congressional power generally *outside* of the specific circumstance of sovereign immunity. The purpose of Part II's initial review is to sketch for the reader the basic modern federalism jurisprudence with which the Supreme Court has limited the federal authority *vis-à-vis* states' rights. This overview will provide necessary context for the more narrow sovereign immunity discussion.

The Supreme Court cases falling outside of the state sovereign immunity framework have tended to limit federal legislative power in three general ways. First, the cases have limited the ability of Congress to regulate the conduct of private parties under the Article I Commerce Clause.[9] Second, the Supreme Court decisions have also narrowed the ability of Congress to legislate under the Section 5 Enforcement Clause of the Fourteenth Amendment.[10] Finally, the Court decisions falling outside of the state sovereign immunity context have limited the ability of the federal government to require states to affirmatively promote federal regulatory policy, either by requiring the state executive branch or the state

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[8] *See Alden*, 527 U.S. at 729. .

[9] U.S. CONST. art. 1, § 8, cl. 3. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (holding that the enactment of the Gun Free School Zones Act of 1990, 18 U.S.C. § 922 (q), exceeded Congress' authority under Article I). *See also infra* notes 12-29 and accompanying text.

[10] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the enactment of the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, exceeded the scope of Congress' enforcement power under Section 5 of the Fourteenth Amendment). *See also infra* notes 30-55 and accompanying text. The general limitation on the authority of Congress to act under Section 5 flowing from *City of Boerne* and its progeny plays a significant role within the specific sovereign immunity framework. *See generally infra* notes 135-211 and accompanying text.

legislature to administer or enact federal regulatory programs.[11]

A. Limiting Congress' Ability to Regulate under the Article I Commerce Clause

The key case of the past decade limiting Congress' ability to regulate under the Article I Commerce Clause is *United States v. Lopez.*[12] In *Lopez*, the Supreme Court considered the validity of the Gun Free Zones Act of 1990 under Article I.[13] The Act made it a federal crime for a person to "knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe is a school zone."[14] The Court found in *Lopez* that the gun possession legislation exceeded congressional authority under the Commerce Clause, since the legislation "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[15]

In coming to its conclusion, the Court stated that the Act could only be sustained as a proper use of Article I Commerce Clause authority if it regulated "an activity that *substantially* affects interstate commerce."[16] However, it could not be sustained as such, the Court explained, since "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[17] The Court specifically refused "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[18] Although the Court did not challenge its prior case law, which gave "great deference to congressional action,"[19] it also refused to conclude from the existing Commerce Clause precedent "that the

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[11] *See* Printz v. United States, 521 U.S. 898 (1997) (invalidating federal legislation mandating state and local officials to conduct background checks on those who purchase handguns); New York v. United States, 505 U.S. 144 (1992) (invalidating an act of Congress that required state legislatures to provide for the disposal of radioactive waste material). *See also infra* notes 56-73 and accompanying text.

[12] 514 U.S. 549 (1995).

[13] 18 U.S.C. § 922(q) (2001).

[14] 18 U.S.C. § 922(q)(2)(A).

[15] 514 U.S. at 551.

[16] *Id.* at 559 (emphasis added). The Court determined that the Act "is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce;" nor can the legislation "be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce." *Id.*

[17] *Id* .at 567 ("Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.").

[18] *Id.*

[19] *Id.* The Court also noted in *Lopez* that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *Id.* at 559.

Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local."[20]

Additionally, in *United States v. Morrison*,[21] the Court, relying heavily on the reasoning developed in *Lopez*, concluded that the Commerce Clause does not give Congress the authority to enact a provision conferring a federal private cause of action against those who commit crimes of violence motivated by gender.[22] The petitioners in *Morrison* sought to uphold the authorization of the federal civil remedy "as a regulation of activity that substantially affects interstate commerce."[23] The Court, finding that the provision at issue focused "on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or person in interstate commerce)," agreed that "this is the proper [Article I Commerce Clause] inquiry."[24]

The *Morrison* Court stated that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[25] While the Court determined that it "need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases," it, nevertheless, stated "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[26] The Court would not deviate from that history in the instant case.

The Court expressly rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."[27] The judiciary, the Court opined, must "preserve" the constitutional principle that "regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce" remain "the province of the States."[28] The Court stated that plenary police power, such as the suppression of crime and the punishment of criminals, is

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[20] *Lopez*, 514 U.S. at 567-68 (citations omitted).

[21] 529 U.S. 598 (2000) (invalidating 42 U.S.C. § 13981 (2000)). Section 13981 was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942. The provision established a "right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). The right could be enforced "in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. § 13981(c).

[22] *Morrison*, 529 U.S. at 619. Congress had specifically identified both the Commerce Clause and Section 5 of the Fourteenth Amendment as the sources of federal authority on which it relied in fashioning the provision. 42 U.S.C. § 13981(a). For a discussion of the Court's analysis of the issue of the availability of Section 5 of the Fourteenth Amendment as a source of federal authority, see generally *infra* notes 135-211 and accompanying text.

[23] *Morrison*, 529 U.S. at 609.

[24] *Id.*

[25] *Id.* at 613.

[26] *Id.*

[27] *Id.* at 617.

[28] *Morrison*, 529 U.S. at 618.

reserved to the states.[29]

B. Narrowing the Ability of Congress to Legislate under the Enforcement Clause of the Fourteenth Amendment

City of Boerne v. Flores[30] is the principal modern decision demonstrating the Supreme Court's restriction of Congress' ability to legislate under the Section 5 Enforcement Clause of the Fourteenth Amendment. The *City of Boerne* Court held that Congress' enactment of the Religious Freedom Restoration Act of 1993 ("RFRA")[31] exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment. This holding set forth the standard for determining the appropriateness of enforcement legislation under that section. The RFRA was enacted as a direct legislative rebuttal to the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*.[32]

The *Smith* Court upheld the state's legislation of general applicability criminalizing peyote use within the specific context of the application of the law to the denial of unemployment compensation to two members of the Native American Church. The church members lost their jobs as drug rehabilitation counselors due to their use of peyote. The *Smith* Court determined that religiously neutral, criminal laws of general applicability that have the effect of burdening a particular religious practice do not have to be justified under the First Amendment by establishing a compelling governmental interest.[33]

In response, Congress, through the RFRA, prohibited state and federal governments from "substantially burdening" an individual's exercise of religion *even when the burden results from a rule of general applicability*, unless the governmental entity can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[34] For its enforcement authority, Congress had relied on Section 5 of the Fourteenth Amendment to impose the RFRA requirements on the states.[35]

The Court explained in *City of Boerne* that Congress' power under Section 5 of the Fourteenth Amendment is remedial in nature, extending "only to 'enforcing' the provisions of the Fourteenth Amendment."[36] The power to "enforce" does not

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[29] *Id.*

[30] 521 U.S. 507 (1997).

[31] 42 U.S.C. § 2000bb *et seq.*

[32] 494 U.S. 872 (1990).

[33] *Id* at 889. The *Smith* court refused to apply the balancing test of *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963) (requiring government action substantially burdening religious practices to be justified by a compelling governmental interest).

[34] 42 U.S.C. § 2000bb-1.

[35] *City of Boerne*, 521 U.S. at 516. *See also* Religious Freedom Restoration Act of 1993, S. REP. NO. 103-111, at 13-14 (1993); H.R. REP. NO. 103-88, at 9 (1993).

[36] *City of Boerne*, 521 U.S. at 519.

include "the power to determine what constitutes a constitutional violation."[37] The Court admitted that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies . . . ."[38] Nevertheless, the Court stated that, "the distinction exists and must be observed."[39] Therefore, the *City of Boerne* Court found that "(t)here must be *a congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end."[40] Legislation lacking this connection "may [inappropriately] become substantive in operation and effect."[41]

In considering whether the RFRA could be deemed appropriate enforcement legislation under Section 5, the *City of Boerne* Court determined that the particular Act "cannot be considered remedial, preventive legislation . . . ."[42] The RFRA, the Court opined, "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[43] Instead, the Court viewed the Act as Congress's attempt to bring about "a substantive change in constitutional protections."[44] The legislative record did not support the concerns that animated the legislation,[45] and the stringent, "compelling interest" test that the RFRA imposed on the states, the Court stated, "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[46]

Section 5 of the Fourteenth Amendment as a source of legislative authority was also an issue in *United States v. Morrison*.[47]. In addition to identifying Article I's Commerce Clause as its legislative authority,[48] Congress also explicitly identified Section 5 as a source of legislative power for the enactment of a federal private cause of action for victims of violent crime motivated by gender.[49]

The *Morrison* Court found, however, that Congress' power under Section 5 did "not extend to the enactment" of Section 13981, the legislation at issue.[50] Referring to the state action requirement and quoting the language of the Court in the *Civil Rights Cases*, the Court stated that the *Morrison* civil remedy was "not 'corrective in its character, adapted to counteract and redress the operation of such prohibited

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[37] *Id.*
[38] *Id.* at 519-20.
[39] *Id.* at 520.
[40] *Id.* (emphasis added).
[41] *City of Boerne*, 521 U.S. at 520.
[42] *Id.* at 532.
[43] *Id.*
[44] *Id.*
[45] *See id.* at 530-31.
[46] *City of Boerne*, 521 U.S. at 533.
[47] 529 U.S. 598 (2000).
[48] *See supra* notes 21-29 and accompanying text.
[49] *Morrison*, 529 U.S. at 607.
[50] *Id.* at 627.

[s]tate laws or proceedings of [s]tate officers.'"[51] Looking to the language used in "the more recent cases" such as *City of Boerne*, the Court raised the need to demonstrate "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[52]

The Court stated that the remedy in *Morrison* was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[53] Unlike other Section 5 remedies that the Court had previously upheld, the remedy in *Morrison* "visits no consequence whatever" on state public official action in handling the gender-based assault claims.[54] The *Morrison* private cause of action remedy is unlike previously upheld remedies "in that it applies uniformly throughout the Nation," and Congress had not found that discrimination against victims of gender-motivated crime exists in all, or even in most, states.[55]

C. Limiting the Ability of the Federal Government to Require the States to Affirmatively Promote Federal Regulatory Policy

Supreme Court decisions falling outside of the state sovereign immunity context have limited the ability of the federal government to require states to affirmatively promote federal regulatory policy, either by requiring the state legislature or the executive branch of the state government to administer or enact federal regulatory programs. The two central cases within this area of concern are *New York v. United States*[56] and *Printz v. United States.*[57]

The *New York* Court held that Congress, through provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[58] could not compel states to provide for the disposal of radioactive waste generated within the states' borders.[59] Of particular concern to the Court was a so-called "take title" provision in the Act.[60] The take-title provision in the legislation offered states an option. States

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[51] *Id.* at 625 (quoting the Civil Rights Cases, 109 U.S. 3, 18 (1883)).

[52] *Id.* at 625-26 (quoting Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639 (1999)). For a discussion of *College Savings Bank*, see *infra* notes 135-150 and accompanying text. *College Savings Bank* is a case that also fits within the specific context of the article's discussion of state sovereign immunity.

[53] *Morrison*, 529 U.S. at 626.

[54] *Id.*

[55] *Id.* at 626-27.

[56] 505 U.S. 144 (1992) (invalidating an act of Congress that required the state legislatures to provide for the disposal of low-level radioactive waste material).

[57] 521 U.S. 898 (1997) (invalidating a federal statutory provision mandating state and local officials to conduct background checks on those who purchase handguns).

[58] Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021b *et seq.* (1986)).

[59] *New York*, 505 U.S. at 188.

[60] The Court also considered in *New York* two other "incentive" provisions set forth in the

could regulate according to the directions of Congress or be forced to take title to, and possession of, low level radioactive waste generated within their borders and become "liable for all damages directly or indirectly incurred" by waste generators if the state failed to do so promptly.[61] This option effectively amounted to offering the states a "'choice of either accepting ownership of waste or regulating according to the instructions of Congress."[62]

The Constitution, the Court explained in *New York*, does not allow Congress to impose either requirement standing alone. Congress could not constitutionally transfer waste from generators to states, nor could Congress constitutionally require states to become liable for generators' damages. The Court stated that "[e]ither type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between the federal and state government."[63] Also, the Court added, the requirement that the states regulate pursuant to the direction of Congress, standing alone, is "a simple command to state governments to implement legislation enacted by Congress," and Congress is not empowered by the Constitution "to subject state governments to this type of instruction."[64] "A choice between two unconstitutionally coercive regulatory techniques," the Court made clear, "is no choice at all."[65]

The Court concluded its *New York* decision with the observation that both the federal government and the states may regulate waste disposal. The federal government may also preempt state regulation "contrary to federal interests," and

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Act, one establishing monetary incentives for the states and the other offering the states access incentives. Monetary incentives were made available by Congress under the Act to states that achieved certain federal regulatory policy milestones. The Court upheld this incentive as a valid conditional exercise of Congress' authority under the Spending Clause, U.S. CONST. art. 1, § 6, cl. 3. *Id.* at 173. Congress, of course, may attach conditions to the receipt of federal monies. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). A discussion of the role of the Spending Clause as a basis for congressional legislative authority is beyond the scope of this article. The access incentive in the Act authorized states and regional compacts with waste disposal sites to increase the cost of access and ultimately to deny access to their sites for the waste generated in states not meeting federal policy deadlines. The Court found the provision constitutional under the scope of authority afforded to Congress by the Commerce Clause. *New York*, 505 U.S. at 174. The Court determined that as a result of the access incentive, states could either regulate waste disposal according to the federal standards; "otherwise, residents producing radioactive waste would be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites." *Id.* "The affected States," the Court found, "are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather that on the State as a sovereign." *Id.*

[61] 42 U.S.C. § 2021e(d)(2)(C) (2001).

[62] *New York*, 505 U.S. at 175.

[63] *Id.*

[64] *Id.* at 176.

[65] *Id.*

provide incentives to the states to encourage them to adopt a regulatory scheme.[66] However, the Constitution, the Court opined, "does not... authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders."[67]

In *Printz*, the Court considered the constitutionality of certain interim provisions of the Brady Handgun Violence Prevention Act.[68] Specifically, the Court looked to provisions commanding local law enforcement officers to conduct background checks on prospective purchasers of handguns and to do other related tasks.[69] The Court struck down the congressional mandate, in effect finding the decision in *Printz* to be the natural extension of its decision in *New York*.

The Court reiterated its holding from *New York*, that "Congress cannot compel the State to enact or enforce a federal regulatory program."[70] Moreover, the Court stated, "we hold that Congress cannot circumvent the prohibition by conscripting the States' officers directly."[71] Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of the political subdivisions, to administer or enforce a federal regulatory program."[72] In fact, the Court made it clear that "[i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[73]

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[66] *Id.* at 188.

[67] *New York*, 505 U.S. at 188.

[68] Pub. L. No. 103-159, 107 Stat. 1536 (1993).

[69] The key task for state and local government officials was to "make a reasonable effort to ascertain within [five] business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2).

[70] *Printz*, 521 U.S. at 935.

[71] *Id.*

[72] *Id.*

[73] *Id. But see* Reno v. Condon, 528 U.S. 141 (2000) (distinguishing *New York* and *Printz*). In *Reno*, the Court upheld from constitutional attack the federal Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (2001). The legislation prohibited states from nonconsensual disclosure of personal information about drivers contained in state motor vehicle department records and otherwise regulated the states' use of the personal information about drivers. Although the Act "will require time and effort on the part of state employees," the Court in *Reno* expressly rejected South Carolina's challenge to the Act on the basis that the Act violated the constitutional principles set forth in either *New York* or *Printz*. *Reno*, 528 U.S. at 150. Finding *South Carolina v. Baker*, 485 U.S. 505 (1988), governing, instead, the Court stated in *Reno* that the legislation at issue regulated state activities, and did not require states "in their sovereign capacity to regulate their own citizens." *Reno*, 528 U.S. at 150-51. The Act regulated the states merely as "the owners of databases." *Id.* at 151. The legislation, the Court determined, does not violate the principles set forth in either *New York* or *Printz* because it does not require states to enact any laws or

III. THE SUPREME COURT'S RECENT EXPANSION OF THE PRINCIPLE OF STATE SOVEREIGN IMMUNITY

After reviewing cases regarding the constitutional limitations on congressional power generally outside of the context of state sovereign immunity, this article now shifts to its main concern. It considers the principle of state sovereign immunity with respect to private remedy litigation and the role of that principle in defining the relationship between the states and the national government.[74]

This article notes in particular the expansion of state sovereign immunity over the past decade by taking into account each of the Supreme Court's six major sovereign immunity cases decided during that period. The first of these decisions, *Seminole Tribe of Florida v. Florida*,[75] was decided in 1996. Three other decisions, *Alden v. Maine*,[76] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[77] and its companion *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[78] were handed down by the Court on the same day, June 23, 1999. These decisions were followed in 2000 by *Kimel v. Florida Board of Regents*[79] and in 2001 by *Board of Trustees v. Garrett*.[80] A constant runs throughout all of these decisions beyond the obvious expansion of the principle of state sovereign immunity: each case was decided by the *same* 5-4 vote among the justices, evidencing both the firm line drawn between those

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regulations, "and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.*

[74] For a general discussion of the place of sovereign immunity in the American legal experience, see Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). For an excellent discussion of the role of the Eleventh Amendment and state sovereign immunity, *see* Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976). Professor Tribe points out "[t]he law of intergovernmental immunities rarely occasions serious scholarly attention in an era intrigued by grander struggles." *Id.*

[75] 517 U.S. 44 (1996).

[76] 527 U.S. 706 (1999).

[77] 527 U.S. 627 (1999).

[78] 527 U.S. 666 (1999). There are two *College Savings Bank* cases because the plaintiff bank brought two separate actions against the state in federal court. One suit alleged that Florida had infringed the bank's patents in violation of 35 U.S.C. § 271(a). *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999). The other action alleged that the state had engaged in false and misleading advertising of its product in violation of the federal Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1125(a) (2001). *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). The Court granted certiorari to the bank in both cases on the same day. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 525 U.S. 1064 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 525 U.S. 1063 (1999).

[79] 528 U.S. 62 (2000).

[80] 531 U.S. 356 (2001).

representing the Court and the members of the minority, and the narrow majority currently driving the expansion of states' rights, sovereign immunity constitutional jurisprudence in particular.[81]

A. Seminole Tribe*: Declaring a Constitutional Limitation upon Congress' Ability to Abrogate State Sovereign Immunity under Article I in Actions against the State in Federal Court*

Seminole Tribe of Florida v. Florida[82] was originally instituted in federal court by the Seminole tribe against the State of Florida and its Governor for the state's refusal to negotiate for the inclusion of certain gaming activities in a tribal-state compact. The tribe alleged in its suit that Florida had violated a requirement to engage in good faith negotiations with the tribe, as set out in the federal Indian Gaming Regulatory Act.[83] Congress had passed the regulatory Act under constitutional authority set forth in the Article I Indian Commerce Clause.[84] In enacting the Indian gaming legislation, Congress expressed its "clear intent to abrogate the States' sovereign immunity."[85]

The *Seminole Tribe* Court held that, notwithstanding Congress' clear intention to abrogate the states' sovereign immunity,[86] the Indian Commerce Clause does not provide Congress with the power to grant jurisdiction over a state that does not consent to suit.[87] The Eleventh Amendment,[88] the Court determined, prevented

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[81] Dissenting in each of these cases are Justices Breyer, Ginsburg, Souter, and Stevens.

[82] 517 U.S. 44 (1996).

[83] Congress passed the Indian Gaming Regulatory Act in 1988 to establish a statutory basis for the operation and regulation of gaming by Native American tribes. *See* 25 U.S.C. § 2702 (2001). The Act required states to negotiate in good faith to bring about a tribal-state compact on the matter. *See* 25 U.S.C. § 2710(d)(3). The Act also authorized Native American tribes to sue states in federal court for the failure to negotiate in good faith. *See* 25 U.S.C. § 2710(d)(7)(A)(I) (2001).

[84] U.S. CONST. art. 1, § 8, cl. 3.

[85] *Seminole Tribe*, 517 U.S. at 47.

[86] *Id.*

[87] *Id.* The Court also held that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), did not supply a basis to enforce the grant of jurisdiction against the Governor as a state official. *See generally* Seminole Tribe, 517 U.S. at 73-76. *Ex parte Young* may provide an exception to a state's Eleventh Amendment immunity under circumstances when a plaintiff raises claims against state officials, rather than the state itself, and seeks declaratory and injunctive relief (rather than monetary damages). A discussion of the ability of private parties to bring actions against state officials, as opposed to state governmental entities, is beyond the scope of this paper. For a recent discussion by the Court of the availability of relief under *Ex parte Young*, see Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (barring tribe's claims against state officials on Eleventh Amendment grounds).

[88] The Eleventh Amendment states: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any foreign State." U.S. CONST. amend. XI.

Congress from authorizing suits by the tribes against the states under the clause.[89]

The Court had found authority under prior case law for Congress to abrogate state sovereign immunity under only two provisions of the Constitution, the Fourteenth Amendment[90] and the Article I Commerce Clause.[91] The Fourteenth Amendment had been found to expand the national power under the Constitution and to do so at the expense of state autonomy within the context of the provisions of that Amendment.[92] The Court explained that Section 1 of the Fourteenth Amendment contains specific prohibitions on state action, and Section 5 of the Amendment expressly authorizes Congress to "enforce, by appropriate legislation, the provisions of the article."[93] The Court stated in *Seminole Tribe* that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that [Section] 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment."[94]

As to the Article I Commerce Clause, the *Seminole Tribe* Court noted that in only one prior case, *Pennsylvania v. Union Gas Co.*,[95] did the Court uphold on the basis of that provision Congress' abrogation of the states' Eleventh Amendment immunity.[96] A plurality[97] of the *Union Gas* Court had found that the Commerce Clause authorized abrogation, since Congress' power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages."[98] Under the *Union Gas* rationale, the Article I Indian Commerce Clause would be indistinguishable from the Article I Interstate Commerce Clause and

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[89] Of course, even assuming the existence of appropriate authority for Congress to act, "private rights of action to enforce federal law must be created by the Congress." Alexander v. Sandoval, 121 S. Ct. 1511 (2001).

[90] U.S. CONST. amend. XIV.

[91] U.S. CONST. art. 1, § 8, cl. 3.

[92] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).

[93] *Id.* at 444.

[94] *Seminole Tribe*, 517 U.S. at 59. *See also, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). To be effective, the legislation abrogating state sovereign immunity under Section 5 must be "appropriate." *See, e.g., infra* notes 175-92 and accompanying text.

[95] 491 U.S. 1 (1989).

[96] *Seminole Tribe*, 517 U.S. at 59.

[97] In *Union Gas*, Justice White added the fifth vote, but he wrote a separate opinion concurring in part and dissenting in part. While the Court in *Seminole Tribe* makes much of this separate opinion, a reading of Justice White's opinion in *Union Gas* makes clear that he agreed that Congress had the authority under Article I of the Constitution to abrogate the Eleventh Amendment barrier to suit. He did disagree, however, with the reasoning of the other four justices as to the requirement that Congress establish an "unmistakably clear" statement of abrogation, and whether Congress had made such a statement of abrogation in the legislation at issue. *See* 491 U.S. 1, 57 (White, J., concurring in part and dissenting in part).

[98] *Union Gas*, 491 U.S. at 19.

would support the congressional abrogation of Florida's sovereign immunity.[99]

However, in *Seminole Tribe* the Court departed from the rationale set forth in *Union Gas*, finding that *Union Gas* "was wrongly decided."[100] The Court stated that congressional utilization of Article I to expand the scope of federal courts jurisdiction under Article III contradicted the "'unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction.'"[101] Since the Court viewed *Union Gas* as a departure from the established understanding "that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III,"[102] *Seminole Tribe* expressly overruled it.[103]

The *Seminole Tribe* Court reconfirmed "that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."[104] The Eleventh Amendment, the Court made clear, prevents congressional authorization of private party actions against states without the states' consent, even when the Constitution grants Congress complete lawmaking authority over a particular policy area. The Eleventh Amendment, the Court stated, "restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[105] As a result, the Court dismissed the suit against the State of Florida for lack of jurisdiction.[106]

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[99] *See Seminole Tribe*, 517 U.S. at 63 ("We agree with petitioner that the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause.").

[100] *Id.* at 66.

[101] *Id.* at 65 (quoting *Union Gas*, 491 U.S. at 39).

[102] *Id.* at 64.

[103] *Id.* at 66. *Seminole Tribe* left intact the rule established in prior Court decisions that Section 5 of the Fourteenth Amendment provides a basis for Congress to abrogate state immunity from suit via statutes properly enacted pursuant to that clause. *See Fitzpatrick*, 427 U.S. at 445. *See supra* note 93 and accompanying text.

[104] *Seminole Tribe*, 517 U.S. at 72. *Compare id.* at 98 (Stevens, J., dissenting) (arguing that "neither the majority's opinion today, nor any earlier opinion by any Member of the Court, has identified any acceptable reason for concluding that the absence of a State's consent to be sued in federal court should affect the power of Congress to authorize federal courts to remedy violations of federal law by States or their officials in actions not covered by the Eleventh Amendment's explicit text.").

[105] *Seminole Tribe*, 517 U.S. at 72-73.

[106] *Id.* at 73.

B. Alden v. Maine*: Declaring a Constitutional Limitation upon Congress' Ability to Abrogate State Sovereign Immunity under Article I in Actions Against the State in State Court*

Alden v. Maine[107] concerned a federal action originally instituted by Maine probation officers against their state employer for alleged violations of the overtime pay provisions of the Fair Labor Standards Act of 1938 ("FLSA").[108] However, while that action was pending, the Supreme Court decided *Seminole Tribe.* As a result, the district court dismissed the federal action based on the holding in *Seminole Tribe* that Congress did not have authority under Article I to abrogate the states' sovereign immunity from suits instituted against the states in federal court, and the court of appeals thereupon affirmed.[109]

The petitioners then filed the same action in Maine state court, since the FLSA had expressly authorized private actions against states in state courts without regard to their consent.[110] The trial court dismissed the case on sovereign immunity grounds, and on appeal, the Maine Supreme Judicial Court affirmed.[111]

The U.S. Supreme Court affirmed the judgment, holding that the powers delegated to Congress pursuant to Article I of the Constitution "do not include the power to subject nonconsenting States to private damages in state courts."[112] The Court explained that its holding was necessitated by a consideration of "the essential principles of federalism and . . . the special role of the state courts in the constitutional design."[113]

The *Alden* decision represents a natural extension of the Court's *Seminole Tribe* rationale. Mere immunity from suit in federal courts (as required by the Court's decision in *Seminole Tribe*) is simply insufficient "to preserve the dignity of the States."[114] The Court stated:

> A power to press a State's own courts into federal service to coerce the other branches of the State. . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.[115]

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[107] 527 U.S. 706 (1999).

[108] 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.*

[109] Mills v. Maine, 118 F.3d 37 (1st Cir. 1997).

[110] *See* 29 U.S.C. §§ 216(b), 203(x).

[111] Alden v. State, 715 A.2d 172 (1998).

[112] *Alden*, 527 U.S. at 712. The Court also found that Maine had neither waived nor consented to suit against it for overtime pay under FLSA. *Id.* at 757-58.

[113] *Id.* at 748. ("Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.").

[114] *Id.* at 749.

[115] *Id.* However, in his dissent, Justice Souter points out that the majority, in fashioning its analysis, forgets the fundamental principle of separation of powers. He explains:

When the state judiciary enforces federal law against state officials, as the Supremacy

Such degree of control on the part of the federal government over state governmental processes would, in the Court's view, denigrate "the separate sovereignty of the States."[116]

The *Alden* Court made it clear that the states enjoy a separate sovereignty. The states enjoyed such sovereignty "before the ratification of the Constitution," and they "retain" that sovereignty today "(either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments."[117] Additionally, any doubt regarding the sovereign status of the states, the Court noted, "is removed by the Tenth Amendment."[118]

For the Court, the federal political system preserves the sovereignty of the states in two ways. First, American federalism reserves to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."[119] Second, "even as to matters within the competence of the National Government," the Constitution secures "the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people.'"[120] Therefore, the Court explained, the states in the federal political system "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."[121] Moreover, the availability to the states of immunity from suit, the Court stated, is "central to sovereign dignity."[122]

Clause requires it to do, it is not turning against the State's executive any more than we turn against the Federal Executive when we apply federal law to the United States: it is simply upholding the rule of law. There is no "commandeering" of the State's resources where the State is asked to do not more than enforce federal law.

Id. at 801 (Souter, J., dissenting)

[116] *Id.* at 749. *But see id.* at 800 (Souter, J., dissenting) ("Maine is not sovereign with respect to the national objective of the FLSA."). Justice Souter explained that the state "is not the authority that promulgated the FLSA, on which the right of action in this case depends." *Id.* "That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided." *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). That authority, Justice Souter stated, "is not contested here." *Id.*

[117] *Alden*, 527 U.S. at 713.

[118] *Id.* The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[119] *Alden*, 527 U.S. at 714.

[120] *Id.* (quoting Printz v. U.S., 521 U.S. 898, 919-20 (1997)).

[121] *Id.* at 715.

[122] *Id. But see Seminole Tribe*, 517 U.S. at 97 (Stevens, J., dissenting) (arguing that indignity is an "embarrassingly insufficient" basis for the application of sovereign immunity

The Court went to a considerable length in *Alden* to make it clear that the Eleventh Amendment does not grant sovereign immunity to the states; it merely confirms the existence of state sovereign immunity as a constitutional principle.[123] The point is an important one, since the facts surrounding the particular assertion of sovereign immunity in *Alden* clearly place the case outside the purview of the Amendment's literal text. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[124] However, *Alden* did not involve a suit brought by citizens of other states or foreign governments. Suit was initiated in state court by citizens of Maine.

Since the Eleventh Amendment merely confirms rather than establishes the principle of state sovereign immunity, "it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."[125] Based on its review of the "history, practice, precedent, and structure of the Constitution,"[126] the Court found that the states were "residuary sovereigns."[127] They possess immunity, the Court stated, that is broader than what the literal text of the Eleventh Amendment provides for, such that they "retain immunity from private suit in their own courts, and immunity beyond the congressional power to abrogate by Article I legislation."[128]

C. The College Savings Bank *Cases: Affecting the Ability to Maintain Actions Against the States for Violation of Patent and Trademarks Rights and for False and Misleading Advertising*

The *College Savings Bank* cases, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[129] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[130] were instituted separately in federal court by the same plaintiff.[131] In the first case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* [hereinafter *College Savings Bank I*], the plaintiff bank alleged patent infringement against the State of Florida. The bank brought the action pursuant to Congress' express

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to the states).

[123] *Alden*, 527 U.S. at 728-29.

[124] U.S. CONST. amend XI.

[125] *Alden*, 527 U.S. at 729.

[126] *Id.* at 754.

[127] *Id.* at 748.

[128] *Id.* at 754.

[129] 527 U.S. 627 (1999).

[130] 527 U.S. 666 (1999).

[131] There are two *College Savings Bank* cases because the bank brought two separate actions against the state in federal court. *See supra* note 78.

abrogation of state sovereign immunity under the Patent Remedy Act.[132]

In the second case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* [hereinafter *College Savings Bank II*], the bank alleged that Florida had made false claims about the state's college savings plan in violation of the federal Trademark Act of 1946, or "Lanham Act."[133] Congress, through the Trademark Remedy Clarification Act, specifically subjected the states to a private cause of action for false claims under the Lanham Act, and expressly abrogated the states' immunity from suit.[134]

1. College Savings Bank I

In *College Savings Bank I*, the Court of Appeals had upheld Congress' abrogation of state sovereign immunity from patent infringement suits pursuant to its authority under Section 5 of the Fourteenth Amendment.[135] However, the Supreme Court disagreed with the Court of Appeal's determination and held that the relevant statute could not be upheld as appropriate congressional legislation to enforce Fourteenth Amendment rights.[136]

The Court reiterated in *College Savings Bank I* what it had stated in *Seminole Tribe*, that "Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment."[137] However, for congressional legislation enacted pursuant to the Enforcement Clause of the Fourteenth Amendment to successfully abrogate state sovereign immunity, the legislation must be "appropriate."[138] To be appropriate, the legislation must meet the standard set forth by the Court in *City of Boerne v. Flores.*[139]

Applying the *City of Boerne* standard in *College Savings Bank I*, the Court found that the record did not show "a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic [Section] 5 legislation."[140] Instead, Congress appeared to have enacted the legislation "in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution."[141] In addition, the Court determined

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[132] 35 U.S.C. § 296(a) (2001).

[133] Trademark Act of 1946, 15 U.S.C. § 1125(a) (2001).

[134] 106 Stat. 3568. *See* 15 U.S.C. §§ 1122, 1125(a) (2001).

[135] *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 148 F.3d 1343, 1355 (Fed. Cir. 1998) ("Because Congress clearly expressed its intent to abrogate the sovereign immunity of the states to suit for patent infringement, and because Congress exercised its intent pursuant to a valid exercise of power, the decision of the district court denying Florida Prepaid's motion to dismiss the claim as barred by the Eleventh Amendment is affirmed.").

[136] *College Savings Bank I*, 527 U.S. at 630.

[137] *Id.* at 637.

[138] *Id.*

[139] 521 U.S. 507 (1997). *See supra* notes 30-46 and accompanying text.

[140] *College Savings Bank I*, 527 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at 526).

[141] *Id.* at 645-46.

that the provisions of the Patent Remedy Act at issue were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[142] The Act, the Court stated, exposed "[a]n unlimited range of state conduct" to private "claims of direct, induced, or contributory patent infringement" for an indefinite period.[143]

Nothing in the Patent Remedy Act, the Court concluded, limited the states' coverage to matters arguably involving constitutional violations, "such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed."[144] In addition, the Court asserted that Congress made no attempt to limit the scope of the legislation's remedy "to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement."[145] Instead, the Court stated that "Congress made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration."[146]

The Court found that "[t]he historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under [Section] 5 of the Fourteenth Amendment."[147] The Court stated that "[t]he examples of States avoiding liability for patent infringement by pleading sovereign immunity in federal court are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still."[148]

The Court recognized that Congress' "apparent and more basic aims" were "to

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[142] *Id.* at 646 (quoting *City of Boerne*, 521 U.S. at 532).

[143] *Id.*

[144] *Id.* at 646-47.

[145] *College Savings Bank I*, 527 U.S. at 647.

[146] *Id.* The Court found the Patent Remedy Act to be "particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Id. But see College Savings Bank I*, 527 U.S. at 662 (Stevens, J., dissenting) ("There is precise congruence between 'the means used' (abrogation of sovereign immunity in this narrow category of cases) and 'the ends to be achieved' (elimination of the risk that the defense of sovereign immunity will deprive some patentees of property without due process of law)"). Justice Stevens also argued in the dissent that the congruence "is equally precise whether infringement of patents by state actors is rare or frequent." *Id.* He elaborated:

> If they are indeed unusual, the statute will operate only in those rare cases. But if such infringements are common, or should become common as state activities in the commercial arena increase, the impact of the statute will likewise expand in precise harmony with the growth of the problem that Congress anticipated and sought to prevent. In either event the statute will have no impact on the States' enforcement of their own laws.

Id. at 662-63.

[147] *Id.* at 647.

[148] *Id.*

provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."[149] While this is a proper congressional concern under Article I, the Court stated, Article I does not provide Congress with the power to enact legislation abrogating states' sovereign immunity subsequent to the Court's holding in *Seminole Tribe.*[150]

2. College Savings Bank II

In *College Savings Bank II*, the Court considered whether the private cause of action granted by the Trademark Remedy Clarification Act ("TRCA")for false and misleading advertising

> is effective to permit suit against a State for its alleged misrepresentation of its own product - either because the TRCA effects a constitutionally permissible abrogation of state sovereign immunity, or because the TRCA operates as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Lanham Act.[151]

As stated previously,[152] Congress may properly authorize suit against the states pursuant to legislation appropriately enacted pursuant to Section 5 of the Fourteenth Amendment.[153] Also, states may waive sovereign immunity by consenting to suit.[154]

The bank in *College Savings Bank II* sought to fit the legislation within the Fourteenth Amendment, arguing that the TRCA was a constitutional exercise of congressional power under Section 1 of the Fourteenth Amendment. The bank claimed that Congress enacted the TRCA "to remedy and prevent state deprivations without due process of two species of 'property' rights: (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests."[155] However, the Court found that neither of the genera offered by the bank "qualifies as a property right protected by the Due Process Clause."[156]

The Court determined that the state's "alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion."[157] The Court also stated that the bank's "second assertion of a property

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[149] *Id.* at 647-48

[150] *Id* at 648. *See supra* note 105 and accompanying text.

[151] College Savings Bank II, 527 U.S. 666, 669.

[152] *See supra* note 94 and accompanying text.

[153] *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[154] *See* Clark v. Barnard, 108 U.S. 436 (1883).

[155] *College Savings Bank II*, 527 U.S. at 672.

[156] *Id.*

[157] *Id.* at 673.

interest rests upon an argument similar to the one just discussed, and suffers from the same flaw."[158] The assets of a business are property and a state taking of business assets is a "deprivation" within the meaning of the Due Process Clause of the Fourteenth Amendment.[159] However, the Court explained, "business in the sense *of the activity of doing business,* or *the activity of making a profit* is not property in the ordinary sense - and it is only *that,* and not any business asset, which is impinged upon by a competitor's false advertising."[160]

Since the Court failed to find a constitutional deprivation of property in the case, it did not pursue the next question that *City of Boerne* would have required the Court to consider, namely, whether the prophylactic measure taken pursuant to the enforcement clause to abrogate state sovereign immunity was "genuinely necessary" to prevent a Fourteenth Amendment violation.[161] The Court turned, instead, to the second issue before it, whether there had been a "waiver" by the State of Florida of its sovereign immunity.

The Court opined that waiver by a state of its sovereign immunity is generally found in those circumstances in which a state voluntarily invokes the jurisdiction of the federal courts, or when the state makes a "clear declaration" of its intent to submit to federal jurisdiction.[162] The Court stated that there was no claim in the instant case that Florida had expressly consented to suit in federal court, and the state had not affirmatively invoked federal jurisdiction.[163]

Instead, the claim was one of implied or constructive waiver of sovereign immunity by Florida, based on the fact that the state voluntarily engaged in specific business activities in interstate commerce. However, the Court stated that the sovereign immunity of the states, "no less than the right to trial by jury in criminal cases, is constitutionally protected."[164] It is "anomalous," the Court declared, to discuss "the 'constructive waiver' of a constitutionally protected privilege."[165] Therefore, the Court concluded that the State of Florida had not validly waived its

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[158] *Id.* at 675.

[159] *Id.*

[160] *College Savings Bank II*, 527 U.S. at 675. *But see id.* at 693 (Stevens, J., dissenting) (stating that the activity of doing business or making a profit is a form of property, as "good will" appears on the balance sheets of businesses and it "is the substantial equivalent of that 'activity.'"). Justice Stevens adds in his dissent that a state's "deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause." *Id.*

[161] *College Savings Bank II*, 527 U.S. at 675.

[162] *Id.* at 675-76.

[163] *Id.*

[164] *Id.* at 682.

[165] *Id.* The Court expressly overruled Parden v. Terminal Ry. of Ala. Docks Dept., 377 U.S. 184 (1964). *College Savings Bank II*, 527 U.S. at 680. *But see id.* at 699 (Breyer, J., dissenting) ("*Parden* had never been questioned because, *Seminole Tribe* or not, it still makes sense."). Justice Breyer complains that "[t]he line the Court today rejects has been drawn by this Court to place States outside the ordinary dormant Commerce Clause rules when they act as 'market participants.'" *Id.*

sovereign immunity through the state's activities within the stream of interstate commerce.

D. Kimel v. Florida Board of Regents*: Delineating the Appropriateness of Legislation Fashioned under Section 5 of the Fourteenth Amendment*

Kimel v. Florida Board of Regents[166] involved actions brought by private plaintiffs in three separate cases consolidated on appeal by the United States Court of Appeals for the Eleventh Circuit.[167] In each case, the plaintiffs sought money damages against their state employers (Alabama and Florida) for alleged age discrimination in violation of the Age Discrimination in Employment Act of 1967 ("ADEA").[168] In each case, the states had defended the suits against them by raising Eleventh Amendment immunity.

The plaintiffs argued that, under the ADEA, Congress had effectively abrogated the states' sovereign immunity. The *Kimel* Court stated that the determination of the plaintiffs' abrogation claim depended on the resolution of two questions; first, if Congress "unequivocally expressed its intent to abrogate" the states' immunity, and, second, if so, whether Congress "acted pursuant to a valid grant of constitutional authority."[169]

Congressional intent to abrogate state sovereign immunity and permit suits by private parties can only be effective where congressional intent to abrogate is "unmistakably clear in the language of the statute."[170] The Court in *Kimel*, however, found that the intent to abrogate is sufficiently clear in the ADEA, when the legislation is read in its entirety and as amended.[171] The critical issue for the Court then rested on whether "Congress effectuated that abrogation pursuant to a valid exercise of constitutional authority."[172]

In 1983, the Court determined in *EEOC v. Wyoming*[173] that the ADEA represented a valid exercise of power by Congress under Article I of the Constitution.[174] However, the Court's decision thirteen years later in *Seminole Tribe* made it clear that an Article I basis for abrogating state sovereign immunity is no longer tenable. Only the Section 5 Enforcement Clause of the Fourteenth Amendment can extend the power to Congress to constitutionally abrogate state sovereign immunity so as to support an authorization of private actions against the

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[166] 528 U.S. 62 (2000).

[167] The Court of Appeals, in a divided panel, held that the ADEA did not abrogate the states' sovereign immunity. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1988).

[168] 81 Stat. 602, as amended, 29 U.S.C. §§ 621 *et seq.*

[169] *Kimel*, 528 U.S. at 73.

[170] *Id.* (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

[171] *See id.* at 76-77.

[172] *Id.* at 78.

[173] 460 U.S. 226 (1983).

[174] *Id.* at 243.

states without their consent. As stated previously,[175] for legislation enacted pursuant to the Section 5 to successfully abrogate state sovereign immunity, the legislation must be deemed "appropriate."[176] To be appropriate, the legislation must meet the standard set forth by the Court in *City of Boerne v. Flores.*[177]

Therefore, the *Kimel* Court turned to the "appropriateness" of the legislation, applied the *City of Boerne* "congruence and proportionality" standard to the case, and found that the ADEA was not appropriate legislation supporting the abrogation of sovereign immunity.[178] The Court stated that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[179] Age discrimination is not a suspect classification under the Equal Protection Clause.[180] Therefore, states are allowed to discriminate constitutionally if the age classification "is rationally related to a legitimate state interested."[181] This includes, the Court explained, the states' permissible drawing of lines "on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases."[182]

Judged within the context of the Equal Protection Clause jurisprudence, the Court stated, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[183] The ADEA, through its broad restriction on age discrimination, "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[184]

The Court made it clear that the mere fact that the ADEA prohibits "very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to" the inquiry under Section 5. The Court stated that "[d]ifficult and intractable problems often require powerful remedies, and we have never held that [Section] 5 precludes Congress from enacting reasonably prophylactic legislation."[185] The Court must determine "whether the ADEA is in fact just such an appropriate remedy, or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination."[186] A means to do this, the Court stated, is "by examining the legislative record containing the reasons for

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[175] *See supra* note 138 and accompanying text

[176] *Kimel*, 528 U.S. at 80.

[177] 521 U.S. 507 (1997). *See supra* notes 36-41 and accompanying text.

[178] *Kimel*, 528 U.S. at 82-83.

[179] *Id.* at 83.

[180] *Id. See also, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

[181] *Kimel*, 528 U.S. at 83.

[182] *Id.* at 86.

[183] *Id.* (quoting *City of Boerne*, 521 U.S. at 532).

[184] *Id.*

[185] *Id.*

[186] *Kimel*, 528 U.S. at 86.

Congress' actions."[187]

An examination of the legislative record in *Kimel* revealed to the Court that the extension of the ADEA age discrimination prohibition to the states was "an unwarranted response to a perhaps inconsequential problem."[188] Congress, the Court stated, "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[189] Finding the evidence compiled by petitioners to show congressional attention to state government age discrimination "almost entirely of isolated sentences clipped from floor debates and legislative reports,"[190] the Court stated that its review of the record "as a whole" demonstrated "that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."[191] Although not determinative of the Section 5 inquiry, the Court stated that "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[192] The Court stated further that "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States," the ADEA was "not a valid exercise of Congress' power under [Section] 5 of the Fourteenth Amendment."[193] Therefore, the Court found the attempted abrogation by Congress of the states' sovereign immunity in the ADEA invalid.

E. Board of Trustees v. Garrett*: Building upon the Notion of "Appropriate" Legislation under Section 5 of the Fourteenth Amendment*

Board of Trustees v. Garrett[194] considered whether employees of Alabama may recover money damages for violation of Title I of the Americans with Disabilities Act of 1990 ("ADA").[195] Just as in *Kimel*, the state defended the litigation by raising Eleventh Amendment immunity, and the Court, finding it "clear" that Congress intended to rely on Section 5 of the Fourteenth Amendment as the authority for the ADA,[196] looked to whether the statute at issue was "appropriate [Section] 5 legislation."[197] In doing so, the Court reiterated that Section 5 legislation "reaching beyond the scope of [Section] 1's actual guarantees must

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[187] *Id.* at 88.
[188] *Id.* at 89.
[189] *Id.*
[190] *Id.*
[191] *Kimel*, 528 U.S. at 91.
[192] *Id.* at 91.
[193] *Id.*
[194] 531 U.S. 356 (2001).
[195] 104 Stat. 330, 42 U.S.C. §§ 12111-12117 (2001).
[196] *Garrett*, 531 U.S. at 364 n.3.
[197] *Id.* at 962.

exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[198]

In identifying the scope of the constitutional right at issue in *Garrett*, the Court determined that the Fourteenth Amendment's equal protection jurisprudence required only the minimum "rational-basis" review of the states' treatment of the disabled. Specifically, the Court stated, "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."[199]

Once the Court determines the scope of the constitutional right, it must then "examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled," since Section 5 can only be applied "in response to state transgressions."[200] However, the Court found that the ADA's legislative record "fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[201]

Even if it was possible to find a pattern of state discrimination on the legislative record, the Court made it clear in *Garrett* that "the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*."[202] Like its decision in *Kimel* regarding the regulation of age discrimination under the ADEA, the Court in *Garrett* concluded that the ADA presented a broad restriction on disability discrimination, such that the ADA prohibited substantially more employment decisions by states than would be held unconstitutional under the Equal Protection Clause.

For example, the Court pointed out that it would be constitutionally permissible (i.e., because it is "rational" under the applicable rational-basis review) for states to seek to "conserve scarce financial resources by hiring employees who are able to use existing facilities."[203] However, the ADA requires employers to make existing facilities "readily accessible to and usable by individuals with disabilities."[204] While the ADA exempts employers from the "reasonable accommodation"

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[198] *Id.* at 963 (quoting *City of Boerne*, 521 U.S. at 520). *See supra* notes 30-46 and accompanying text for a review of the *City of Boerne* decision.

[199] *Garrett*, 531 U.S. at 367. The court elaborated: "[The states] could quite hard headedly – and perhaps hardheartedly – hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.*

[200] *Id.*

[201] *Id.* at 369. *But see id.* at 391-424 (Breyer, J., dissenting) (listing hundreds of age discrimination examples by state and local governments as part of the legislative record). Justice Breyer stated that Congress "could have reasonably believed that these examples represented signs of a widespread problem of unconstitutional discrimination." *Id.* at 972 (Breyer, J., dissenting).

[202] *Garrett*, 531 U.S. at 371.

[203] *Id.*

[204] *Id.* at 371-72 (quoting 42 U.S.C. §§ 12112(5)(B), 12111(9)).

requirement where "undue hardship" is shown, "the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' on the employer."[205] The ADA also imposes on the employer the duty to establish the existence of an undue burden, while the Constitution requires instead that "the complaining party negate reasonable bases for the employer's decision."[206] Additionally, the Court stated that the ADA prevents the use in administration of standards, criteria, or methods that impose a disparate impact on the disabled. Evidence of disparate impact, the Court concluded, "is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny," let alone rational-basis analysis.[207]

The present case demonstrated to the Court the clear constitutional "shortcomings" of the ADA.[208] Congress could not authorize private actions against the states, the Court stated, without establishing "a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[209] The constitutional requirements simply were not met in the instant case, and "to uphold the Act's application to the States would [impermissibly] allow Congress to rewrite the Fourteenth Amendment law laid down by this Court."[210] Section 5, the Court added, "does not so broadly enlarge congressional authority."[211]

IV. CONCLUSION

In his dissent to *Alden*, Justice Souter linked the Court's recent state sovereign immunity cases to the failed judicial "experiment" with laissez-faire in the first part of the Twentieth century.[212] He wrote:

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[205] *Id.* at 372. *But see id.* at 391-424 (Breyer, J., dissenting) ("And what is wrong with a remedy that, in response to unreasonable employer behavior, requires an employer to make accommodations that are reasonable?").

[206] *Id.* at 372.

[207] *Garrett*, 531 U.S. at 372.

[208] *Id.*

[209] *Id.* at 371-72.

[210] *Id.* at 372.

[211] *Id.*

[212] *Alden*, 527 U.S. at 814 (Souter, J., dissenting). Justice Souter specifically referenced "[t]he resemblance of today's sovereign immunity to the *Lochner* era's industrial due process." *Id.* The term, "Lochner," refers to the case *Lochner v. New York*, 198 U.S. 45 (1905), and a period in Court history from about 1897 to 1937 in which the Court invalidated a number of state and federal laws regulating business on due process grounds. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-3 at 567-68 (2d ed. 1988). Interestingly, Justice Breyer has raised another parallel with *Lochner*. *See College Savings Bank II*, 527 U.S. at 701 (Breyer, J., dissenting) ("By interpreting the Constitution as rendering immutable this one common-law doctrine (sovereign immunity), *Seminole Tribe* threatens the Nation's ability to enact economic legislation needed for the future in much the

> The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution.[213]

Justice Souter referred to the Court's position on state sovereign immunity as "probably . . . fleeting," "unrealistic," and "indefensible."[214]

It is remarkable that each of the Court's sovereign immunity decisions was decided by the *same* 5-4 vote among the justices, and only time will tell how fleeting the Court's attachment to states' rights and its expansive application of the doctrine of sovereign immunity will be. The thinnest of Court majorities is shaping today's state sovereign immunity jurisprudence in a dramatic fashion.

No converts to the Court's majority position appear likely to come from the four justices now in the minority. Each of the current justices on the Court is steadfast in his and her position. For example, in *Kimel,* Justices Souter, Ginsburg, and Breyer joined Justice Stevens in yet another strongly worded dissent. Justice Stevens wrote, for example, that he was "unwilling to accept *Seminole Tribe* as controlling precedent" because, "[f]irst and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framer's conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of the Court."[215]

The next vacancy on the Court will be critical to the development of the law. The appointment of the next justice to the Court will decide whether the aggressive enhancement of the principle of state sovereign immunity undertaken by the current majority will continue—an enhancement that has left two prior cases, *Pennsylvania v. Union Gas Co.*[216] and *Parden v. Terminal R. of Alabama Docks Department,*[217] expressly overruled in its wake.

The central element underlying the Court's rationale for enhancement of state sovereign immunity (as laid forth at length in the *Alden* decision) is also remarkable. The Court principally relies on the conclusion that the states' immunity from suit is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."[218] In other words, state sovereign immunity has constitutional stature because of a pre-existing doctrine of state sovereign immunity.

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way that *Lochner v. New York* . . . threatened the Nation's ability to enact social legislation over 90 years ago.").

[213] *Alden*, 527 U.S. at 814 (Souter, J., dissenting).

[214] *Id.*

[215] 528 U.S. 62, 97-98 (2000) (Stevens, J., dissenting in part and concurring in part).

[216] 491 U.S. 1 (1989). *See supra* note 103 and accompanying text.

[217] 377 U.S. 184 (1964). *See supra* note 165.

[218] *Alden*, 527 U.S. at 713.

According to the Court, the constitutionality of state sovereign immunity does not derive from the Eleventh Amendment. The Eleventh Amendment merely confirms its existence as a constitutional principle.[219] As stated earlier in this article,[220] that prescript is extremely important to the Court's analysis and doctrinal expansion, as the nature of the particular assertion of sovereign immunity in *Alden* falls outside the literal text of the Amendment. The Eleventh Amendment prohibits the national judicial power from extending "to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[221] *Alden*, of course, involved a suit brought against the State of Maine by its own citizens.

The pre-existing doctrine of sovereign immunity raises two interesting points. First, if the decision of the Court is to turn on history, then that history is not as clear as the Court has presented it in its opinions. A significant number of commentators disagree with the Court's historical interpretation.[222] While historical interpretation can serve to drive the judicial methodology in a case analysis, a weak historical basis necessarily leads to a weak methodology—particularly when that basis is designed to serve as the support for a dramatic expansion of legal principle.

As Justice Souter argued in his *Alden* dissent, "[t]here is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable."[223] He wrote, "[w]hether one looks at the period before

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[219] *Id.* at 728-29.

[220] *See supra* notes 123-24 and accompanying text.

[221] U.S. CONST. amend XI.

[222] A discussion of the historical underpinnings of the sovereign immunity doctrine is beyond the scope of this article. However, the dissenting opinions written in the sovereign immunity cases develop the historical contradictions well. The reader is referred particularly to the dissenting opinions of Justice Souter in *Alden* and Justice Stevens in *Seminole Tribe*. *Alden*, 527 U.S. at 760 (Souter, J., dissenting); *Seminole Tribe of Florida v. Florida*, 517 U.S. at 76 (Stevens, J., dissenting). *See also, e.g.*, TRIBE, *supra* note 212, § 3-25 at n.8 ("A powerful argument has been advanced that the eleventh amendment should not be read as a constitutionalization of state sovereign immunity at all," and collecting, as examples, an extensive list of law review commentaries). *See generally* John Minor Wisdom, *Foreward: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984). Justice Wisdom wrote "[I]t is illusory, if not misleading, to argue that we are keeping faith with the Framers by narrowing the powers of the central government because of the states' reserved power as sovereigns." *Id.* at 1073. He also quoted Irving Brant as follows: "'State sovereignty had virtually no place in the scheme of government Madison outlined to Washington, Randolph and Jefferson on the eve of the Constitutional Convention. The state governments were to be regarded as 'subordinately useful' local authorities subject to 'a due supremacy of the national authority.'" *Id.* at 1074 (quoting IRVING BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION, 1787-1800 13 (1950)).

[223] *Alden*, 527 U.S. at 764 (Souter, J., dissenting). *See also id.* at 795 ("It is clear enough that the Court has no historical predicate to argue for a fundamental or inherent theory of sovereign immunity as limiting authority elsewhere conferred by the Constitution or as

the framing, to the ratification controversies, or to the early republican era, the evidence is the same."[224] He explained:

> Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; [and] some thought sovereign immunity was a common -law power defeasible, like other common -law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from common -law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it.[225]

Second, the finding of broad state sovereign immunity of constitutional import outside the literal text of the Eleventh Amendment and granted by implication to the states through pre-existing doctrine, is in itself interesting when advocated, as it is in this setting, by justices generally viewed as Court conservatives.[226] In the not too distant past, it has typically been the "liberal" justices who have been criticized by conservatives for their activist, constitutional "penumbras" and "shadows,"[227] which were employed to create constitutional rights such as the constitutional zone of privacy. Certainly, the Court has engaged in an aggressive enhancement of the principle of state sovereign immunity.[228] The Court has been so aggressive that Justice Stevens wrote in his *Kimel* dissent that the "kind of judicial activism manifested" by the majority in this line of authority "represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."[229] It can be argued that there has been a change of mantle and the development of a modern conservative activism on the Court. At minimum, this is true as to federalism concerns, where the majority has carved out from "fundamental postulates implicit in the constitutional design"[230] what can be viewed as a constitutional zone of sovereign immunity for the states.

The Court's decisions in the several sovereign immunity cases have expanded states' rights at the expense of private citizens by eliminating or at least restraining damage claims against the states on the part of aggrieved parties. From the Court's perspective, this helps to ensure that states "are not relegated to the role of mere provinces or political corporations, but retain the *dignity*, though not the full authority, of sovereignty."[231] However, as Justice Stevens pointed out in his dissent to *Seminole Tribe*, preventing "indignity" is in reality "an embarrassingly

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imported into the Constitution by the Tenth Amendment.").

[224] *Id.* at 764.

[225] *Id.*

[226] *See, e.g.*, PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 481-82 (1999).

[227] *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977).

[228] *See supra* notes 216-17 and accompanying text.

[229] *Kimel*, 528 U.S. at 98-99 (Stevens, J., dissenting).

[230] *Alden*, 527 U.S. at 729.

[231] *Id.* at 715 (emphasis added).

insufficient" rationale.[232]

Justice Souter, in his dissent to *Alden,* also raised concern over the majority's appeal for the preservation of state dignity through the doctrine of sovereign immunity. He stated that sovereign, or "royal dignity" is "inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own."[233] Justice Souter added that "[w]hatever justification there may be for an American government's immunity from private suit, it is not dignity."[234] This is particularly an issue when the Court's decisions preclude private remedies to those who have faced discrimination at the hands of state employers based on their age or disability. These people have faced their own personal indignities. It is no consolation that the Court has upheld the sovereign "dignity" of the state employer when that employer imposed the indignity of discrimination on them in the first place.

Moreover, regardless of the argument used to buttress sovereign immunity for the states, the Court's expansion of the doctrine in these cases clearly runs counter to the general thrust of modern law to make states increasingly liable to citizens for their actions.[235] In effect, the Court promotes sovereign immunity at a time when the doctrine is increasingly disfavored.

In his dissent to *Kimel*, Justice Stevens wrote that "[t]here is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States."[236] He urges respect for "the Framers' decision to assign the business of lawmaking to the Congress," especially when it comes to a consideration of the breadth of Section 5.[237] The importance of that judicial respect, Justice Stevens states, "dictates firm resistance to the present majority's repeated substitution of its own views of

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[232] *Seminole Tribe*, 517 U.S. at 97 (Stevens, J., dissenting).

[233] *Alden*, 527 U.S. at 802 (Souter, J., dissenting)

[234] *Id.* at 802-03. Souter explained that "the very idea of dignity ought also imply that the State should be subject to, and not outside of, the law" *Id.* at 803 n.35.

[235] *See, e.g.,* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 790 (3d ed. 1988) ("The growing trend is toward making state governments liable . . . ."); Note, *In Defense of Tribal Sovereignty*, 95 HARV. L. REV. 1058, 1068-69 (1982) (discussing the "clear trend" toward the virtual elimination of common law immunities from suit). Justice Stevens in *Seminole Tribe* identified "the questionable heritage" of the sovereign immunity doctrine and suggested "valid reasons for limiting, or even rejecting that doctrine altogether, rather than expanding it." 517 U.S. at 95 (Stevens, J., dissenting). Looking to "the bloody path trod by English monarchs," the defunct, devine right theory, and past "society where noble birth can justify preferential treatment," Justice Stevens found the features of sovereign immunity's "English ancestry" such as to make the doctrine "particularly unsuitable for incorporation into the law of this democratic Nation." *Id.* at 95-96.

[236] *Kimel*, 528 U.S. at 96 (Stevens, J., dissenting).

[237] *Id.*

federalism for those expressed in statutes enacted by the Congress and signed by the President."[238]

The Court imposes on its constitutional analysis of permissible Section 5 Congressional enforcement power a non-deferential review of Congress' findings of discrimination by the states. It seems, however, that Section 5 is in the Constitution precisely to affect the position of the states with respect to the federal government, particularly with respect to congressional legislation. The Fourteenth Amendment is designed to prohibit the states from denying people, among other things, the equal protection of the law. Section 5 expands federal power by specifically authorizing Congress to enforce the Amendment's terms against state action. Justice Breyer was on firm ground when he wrote in his dissent to *Garrett*:

> Rules for interpreting [Section] 5 that would provide States with special protection, however, run counter to the very object of the Fourteenth Amendment. By its terms, that Amendment prohibits *States* from denying their citizens equal protection of the laws .... Hence 'principles of federalism' that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.[239]

Further, the Court, in its Section 5 analysis, holds Congress to an evidentiary standard more applicable to the judiciary, although Congress is not a lower court in the federal system but a *legislative* body. In *Kimel*, the Court stated that "Congress' [Section] 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."[240] Section 5 gives Congress the power "to enforce" the Amendment, and that includes, as the Court stated, "the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[241] That language offered by the Court's majority speaks to a need to give deference to the deliberations of Congress, but that deference, in fact, is severely lacking in the Court's final analysis.[242]

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[238] *Id.*

[239] *Garrett*, 531 U.S. at 387 (Breyer, J., dissenting) (quoting City of Rome v. U.S., 446 U.S. 156, 179 (1980)).

[240] *Kimel*, 528 U.S. at 81.

[241] *Id.*

[242] Deference toward the political branch also arguably has its place even regarding the issue of the general institution of immunity from federal litigation. For example, Justice Stevens wrote in his dissent in *Seminole Tribe* that "federalism concerns . . . may well justify a grant of immunity from federal litigation in certain classes of cases." 517 U.S. at 98-99. He added that "[s]uch a grant, however, should be the product of a reasoned decision by the policymaking branch of our Government," and "[f]or this Court to conclude that timeworn

Related to the issue of non-deference toward the deliberations of the federal political branch and underlying its sovereign immunity decisions is the Court's apparent concern for the policy-making *ability* of the Congress. This concern may stem from the Court majority's sense of its own superiority, such that it is justified in substituting its own views for that of Congress'. Yale Professor Akhil Amar has framed this issue bluntly and well. "It's not that the court loves the states," he is quoted as saying, "[i]t's that the justices hate Congress and love themselves even more."[243] "To them, the court really is supreme," he adds. If this, indeed, is the case, then such a mindset on the part of the Court's majority can fuel a judicial boldness that will provide scant deference to the democratically elected Congress.

It is quite clear that Congress had substantial evidence of the existence of disability discrimination in the legislative record that the Court reviewed in *Garrett.* Justice Breyer, in his dissent, discussed the "powerful evidence of discriminatory treatment throughout society in general" accumulated by the Congress.[244] Congress, he wrote, had "compiled a vast legislative record" of ADA employment discrimination through a process that included 13 congressional hearings, "attended by more than 30,000 people, including thousands who had experienced discrimination first hand."[245] Justice Breyer wrote persuasively that "[t]here is no particular reason to believe that [the states] are immune from the 'stereotypical assumptions' and pattern of 'purposeful unequal treatment' that Congress found prevalent"[246] He also wrote that "[t]here are roughly 300 examples of discrimination by state governments themselves in the legislative record"[247] and

> hundreds of instances of adverse treatment at the hands of state officials—instances in which a person with a disability found it impossible to obtain a state job, to retain state employment, to use the public transportation that was readily available to others in order to get to work, or to obtain a public education, which is often a prerequisite to obtaining employment.[248]

The legislative record of discriminatory treatment accumulated by the Congress in the legislative process that resulted in the passage of the ADA was much more than the "minimal" evidence of discrimination, as the Court claimed.[249]

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shibboleths iterated and reiterated by judges should take precedence over deliberations of the Congress of the United States is simply irresponsible." *Id.* at 99.

[243] Joan Biskupic, *Fla. Recount Dominated High Court's Term*, USA TODAY, June 29, 2001, at 4A.

[244] *Garrett*, 531 U.S. at 378 (Breyer, J., dissenting).

[245] *Id.* at 377-78.

[246] *Id.* at 378.

[247] *Id.*

[248] *Id.*

[249] *Garrett*, 531 U.S. at 378. For the Court's discussion of this number in its review of the evidence, see *id.* at 368-72 ("Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.").

The Court stated in *Alden* that the constitutionalization of sovereign immunity "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."[250] The states, the Court opined, "are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design."[251] This fact, of course, requires the states to honor federal legislation enacted by Congress within its constitutional authority. However, the Court, by its sovereign immunity decisions, has prohibited private actions to enforce the federal law in federal or state courts, absent state consent to be sued, when those rights are created pursuant to authority under Article I. It has also invalidated congressional abrogation of states' sovereign immunity from private suit for money damages when legislation is not "appropriate" under its understanding of the scope of Section 5 of the Fourteenth Amendment. The Court's position, that the states must meet their federal law obligations (as stated by the Court) within the context of decisions that have the impact of restraining private remedies to enforce those obligations, lacks logic. As Justice Breyer wrote in his dissent to *College Savings Bank II*, if Congress has "the power to create substantive rights that bind States (despite their sovereignty)," then Congress must have "the subsidiary power to create related private remedies that bind states (despite their sovereignty)."[252]

In *Alden*, the Court stated further that it was "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[253] Hopefully, the Court's confidence in the existence of an inherent "good faith" on the part of the states is well placed. It may have to be. Taking away the opportunity for aggrieved parties to seek redress through private suits, which is generally an effective avenue to help ensure that persons, including the states, meet their legal obligations, is a risky endeavor.[254]

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[250] *Alden*, 527 U.S. at 754-55.

[251] *Id.* at 755. *See also, e.g., Garrett*, 531 U.S. at 374 n.9 ("Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I [of the ADA] does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States.").

[252] *College Savings Bank II*, 527 U.S. at 701 (Breyer, J., dissenting).

[253] *Alden*, 527 U.S. at 755.

[254] *See College Savings Bank II*, 527 U.S. at 701 (Breyer, J,. dissenting) (stating that Congress may need the subsidiary power to create private remedies applicable against the states "lest States (if they are not subject to federal remedies) ignore the substantive Federal law that binds them, thereby disabling the National Government and weakening the very Union that the Constitution creates.").