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## Accomodation by Declaration

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# ACCOMMODATION BY DECLARATION

*Melvyn R. Durchslag\**

## I.

In 1994, in an attempt to devote more time to equal protection and due process in the required first year Constitutional Law course, I decided to teach federalism by using one problem. That problem was taken from the facts recited by the lower court in *United States v. Lopez*.<sup>1</sup> (Little did I know.) The discussion, as I recall, took about two days and was rather ho-hum, except for the occasional observation about how terrible it was that the Court allowed the big bad federal government to take over our very being. The classroom debate is now anything but boring. The result is that I am currently spending more time on federalism than I did before attempting to move on to bigger and better things. Indeed, I am now considering adding several days of additional time to the federalism discussion and introducing students to the Eleventh Amendment, something that before the Court's 1999 Term, I was content to leave to those who taught Federal Courts.

Upon reflection, I suppose that no one should be surprised by the renewed interest in states' rights, or federalism if you will. African Americans are no longer enslaved, nor do states subject them to the indignities of Jim Crow laws as they did thirty years ago. Consequently, the worst of states' rights history is just that—history. The centralizing forces of the Great Depression and four major overseas military conflicts, including two world wars, have been demagnetized, at least for the moment. On the other side, factors such as an increasingly diversified citizenry and the unfulfilled promises of Lyndon Johnson's Great Society have prompted some to question

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\* Professor of Law, Case Western Reserve University. My gratitude to Bill Marshall for those endless informal conversations that challenged me to constantly rethink my views of federalism.

1. 514 U.S. 549 (1995).

a “one size fits all” approach to our social and economic ills. What is surprising is the central role the Court has played in reversing the steady march of federal authority that has occurred since 1937, when the Court took the first step in leaving to Congress the question of how much centralized authority is appropriate.<sup>2</sup> In *Lopez*, the Court, while not necessarily limiting the substantive scope of federal commerce powers, held that where Congress regulates activities that are not evidently commercial and seem to fall within areas “ordinarily” regulated by the states, the basis for that regulation will be carefully scrutinized. Moreover, in a case that all but exhumed *The Slaughter-House Cases*,<sup>3</sup> the Court, largely for federalism reasons, limited Congress’s substantive power under Section 5 of the Fourteenth Amendment, a power that explicitly can be exercised directly against the states.<sup>4</sup> The constitutional basis for these limitations on federal legislative authority is the Tenth Amendment, or at least the spirit of state autonomy, which that amendment embodies. By limiting federal legislative/policy-making authority, the Court has necessarily increased the realm in which state policy choices hold sway.

Not only has the Court used federalism to draw a tighter noose around congressional ends, it has employed the rhetoric of federalism to limit as well the means by which Congress can enforce policies that are otherwise within its constitutional domain. It has held that concerns for state autonomy prohibit Congress from mandating that states use their legislative or executive resources to enforce federal law.<sup>5</sup> Most recently, the Court has prohibited Congress from using its Article I powers to enlist either the federal or the state courts to require state compliance with federal obligations *lawfully* imposed upon them.<sup>6</sup> As a result, a Maine probation officer who was

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2. Eric Waltenburg and Bill Swinford have described the recent foray into the federalism thicket as “the Court’s participation in the federalism equivalent of manifest destiny.” ERIC N. WALTENBURG & BILL SWINFORD, *LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT* 6 (1999).

3. 83 U.S. (16 Wall.) 36 (1873).

4. See *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997).

5. See *Printz v. United States*, 521 U.S. 898 (1997) (discussing executive resources); *New York v. United States*, 505 U.S. 144 (1992) (discussing legislative resources).

6. See *Alden v. Maine*, 119 S. Ct. 2240 (1999) (discussing state courts); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (discussing federal courts).

underpaid by a state agency may not seek compensation in the form of back pay. Subject to one (inadequate) exception I will mention below, he must be satisfied with a prospective order prohibiting the state's department head from further violating the federal standards. He may not be made whole.

The Court in *Alden v. Maine*<sup>7</sup> did not cite the Tenth Amendment to limit federal legislation that encroaches on state autonomy. Rather, the Court relied on the Eleventh Amendment, presumably because that amendment says something about the exercise of judicial power. It does not matter that the Eleventh Amendment says nothing about congressional power, much less about citizens suing their states of residence in state courts in order to rectify clear violations of a valid federal law. The Court, first in *Seminole Tribe* and later in *Alden*, held that state sovereign immunity, confirmed but not conferred by the Eleventh Amendment, protects the states from *all* nonconsensual private suits, except those in which the United States is the plaintiff. According to the Court, not only was this part of the original design,<sup>8</sup> but it is also a necessary element of a larger structural principle that protects state autonomy.<sup>9</sup> If Congress had the power to abrogate state sovereign immunity at will, an "unwarranted strain [would be placed] on the States' ability to govern in accordance with the will of their citizens."<sup>10</sup>

Odd? Indeed it is. Without violating a state's autonomous right to govern, Congress may obligate it to conform to federal standards, for example by requiring that its employees be paid the federally prescribed minimum wage. Congress, however, crosses the line when it enlists a federal or state judicial system to enforce that obligation. While I do not doubt that the Constitution operates on congressional means as well as congressional ends, its application in a case like *Alden* turns the sovereign immunity child into the autonomy parent. This Constitutional inversion and Justice Souter's response,<sup>11</sup> prompted me to re-read Professor Calvin Massey's ten-year-old,

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7. 119 S. Ct. 2240 (1999).

8. See *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

9. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 117 (1984); *Alden*, 119 S. Ct. at 2264-66.

10. *Alden*, 119 S. Ct. at 2264.

11. See *id.* at 2269-70 (Souter, J., dissenting).

pre-*Seminole Tribe*, article in which he argued that what is currently Eleventh Amendment sovereign immunity doctrine ought to be reconsidered and analyzed under Tenth Amendment autonomy principles.<sup>12</sup> This, he argued, would make sense of the line of Eleventh Amendment cases dating back to *Hans v. Louisiana*.<sup>13</sup> It would also provide an analytical framework for future cases in which the federal judiciary is asked to vindicate federal law against violating states.

Because I agree with Professor Massey, some of what I say here will add little to his arguments. But I hope to discuss it in a somewhat different way. Let me begin, however, by disclaiming being a doctrinal purist. I could live with all of the Court's century-old bad history and analytical incoherence if what the Court has accomplished is what it promised—an “acceptable” accommodation between state autonomy<sup>14</sup> and “the effective supremacy of rights and powers secured elsewhere in the Constitution.”<sup>15</sup> Unfortunately, I am not persuaded that it has.<sup>16</sup> Rather, the Court has seemingly accomplished what the anti-federalist Framers and the states of Virginia<sup>17</sup> and Maryland<sup>18</sup> could not:<sup>19</sup> a general distrust of federal

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12. See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 *passim* (1989). Professor David Shapiro made the same observation five years earlier, although he did so only in passing. See David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 62 & n.5 (1984).

13. 134 U.S. 1 (1890).

14. There is certainly a difference between state autonomy and state sovereign immunity. However, I will not discuss the difference in this short paper except to say that the latter is not necessary to achieve the former. As the Supremacy Clause implies (if not directly expresses), states in a federal system can be autonomous and still be subject to a “higher” law. Solecism or not, this is the essence of *imperium in imperio*. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341 *passim* (criticizing the continued use of “sovereignty” as descriptive of state autonomy).

15. *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part, and dissenting in part).

16. For the opposite view, see William P. Marshall, *Understanding Alden*, RUTGERS L. REV. (forthcoming).

17. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

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

19. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 675-81 (1993) (commenting on the similarity between Justice O'Connor's reasoning in *New York v. United States* and that of Judge Ca-

legislative power coupled with a reborn faith in state government bound together with a constitutional ribbon that we call federalism. The Eleventh Amendment's role in this reinvigorated constitutional federalism is analagous to that which the Due Process Clause played after *The Slaughter-House Cases* effectively read the Privileges or Immunities Clause out of the Fourteenth Amendment. If the Tenth Amendment is not read to protect the states' autonomy because prior judicial decisions have granted such a wide berth to Congress under Article I, the Eleventh Amendment will suffice to deny Congress the power to enforce its policies against the states.

Part II outlines what I perceive to be the most persuasive reasons for limiting congressional enforcement powers against the states while leaving the scope of its substantive powers untouched. Part II also describes why those arguments are either unpersuasive or do not serve to distinguish Eleventh Amendment immunity from Tenth Amendment autonomy or both. In Part III, I suggest that accommodation of state autonomy and federal authority can be accomplished better by focusing the Eleventh Amendment inquiry on judicial remedies. Doing so will bring about a more realistic judicial investigation of both the federal and state interests. It will also be more in line with the Court's own description of the Eleventh Amendment's place in our constitutional structure—assuring a certain degree of state autonomy from the exercise of federal judicial authority. Finally, concentrating on the intrusiveness of the remedy rather than the status of the parties might introduce into the mix the John Aldens of the world, so often forgotten when courts and law professors argue over and decide cases on great universal structural principles.

## II.

For analytical convenience, I divide the arguments supporting current Eleventh Amendment doctrine into three categories: (A) arguments of political processes; (B) arguments of results or effects; and (C) arguments of structure. There is one supporting argument I will avoid commenting upon even in passing—state sovereign immunity only mirrors the same sovereign immunity afforded to the federal government. This is a very complicated argument, one which

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bell of the Virginia Court of Appeals in *Martin v. Hunter's Lessee*).

packs a variety of constitutional and other assumptions beneath its facial simplicity. It demands a separate and thorough analysis well beyond the point I want to make here.

A.

The link between requiring state institutions to respond to federal dictates (the autonomy concern) and fracturing lines of political accountability was first raised by Justice O'Connor, dissenting in part in *FERC v. Mississippi*.<sup>20</sup> Justice O'Connor's special brand of process federalism later became *the* rationale for the Court's anti-commandeering rule in *New York v. United States*<sup>21</sup> and *Printz*. It even found its way into Justice Kennedy's concurrence in *United States v. Lopez*,<sup>22</sup> even though the issue was preemption, not commandeering. All four cases, it should be emphasized, were Tenth Amendment autonomy cases. Despite this, the political accountability argument reappeared in *Alden*,<sup>23</sup> purportedly an Eleventh Amendment case.

It takes some doing, but the argument can be understood (it may even be sensible) when raised in the Tenth Amendment context of federal enlistment of state agencies, be they legislative or executive. When the federal government requires state legislatures to enact particular federal programs or state executive officers to enforce those programs, states lose the ability to set their own legislative agendas and determine the activities where their officers will spend their energy (and presumably their taxpayers' money). Moreover, requiring state policymakers to implement federal law confuses local voters as to whose judgments are being enforced and why. There is thus no one to credit for success and no one to blame for failure. In addition, because those who are elected by one constituency (local) are required to respond to another (national), it is easy for local officials, legislative or executive, to escape political responsibility for their

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20. 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part).

21. 505 U.S. 144 (1992).

22. 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring). Justice O'Connor, it should be noted, was the only other signatory to Justice Kennedy's opinion. See *id.* at 568.

23. See *Alden v. Maine*, 119 S. Ct. 2240, 2264-65 (1999).

actions by blaming a higher authority. This not only confuses local voters, but frustrates them as well, because access to the channels of change must be shared with a variety of other interests.<sup>24</sup> It is even possible to understand the political accountability argument in the preemption setting of *Lopez*, although preemption is the Court's preferred remedy for the political accountability difficulty in the commandeering cases. A national polity simply should not be making decisions that affect only a local constituency.

It is hard to understand, however, why the political accountability argument, even assuming its constitutional foundation,<sup>25</sup> applies to questions of sovereign immunity. Certainly there can be no doubt about whom deserves the credit or the blame when a federal court orders a state to accept responsibilities imposed by federal law. This is particularly true when the federal legislation imposing responsibility on the states is the very same legislation that enlists the courts to enforce it. *Alden* presents a different problem only because Congress enlisted courts other than federal ones to enforce its laws. But however weak the historical basis is (1) for constitutional sovereign immunity<sup>26</sup> and (2) for Congress's inability to enlist the aid of state executive officers in enforcing federal law,<sup>27</sup> the notion that the Framers did not contemplate that state courts would be the primary

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24. This branch of the political accountability argument is not peculiar to federal constitutional law. Before the turn of the century, it was used by supporters of municipal home rule who sought to free local constituencies from largely unresponsive state legislatures and to add a measure of political responsibility to the actions of locally elected municipal officers. See, e.g., Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 656 (1964) (describing a phenomena called "municipal pussyfooting" (quoting LEPAWSKY, HOME RULE FOR METROPOLITAN CHICAGO xv (1935))).

25. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2200-01 (1998).

26. See, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. PA. L. REV. 515, 515 (1978) (suggesting "that sovereign immunity is a common law doctrine, and is not constitutionally compelled").

27. See, e.g., Erik M. Jensen & Jonathan L. Entin, *Commandeering, The Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENTARY 355, 374-79 (1998) (concluding that the historical record supports the argument that federal power to requisition state revenue officers survived the Constitution).



judicial enforcer of federal law is even weaker. Maybe this is why the Court in *Alden* chose not to rely explicitly on the Tenth Amendment anti-commandeering rule of *Printz*.

The Tenth Amendment political accountability argument can only be understood in an Eleventh Amendment setting by considering an exception to it: the ability of the federal government itself to sue the states to obtain either retroactive monetary or prospective injunctive relief. If the federal government believes that a state's policy is sufficiently disruptive of national interests, it will do something about it in the same way that the Court would require Congress to directly regulate the storage of low level nuclear waste or have the executive enforce the Brady Bill. Conferring a private right of action against the states, so the argument goes, simply allows the federal government to avoid that difficult political choice.

There are some pragmatic answers to the argument that will be discussed below. But even conceptually, the argument is troubling. The question posed by *Seminole Tribe* and *Alden*, it must be repeated, is not whether Congress exceeded its delegated powers and entered an area that is of only limited and local interest. Whatever one may think of federal hegemony, *Alden* was not *Lopez*. Political accountability thus rested precisely where it should have—with the national legislature. Indeed, to suggest that political accountability demands state sovereign immunity, despite the fact that Maine thumbed its nose at a national constituency with respect to an issue that is concededly within the nation's interest, turns *McCulloch v. Maryland* on its head.

The anti-commandeering principle does not work well either. In the context in which that principle became constitutional law, the state institutions, the legislature in one case, *New York*, and the executive in the other, *Printz*, were asked to govern their own citizens according to some other sovereign's dictates. By contrast, in *Alden*, the state courts were asked only to do what the Supremacy Clause explicitly requires—to enforce a valid federal law. In terms of political accountability, it should not matter whether the enforcement runs against an individual (which is permissible under the Eleventh Amendment) or against the state itself.

There is a second political process argument, however, focusing on the political forces to which Congress responds. Broad Eleventh

Amendment protection is needed for the same reason broad Tenth Amendment protection is needed—we cannot trust Congress to do the right thing by the states. Congress will jump at the chance to claim credit, with no downside risk of blame for failing, or to avoid blame, by laying responsibility upon a state institution.<sup>28</sup> Moreover, we cannot place our faith in a clear statement rule because that rule only assures that state sovereign immunity will not be abrogated by accident. The problem with Congress is not that it is accidentally abrogating the states' sovereign immunity.

While I would hope for better, there is enough recent evidence that when political pressures mount for the federal government to do something, Congress will either ignore the states and their governance role or use the states to avoid spending scarce national resources.<sup>29</sup> But even if we assume that national politicians will respond more to centripetal than centrifugal forces, why do we not assume that local politicians will respond in exactly the same self-interested manner? Alexander Hamilton certainly did.<sup>30</sup> And, the actions of Louisiana<sup>31</sup> and Virginia<sup>32</sup> (to name just a few) demonstrated that Hamilton was correct. More importantly, is there something in the Constitution that tells us to presume that Congress will be less respectful of the states' interests than the states will be of national concerns?<sup>33</sup> Finally, even if one accepts that the states will be more respectful of federally enacted norms than the federal government will be of state autonomy (because they are possibly less

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28. This is what Professor Marshall calls the "Accountability" argument. See Marshall, *supra* note 17.

29. See, e.g., Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979) ("'federalizing' the machinery of state government to serve the ends of national policy"); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 140 (1998) (noting a 60-year congressional "carte blanche on federalism matters"). But see Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1490 (1994) (claiming the process guarantees states "a voice in the national political process").

30. See THE FEDERALIST NO. 15, at 88-91 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

31. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

32. See *Virginia Coupon Cases*, 114 U.S. 269 (1884).

33. The answer, of course, is no. Indeed, it is quite the opposite, as the judicial history of the dormant Commerce Clause demonstrates.

subject to capture by minority special interests?), what do the Eleventh Amendment and sovereign immunity add to that assumption that the Tenth Amendment has not already accounted for?

Doctrinally, one must argue that the Eleventh Amendment adds a separate and quite distinct dimension to our concerns about federal hegemony. Professor Massey, in other words, was wrong when he concluded that the autonomy principles of the Tenth Amendment were sufficient to insulate the states from Congress's use of overly intrusive means (such as enlisting federal and state judicial systems) to realize their policy objectives.<sup>34</sup> The difficulty is that the Eleventh Amendment simply does not do that. The Eleventh Amendment's text only deals with a certain defined set of claims based on the status of the parties. The rest is judicial gloss, a gloss wholly dependent upon one's view of the broader principles of federal/state relations.<sup>35</sup> The response is thus circular.

There is another, stronger response. If, as *Hans v. Louisiana* held, the Eleventh Amendment reaffirms the original understanding that state sovereign immunity was not altered by Article III of the Constitution, that understanding would be meaningless if Congress could create jurisdiction adjunct to its Article I powers. I will not deal with this argument by questioning whether *Hans* reached the correct conclusion; volumes have been written on that subject. The difficulty with the argument, certainly conceptually if not pragmatically, is that the exceptions to the Eleventh Amendment have all but swallowed up the autonomy/sovereignty rationale. It violates a state's sovereign right to be free from private lawsuits in some foreign courts (the federal and their own courts) but not in others (the courts of other states).<sup>36</sup> It violates a state's sovereign immunity to

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34. See Massey, *supra* note 13, at 143-44 (Tenth Amendment autonomy recognizes state sovereign immunity except where the people of the nation have abrogated that immunity in the Supremacy Clause or through national legislation).

35. Cf. *Alden*, 119 S. Ct. at 2255 ("This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.").

36. See *Nevada v. Hall*, 440 U.S. 410, 426-27 (1979). The *Alden* majority distinguishes *Hall* by deciding that our constitutional structure protects state autonomy from the federal government, not from the governments of other states. See *Alden*, 119 S. Ct. at 2258-59. With all due respect, that is just plain

force it to justify its actions to a federal judge in a suit by an individual but not in a suit by the federal government, even if the federal government is asserting a claim that by all rights belongs to an individual. It is unbecoming for a sovereign state to be required to appear before a federal district court in the exercise of its original jurisdiction, but it is not so unbecoming to require an appearance before nine Supreme Court Justices in the exercise of either their appellate or, in some limited cases, original jurisdiction. I could go on, but the point is clear: the Eleventh Amendment is hopelessly underinclusive in its protection of state sovereign immunity. And, it is underinclusive for exactly the reason given by Justice Powell in *Pennhurst* and Justice Kennedy in *Alden*. Rather than protecting sovereign immunity for its own sake, the Eleventh Amendment attempts to accommodate the constitutional sovereignty/autonomy interests of the state and the constitutional requirement of the supremacy and uniformity of federal law. Therefore, to suggest that state immunity from suit to enforce federal law is an inquiry peculiar to the Eleventh Amendment is to confuse the tail with the dog. Moreover, it is an assertion that depends, for its validity, on consequentialist rather than conceptual considerations. I now turn to those arguments.

### B.

The argument from effects is simple. Current Eleventh Amendment doctrine, taken as a whole, allows for the vindication of the most important federal rights while at the same time preserving the dignity of the states qua states. Thus, if one looks at the result of the doctrine, not only an acceptable, but also a laudable, accommodation of federal supremacy and state sovereignty has been reached. Moreover, the structural formalism of the Court's analysis in cases like *Seminole Tribe* and *Alden* has reached that accommodation in a clear and understandable way. The accommodation may be clear. It is debatable, however, whether "acceptable" properly characterizes the outcome.

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silly. If the states were profoundly shocked by *Chisolm v. Georgia*, they would have taken up arms had they known that *Nevada v. Hall* was in the offing. See Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 CORNELL L. REV. 253, 263-64 (1985).

The claim that we have reached an acceptable accommodation between state sovereignty and federal supremacy is based on four exceptions to the Eleventh Amendment. First, federal supremacy is ensured by permitting an individual to enjoin a state officer from enforcing a statute that violates federal law.<sup>37</sup> Second, the United States can sue to enforce federal law both prospectively and retroactively.<sup>38</sup> Third, Congress can abrogate a state's sovereign immunity when exercising its powers under Section 5 of the Fourteenth Amendment.<sup>39</sup> The third affords the full panoply of remedies for the bulk of constitutional infringements by the state of individual freedoms, while the first effectively precludes the state (since the state can only operate through its officers) from violating federal law in the initial instance. Moreover, if all else fails, as is the case after *Alden*, the federal government can always sue the state either to enjoin further violations of federal law or to recover past due benefits. Finally, these remedies are in addition to judicial actions against a state's political subdivisions and administrative remedies available under federal grant programs to require state compliance with federal law and regulations.

To test the proposition that "the system ain't broke so there is no need to fix it"<sup>40</sup> look at John Alden and his fellow probation officers who were paid less than what Congress had determined they were entitled to, a determination that the Court previously held Congress was entitled to make and apply against the states.<sup>41</sup> What can they now do about being underpaid? They could certainly go to the state, their boss, and say, "you've made a mistake in calculating our overtime. Why don't you just do the right thing, pay us what you owe us, stop doing it in the future and we can all go home happy?" I assume they did that before filing suit and it did not work. And why should it have worked? The state could have reasonably decided that *Seminole Tribe* precluded a lawsuit in federal court. Moreover, *Edelman*

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37. See *Ex parte Young*, 209 U.S. 123, 167 (1908).

38. See *United States v. Texas*, 143 U.S. 621, 642-46 (1892).

39. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

40. This is essentially Professor Marshall's argument. See Marshall, *supra* note 17; see also John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998).

41. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985).

*v. Jordan*<sup>42</sup> insulated the state treasurer or whomever from personal liability since the “real party in interest” in such a suit would be the state, not the individual officer. So why pay Alden and his colleagues when the money could be used for other purposes or to benefit others with more political clout? The only risk was that the Court would distinguish *Seminole Tribe* on the ground that the Eleventh Amendment referred only to the jurisdiction of the federal courts. It is, after all, an amendment directed specifically at the jurisdiction granting provisions of Article III. But the Court has not paid any attention to the Eleventh Amendment’s text (or its history for that matter) since 1890. And because the composition of the Court had not changed since *Seminole Tribe*, Maine would have been safe in concluding that it could get away with determining that others were more deserving of state funds than John Alden et al.<sup>43</sup>

Perhaps the state of Maine should not be so cocky. The federal government might become sufficiently incensed by the flaunting of its substantive norms, norms that may constitutionally be applied to the states, that it may sue on behalf of Alden and his colleagues to recover their back wages. Certainly, that is plausible. The federal government has sued states and local governments over civil rights violations. But the political dynamics of suing states for violations of civil rights are not the same as those that operate when the federal government is forced to sue for violations of an individual’s statutory entitlements enacted for reasons of national economic uniformity or efficiency. The state’s rights card was long ago played in the discrimination setting, and it was trumped on both moral and legal grounds. Few in Congress are willing to hold the Justice Department hostage to a state’s claim that it has the right to discriminate against minorities in the state. On the other hand, assuming that the Department of Labor has the resources to pursue individual actions against

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42. 415 U.S. 651 (1974).

43. Apparently this was not Maine’s reasoning. *See infra* note 73. But, had it been (or might it be in the future) the result in *Alden* would have been no different. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), decided the same day as *Alden*, the allegation was that “Florida Prepaid [the state] had *willfully* infringed [College Savings’] patent . . . as well as contributed to and induced infringement.” *Id.* at 2203 (emphasis added). So much for Justice Kennedy’s faith that the states will do the right thing. *See Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

recalcitrant states (which it does not),<sup>44</sup> my suspicion is that it would take only one suit to get appropriations bottled up in the next budget go around or have major policymakers spending days/weeks from their appointed tasks testifying before congressional committees.

Justice Kennedy argued that this is as it should be.<sup>45</sup> Congress gets off cheaply by imposing obligations on states and then delegating to private parties the task of ensuring the states will abide by those obligations. The proof of the political pudding is whether Congress is willing to ante up and whether the executive is willing to pay the political price to enforce those obligations. Unfortunately, the argument takes the human being out of the calculus by assuming that the dispute is purely institutional in nature. Mr. Alden and his colleagues were the ones harmed by the state's actions. Not only were they harmed financially by the state, but they are now harmed politically by the Court's attempt to throttle Congress's corrective attempt. Alden (and all future Aldens) must not only jump through the political hoop of securing enactment of the substantive requirements and their extension to the states, but he must also win a second political battle, persuading the executive branch to enforce those standards against the states. Moreover, the federal government's attempt to enforce its constitutionally permissible norms is not likely to be decided by majority vote. More probably, it is going to be decided by a combination of who wields power over the particular enforcement agency and logrolling. If that is true, there will in fact be no determination that the benefits to the nation of enforcing the policy against the states are worth the political fallout. The process will not let it get to that stage.

Notwithstanding, the United States may not be able to sue Maine for back wages in any event. It is certainly true that *Alden's* dictum assures us that such a suit is permissible under the Eleventh Amendment.<sup>46</sup> But a similar suit was tried once before when the states of New York and New Hampshire sued Louisiana to recover monies owed by the latter state on bonds held by residents of the plaintiff states. The Court held that since the real parties in interest were the individuals, and not the plaintiff states, the suit was

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44. See *Alden*, 119 S. Ct. at 2292-93 (Souter, J., dissenting).

45. See *id.* at 2267.

46. See *id.*

precluded by the Eleventh Amendment.<sup>47</sup> Of course, there are differences, most prominently that the prospective plaintiff is the federal government and not another state. But why should that matter? In either event, the United States is only a surrogate to enforce what is, in fact, a private right of action. To use the language of *New Hampshire v. Louisiana*, it is little more than a collection agent.<sup>48</sup> In addition, if the Eleventh Amendment prohibits Congress from using its Article I powers to abrogate the state's Eleventh Amendment immunity, as *Seminole Tribe* and *Alden* hold, why should it not equally prohibit the executive from waiving the state's sovereign immunity simply by fiat? Whatever one may say about the effect of the Seventeenth Amendment on the states' influence on Congress, they have even less structural influence on the executive, the electoral college notwithstanding. Consequently, both for doctrinal and practical reasons, if I were Mr. Alden, I would not hold up much hope that the U.S. Labor Department will unlock the door to my back wages.

Why not argue that the Fair Labor Standards Act was enacted to provide individuals with a minimum standard of living and to ensure that employers would not impose onerous employment conditions—arguably basic human rights—or at least allow Congress to so find? The Maine probation officers could then take advantage of *Fitzpatrick v. Bitzer*.<sup>49</sup> Unfortunately, Congress never said that it was relying on its powers under Section 5 of the Fourteenth Amendment when it enacted the Fair Labor Standards Act or when it later applied it to the states. This was an exercise of the commerce power and thus governed by *Seminole Tribe*, not *Fitzpatrick*. But even if Congress had said or were to say that a living wage is a basic human right, a denial of which is a violation of the Due Process Clause of

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47. See *New Hampshire v. Louisiana*, 108 U.S. 76, 90-91 (1883).

48. See *id.* at 82-83. That also seems to be Professor Evan Caminker's tentative conclusion. Although, to make his point about *qui tam* actions, he decides not to resolve the issue. See Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 113-119 (1999). But cf. Jonathan R. Seigel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 85-86 (1999) (arguing that the Court should uphold *qui tam* actions against states but is unlikely to do so). The Supreme Court had the opportunity to resolve the constitutional issue but chose instead to hold that the state is not a "person" within the meaning of False Claims Act. See *Vermont Natural Resources v. United States*, 68 U.S.L.W. 4399 (2000).

49. 427 U.S. 445 (1976).



the Fourteenth Amendment, it is not likely that the Supreme Court would respect that judgment. In *City of Boerne v. Flores*, the Court struck down the Religious Freedom Restoration Act because Congress extended religious freedoms beyond what the Court had held to be specially protected under the First Amendment.<sup>50</sup> Even Congress's remedial powers, once thought to be rather broad, now seem to be less than that. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>51</sup> Justice Rehnquist's majority opinion might well be read to say that Congress can only exercise its Section 5 remedial powers when there is evidence of pervasive state violations of constitutionally protected rights.<sup>52</sup> Again, John Alden seems out of luck.

What is wrong with enjoining the appropriate state department heads from continuing to violate the overtime provisions of the Fair Labor Standards Act? That may not work either. Professor Vicki Jackson has speculated that the Court's reasoning in *Seminole Tribe* could well lead to a narrowing of *Ex parte Young*, particularly when a state statute or policy violates only a federal statute.<sup>53</sup> Alden's laundry list of avenues still open to enforce state compliance with federal law does nothing to quiet Professor Jackson's fears. In this regard, the opinion mentions *Ex parte Young* only in passing and even then says only "[t]he rule . . . does not bar certain actions against state officers for injunctive or declaratory relief."<sup>54</sup>

### C.

What then are the realistic possibilities that John Alden will ever receive his just rewards? Probably slim to none. But maybe that is simply the price one must pay for living in a federalist system. There

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50. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); see also *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 637 (2000) (holding Congress's prohibitions must be proportionate to what the Court has declared to be unconstitutional behavior).

51. 119 S. Ct. 2199 (1999).

52. See *id.* at 2207. See, e.g., *Kimel*, 120 S. Ct. at 649 (stating "Congress never identified any pattern of age discrimination by the States . . .").

53. See Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 530-38 (1997).

54. *Alden*, 119 S. Ct. at 2267 (emphasis added).

has always been an individual cost to living in a republic that divides legislative authority between two sovereigns. Mr. Barron lost his dock to the actions of the city of Baltimore and never received payment.<sup>55</sup> Butchers in New Orleans were left to their state remedies if they wanted to practice their profession outside the state sanctioned slaughterhouse monopoly.<sup>56</sup> And children in poor Texas school districts could not assert the Equal Protection Clause in order to equalize their educational opportunities.<sup>57</sup>

Justice Kennedy's declaration that "[t]he principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States"<sup>58</sup> falls neatly and comfortably within that federalist tradition. It is, however, little more than a political determination, for it is dependent upon one's views of that balance rather than upon some clear constitutional or precedential directive. The political or, to be more charitable, judgmental quality to the Court's declaration is demonstrated both by the consistency of the dissents in federalism cases over the past two decades and the empirical studies of social scientists which demonstrate that federalism doctrine ebbs and flows with the make-up of the Court.<sup>59</sup> In other words, the appropriateness of the balance in *Alden* is a policy determination by the Court that Maine's ability to ignore federal standards (because there is no effective mechanism to require its compliance) is more important than John Alden's ability to recover what is, *under the law*, due him. I am not saying that reasonable people cannot reach that conclusion—they can. But in order to do so, one must balance not only two competing institutional concerns, as the Court does, but also the institutional concern of ensuring some degree of state autonomy against the *individual's* statutory right to be paid a living (or close to a living) wage.<sup>60</sup> This is so because (to repeat once again) the Court has

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55. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 251 (1833).

56. See *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 82 (1873).

57. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

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

59. See Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1308-13 (1999).

60. This overstates Alden's claim. He claimed the state violated the maximum hour provisions. See *Alden*, 119 S. Ct. at 2246. But, the result would be the same had the state paid Alden three dollars per hour or required him to

already confirmed Congress's power to (1) create the statutory right to a minimum wage and (2) apply that requirement to the states. Consequently, if there is any "unwarranted strain on the States' ability to govern in accordance with the will of their citizens,"<sup>61</sup> it occurred when Congress extended the Fair Labor Standards Act to the states. Unless, of course, Congress created unduly intrusive remedies to enforce that obligation. It is that issue to which the concluding section of this paper now turns.

### III.

A number of years ago I argued that there was a better way of accommodating individual interests with concerns for state autonomy. Rather than narrow the right, we should look instead at the intrusiveness of the remedy.<sup>62</sup> This would not only account for the constitutional interest of state autonomy, but would do so without undue cost to the individual or to Congress's remedial powers under Section 5 of the Fourteenth Amendment. I would argue that in cases like *Seminole Tribe* and *Alden*, where Congress has the admitted right to impose obligations directly on states, we consider the same approach. Put another way, the appropriate inquiry is not whether providing a private right of action to enforce constitutionally acceptable obligations imposed upon the states violates our more general concern for protecting state autonomy from *federal* overreaching.<sup>63</sup> Rather, it is whether the remedy afforded to enforce those lawfully imposed obligations is too intrusive on legitimate state interests, given the individual right that is asserted. Put simply, the Court's solution is too broad for the problem.

Part of the reason for the Court's overbroad response may be its formalist approach to constitutional interpretation. But, as I will note below, formalism has been compromised when necessary to reach a "correct" result. The Court in *Alden* also posits that broad sovereign immunity protects "the States' ability to govern in accordance with the will of their citizens," most particularly "the allocation of scarce

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work fourteen hours a day at straight time.

61. *Alden*, 119 S. Ct. at 2264.

62. See Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 771 (1979).

63. *But see Nevada v. Hall*, 440 U.S. 410, 426-27 (1979) (holding that if California's policy were not enforced, its sovereignty would be intruded upon).

resources among the competing needs and interests . . . .”<sup>64</sup> But that rationale is inconsistent with *Milliken v. Bradley*,<sup>65</sup> *Nevada v. Hall*,<sup>66</sup> and *New York v. United States*,<sup>67</sup> to say nothing of the other exceptions to the Eleventh Amendment noted above.

That leaves the states’ dignity,<sup>68</sup> which I take to mean the symbolic side of a state’s autonomy. Dignity explains the rule that if states are to waive their Eleventh Amendment immunity in federal courts they must do so explicitly; a state’s waiver of sovereign immunity in its own courts will not suffice. Dignity also explains why the state itself may not be made a party to an injunctive proceeding, although its policies (even its fiscal policies) can be rendered meaningless by prohibiting a state officer from enforcing them. It may even explain why political subdivisions of the state are not afforded Eleventh Amendment immunity.<sup>69</sup> It does not explain *Nevada v. Hall*, but nothing about the Eleventh Amendment explains that case except the text, which the Court persistently disclaims being important. However, even accepting that a state’s dignity deserves constitutional status, why must the dignity of the state always trump the dignity of the individual in a system where, also constitutionally, the ultimate “sovereigns” are those very same individuals?<sup>70</sup>

I would argue that it should not. Rather, constitutional state sovereign immunity should depend on a number of factors. What has Congress said of the importance of individual interests versus those of the states? Is the jurisdiction of the court invoked pursuant to a general grant of federal question jurisdiction, as it was in *Hans v. Louisiana*,<sup>71</sup> or has Congress made a separate decision that the individual entitlement at issue is sufficiently important to require a distinct private right of action? Is the nature of the individual interest

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64. *Alden*, 119 S. Ct. at 2264.

65. 418 U.S. 717 (1974).

66. 440 U.S. 410 (1979).

67. 505 U.S. 144 (1992) (holding that Congress can impose monetary liability on states under Article I so long as it imposes the same liability on private individuals for the same conduct).

68. *See id.* at 163-64.

69. *See* Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 589-91 (1994).

70. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480-81 (1987).

71. 134 U.S. 1 (1890) (quoting THE FEDERALIST NO. 45 (James Madison)).

asserted sufficiently protected by prospective relief, such that damage relief can be denied without undue harm to the individual? By analogy to the Dormant Commerce Clause and Fourteenth Amendment discrimination cases, has the state deliberately violated federal policy (acted out of its own self-interest, fiscal or otherwise) or has the violation either been "inadvertent" or a matter of legitimate dispute as to the meaning of the federal requirement? There are undoubtedly other considerations that ought to be accounted for in determining whether the relief prescribed by Congress, be it retrospective or prospective, is too intrusive.<sup>72</sup>

Therefore, I come out somewhere between the majority and dissent in *Alden*. The majority's position that Article I never justifies an individual's private right of action against the state is supported only by its reading of history, a reading that at best is open to debate. That is hardly the stuff of firm constitutional rules. History aside, with all of the rhetoric about acceptable balances and accommodations, the Court adopts an analytical method that does everything but balance or accommodate. On the other hand, I am equally troubled by the dissent's claim that Article I automatically trumps a state's

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72. To use *Alden* as an example, it is not clear that my proposal would alter the result. First it appears that Maine did not simply ignore the federal regulations. Rather, the state argued that probation officers were either professional employees (exempted from the act) or fell within a regulation that computed overtime differently for law enforcement personnel. Neither argument seems unreasonable nor pretextual. *See Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993). *But cf. Mills v. Maine*, 853 F. Supp. 551, 554-55 (D. Me. 1994) (holding that Maine was liable for liquidated damages because it failed to take reasonable steps to ascertain the applicability of the FLSA regulations). Moreover, once the district court ruled, Maine conformed its policies to those of the Department of Labor. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997). On the other hand, Congress did declare that agency remedies would be insufficient to ensure the uniform application of the FLSA. Moreover, one would have to, in some way, assess the significance of the state's monetary exposure, given that it was apparently acting in good faith, against the monetary consequence to the individual officers of not being made whole, again accounting for the fact that Maine is now paying them according to the federal regulations. My tentative conclusion is to place more weight on the individual because of the statute's evident purpose and Congress's findings regarding the enforcement mechanisms. Moreover, any financial consequence to the state can be widely distributed either through the tax system or through private labor negotiations or both. But I can be persuaded otherwise. Under the Court's analysis, however, it is fruitless even to engage in such a conversation.

interest in sovereign immunity under the Eleventh Amendment any more than it does under the Tenth Amendment. The dissent fails to recognize that subjecting a state to judicial process can, depending on the remedy, be as much an enemy of the states' governance role as the declaration of the states' obligation. Finally, both the majority and the dissent forget that the individual and her dignity are as much involved in these so-called institutional disputes as which level of government should be exercising what power.

Numerous objections can be made to an analytical approach to Eleventh Amendment sovereign immunity that balances state and individual "dignity interests." I will mention only three. First, and least important, it would both abolish the constitutional doctrine of sovereign immunity as we know it and overrule a precedent that we have come to live with for 110 years. The answers are "yes" and "not necessarily." The "yes" answer must, however, be qualified. The Court itself has altered the sovereign immunity doctrine by arguing that it does not stand alone but is only an element, albeit a necessary element, of a broader principle of state autonomy. All I am suggesting is that the Court justify that additional dimension to sovereign immunity with something other than fiat. As to the second answer, *Hans* need not necessarily be overruled. It can be distinguished from cases like *Alden* and *Seminole Tribe*. In the latter cases, Congress had made a specific declaration that a private right of action to enforce its *constitutionally permissible* policy was necessary to the statutory scheme. That conclusion certainly deserves *some* deference. In *Hans*, on the other hand, federal judicial authority was based on a general grant of federal question jurisdiction.<sup>73</sup>

Second, one might claim that what I suggest simply will not work. How can the Court, in an ad hoc, case-by-case manner determine whether the specific private remedy prescribed by Congress does or does not intrude too deeply into the states' autonomy? There are three answers. To begin with, the Court has already done so by stating that Congress upsets the appropriate balance between federal supremacy and state sovereignty/autonomy by creating a private damage action against the states. No reliance on "Framer's intent" (i.e., "we didn't say it, they did") can alter that initial balancing

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73. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989).

conclusion unless one dismisses out of hand the dissent's history and the near unanimous conclusions of every scholar who has studied the founding era. With all due respect, the Court is using interpretation of ambiguous historical data as a cover for its sub rosa balancing. In addition, the Court is perfectly willing to engage in explicit ad hoc balancing when it suits its purposes to do so. In *Idaho v. Couer d'Alene Tribe of Idaho*,<sup>74</sup> both Justice Kennedy's principal opinion and Justice O'Connor's concurring opinion use ad hoc balancing, in one form or another, to determine whether to create yet another exception to *Ex parte Young*.<sup>75</sup> My suggestion would simply change the analytical point at which the Court balances. My argument is that balancing ought to occur at the initial stage, when the question is whether the state ought to be able to assert its immunity, rather than at the end stage, when the question is whether a state's interest is sufficiently important that suits for prospective relief against state officers should nevertheless be precluded. Finally, there is a whole body of law on federal preemption that is based on what the Court can glean, by looking at statutes *one-by-one*, about the strength of Congressional policy when compared to the interests of the states in concurrent regulation. Looking at the intrusiveness of Congress's remedy, case-by-case, does not differ significantly from that inquiry.

The third objection is that what I propose significantly increases judicial discretion and therefore decreases certainty. As such it poses a separate threat to federalism and, indeed, to the rule of law itself. I will only make two brief points. First, for me it is more important to be right than to be certain. And while case-by-case balancing does not ensure correctness, in my judgment it stands a far better chance than a categorical and unalterable constitutional rule that, of necessity, treats different cases as if they were the same.<sup>76</sup>

Second, as noted above, the Court's conclusion that sovereign immunity always trumps Congress's Article I powers, assumes that, *on balance*, both the federal system and the individuals served by

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74. 521 U.S. 261 (1997).

75. *See id.* at 270-80; *id.* at 288-97 (O'Connor, J., concurring).

76. *But see* Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 31-33 (1998) (arguing that formalism's bright-line rules have better consequences than functionalism's balancing tests in the context of the Commerce Clause power).

that system are better off by preserving the states' immunity from private law suits than by permitting individuals to be recompensed for past violations by the states of their federal constitutional or statutory rights. The Court does not tell us explicitly either how it measures "betteroffness" or why the balance comes out that way. But if you believe that federalism first and foremost protects individual liberty, the Court's result is certainly ironic (to put it mildly).



