

THE SUPREME COURT'S CONFUSING STATE SOVEREIGN IMMUNITY JURISPRUDENCE

*Scott Fruehwald**

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“[T]he judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills.”

Judge Frank H. Easterbrook¹

* Professor of Legal Research and Writing, Hofstra Law School; B.A., J.D., University of Louisville; M.A., University of North Carolina; Ph.D., City University of New York; L.L.M., S.J.D., University of Virginia.

1. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L.

I. INTRODUCTION

Beginning in 1996, the conservative majority of the Rehnquist Court created a broad sovereign immunity for states from suits for money damages in both federal and state courts.² In these cases, the Court asserted that Congress could not abrogate this sovereign immunity through its Article I powers.³ In later cases, the Court analyzed possible circumstances in which Congress could negate this immunity under Section 5 of the Fourteenth Amendment, producing inconsistent answers.⁴ In 2006, the Court reversed its total rejection of Congress's ability to

REV. 1119, 1120 (1998).

2. *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *see also* *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (extending sovereign immunity to situations in which states are sued by federal administrative agencies). These cases were part of the Rehnquist Court's federalism revolution in which it gave the states greater rights at the expense of the federal government. Other parts of the revolution included: (1) constitutional limitations on Congress's power to pass statutes, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); (2) limitations on Congress's power to coerce states to pass statutes, *New York v. United States*, 505 U.S. 144 (1992); and (3) limitations on Congress's power to force local officials to enforce federal schemes, *Printz v. United States*, 521 U.S. 898 (1997). This author has previously argued that the limitations on Congress's power to pass statutes are principled because they are supported by the Constitution's text (Article I and the Tenth Amendment), while the existence of state sovereign immunity is unprincipled because it is not supported by any constitutional provision. Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 *MERCER L. REV.* 811 (2002).

3. *Alden*, 527 U.S. at 712.

4. *See Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that when Title II implicates a fundamental right of access to the courts, the use of Section 5 of the Fourteenth Amendment is proper); *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (holding that patterns of gender discrimination by states justified the use of Section 5); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (finding the use of Section 5 was not in Congress's authority because there was no pattern of state discrimination); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (determining the ADEA was not a proper use of Section 5 because the broad legislation was unnecessary); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (holding that the Trademark Remedy Clarification Act did not invoke the Fourteenth Amendment, thus immunity was not abrogated); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (declaring the Patent Remedy Act unsustainable based on its indiscriminate scope and the lack of a historical pattern of discrimination); *see also* *United States v. Georgia*, 546 U.S. 151, 159 (2006) (declaring that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity when an actual violation of the Fourteenth Amendment has occurred).

extinguish the states' sovereign immunity under Congress's Article I powers when it held that Congress could abrogate a state's sovereign immunity under the Bankruptcy Clause.⁵ This abrupt reversal brings into question the Court's entire sovereign immunity jurisprudence.

This Article will reexamine the Court's state sovereign immunity jurisprudence in light of this latest development. Part II will discuss the Rehnquist Court's creation of state sovereign immunity in federal and state courts. Part III will criticize the Rehnquist Court's sovereign immunity jurisprudence, particularly its shaky historical basis. Part IV will study Congress's ability to extinguish the states' sovereign immunity under Section 5 of the Fourteenth Amendment. Part V will examine inconsistencies in the Court's application of this doctrine. Part VI will examine the Court's recent creation of an exception to the states' sovereign immunity under the Bankruptcy Clause of Article I. Finally, Part VII will show that the historical foundation of this exception rests on as shaky a historical ground as state sovereign immunity itself.

II. THE REHNQUIST COURT'S STATE SOVEREIGN IMMUNITY JURISPRUDENCE

A. *The States' Sovereign Immunity in Federal Court*

The Court has created a sweeping state immunity from suits in federal court based on the Eleventh Amendment.⁶ 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."⁷ The Court announced: "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the proposition . . . which it confirms.'"⁸ Despite the text's specific language, the Court has extended the immunity to suits by citizens against their own

5. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378–79 (2006); *see also* U.S. CONST. art. I, § 8, cl. 4.

6. *E.g.*, *Hibbs*, 538 U.S. at 726–27; *Kimel*, 528 U.S. at 72–73; *Seminole Tribe*, 517 U.S. at 54.

7. U.S. CONST. amend. XI.

8. *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

states.⁹ Elsewhere, the Court has gone even further: “Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”¹⁰ This means “first, that each State is a sovereign entity in our federal system; and second, that ‘[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.’”¹¹

For more than a century, the Court has understood “state sovereign immunity as an essential part of the Eleventh Amendment.”¹² The Court has allowed a few instances of Congressional negation of state sovereign immunity. In *Pennsylvania v. Union Gas Co.*, a plurality of the Court held that Congress could abrogate state sovereign immunity under the Interstate Commerce Clause.¹³ In overruling this case in *Seminole Tribe of Florida v. Florida*, the Court stated:

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. . . . The plurality’s citation of prior decisions for support was based upon what we believe to be a misreading of precedent.¹⁴

The Court found support for this broad Eleventh Amendment immunity in the quick passage of the Eleventh Amendment after *Chisholm v. Georgia*, which held that Article III permitted a citizen of another state to sue Georgia in federal court without its consent.¹⁵ The Court maintained that an argument that “the decision in *Chisholm* was ‘reasonable,’ certainly would have struck the Framers of the Eleventh Amendment as quite odd: That decision created ‘such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.’”¹⁶

The Court applied the above principles in *Seminole Tribe*, which involved a suit in federal court by a tribe against Florida and its governor

9. *Garrett*, 531 U.S. at 363.

10. *Seminole Tribe*, 517 U.S. at 72.

11. *Id.* at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

12. *Id.* at 67.

13. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

14. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1999).

15. *Id.* at 69–70 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

16. *Id.* at 69 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 326 (1934)).

for their failure to negotiate for the inclusion of gaming activities in a tribal-state compact required under a federal statute.¹⁷ Although Congress provided an unmistakable statement of its intent to abrogate, it lacked the power to eliminate the states' sovereign immunity from suits in federal court because of the states' Eleventh Amendment immunity.¹⁸ This was true despite the fact that the suit only sought prospective injunctive relief.¹⁹ State sovereign immunity also applied despite the fact that the statute was passed pursuant to the Indian Commerce Clause, which gives Congress exclusive authority over certain matters: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."²⁰ The Court concluded: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."²¹

Similarly, Congress cannot use its Article I powers to eliminate the states' sovereign immunity from suits in federal court under trademark law or its Article I patent power.²² Likewise, Congress cannot extinguish state sovereign immunity under its Article I commerce power to make the states subject to the Family and Medical Leave Act of 1993.²³

The Rehnquist Court recognized three ways Congress might strip states of their sovereign immunity: (1) by a state's consent,²⁴ (2) through the *Ex parte Young* doctrine,²⁵ and (3) under Section 5 of the Fourteenth Amendment.²⁶ Because Section 5 of the Fourteenth Amendment is an important issue in state sovereign immunity, Parts IV and V will discuss it in detail.

17. *Seminole Tribe*, 517 U.S. at 51–52.

18. *Id.* at 74–76.

19. *Id.* at 72.

20. *Id.*

21. *Id.* at 72–73.

22. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999).

23. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–27 (2003).

24. *Coll. Sav. Bank*, 527 U.S. at 675 (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

25. *Seminole Tribe*, 517 U.S. at 73; see also *Ex parte Young*, 209 U.S. 123 (1908).

26. *Hibbs*, 538 U.S. at 726.

A state may voluntarily waive its sovereign immunity.²⁷ However, the Court's "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one."²⁸ Waiver occurs if a state voluntarily invokes a federal court's jurisdiction, or if a state clearly declares that it intends to submit to federal court jurisdiction.²⁹ A state does not consent to federal court jurisdiction by consenting to suits in its own courts or by stating its intention to sue and be sued.³⁰

A state also does not consent to be sued through constructive waiver.³¹ Constructive waiver occurs when (1) Congress "provide[s] unambiguously that the State will be subject to suit if it engages in certain specified conduct governed by federal regulation" and (2) "the State . . . voluntarily elect[s] to engage in the federally regulated conduct that subjects it to suit."³² The Court overruled the constructive waiver doctrine because it was ill-conceived: "The whole point of requiring a 'clear distinction' by the State of its waiver is to be certain that the State in fact consents to suit."³³ The Court continued: "There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity."³⁴ In such an instance, the state has not voluntarily waived its immunity, and "[t]he classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'"³⁵ Notably, such waivers do not exist with other constitutional rights, such as the right to a jury trial in criminal cases.³⁶ In addition, allowing constructive waiver would vitiate the Eleventh Amendment immunity established by *Seminole Tribe*.³⁷ The Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* remarked that:

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27. *Coll. Sav. Bank*, 527 U.S. at 675.
 28. *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)).
 29. *Id.* at 675–76.
 30. *Id.* at 676.
 31. *Id.* at 676–87.
 32. *Id.* at 679.
 33. *Id.* at 680.
 34. *Id.* at 680–81.
 35. *Id.* at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).
 36. *Id.*
 37. *Id.* at 683.

[t]here is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce for its prepaid tuition program, and saying the same thing but adding at the end ‘if Florida chooses to engage in such advertising.’³⁸

Finally, an exception for when a state is a “market participant” has no support in the constitutional text or tradition.³⁹

Under *Ex parte Young*,⁴⁰ the Court has frequently “found federal jurisdiction over a suit against a state official when that suit seeks only prospective relief in order to ‘end a continuing violation of federal law.’”⁴¹ However, the Court rejected application of that doctrine in *Seminole Tribe* because the situation was different.⁴² The Court stated that “[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.”⁴³ The Court found such a scheme in *Seminole Tribe*.⁴⁴

B. *The States’ Sovereign Immunity from Damage Suits in Their Own Courts and Before Administrative Agencies*

The Rehnquist Court viewed the states as having sovereign immunity from damages from most Congressional enactments in their own courts.⁴⁵ The Court declared:

[A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, 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 . . . except as altered by the plan of the Convention or

38. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683–84 (1999).

39. *Id.* at 684.

40. *Ex parte Young*, 209 U.S. 123 (1908).

41. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

42. *Id.*

43. *Id.* at 74 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

44. *Id.*

45. *See Alden v. Maine*, 527 U.S. 706, 716 (1999) (discussing the constitutional origins of state sovereign immunity).

certain constitutional Amendments.⁴⁶

The Court stated that the Constitution “specifically recognizes the States as sovereign entities.”⁴⁷ It asserted “[d]ual sovereignty is a defining feature of our Nation’s constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union ‘with their sovereignty intact.’”⁴⁸

Any doubt concerning the states’ continuing sovereignty was removed by the Tenth Amendment, which 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.”⁴⁹

The Court felt the Constitution preserves state sovereignty in two ways:

First, it reserves to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status. . . . Second, even as to matters within the competence of the National Government, the constitutional design 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—who were, in Hamilton’s words, ‘the only proper objects of government.’”⁵⁰

In other words, the states “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”⁵¹

The Court claimed the framing generation “considered immunity from private suits central to sovereign dignity” and that “it was well established in English law that the Crown could not be sued without

46. *Id.* at 713.

47. *Seminole Tribe*, 517 U.S. at 71 n.15.

48. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (citation omitted)).

49. U.S. CONST. amend. X.

50. *Alden*, 527 U.S. at 714 (quoting *Printz v. United States*, 521 U.S. 898, 919–20).

51. *Id.* at 715.

consent in its own courts.”⁵² According to the Court, during the ratification debates serious concerns were voiced regarding Article III’s extension of federal judicial power to controversies between States and citizens of other States and foreign nations; the Constitution’s advocates assured them the Constitution would not divest the states of sovereign immunity.⁵³ For example, the Court noted that Alexander Hamilton wrote:

“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . [T]he exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.”⁵⁴

The Court also noted a similar statement made by John Marshall: ““With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court.””⁵⁵ The Court also asserted that the state conventions made clear that the Constitution was drafted to preserve the states’ immunity.⁵⁶

As was true of Eleventh Amendment immunity, the Court thought the quick enactment of the Eleventh Amendment after *Chisholm* supported the presence of state sovereign immunity in the original Constitution.⁵⁷ The Court declared:

The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design. . . . [I]t is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment. . . . The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States’ traditional immunity from private

52. *Id.*

53. *Id.* at 716.

54. *Id.* at 716–17 (quoting THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

55. *Id.* at 718 (quoting 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 555–56 (2d ed. 1854)) (emphasis removed).

56. *Id.* at 718–19.

57. *Id.* at 719–24.

suits.⁵⁸

The Court also believed its previous decisions reflected “a settled doctrinal understanding . . . that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”⁵⁹ Among these cases was *Hans v. Louisiana*, which held that a citizen of a state could not sue that state under federal question jurisdiction because of sovereign immunity.⁶⁰

A key question concerning a state’s sovereign immunity is “whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts.”⁶¹

[Although] the historical record gives no instruction as to the founding generation’s intent to preserve the States’ immunity from suit in their own courts . . . the Founders’ silence is best explained by the simple fact that no one, not even the Constitution’s most ardent opponents, suggested the document might strip the States of the immunity.⁶²

This silence “suggests the sovereign’s right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.”⁶³ The Court concluded:

In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora.⁶⁴

The Court also rejected the notion that states surrendered their sovereign immunity through the Supremacy Clause or the Necessary and Proper Clause.⁶⁵ Concerning the Supremacy Clause, the Court asserted

58. *Id.* at 722–24.

59. *Id.* at 728; *see also* Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) (“[T]he Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”).

60. *Hans v. Louisiana*, 134 U.S. 1, 1–7 (1890); *see also* *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934).

61. *Alden*, 527 U.S. at 730. Article I enumerates Congress’s powers. U.S. CONST. art. I, § 8.

62. *Alden*, 527 U.S. at 741.

63. *Id.*

64. *Id.* at 743.

65. *Id.* at 733.

that the “Clause enshrines as ‘the Supreme Law of the Land’ only those Federal Acts that accord with the constitutional design.”⁶⁶ The Court declared:

[t]he Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power.⁶⁷

In other words, “[w]hen a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.”⁶⁸ Similarly, the Necessary and Proper Clause does not include “the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.”⁶⁹

The Court argued that its historical analysis was supported by early congressional practice and its own cases. It observed, “[n]ot only were statutes purporting to authorize private suits against nonconsenting States in state courts not enacted by early Congresses; statutes purporting to authorize such suits in any forum are all but absent from our historical experience.”⁷⁰ Similarly, the Court has “said on many occasions . . . that the States retain their immunity from private suits prosecuted in their own courts.”⁷¹ The Court added:

[i]n particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.⁷²

The Court also reasoned that not allowing Congress the authority to subject non-consenting states to suits in state court was consistent with the

66. *Id.* at 731.

67. *Id.* at 732.

68. *Id.*

69. *Id.*

70. *Id.* at 744.

71. *Id.* at 745.

72. *Id.* at 747 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Constitution's structure.⁷³ Looking at principles of federalism, the Court declared: "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."⁷⁴ "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."⁷⁵ In other words, "[t]he principle of sovereign immunity preserved by the constitutional design 'thus accords the States the respect owed them as members of the federation.'"⁷⁶ The Court averred:

A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, 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.⁷⁷

The Court noted that private suits might "threaten the financial integrity of the States."⁷⁸ Similarly, private suits for money damages would interfere with the states' authority to govern in accordance with their citizens' will.⁷⁹ The Court observed: "While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc."⁸⁰ In addition, "[a] State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts."⁸¹

Sovereign immunity does not free the states from their responsibility to follow the Constitution and federal statutes.⁸² First, "[t]he good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance

73. *Id.* at 754.

74. *Id.* at 748.

75. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

76. *Alden*, 527 U.S. at 748–49 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

77. *Id.* at 749.

78. *Id.* at 750.

79. *Id.* at 750–51.

80. *Id.* at 751.

81. *Id.* at 752.

82. *See id.* at 755–56.

thereof . . . shall be the supreme Law of the Land.”⁸³ Second, states can and have consented to a waiver of their sovereign immunity.⁸⁴ In addition, “in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.”⁸⁵ Finally, sovereign immunity does not bar suits against lesser entities than states, or “all suits against state officers.”⁸⁶

The Court concluded:

Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.⁸⁷

The Supreme Court applied these principles in *Alden v. Maine*, in which the Court held that a group of Maine probation officers could not sue Maine in state court under the Federal Labor Standards Act of 1938 because the powers delegated to Congress under Article I did not include the right to subject non-consenting states to private suits in state courts.⁸⁸ In *Federal Maritime Commission v. South Carolina State Port Authority*, the Court extended the above principles of broad state sovereign immunity to protect states from adjudication before federal administrative agencies.⁸⁹ In *South Carolina State Ports Authority*, a company requested permission from the South Carolina State Ports Authority to berth a gambling cruise ship in Charleston, South Carolina.⁹⁰ After the Authority denied such permission on the ground that the ship’s primary purpose was gambling,

83. *Id.* at 755 (citing U.S. CONST. art. VI).

84. *Id.*

85. *Id.* at 756 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). For a complete discussion of the Court’s sovereign immunity cases involving Section 5 of the Fourteenth Amendment, see *infra* Part IV.

86. *Alden*, 527 U.S. at 756.

87. *Id.* at 758.

88. *Alden v. Maine*, 527 U.S. 706, 711–12 (1999).

89. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

90. *Id.* at 747.

the company filed a complaint with the Federal Maritime Commission (FMC) alleging that the refusal violated the Shipping Act.⁹¹ The company sought injunctive relief and reparations.⁹² An administrative law judge dismissed the suit based on state sovereign immunity.⁹³

The Court found a “barren historical record” in the original understanding of the Constitution and early congressional practice concerning whether sovereign immunity protected states in administrative hearings.⁹⁴ Instead, the Court declared, “[t]his Court, however, has applied a presumption . . . that the Constitution was not intended to ‘rais[e] up’ any proceedings against the States that were ‘anomalous and unheard of when the Constitution was adopted.’”⁹⁵ The Court found that administrative proceedings overwhelmingly resembled civil litigation in federal court.⁹⁶

The Court also emphasized the importance of protecting the states’ dignity from suit in an administrative proceeding.⁹⁷ The Court proclaimed:

Simply put, if the Framers thought it an impermissible affront to a State’s dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.⁹⁸

The Court concluded, “Given both this interest in protecting States’ dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State.”⁹⁹

III. CRITICISM OF THE REHNQUIST COURT’S SOVEREIGN IMMUNITY JURISPRUDENCE

A. *Evaluation of the Court’s Eleventh Amendment Jurisprudence*

The Rehnquist Court’s broad interpretation of Eleventh Amendment

91. *Id.* at 747–48.

92. *Id.* at 748–49.

93. *Id.* at 749–50.

94. *Id.* at 754–55.

95. *Id.* at 755 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

96. *Id.* at 757.

97. *Id.* at 760–61.

98. *Id.* at 760.

99. *Id.*

immunity contradicts the plain meaning of the text of the Eleventh Amendment, which clearly applies only to diversity jurisdiction.¹⁰⁰ A broad concept of immunity from suits in federal courts has replaced a narrow text. This is not supported by the text or structure of the Constitution.¹⁰¹

A comparison between the Eleventh Amendment and Article III, Section 2 demonstrates that the Amendment only concerns diversity jurisdiction. Article III, Section 2, which establishes federal question jurisdiction and diversity jurisdiction of the federal courts, states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹⁰²

The Eleventh Amendment mentions suits between states and citizens of

100. A few scholars have applied a literalist reading to the Eleventh Amendment. For example, Andrew B. Coan has stated, “[T]his text appears to extinguish federal jurisdiction over all suits against states by citizens of another state, while leaving intact jurisdiction over suits arising under the Constitution or federal laws where the parties are not so aligned—most notably, suits by citizens against their own states.” Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court’s Costly War over the Eleventh Amendment*, 74 *FORDHAM L. REV.* 2511, 2511 (2006). Coan’s literalist reading is problematic for two reasons. First, as developed more fully in the text, the mirroring of the language of Article III makes it more likely that the Eleventh Amendment was intended to apply only to diversity jurisdiction. Second, it makes no sense that individuals who are citizens of a state can sue a state in federal court under federal law, but foreign individuals cannot. Out-of-state individuals need more protection from state court systems.

101. Applying principles of statutory interpretation, Professor Manning has argued that “when the Court confronts a precise and detailed constitutional text, it should adhere closely to the prescribed solution rather than stretch or contract the text in light of the apparent *ratio legis*.” John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *YALE L.J.* 1663, 1665 (2004). This principle is important because a precise text may constitute a compromise. *Id.*

102. U.S. CONST. art. III, § 2.

another state-diversity jurisdiction, but not suits against states by citizens of that state.¹⁰³ This tracking of the Article III language means that it does not preclude suits in federal court based on federal question jurisdiction.

Other evidence supports that the Eleventh Amendment was intended to have a narrow reading. Immediately after *Chisholm*, Congress considered, but never voted on, a broader Amendment than the Eleventh Amendment.¹⁰⁴ This proposed Amendment stated:

[T]hat no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.¹⁰⁵

This proposed Amendment contrasts sharply with the narrow wording that was ultimately adopted. In addition, the evil that the Eleventh Amendment was intended to remedy supports the plain meaning of the text. *Chisholm* concerned a suit to recover under a contract with a state for supplies entered into with that state during the Revolutionary War under state law;¹⁰⁶ it did not involve a federal question.

The Rehnquist Court's Eleventh Amendment jurisprudence also ignores the Constitution's structure. The Eleventh Amendment modifies the Supreme Court's Article III judicial power, not Congress's Article I powers. The only sensible interpretation is that, again, the Eleventh Amendment was intended only to affect diversity jurisdiction, not federal question jurisdiction.¹⁰⁷ Because the Eleventh Amendment does not affect

103. U.S. CONST. amend. XI.

104. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1922).

105. *Id.*

106. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). For a discussion of the facts of *Chisholm*, see 1 WARREN, *supra* note 104, at 93–94. As Professor Amar has pointed out, “[u]nder the common law of Georgia and, apparently, every other state, no cause of action lay for a breach of contract by the state itself.” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1469 (1987).

107. Professor Amar has remarked:

By reading the Eleventh Amendment's “state sovereign immunity” restrictions on federal *judicial* power to go far beyond the Tenth's “residuary state sovereignty” restrictions on federal *legislative* power, the Court has created a curious category of cases in which Congress may pass laws operating directly on states that can be enforced (if at all) only in state courts.

Congress's powers under Article I, Congress can pass laws that apply to the states, and suits under those laws can be brought against states in federal court.¹⁰⁸

The Court countered the plain meaning of the Eleventh Amendment by declaring that the quick passage of the Eleventh Amendment demonstrates that *Chisholm* was contrary to the states' sovereign immunity, which was well-established in the Constitution.¹⁰⁹ The Court also noted that because Congress did not authorize federal question jurisdiction until 1875, "it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States."¹¹⁰

There are other explanations for the quick passage of the Eleventh Amendment besides the fact that it confirmed the states had a broad sovereign immunity in the original Constitution.¹¹¹ It simply could have been a reaction to the ability of the states to be sued by foreign citizens in federal court for Revolutionary and pre-Revolutionary war debts.¹¹² Even though states thought they should not be subject to suit in federal courts for such debts does not mean that the Constitution contained state sovereign immunity and *Chisholm* got it wrong.

The Court may be correct that there is a long series of cases dating back to *Hans* that support state sovereign immunity.¹¹³ However, the Court ignores pre-*Hans* history, which supports the opposite conclusion. First, Congress's enactment of the Judiciary Act of 1789, which gave the

Amar, *supra* note 106, at 1476–77 (footnote omitted). Amar's article was written before *Alden*.

108. Professor Randall has gone further to argue that Article III, Section 2 "authorizes actions against states and the United States as a fundamental constitutional principle and empowers the national judiciary to decide those actions." Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 40–41 (2002).

109. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996).

110. *Id.* at 69–70.

111. For a detailed discussion of *Chisholm*, see Mark Strasser, *Chisholm, the Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 606–17 (2001).

112. Professor Strasser has declared, "it seems plausible to suggest that the shock resulted from a consideration of who would benefit if such suits were permitted—speculators who had bought state debts at a mere fraction of their face value, Tories/British sympathizers, and the British themselves." *Id.* at 620–21 (footnotes omitted).

113. *Seminole Tribe*, 517 U.S. at 54, 66–71. Justice Stevens questioned the majority's reading of these cases in his *Seminole Tribe* dissent. *Id.* at 83–93 (Stevens, J., dissenting).

Supreme Court original jurisdiction over suits between states and citizens of other states, did not raise any controversy.¹¹⁴ Second, the *Chisholm* majority, decided only a few years after the ratification of the Constitution, failed to find such an immunity.¹¹⁵ Finally, in *Cohens v. Virginia*, Chief Justice Marshall explained the purpose of the enactment of the Eleventh Amendment:

It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment.¹¹⁶

He also thought that states could be sued in federal court under federal question jurisdiction:

One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever

114. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1053–54 (1983).

115. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793).

116. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

may be the parties to that case.¹¹⁷

He later noted that the Eleventh Amendment does not bar suits by individuals against their own state.¹¹⁸

In sum, the plain meaning of the Eleventh Amendment, the structure of the Constitution, the evil for which the Eleventh Amendment was enacted, and the history of the Eleventh Amendment support a narrow reading of this Amendment. The Eleventh Amendment is a limitation, not a confirmation. As Justice Stevens asserted in his *Seminole Tribe* dissent concerning the majority's broad reading of the Eleventh Amendment, "little more than speculation justifies the conclusion that the Eleventh Amendment's express but partial limitation on the scope of Article III reveals that an implicit but more general one was already in place."¹¹⁹

B. Criticism of the Court's Creation of State Sovereign Immunity from Damage Suits in Their Own Courts and Before Administrative Agencies

The Court's creation of state sovereign immunity from damages suits in their own courts, based on its interpretation of history and the Tenth Amendment, is equally as flawed as its Eleventh Amendment immunity jurisprudence.¹²⁰ First, other than the narrow Eleventh Amendment, there

117. *Id.* at 382–83.

118. *Id.* at 412 ("But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.").

119. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 83 (1996) (Stevens, J., dissenting).

120. Numerous authors have criticized *Alden* and its progeny. *E.g.*, Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1285 (2000) ("My thesis is that the Court has made a value choice that protecting the rights of state governments is more important than protecting the rights of individuals."); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83–84 (2001); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1011–12 (2000); Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 749 (2005); James G. Wilson, *The Eleventh Amendment Cases: Going "Too Far" with Judicial Neofederalism*, 33 LOY. L.A. L.

is nothing in the Constitution that explicitly supports state sovereign immunity. Sovereign immunity is not mentioned in the Constitution, and the document does not use the term sovereignty at all. The Tenth Amendment reserves powers to the states, but it does not say what those powers are.¹²¹ Additionally, an immunity is not a power. More importantly, the Court has never before created a constitutional right without any textual support.¹²²

The history of state sovereignty at the time of the Constitution's

REV. 1687, 1687 (2000) ("Beginning with *Seminole Tribe v. Florida*, the Supreme Court's recent Eleventh Amendment decisions are some of its worst in decades." (footnote omitted)); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 2. A few authors have supported Alden and its progeny. E.g., Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 217 (2006) ("The ample array of powers at hand to ensure state compliance with federal law, both internal to the Eleventh Amendment and external to the courts, strongly suggests that the criticism of the Court's sovereign immunity cases is considerably exaggerated."); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 489-90 (2001); William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1169 (2002) ("The jurisprudence of the Rehnquist Court in matters of Federalism is principled, coherent, and true to the text and structure of the Constitution."); Richard H. Seamon, *A Brief Comment on the Current Eleventh Amendment Jurisprudence of the Supreme Court*, 1 GEO. J.L. & PUB. POL'Y 9, 9 (INAUGURAL ISSUE) (2002) ("I believe that the Supreme Court's understanding of state sovereign immunity is generally correct."); Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161, 1161 (2000).

121. As Justice Souter has written, "[t]here is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law." Alden v. Maine, 527 U.S. 706, 761 (1999) (Souter, J., dissenting). In addition, Professor Weinberg has observed: "The Tenth Amendment reserves a residuum of 'powers,' not 'sovereignty,' to the states." Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1154 (2001).

122. See *Seminole Tribe*, 517 U.S. at 167 (Souter, J., dissenting) ("I know of only one other occasion on which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision. Justice Chase once took such a position almost 200 years ago . . ."). Similarly, Professor Eastman has written, while discussing *Seminole Tribe*, "in openly admitting that its decision was not compelled by or even grounded in the text of the Eleventh Amendment, the Court opened itself up to the very criticism that originalists have long leveled at jurists who subscribed to the notion of an evolving, unwritten Constitution." John C. Eastman, *A Seminole Dissent?*, 1 GEO. J.L. & PUB. POL'Y 29, 30 (INAUGURAL ISSUE) (2002).

enactment and its continuation in the Constitution's text is at best ambiguous. At the time of the Constitution's enactment, some states had sovereign immunity while others did not.¹²³ The question of whether a state is immune in its own courts does not appear to have been debated during the Constitutional Convention.¹²⁴ However, the issue of whether a state could be sued in federal court did arise during the ratification debates, and there were a variety of views on this question.¹²⁵ Moreover, these discussions, and the discussions in the Federalist Papers, centered on actions against states to collect debts by individuals to enforce state bond obligations, not federal questions.¹²⁶

As was true of Eleventh Amendment immunity, the quick enactment of the Eleventh Amendment after *Chisholm* does not support broad state sovereign immunity under the Tenth Amendment and general conceptions of federalism. In addition to the reasons given in the previous subsection concerning *Chisholm* and Eleventh Amendment immunity,¹²⁷ Justice Souter has pointed out, “[n]ot a single Justice [in *Chisholm*] suggested that sovereign immunity was an inherent and infeasible right of statehood, and neither counsel for Georgia before the Circuit Court, nor Justice Iredell seems even to have conceived the possibility that the new Tenth Amendment produced the equivalent of such a doctrine.”¹²⁸ Equally important, *Chisholm* concerned whether a state could be sued in federal court, not whether states were bound by federal law; *Chisholm* involved a state cause of action.

While the Tenth Amendment supports the states' sovereignty, the Constitution did not give them sovereignty in the traditional sense; the Constitution “shattered” traditional notions when it divided power between the state and federal governments.¹²⁹ Traditional British notions of sovereignty considered it to be an “indivisible, final, and unlimited power.”¹³⁰ Traditional sovereignty has been defined as a “supreme power especially over a body politic” and “freedom from external control”; other

123. *Alden*, 527 U.S. at 769–71 (Souter, J., dissenting).

124. *Id.* at 772; *see also* Coan, *supra* note 100, at 2515.

125. *Alden*, 527 U.S. at 772–73 (Souter, J., dissenting).

126. John Randolph Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 BUFF. L. REV. 411, 479–80 (2000).

127. *See supra* notes 109–12 and accompanying text.

128. *Alden*, 527 U.S. at 789 (Souter, J., dissenting) (citation omitted).

129. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 151 (1996) (Souter, J., dissenting).

130. Amar, *supra* note 106, at 1430.

definitions include a “controlling influence” or “one that is sovereign,” or, especially, “an autonomous state.”¹³¹ States are certainly not free from external control, nor are they autonomous, nor do they possess supreme power in all areas; they are subject to the control of the federal government under the Supremacy Clause.¹³² In other words, they have some aspects of sovereignty and lack other aspects—namely total sovereignty, making them quasi-sovereign.

States do retain some sovereign immunity under this new type of sovereignty, however. First, they are free from lawsuits in federal courts based on diversity jurisdiction under the Eleventh Amendment. More importantly, states retain sovereign immunity in their own courts from state causes of action, if they wish. In other words, a state can have traditional sovereign immunity from the laws it created. By finding state sovereign immunity in the Constitution, the Court has given a traditional meaning to a new kind of sovereignty.

States are quasi-sovereigns because the Constitution gives some authority to Congress in Article I and reserves other authority to the states in the Tenth Amendment. Notably, the Constitution places no limitations on the power it gives Congress in Article I.¹³³ As Chief Justice Marshall declared in *McCulloch v. Maryland*, “[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.”¹³⁴ Because states are not sovereign with respect to objects committed to Congress, the states should be subject to congressional enactments under Article I. This corresponds with traditional notions of sovereignty. As Justice Holmes once declared, “A

131. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/dictionary/sovereignty> (last visited Jan. 21, 2008).

132. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

133. As Professors Redish and Drizin stated: “If a particular power has been given to the federal government, in Article I or elsewhere in the Constitution, then that power is tautologically *not* reserved to the states by the tenth amendment.” Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 10–11 (1987).

134. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”¹³⁵ In other words, states should have sovereignty when they enact the law, but not when Congress has enacted the law.¹³⁶ In fact, one might say, unless states are subject to congressional enactments, Congress and the federal government are not sovereign.

Concerning this subject, Chief Justice Marshall wrote:

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character, they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.¹³⁷

Nothing in the constitutional debates contradicts that Congress can subject states to liability under its Article I powers. As Justice Souter has noted, “[a]s it has come down to us, the discussion gave no attention to congressional power under the proposed Article I but focused entirely on the limits of the judicial power provided in Article III.”¹³⁸ As mentioned before, the conservative majority thought the framers’ silence was

135. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

136. The Court previously applied this principle to a case in which California residents sued Nevada in a California court, with the Court holding such a suit proper. *Nevada v. Hall*, 440 U.S. 410, 414–18 (1979).

137. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 413–14 (1821).

138. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 104 (1996) (Souter, J., dissenting).

telling,¹³⁹ but silence means nothing. In addition, should we allow silence to become the law when it has not been debated or enacted according to the proper procedures? As Professor Redish has noted, “[u]nless the Framers actually embodied their goal in constitutional text, that goal has no constitutional status, because it has not been subjected to the ratification process”¹⁴⁰ Moreover, history can be read in more than one way. As Justice Souter has commented, “[g]iven the Framers’ general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights.”¹⁴¹

The Supremacy Clause also supports the notion that Congress can pass laws that apply to the states under its Article I powers. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁴²

This clause makes congressional enactments the “supreme Law of the Land,” and it makes every state judge bound by those enactments. Most importantly, as mentioned in the clause itself, nothing in the Constitution or state law can create an exception to this Clause. As Professor Westover remarked:

Read as a whole, the Constitution requires a balanced approach to federalism that takes account of two countervailing principles—state sovereignty and federal supremacy. In the new federalism cases, however, the majority relies exclusively on the state sovereignty principle, using it to strike down various laws that somehow impose

139. See *supra* note 62 and accompanying text.

140. MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 46 (1995).

141. *Seminole Tribe*, 517 U.S. at 155 (Souter, J., dissenting); see also Randall, *supra* note 108, at 26; Strasser, *supra* note 111, at 648 (“Yet, the Framers had just experienced the consequences of having a weak central government where states might put their own perceived interests over the interests of the nation as a whole.”).

142. U.S. CONST. art. VI, cl. 2.

upon the states.¹⁴³

Professor Chemerinsky has gone one step further: “*Alden* means that the Constitution is subordinate to the principle of state sovereign immunity.”¹⁴⁴

The remainder of the Constitution does not support broad state sovereign immunity, and, in fact, it supports the protection of the “People.” As Professor Amar has asserted, “the Constitution draws its life from postulates that limit and control lawless governments, not postulates that limit and control citizens in their efforts to vindicate constitutional rights”¹⁴⁵ Professor Amar has also added that a “blanket government immunity from liability conflicts with the Constitution’s structural principle of full remedies for violations of legal rights against [the] government.”¹⁴⁶

Similarly, and contrary to the Court’s argument, the Constitution does not protect the states’ dignity through sovereign immunity. As stated in the previous subsection, Justice Marshall thought that the Eleventh Amendment was not passed to protect the states’ dignity.¹⁴⁷ In addition, the Court has not shown that dignity is an essential attribute of sovereignty. In creating this dignity attribute of sovereignty, is the Court not anthropomorphizing states? Finally, how is a quasi-sovereign’s dignity violated by having laws applied to it in an area where it has no sovereignty?

Allowing state sovereign immunity also limits the dual protections that the Framers intended the Constitution to create. As James Madison wrote:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.¹⁴⁸

Moreover, as mentioned above, ultimate sovereignty lies with the people,

143. Westover, *supra* note 120, at 694.

144. Chemerinsky, *supra* note 120, at 1294.

145. Amar, *supra* note 106, at 1485.

146. *Id.* at 1489.

147. *See supra* note 116 and accompanying text.

148. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

referring to the unitary people, not the people of each state.¹⁴⁹ This created a new type of government: “As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers.”¹⁵⁰ In other words, “[e]ach government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by another government’s misconduct.”¹⁵¹ Similarly, Alexander Hamilton asserted:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, *they can make use of the other, as the instrument of redress.*¹⁵²

Yet, the Rehnquist Court’s sovereign immunity jurisprudence destroys this dual sovereignty and the protections inherent therein. The federal government cannot protect the people from state government. Instead, the protection is turned inside out to protect the states from the people.¹⁵³ This goes against the rule of law, which depends on the government being accountable. As Justice Souter observed, “[i]t would be hard to imagine anything more 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

149. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 150–52 (1996) (Souter, J., dissenting); see also Amar, *supra* note 106, at 1435 (“The American answer was at once traditional and arresting: True sovereignty resided in the People themselves.”). Notably, the Constitution was ratified not by state legislatures, but by state conventions. As Professor Amar remarked, “[e]ach state’s ratifying convention was superior to its ordinary legislature, for the convention was in theory the virtual embodiment of the People of that state.” *Id.* at 1459 (emphasis removed).

150. Amar, *supra* note 106, at 1436.

151. *Id.* at 1428.

152. THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

153. Professor Prince stated aptly “[t]hat state ‘personage’ allows the Court to mischaracterize the interests their opinions serve, by pretending to be protecting the state David from the federal Goliath, while in fact defending the state Goliath against the private person David.” Prince, *supra* note 126, at 491. Likewise, Professor Wilson has argued that, under *Seminole Tribe*, any state essentially has veto power over federal law. Wilson, *supra* note 120, at 1717.

law just like their own.”¹⁵⁴

In addition, one cannot expect the states to protect the people from the states themselves. As Justice Stevens commented:

that “the King can do no wrong” has always been absurd; the bloody path trod by English monarchs both before and after they reached the throne demonstrated the fictional character of any such assumption. Even if the fiction had been acceptable in Britain, the recitation in the Declaration of Independence of the wrongs committed by George III made that proposition unacceptable on this side of the Atlantic.¹⁵⁵

Thus, the fact that federal statutes may require payment from state treasuries is irrelevant. Payment from state treasuries is one of the consequences of having dual protection. As Justice Souter pointed out:

[s]o long as the citizens’ will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State: the strain then is not only expected, but necessarily intended.¹⁵⁶

Justice Souter also noted:

The “judgment creditor” in question is not a dunning bill collector, but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law.¹⁵⁷

The results that the sovereign immunity cases have produced show the problems with the existence of state sovereign immunity. First, there is a need for uniformity in intellectual property laws and anti-discrimination laws. Certain entities should not be covered by such laws while others are exempt. Second, these laws were enacted to protect property and individual rights, and states are just as able as individuals to infringe upon these rights. Not only does history support this, but the very existence of

154. *Alden v. Maine*, 527 U.S. 706, 802 (1999) (Souter, J., dissenting).

155. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 95 (1996) (Steven, J., dissenting).

156. *Alden*, 527 U.S. at 803 (Souter, J., dissenting).

157. *Id.* at 803 (Souter, J., dissenting); see also Weinberg, *supra* note 121, at 1143 (“[I]t cannot be a legitimate priority of the people of the state to misappropriate the wages earned by state employees.”).

these cases demonstrates the need to apply these laws to the states. As Joan Meyler noted:

because of this expanded . . . immunity, [states] will be permitted to behave as unscrupulous parties, subject to no rules but their own, even though one of the prime reasons for the adoption of the Constitution to replace the Articles of Confederation was to achieve uniformity in the laws and to control the states.¹⁵⁸

The Court in *Federal Maritime Commission* piled speculation upon speculation. In this case, the Court took a weak argument concerning state sovereign immunity in courts and made it into a presumption of sovereign immunity in other types of hearings that were unthought of by the Framers.¹⁵⁹ As Justice Souter commented in his *Alden* dissent:

[t]he Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure, but they do not hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated.¹⁶⁰

The action was an executive branch action under congressional authority. Article III was not involved at all—"[f]ederal administrative agencies do not exercise the '[j]udicial power of the United States.'"¹⁶¹ Congress has the sole power to regulate commerce with foreign nations,¹⁶² and state sovereign immunity before the Federal Maritime Commission would significantly weaken that power. As Justice Breyer declared: "The Court's decision threatens to deny the Executive and Legislative Branches of Government the structural flexibility that the Constitution permits and which modern government demands."¹⁶³ Furthermore, as was discussed

158. Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77, 105 (2001). Similarly, Professor Chemerinsky has averred: "States can inflict great injuries—by ignoring federal labor laws, by violating copyrights and patents, by discriminating based on age—and nowhere be held accountable." Chemerinsky, *supra* note 120, at 1286.

159. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 776–77 (2002) (Breyer, J., dissenting).

160. *Alden*, 527 U.S. at 807 (Souter, J., dissenting) (quoting U.S. CONST. amend. XI).

161. *Fed. Mar. Comm'n*, 535 U.S. at 777 (Breyer, J., dissenting).

162. U.S. CONST. art. I, § 8, cl. 3.

163. *Fed. Mar. Comm'n*, 535 U.S. at 786 (Breyer, J., dissenting).

above in another context, the Court's reliance on the states' dignity is unfounded. The dignity of the states is not affected when they have to answer to a federal administrative agency that has plenary power over a field in which the states have no authority.¹⁶⁴

IV. THE SECTION 5 EXCEPTION TO STATE SOVEREIGN IMMUNITY

As mentioned in Part II, Congress can abrogate the states' sovereign immunity through Section 5 of the Fourteenth Amendment.¹⁶⁵ Section 5 states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."¹⁶⁶ "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."¹⁶⁷ "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."¹⁶⁸ "Congress' power 'to enforce' the Amendment includes the authority both to remedy and 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*."¹⁶⁹ Moreover, "[d]ifficult and intractable problems often require powerful remedies, and [the Court has] never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."¹⁷⁰

However, such legislation must be appropriate under Section 5.¹⁷¹

164. As Justice Breyer argued, "[o]nce one avoids the temptation to think (mistakenly) of an agency as a court, it is difficult to see why the practical pressures at issue here would 'affront' a State's 'dignity' any more than those just mentioned." *Id.* at 784.

165. *E.g.*, *Nev. Dep't Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999). The Court previously applied these principles in *South Carolina v. Katzenbach*, which permitted a suspension of literacy tests and similar voting requirements under Congress's power to enforce the Fifteenth Amendment in order to eliminate racial discrimination in voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 325–27 (1966).

166. U.S. CONST. amend. XIV, § 5.

167. *Kimel v. Fla. Bd. Regents*, 528 U.S. 62, 81 (2000).

168. *Hibbs*, 538 U.S. at 727–28.

169. *Kimel*, 528 U.S. at 81 (emphasis added).

170. *Id.* at 88; *see also Tennessee v. Lane*, 541 U.S. 509, 518 (2004) ("This enforcement power, as we have often acknowledged, is a 'broad power indeed.'" (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982))).

171. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999).

Congress “‘has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.’”¹⁷² “[T]he term ‘enforce’ is to be taken seriously— . . . the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations.”¹⁷³ “Valid § 5 legislation must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”¹⁷⁴ Thus, to satisfy Section 5, Congress “must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”¹⁷⁵ The Court has written, “[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”¹⁷⁶ In addition, although Congress should be given much deference concerning its Section 5 power, the ultimate interpretation of the Fourteenth Amendment remains with the Court.¹⁷⁷

The Court applied these principles in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, holding that Congress did not have the authority to abrogate the states’ sovereign immunity in the Patent Remedy Act.¹⁷⁸ Congress amended the patent laws in 1992 to abrogate the states’ sovereign immunity for patent claims.¹⁷⁹ College Savings Bank, which marketed certificates of deposit that were annuity contracts for financing future college educations, patented a financing methodology that was developed to guarantee sufficient funds for college tuition.¹⁸⁰ College Savings Bank claimed that an arm of Florida—Florida Prepaid—infringed on its patent, and it filed suit in the District Court of New Jersey.¹⁸¹ The district court denied Florida Prepaid’s motion to

172. *Id.* at 638 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)); *see also Hibbs*, 538 U.S. at 728; *Kimel*, 528 U.S. at 81.

173. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999) (citing *City of Boerne*, 521 U.S. at 516–29).

174. *Hibbs*, 538 U.S. at 728 (quoting *City of Boerne*, 521 U.S. at 520); *see also Kimel*, 528 U.S. at 81.

175. *Florida Prepaid*, 527 U.S. at 639.

176. *Kimel*, 528 U.S. at 89 (quoting *City of Boerne*, 521 U.S. at 530).

177. *Id.* at 81.

178. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999).

179. *Id.* at 630.

180. *Id.* at 630–31.

181. *Id.* at 631.

dismiss on grounds of sovereign immunity, and the Federal Circuit affirmed the ruling.¹⁸²

The Court framed the issue as “[c]an the Patent Remedy Act be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for patent owners?”¹⁸³ The Court noted that the “unremedied patent infringement by the States . . . must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act.”¹⁸⁴ The Court declared: “In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone . . . constitutional violations.”¹⁸⁵

The Court stated that because patents were property, they might be protected under the Due Process Clause of the Fourteenth Amendment.¹⁸⁶ However, the Court observed “that [i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.”¹⁸⁷ The Court wrote:

under the plain terms of the Clause and the clear import of our precedent, a State’s infringement of a patent, though interfering with a patent owner’s right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.¹⁸⁸

In finding no Section 5 violation, the Court declared:

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of “widespread and persisting deprivation of constitutional rights” of the sort Congress has faced in enacting proper prophylactic § 5 legislation. Instead, Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the

182. *Id.* at 633.

183. *Id.* at 639.

184. *Id.* at 640.

185. *Id.*

186. *Id.* at 642.

187. *Id.* at 642–43 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)).

188. *Id.* at 643.

Constitution. . . . Here, the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions.¹⁸⁹

Thus, the Patent Remedy Act is “so out of proportion to a supposed remedial or preventative object that [it] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”¹⁹⁰

The Court added:

The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment. . . . The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.¹⁹¹

In a companion case, the Court ruled that Congress did not have the authority to extinguish the states' sovereign immunity under the Trademark Remedy Clarification Act (TRCA).¹⁹² Section 43(a) of the Lanham Act—federal legislation enacted in 1946 to govern trademarks—provides “a private right of action against ‘[a]ny person’ who uses false descriptions or makes false representations in commerce.”¹⁹³ The TRCA extended section 43(a) to include states.¹⁹⁴ College Savings sued Florida Prepaid under these provisions, based on the same facts as the companion case.¹⁹⁵

The Court ruled Congress could not abrogate the states' sovereign immunity under the TRCA because section 43(a) did not involve any property right that could be protected under the Due Process Clause.¹⁹⁶ College Savings alleged state deprivation of two types of property: “(1) a right to be free from a business competitor's false advertising about its own

189. *Id.* at 645–46 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)).

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

191. *Id.* at 647–48 (footnote omitted).

192. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999).

193. *Id.* at 670 (quoting 15 U.S.C. § 1125(a)(1) (2000)).

194. *Id.*; see also 15 U.S.C. § 1125(a)(2).

195. *Coll. Sav. Bank*, 527 U.S. at 670–71.

196. *Id.* at 672–75.

product, and (2) a more generalized right to be secure in one's business interests."¹⁹⁷ Noting that "[t]he hallmark of a protected property interest is the right to exclude others," the Court observed that the false advertising claim bore no relationship to a right to exclude.¹⁹⁸ Similarly, the Court remarked that "business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense."¹⁹⁹

Likewise, in *Kimel v. Florida Board of Regents*, the Court held that Congress could not abrogate the states' immunity under Section 5 to enforce in the Age Discrimination in Employment Act of 1967 (ADEA).²⁰⁰ The Court declared, "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."²⁰¹ In analyzing equal protection violations, the Court has applied the rational basis test to claims of age discrimination because "[o]ld age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it."²⁰² Thus, "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."²⁰³ The Court concluded: "The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."²⁰⁴ In addition, the Court's review of the ADEA's legislative history failed to reveal that Congress had any reason to believe that states were discriminating against their employees.²⁰⁵

Finally, in *Board of Trustees of the University of Alabama v. Garrett*, the Court ruled that, because of sovereign immunity, employees of the state of Alabama may not recover money damages against that state for failure to comply with Title I of the American with Disabilities Act of 1990

197. *Id.* at 672.

198. *Id.* at 673.

199. *Id.* at 675.

200. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

201. *Id.* at 83.

202. *Id.*

203. *Id.*

204. *Id.* at 86.

205. *Id.* at 91.

(ADA).²⁰⁶ As was true in *Kimel* for age discrimination, the Court applied the rational basis test to discrimination against the disabled.²⁰⁷ The Court remarked that states “could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.”²⁰⁸ The Court concluded: “The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”²⁰⁹

After the cases discussed above in which the Court refused to find that Congress properly extinguished the states’ immunity under Section 5, the Court found such abrogation in two cases, *Tennessee v. Lane* and *Nevada Department of Human Resources v. Hibbs*.²¹⁰ *Hibbs* involved a claim under the Family and Medical Leave Act of 1993 (FMLA), which “entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a ‘serious health condition’ in an employee’s spouse, child, or parent.”²¹¹ The FMLA provides a private right of action in federal or state court against any employer, including a public agency, for equitable or monetary relief.²¹² *Hibbs*, who took time off from his job at the Nevada Department of Human Resources to care for his ailing wife, sued the department and two of its officials for damages, injunctive relief, and declaratory relief in federal court.²¹³ The defendant-petitioners defended the suit on the grounds of Eleventh Amendment immunity.²¹⁴

The Court found that the FMLA’s goal was “to protect the right to be free from gender-based discrimination in the workplace.”²¹⁵ The key to the Court’s decision was that gender-based classifications receive heightened scrutiny under the Equal Protection Clause.²¹⁶ The Court noted its earlier holding “that statutory classifications that distinguish between males and

206. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).

207. *Id.* at 365–68.

208. *Id.* at 367–68.

209. *Id.* at 368.

210. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726–28, 740 (2003).

211. *Hibbs*, 538 U.S. at 724 (quoting 29 U.S.C. § 2612(a)(1)(c) (1994)).

212. *Id.* at 724–25.

213. *Id.* at 725.

214. *Id.*

215. *Id.* at 728.

216. *Id.* at 735–36.

females are subject to heightened scrutiny. For a gender-based classification to withstand such scrutiny it must ‘serv[e] important governmental objectives,’ and ‘the discriminatory means employed [must be] substantially related to the achievement of those objectives.’”²¹⁷

Using this standard, the Court held that “Congress was justified in enacting the FMLA as remedial legislation.”²¹⁸ The Court averred:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.²¹⁹

The Court continued:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.²²⁰

In *Lane*, the Court concluded that Congress properly extinguished the states’ sovereign immunity in Title II of the ADA using Section 5.²²¹ The respondents were both paraplegics who alleged that they were denied access to the Tennessee state court system because of their disabilities.²²² The Court determined that Title II of the ADA went further than Title I: “it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review,” including access to the courts, which is protected by the Due Process

217. *Id.* at 728 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

218. *Id.* at 734.

219. *Id.* at 736.

220. *Id.* at 737.

221. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).

222. *Id.* at 513–14.

Clause of the Fourteenth Amendment.²²³ In addition, the Constitution guarantees a criminal defendant “the ‘right to be present at all stages of the trial’” and “civil litigants a ‘meaningful opportunity to be heard.’”²²⁴ The Court concluded that Title II addressed these harms.²²⁵ The Court asserted, “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.”²²⁶ In particular, “Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.”²²⁷ In addition, Title II’s remedy is limited; for example, it requires only reasonable modifications.²²⁸ The Court concluded: “Judged against this backdrop, Title II’s affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be ‘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.’”²²⁹

V. CRITICISM OF THE COURT’S SECTION 5 CASES

While this author basically agrees with the principles of the Court’s Section 5 cases, the Court has applied these principles inconsistently, creating confusion for lower courts that have to apply these principles. Of course, the Court would not have to create Section 5 exceptions if it had not improperly found the existence of state immunity. In other words, Section 5 should be irrelevant because there should be no reason to use it.

Congress should not be able to create new rights under Section 5 because Section 5 gives Congress the power to enforce the provisions of the Fourteenth Amendment and nothing more. *City of Boerne v. Flores* is a clear example of when Congress improperly tried to create new constitutional rights, and the Court struck it down.²³⁰ *Boerne* held that Congress lacked the power to enact the Religious Freedom Restoration

223. *Id.* at 522–23.

224. *Id.* at 523 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

225. *Id.* at 524.

226. *Id.*

227. *Id.* at 527.

228. *Id.* at 531–32.

229. *Id.* at 533 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

230. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Act of 1993 (RFRA).²³¹ The case involved the application of a preservation ordinance to a church building.²³² When the city denied the church a building permit under the ordinance, the church challenged the denial under RFRA.²³³ RFRA states:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.²³⁴

The Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise [of religion]."²³⁵

RFRA obviously expands the scope of the Free Exercise Clause. In a pre-RFRA case, the Court held that neutral laws of general applicability, such as drug laws, may be applied to religious practices even if the law is not supported by a compelling governmental interest.²³⁶ RFRA changed this interpretation. In striking down RFRA, Justice Kennedy declared: "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."²³⁷ He added: "If

231. *Id.* at 536.

232. *Id.* at 511–12.

233. *Id.*

234. 42 U.S.C. § 2000bb-1 (1994).

235. U.S. CONST. amend. I.

236. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885–89 (1990) (upholding an Oregon law banning the use of peyote, even in religious ceremonies).

237. *Boerne*, 521 U.S. at 519.

Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"²³⁸

The Court's holding in *Boerne* makes it clear that Congress can enact legislation under Section 5 only when it involves an existing right under the Fourteenth Amendment, such as a due process or equal protection right. Also, the level of scrutiny that the Court applied restricts Congress's use of Section 5.²³⁹ For example, Congress cannot use Section 5 to enact an age anti-discrimination statute that applies to the states when a state has a rational basis for its actions because the Court has held that discrimination based on age only merits rational basis scrutiny under the Equal Protection Clause.²⁴⁰ Of course, this results in different standards for racial, gender, and age anti-discrimination statutes, but this difference is already built into the Court's Fourteenth Amendment analysis.

While this limitation is complex, it is correct. If Congress goes beyond the Court's interpretation of a constitutional right, it is doing more than enforcing that right; it is redefining that right. However, it seems troubling that Congress must constantly consult the Court's latest opinions in depth when making policy decisions. Of course, this problem would not exist in the first place if the Court had not wrongly created state sovereign immunity from Congress's Article I powers.

The rest of the Court's Section 5 arguments are logical. Congress should be able to fashion the remedy for a Fourteenth Amendment violation under Section 5. Moreover, the congruence and proportionality limitation that requires the remedy to be tailored to the evil to be prevented is legitimate. If Congress goes significantly beyond the evil to be remedied, it goes beyond its Section 5 power and creates a new constitutional right.

The most troubling aspect of the Court's Section 5 jurisprudence is its application in cases. The first problem is the extreme scrutiny that the Court gives to Congress's evaluation of the need for Section 5 legislation. The Court completely reevaluates the evidence that Congress used for its enactments. The Court appears to be rethinking the wisdom of Congress's decision; it has placed a very high burden of proof on Congress to support

238. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

239. *See supra* note 202 and accompanying text.

240. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83–84 (2000).

its enactments.²⁴¹ This should not be the standard that the Court applies. The standard should be whether Congress had sufficient evidence to make its determination that the problem needed to be remedied under Section 5. While the Court should be the final arbiter under principles of judicial review, the Court has gone far beyond the deference it says it owes Congress in these cases. As Professor McCormick has stated, “The Court also, however, balanced its own power against the power of Congress—which body has the power to decide whether any mechanism is available to reach a particular goal, and if so, what mechanism.”²⁴²

The Court has also taken a narrow view of what enforcement means. As Professor McCormick pointed out: “Legislation under the Fourteenth Amendment can be broader than the amendment itself and be valid as long as it works to *remedy* past unconstitutional discrimination or infringement upon rights or to *deter* future constitutional violations.”²⁴³ However, the Court in the sovereign immunity cases has focused on remedy, not on deterrence. “In other words, the Court has allowed Congress to prohibit only those actions that the states have widely engaged in and which violate the self-executing portion of the Fourteenth Amendment.”²⁴⁴ In addition, the fact that alternative remedies to money damages exist does not ameliorate the problem. “[A] private right of action for money damages is one of the most effective deterrents to illegal conduct because it decentralizes enforcement power to individuals and because money, by its nature, is a limited resource.”²⁴⁵

Also, this author disagrees with how the Court has applied the rational basis test. For example, in *Garrett*, the Court held that Congress could not apply Title I of the ADA to states because under the rational basis test states often had such a basis to discriminate against the disabled.²⁴⁶ This argument, however, ignores two important factors. First, while the Court generally requires only minimal evidence of a rational basis for a statute, often allowing almost any justification to serve as a

241. As Professor Prince has remarked, “legislative history is being used to test not Congress’s intent but whether it did its job thoroughly enough. Congress is being put on trial, and its case-in-chief is its legislative history.” Prince, *supra* note 126, at 463; *see also* Colker & Brudney, *supra* note 120, at 85–86.

242. Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment’s Illogical Impact on Congress’ Power*, 37 IND. L. REV. 345, 362 (2004).

243. *Id.* at 346–47.

244. *Id.* at 347.

245. *Id.* at 346.

246. *See supra* notes 206–09 and accompanying text.

rational basis,²⁴⁷ the Court has given rational basis some “bite” when applied to disabilities.²⁴⁸ As the Court declared, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”²⁴⁹ Second, the ADA has built-in protections, such as only requiring employers to make “reasonable accommodations.”²⁵⁰ Based on these two factors, it is difficult to see how a state could have a rational basis for discriminating against its disabled citizens.

Hibbs goes in the opposite direction by wrongly allowing Congress to apply FMLA to the states, resulting in a remedy that is not congruent and proportional to the evil.²⁵¹ The first part of the Court’s analysis is logical. Because FMLA involves gender discrimination, the Court can apply the intermediate scrutiny test, and under this test, discrimination against women concerning pregnancy is a violation of equal protection.²⁵² However, how is requiring twelve weeks of unpaid leave congruent and proportional to this evil? If the problem is that women are discriminated against in the workplace because they can get pregnant, general antidiscrimination statutes, like Title VII, can handle this problem. There is no need to mandate twelve weeks of unpaid leave. Thus, the remedy goes beyond what is required to correct the evil.

In sum, the Supreme Court has created a confusing and unnecessary exception to the states’ sovereign immunity under Section 5. There would be no need for this confusion if the Court had not created that sovereign immunity in the first place.

VI. CONGRESS’S ABILITY TO ABROGATE THE STATES’ SOVEREIGN IMMUNITY UNDER ITS ARTICLE I BANKRUPTCY POWERS

Two cases involving bankruptcy courts have limited the states’ sovereign immunity and have contravened principles seen in earlier cases. Although the Court granted certiorari in *Tennessee Student Assistance*

247. See, e.g., *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980).

248. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

249. *Id.* at 446.

250. *Bd. of Trs. of The Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001) (citing 42 U.S.C. §§ 12111(9), 12112(b)(5)(A), 12112(5)(B) (2000)).

251. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726–27 (2003). Of course, this author would find the ADA’s application to the states constitutional under Article I.

252. *Id.* at 736.

Corp. v. Hood to determine whether the Bankruptcy Clause grants Congress the power to abrogate the states' immunity from private suits, the Court did not reach this question because a proceeding to determine the dischargeability of a student loan debt involving a state agency did not implicate the Eleventh Amendment.²⁵³ Not all suits in federal court concern the states' sovereign immunity.²⁵⁴ For example, the Eleventh Amendment does not preclude federal jurisdiction of in rem admiralty suits when the state does not possess the res.²⁵⁵ The same principle applies to the in rem discharge of a debt by the bankruptcy court.²⁵⁶ The Court wrote:

[a] bankruptcy court's *in rem* jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" Because the court's jurisdiction is premised on the res, however, a nonparticipating creditor cannot be subjected to personal liability.²⁵⁷

The analysis above is true for the discharge of a student loan, even though the debtor has to secure a hardship determination in an adversary proceeding to discharge a student loan against a governmental entity.²⁵⁸ In *Hood*, the petitioner argued that "[b]y making a student loan debt presumptively nondischargeable and singling it out for an 'individualized adjudication,' . . . Congress has authorized a suit against a State."²⁵⁹ The Court replied:

No matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona; that States were granted the presumptive benefit of nondischargeability does not alter the court's underlying authority. A debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He

253. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004).

254. *Id.* at 446–47.

255. *Id.* (citing *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 507–08 (1998)).

256. *Id.* at 447.

257. *Id.* at 448 (quoting 16 J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 108.70[1] (3d ed. 2004)).

258. *Id.* at 449–50.

259. *Id.* at 450.

seeks only a discharge of his debts.²⁶⁰

This is even true despite the fact that the debtor has to file an adversary proceeding against the state and serve it with a summons.²⁶¹ The Court asserted, “[o]ur precedent has drawn a distinction between *in rem* and *in personam* jurisdiction, even when the underlying proceedings are, for the most part, identical.”²⁶² Here, the court could adjudicate the discharge without gaining *in personam* jurisdiction over the state.²⁶³ The Court concluded: “We see no reason why the service of a summons, which in this case is indistinguishable in practical effect from a motion, should be given dispositive weight.”²⁶⁴

In *Central Virginia Community College v. Katz*, the Court abandoned the absolute rule that Congress could not use its Article I powers to extinguish the states’ sovereign immunity by holding that Congress could abrogate the states’ sovereign immunity under its Article I bankruptcy authority.²⁶⁵ The majority in this case was much different from most of the sovereign immunity cases: Justices Stevens, Souter, Ginsburg, and Breyer, who were usually the dissenters in the sovereign immunity cases, and Justice O’Connor.²⁶⁶

The debtor, Wallace’s Bookstores, Inc., had done business with “arms of the state”—Virginia institutes of higher education.²⁶⁷ The court-appointed liquidating supervisor of the bankruptcy estate commenced proceedings against the institutions under sections 547(a) and 550(a) of the Bankruptcy Code to avoid and recover preferential transfers.²⁶⁸ The

260. *Id.*

261. *Id.* at 451–55.

262. *Id.* at 453.

263. *Id.*

264. *Id.* at 454.

265. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006). The Court stated: “We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla. v. Florida*, reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous.” *Id.* at 363 (citations omitted).

266. *Id.* at 358.

267. *Id.* at 360.

268. *Id.* A preferential transfer is defined as:

any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such

bankruptcy court rejected the institutions' motions to dismiss based on sovereign immunity, and the district court and court of appeals affirmed.²⁶⁹

Because bankruptcy jurisdiction is “an adjudication of interests claimed in a res,” and is mainly in rem jurisdiction, “it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction.”²⁷⁰ The Court maintained that:

[i]t is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause—a provision which . . . reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law [with] sovereign immunity defenses that might have been asserted in bankruptcy proceedings.²⁷¹

The Court wrote:

The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena. Foremost on the minds of those who adopted the Clause were the intractable problems, not to mention the injustice, created by one State's imprisoning of

transfer was made;

(3) made while the debtor was insolvent;

(4) made—

- (A) on or within 90 days before the date of the filing of the petition; or
- (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

- (A) the case were a case under chapter 7 of this title;
- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (2000).

269. *Katz*, 546 U.S. at 360–61.

270. *Id.* at 362 (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)).

271. *Id.* (footnote omitted).

debtors who had been discharged (from prison and of their debts) in and by another State.²⁷²

The Court noted that “the very first Congresses considered, and the Sixth Congress enacted, bankruptcy legislation authorizing federal courts to, among other things, issue writs of habeas corpus directed at state officials ordering the release of debtors from state prisons.”²⁷³

The Court observed that:

[c]ritical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor’s property, the equitable distribution of that property among the debtor’s creditors, and the ultimate discharge that gives the debtor a “fresh start” by releasing him, her, or it from further liability for old debts.²⁷⁴

Just like other creditors, states are bound by a bankruptcy discharge.²⁷⁵

Historically, discharge involved not only release of the debts but also release of the debtor from prison.²⁷⁶ In the American Colonies, there were differing schemes for discharging debtors and debts, which created uniformity problems.²⁷⁷ The Constitutional Convention committed the questions of bankruptcy, insolvency laws, and their relationship to the Full Faith and Credit Clause to the Committee of Detail, which recommended adding the bankruptcy power to what became Article I.²⁷⁸ The Committee approved the recommendation with little debate two days later.²⁷⁹ Based on this quick passage, the Court asserted: “The absence of extensive debate over the text of the Bankruptcy Clause or its insertion indicates that there was general agreement on the importance of authorizing a uniform federal response to the problems presented in cases like *James* and *Millar*.”²⁸⁰

The Bankruptcy power involves more than in rem jurisdiction.²⁸¹ The Court has written, “[a]lthough the interest in avoiding unjust imprisonment

272. *Id.* at 362–63.

273. *Id.* at 363.

274. *Id.* at 363–64.

275. *Id.* at 364 (citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004)).

276. *Id.*

277. *Id.* at 365.

278. *Id.* at 368–69.

279. *Id.* at 369.

280. *Id.*

281. *Id.* at 370.

for debt and making federal discharges in bankruptcy enforceable in every State was a primary motivation for the adoption of that provision, its coverage encompasses the entire ‘subject of Bankruptcies.’”²⁸² The Court has declared that the framers would have understood this.²⁸³ They have also asserted that “courts adjudicating disputes concerning bankrupts’ estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications.”²⁸⁴ In addition, “[a] court order mandating turnover of the property [in a preferential transfer action], although ancillary to and in furtherance of the court’s *in rem* jurisdiction, might itself involve *in personam* process.”²⁸⁵ The Court noted,

it is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in rem*. . . [T]hose who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property.²⁸⁶

The Court reasoned that the states agreed in the plan of the convention not to assert immunity against ancillary orders like preferential transfers.²⁸⁷ The Court asserted: “So much is evidenced not only by the history of the Bankruptcy Clause, which shows that the Framers’ primary goal was to prevent competing sovereigns’ interference with the debtor’s discharge, but also by legislation considered and enacted in the immediate wake of the Constitution’s ratification.”²⁸⁸ Reflecting the uniqueness of a system involving multiple sovereigns, the 1800 Act granted federal courts the power “to issue writs of habeas corpus effective to release debtors from state prisons.”²⁸⁹ The Court remarked, “there appears to be no record of any objection to the bankruptcy legislation or its grant of habeas power to federal courts based on an infringement of sovereign immunity.”²⁹⁰

282. *Id.*

283. *Id.* (“The first bankruptcy statute, for example, gave bankruptcy commissioners appointed by the district court the power, *inter alia*, to imprison recalcitrant third parties in possession of the estate’s assets.”).

284. *Id.*

285. *Id.* at 372.

286. *Id.* (footnote omitted). “Petitioners do not dispute that that authority has been a core aspect of the administration of bankrupt estates since at least the 18th century.” *Id.*

287. *Id.* at 373.

288. *Id.* (citation omitted).

289. *Id.* at 374.

290. *Id.* at 375.

The Court concluded:

The relevant question is not whether Congress has “abrogated” States’ immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress’ determination that States should be amenable to such proceedings is within the scope of its power to enact “Laws on the subject of Bankruptcies.” We think it beyond peradventure that it is.²⁹¹

VII. CRITICISM OF THE COURT’S HOLDING THAT CONGRESS CAN ABROGATE THE STATES’ SOVEREIGN IMMUNITY UNDER ITS ARTICLE I BANKRUPTCY POWERS

In *Katz*, the Court created a bad exception to a bad rule.²⁹² It used speculative history to counter speculative history, unprincipled reasoning to counter unprincipled reasoning, and silence to counter silence. In fact, one can say that in this case the usual dissenters in the sovereign immunity cases used the reasoning of the Rehnquist majority in sovereign immunity cases to the detriment of the Rehnquist majority.²⁹³ Of course, the majority would not have had to do this had it not been for the Rehnquist majority’s unprincipled decision to create immunity for the states.

If any area of law calls out for Congress to be able to abrogate state sovereign immunity, it is bankruptcy.²⁹⁴ Bankruptcy needs uniformity. It is

291. *Id.* at 379 (citation omitted).

292. The dissent noted that “[t]he majority does not appear to question the established framework for examining the question of state sovereign immunity under our Constitution.” *Id.* at 380 (Thomas, J., dissenting).

293. The majority in *Katz* was comprised of Stevens, O’Connor, Souter, Ginsburg, and Breyer. Thomas, Roberts, Scalia, and Kennedy dissented. *Id.* at 358.

294. Shortly after *Seminole Tribe*, a number of commentators expressed the concern that Eleventh Amendment immunity would affect a bankruptcy court’s ability to adjudicate claims involving states. *E.g.*, Laura B. Bartell, *Getting to Waiver—A Legislative Solution to State Sovereign Immunity in Bankruptcy After Seminole Tribe*, 17 *BANKR. DEV. J.* 17 (2000); Kenneth N. Klee et al., *State Defiance of Bankruptcy Law*, 52 *VAND. L. REV.* 1527, 1529 (1999) (“As the shock wave of the cases reverberates, the bankruptcy system threatens to shake apart at its core, at least in those cases in which a state is involved.”); Joseph F. Riga, *State Immunity in Bankruptcy After Seminole Tribe v. Florida*, 28 *SETON HALL L. REV.* 29 (1997); Troy A. McKenzie, Note, *Eleventh Amendment Immunity in Bankruptcy: Breaking the Seminole Tribe Barrier*, 75 *N.Y.U. L. REV.* 199 (2000). On the other hand, Adam Feibelman has argued that state sovereign immunity improves bankruptcy law. Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 *TEX. L. REV.* 1381, 1402 (2003) (arguing that sovereign immunity “is generally consistent with

an action to settle the debts of a debtor against the world. As one set of commentators has noted, “[a]ll of a debtor’s problems are dealt with in a single case in a single court.”²⁹⁵ In order to do this, it must be binding against all sovereigns, and bankruptcy courts must be able to recover property of the estate from everyone, including governmental entities. This is especially true when preferential transfers are involved.

State defiance of federal bankruptcy law based on sovereign immunity can have serious consequences. After *Seminole Tribe* (and before *Katz*), “it is apparent that although some states are complying with traditionally held notions of bankruptcy law, other states are defying bankruptcy law by seizing money or property of a bankrupt business or individual.”²⁹⁶ These states then assert Eleventh Amendment immunity in bankruptcy court.²⁹⁷ Thus, “[o]ne greedy governmental creditor can undo all the good for literally millions of debtors, creditors, employees, and communities.”²⁹⁸

However, the need for abrogation of state sovereign immunity in bankruptcy cases does not mean that the Framers created an exception to state sovereign immunity by giving Congress power over bankruptcies in Article I. There is nothing in the text of the Constitution or history of the Bankruptcy Clause that even suggests that Congress intended to create an exception to the states’ sovereign immunity in this clause. There is certainly no more history concerning the Bankruptcy Clause and sovereign immunity than there is for other Article I provisions. Moreover, there is a need for uniformity in other areas governed by Article I, such as intellectual property law and interstate commerce law.²⁹⁹

Of course, the Framers likely never intended to create state sovereign immunity in the first place. However, the majority’s untethered decision in

bankruptcy policy and with the goals of public law to favor the interests of states over those of private debtors and creditors in most instances”).

295. Klee et al., *supra* note 294, at 1529.

296. *Id.* at 1530.

297. *Id.* at 1531–32.

298. *Id.* at 1535; *see also* McKenzie, *supra* note 294, at 201 (“[S]tates assert for themselves the status of ‘supercreditors’ in bankruptcy, able to continue collecting on debts long after other creditors have ceased doing so and able to retain property of the estate that would ordinarily be turned over to the bankruptcy court for distribution to other similarly situated creditors.”).

299. Note that the Court rejected the need for uniformity in the enforcement of patent laws in *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 644–45 (1999).

Katz is legal reasoning of the worst kind. The assumption that the Framers were aware of the contemporary legal context is not a basis for adding something to the Constitution. Such atextual interpretation allows interpretation based on ideology, not principle.³⁰⁰ As Justice Scalia stated, “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”³⁰¹ He added, “[g]overnment by unexpressed intent is similarly tyrannical.”³⁰²

One can state that there is no history at all that supports the majority’s arguments, or for that matter, the dissent’s arguments. There was little debate by the Framers concerning the Bankruptcy Clause, which is not surprising considering that they adopted the Clause only two days after it was first considered late in the Constitutional Convention.³⁰³ The fact that an early bankruptcy act contained provisions for writs of habeas corpus does not support the majority’s historical argument. This shows a concern for states not imprisoning debtors; it says nothing about the Framers’ intent to extinguish state sovereign immunity. In fact, as the dissent in *Katz* pointed out, “[t]he habeas writ was well established by the time of the framing, and consistent with then-prevailing notions of sovereignty.”³⁰⁴ Similarly, the need for states to recognize sister-state judgments does not support the argument that the Framers intended to except states from sovereign immunity under the Bankruptcy Clause. The Full-Faith and Credit Clause deals with this problem.

The Court was correct in *Hood* and *Katz* that the bankruptcy court’s in rem jurisdiction affects the states less than in personam jurisdiction. However, a federal court is still adjudicating rights of a state in these proceedings. It can extinguish a claim of a state (a property right), and it can force a state to come to federal court to protect its rights.

More importantly, as the Court noted in *Katz*, “ancillary

300. Justice Kennedy made similar comments concerning statutory interpretation. See *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 471–73 (1989) (Kennedy, J., concurring) (“The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.”).

301. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997).

302. *Id.*

303. *Cent. Va. Comty. Coll. v. Katz*, 546 U.S. 356, 385 (2006) (Thomas, J., dissenting).

304. *Id.* at 388–89 (Thomas, J., dissenting).

proceedings” involve more than in rem jurisdiction.³⁰⁵ For example, a bankruptcy court can force a state to turn over a preferential transfer such as money. This affects the state treasury, a concern in other sovereign immunity cases. It also forces the state to stand equally with other creditors, like businesses and individuals, in a federal court. In addition, the money recovered from a preferential transfer from a state may be turned over to other creditors, again a business or an individual. Similarly, a state might (1) be liable for damages for violating the Bankruptcy Code’s automatic stay provisions, (2) be required to turn over assets of the debtor’s estate, or (3) be required to return fraudulent conveyances.

How can the Court assert that a state’s dignity is impacted by having to appear at an administrative hearing, as was true in *Federal Maritime Commission*, but not in front of a federal bankruptcy court? This inconsistency suggests that the concept of dignity is not a proper consideration when evaluating sovereignty. Rather, the proper inquiry should be who has the power and who does not.

What *Katz* and *Hood* teach us is not that the Framers intended for Congress’s bankruptcy power to be excepted from the states’ sovereign immunity, but that there should not be state sovereign immunity from Congress’s power under Article I. There is *no* support for the argument that the Bankruptcy Clause is different from any other of Congress’s Article I powers.³⁰⁶ This does not support a general state sovereign immunity with certain exceptions, but rather no sovereign immunity at all. Moreover, when there is no general rule, there is no need for exceptions, especially confusing ones that exist with Section 5 and the Bankruptcy Clause.

VIII. CONCLUSION

Justice Kennedy has written:

It is a question of quite a different order, however, to say that the States in their official capacities, the States as governmental entities,

305. See *supra* notes 281–86 and accompanying text.

306. Justice Thomas has remarked, “our cases are replete with acknowledgments that there is nothing special about the Bankruptcy Clause in this regard.” *Katz*, 546 U.S. at 382 (Thomas, J., dissenting). Similarly, a group of commentators wrote in 1999, “there are no logical bases to distinguish the Indian Commerce Clause from the Bankruptcy Clause or other grants of Congressional power under Article I of the Constitution.” Klee et al., *supra* note 294, at 1548–49.

must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy. States can, and do, stand apart from the citizenry. States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand.³⁰⁷

The Framers were not as trusting.³⁰⁸ As noted several times throughout this Article, history, including the facts of the sovereign immunity cases, supports the Framers rather than the Rehnquist Court's conservative majority. In addition, *Katz* stretched the reasoning methods of the sovereign immunity cases to the absurd. In sum, sovereign immunity is unprincipled and unwise.

307. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

308. See *supra* notes 148–52 and accompanying text.