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# SOVEREIGNTY, FEDERALISM AND PROPERTY IN THE BALANCE: A PARADOX IN THE MAKING

*Michael Peter Hatzimichalis\**

*Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification?*<sup>1</sup>

## INTRODUCTION

Since 1991, the Supreme Court has been taking hearty sips from the goblet of federalism. This judicial policy of vigorously policing federalist infractions is to be applauded. This Note contends that the Court presently and historically has taken an active role in defining the proper relationship between the federal government and the states. The major areas of constitutional law are replete with federalist overtones. The melody of federalism, which the Court has sung continuously from as far back as the formulation of the *Erie* doctrine,<sup>2</sup> continues to reverberate in present day Equal Protection Clause,<sup>3</sup> Due Process Clause,<sup>4</sup> Tenth

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<sup>1</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (Jonathan Elliot ed. 1937) (quoting speech of George Mason) [hereinafter 3 Elliot's Debates].

<sup>2</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See also *infra* Part I.A (discussing *Erie* doctrine).

<sup>3</sup> U.S. CONST. amend. XIV, § 1. See also *infra* Part I.B (discussing Equal Protection Clause jurisprudence).

<sup>4</sup> U.S. CONST. amend. XIV, § 1. See also *infra* Part I.B (discussing Due Process Clause jurisprudence).

Amendment<sup>5</sup> and Commerce Clause jurisprudence.<sup>6</sup> The Eleventh Amendment also plays a unique role in the federalism brew.<sup>7</sup>

Our national government is a government of enumerated and defined powers. In reality, however, it is no longer a national government of limited authority. The cantankerous debates surrounding the power and scope of central authorities did not begin with the creation of our social compact, but have raged from as far back as the ancients and are likely to continue indefinitely.<sup>8</sup> The peaks and valleys of the exercise and definition of federal power have been influenced by countless exogenous variables: from changes to our social fabric, norms, mores, and economic plight to vogue academic and constitutional methodologies.<sup>9</sup> Irrespective of

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<sup>5</sup> U.S. CONST. amend. X. *See also infra* Part I.C (discussing recent Tenth Amendment jurisprudence).

<sup>6</sup> U.S. CONST. art. I, § 8, cl. 3. *See also infra* Part I.D (discussing Commerce Clause jurisprudence).

<sup>7</sup> U.S. CONST. amend. XI. The Eleventh Amendment provides: "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." *Id.* The Eleventh Amendment is one of only two clauses in the United States Constitution that is instructive as how to construe the remaining constitutional text. The other provision is the Ninth Amendment. U.S. CONST. amend. IX. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.*

<sup>8</sup> *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (noting that "the question respecting the extent of the powers actually granted [to the national government], is perpetually arising, and will probably continue to arise, as long as our system shall exist"); *New York v. United States*, 505 U.S. 144, 149 (1992) (proclaiming 173 years later that "discerning the proper division of authority between the Federal Government and the States" is "perhaps our oldest question of constitutional law").

<sup>9</sup> *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that "the principle benefit of the federalist system is a check on abuses of government power"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (adopting national political process approach to deciding issues of federalism); *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (articulating affirmative limits on congressional power with respect to state sovereignty); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (declaring that local activities are subject to congressional reach if they exert "a substantial economic effect on interstate commerce").

these seemingly anomalous shifts of power, one can discern a clear pattern beginning to reveal itself. Currently there is fomenting a slow but active movement towards loosening the grip of the federal jaw by actively protecting states from the federal bite. These shifts represent the never-ending debate of federalism—"the assignment of dual responsibilities for governing to lower and higher levels of government"<sup>10</sup>—and are reflected in all major areas of constitutional law.<sup>11</sup>

The Court's three most recent Eleventh Amendment decisions have had the effect of expanding the states' sovereign immunity, thus insulating them from federal overreaching.<sup>12</sup> While the Court historically has followed a pattern of vigorous federalism, it has recently also has undertaken a unique role in protecting property rights from over-burdensome governmental action.<sup>13</sup> As a result of expanding the Eleventh Amendment, however, the Court has paradoxically made property rights somewhat more difficult to enforce.<sup>14</sup> Moreover, the Court has adopted an unduly restrictive definition of property both unnecessary to its holding in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense*

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<sup>10</sup> Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1204 (1997).

<sup>11</sup> These areas of constitutional law include the *Erie* doctrine, Due Process, Equal Protection, Tenth Amendment, and Commerce Clause jurisprudence. See *infra* Part I.A-D (discussing federalism in relation to these areas of constitutional jurisprudence).

<sup>12</sup> See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (hereinafter "*College Savings I*"); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999) (hereinafter "*College Savings II*"); *Alden v. Maine*, 119 S. Ct. 2240 (1999). In all of the Court's most recent decisions the majority consisted of Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy and Justice Thomas. The dissent consisted of Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer. The debate regarding federalism has fractured with the fault line being philosophical grounds.

<sup>13</sup> See *infra* Part III.A (outlining recent Takings Clause jurisprudence).

<sup>14</sup> See *infra* Part III.B (highlighting the tension between property rights and federalism).

*Board* ("College Savings II"),<sup>15</sup> and inconsonant with modern notions of property rights.

In its 1999 term, the Supreme Court has expressed that federalism is a force with which to be reckoned. The Court, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* ("College Savings I"),<sup>16</sup> held that neither the Patent Clause<sup>17</sup> nor the Commerce Clause<sup>18</sup> of the Constitution grant Congress the proper avenue by which to abrogate the states' sovereign immunity.<sup>19</sup> The Court opined that the abrogation of state sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act ("Act")<sup>20</sup> was a nullity in that it was not enacted in order to enforce the Fourteenth Amendment's guarantee of due process.<sup>21</sup> Chief Justice Rehnquist, speaking for the Court, explained that "sovereign immunity does not yield to Congress' Article I powers,"<sup>22</sup> and reaffirmed that only legislation properly passed pursuant to Congress' enforcement powers by virtue of the Fourteenth Amendment can abrogate the states' sovereign immunity.<sup>23</sup> After determining that Congress failed to identify a pattern of state infringement, the Court declared

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<sup>15</sup> 119 S. Ct. 2219.

<sup>16</sup> 119 S. Ct. 2199.

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 8. "The Congress shall have Power . . . [T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive right to their respective Writings and Discoveries." *Id.* See also 35 U.S.C. § 101 (1994). "Whoever invents or discovers any new useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore." *Id.*

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . . [T]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

<sup>19</sup> *College Savings I*, 119 S. Ct. at 2205.

<sup>20</sup> 35 U.S.C. § 296 (1994). The Act declared that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent." *Id.* at § 296(a).

<sup>21</sup> *College Savings I*, 119 S. Ct. at 2205.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2206-07 (reaffirming *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

that a state's patent infringement violates the Due Process Clause only where the state does not provide an adequate remedy to affected patent holders.<sup>24</sup> In an effort to save the statute, petitioners stressed the need for uniformity in the national patent system.<sup>25</sup> The Court responded by acknowledging the statute's purpose, but pointed out that uniformity is a function of Congress' Article I "patent-power calculus" and does not give Congress the authority to enact this type of legislation.<sup>26</sup>

In *College Savings II*,<sup>27</sup> the Court insisted that unfair competition<sup>28</sup> and false advertising claims<sup>29</sup> under the Trademark Remedy Clarification Act ("TRCA")<sup>30</sup> fall far short of validly abrogating a state's sovereign immunity.<sup>31</sup> Petitioner claimed that its right to be free from false advertising and to be secure in its business interests were indeed property rights protected by the strictures of the Fourteenth Amendment.<sup>32</sup> Applying a distinctly ancient view of property,<sup>33</sup> the Court, without meaningful analysis, quickly rejected these claims.<sup>34</sup> Moreover, the Court indicated that while a state voluntarily may waive its sovereign immunity, a constructive waiver of that immunity is impossible.<sup>35</sup> The TRCA, the court

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<sup>24</sup> *Id.* at 2208.

<sup>25</sup> *Id.* at 2209.

<sup>26</sup> *Id.*

<sup>27</sup> 119 S. Ct. 2219 (1999).

<sup>28</sup> See *infra* note 306 (listing the elements of the tort of unfair competition).

<sup>29</sup> See *infra* note 303 (listing the elements of the tort of false advertising).

<sup>30</sup> 15 U.S.C. § 1125 (1994 & Supp. IV 1998). The TRCA creates a cause of action against any "person" for intellectual property disputes. *Id.* § 1125(a)(1). The term "person" was defined to include "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." *Id.* § 1125(a)(2).

<sup>31</sup> *College Savings II*, 119 S. Ct. at 2224-27.

<sup>32</sup> *Id.* at 2224.

<sup>33</sup> Cf. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (Brennan, J.) ("Much of the existing wealth in this country takes the form of rights that do not fall within the traditional common-law concepts of property.").

<sup>34</sup> *College Savings II*, 119 S. Ct. at 2225.

<sup>35</sup> *Id.* at 2228 (overruling *R. B. Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964)). In *Parden*, Alabama attempted to dismiss a suit against its state run railway predicated upon the Federal Employers' Liability Act by pleading sovereign immunity. *Parden*, 377 U.S. at 184-86. The Court held that

explained, cannot be positioned as a thorn bush waiting eagerly to pierce a state's immunity the moment it acts as a participant in interstate commerce.<sup>36</sup> Rather, a state can only waive its sovereign immunity when it unambiguously declares itself amenable to federal jurisdiction.<sup>37</sup> Thus, states are amenable to suit only when they voluntarily cast aside their shields of immunity and acquiesce to battling potential litigants.

Finally, in *Alden v. Maine*, the Court held that Congress cannot subject an unconsenting state to a lawsuit in its own courts.<sup>38</sup> The Court reasoned that, the "sovereign immunity of the states neither derives from nor is limited by the terms of the Eleventh Amendment" and that the "structure" and "history" of the Constitution precludes such suits.<sup>39</sup> Thus, Congress lacks power under Article I when it attempts to abrogate a state's sovereign immunity and subject it to suit in state courts as well. In deciding *Alden*, the Court was forced to take an extra-constitutional excursion, as the issue was one of first impression.<sup>40</sup> Because the Eleventh Amendment is silent with respect to state courts, the Court marshalled "evidence of the original understanding of the Constitution."<sup>41</sup> The "scope of the States' immunity from suit," the Court concluded, "is not demarcated by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."<sup>42</sup> The structure of the constitution, therefore, limits congressional authority.

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"when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.* at 196 (citations omitted). Therefore, a state may constructively waive its immunity by participating in commerce subject to congressional authority. *Id.* at 192. Justice Scalia described *Parden* as "an elliptical opinion standing at the nadir of our waiver (and, for that matter, sovereign immunity) jurisprudence." *College Savings II*, 119 S. Ct. at 2226.

<sup>36</sup> *College Savings II*, 119 S. Ct. at 2228.

<sup>37</sup> *Id.* at 2229.

<sup>38</sup> 119 S. Ct. 2240, 2246 (1999).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2260.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2254.

The foregoing trilogy of decisions, all sharply decided by a plurality margin of five to four, indicate that the current Court will go to great lengths to protect states from federal overreaching in an attempt to further a devolution of federal power. Each majority opinion rests heavily upon the history of the Constitution, the Eleventh Amendment, dicta of the Framers, and places itself in the historical (and yet quite modern) series of cases seeking a judicial vision of federalism. This trilogy, in combination with the Court's penchant for respecting the boundaries of federal and state power in several other areas of constitutional law, indicate that the current Court's lodestar is federalism.

Part I of this Note provides a brief synopsis of several areas of modern constitutional law and posits that federalism and state sovereignty are the driving forces behind the Court's rationale. Part II analyzes the Court's most recent decisions with respect to the Eleventh Amendment. Part III contends that the Court's recent treatment of property rights is at odds with its expansion of sovereign immunity. Property rights created by Congress' Article I grant of authority now possibly may be disregarded and rendered subservient to the magisterial concept of state sovereignty. In fact, this collision between property rights and states' rights caused the *Lochner* era<sup>43</sup> Court to create the fictional *Ex Parte Young* exception<sup>44</sup> to state sovereignty and the Eleventh Amendment. Part III also contends that interests, which by themselves are not encompassed by the traditional common law definition of property,

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<sup>43</sup> See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 480 (3d ed. 1997). Professor Chemerinsky documents that during the period of 1905-1937, the period known as the "Lochner era," the Court put forth and rigidly adhered to three principle tenets: First, the Court operated from the shibboleth "that freedom of contract is a basic right protected as liberty and property rights under the Due Process clause of the Fourteenth Amendment." *Id.* Second, "government could interfere with freedom of contract only to serve a valid police purpose: that is to protect the public safety, public health, or public morals." *Id.* Lastly, "it was the judicial role to carefully scrutinize legislation interfering with freedom of contract to make sure that it served a police purpose." *Id.*

<sup>44</sup> 209 U.S. 123 (1908). *Ex Parte Young* allows for injunctive relief in federal court for the alleged violation of federal law by state officers, as that officer is stripped of her state's sovereign immunity when acting unconstitutionally. *Id.* at 159-160, 168.



but carry with them strong federal concerns, should fall within the purview of the Fourteenth Amendment's protection. This concept of property rights, this Note concludes, may serve to undo the Court's property paradox and, thus, return the full bundle of rights owed to American property holders.

## I. THE GENESIS OF CONSTITUTIONAL FEDERALISM: FROM MEAGER BEGINNINGS TO MONOLITH

The *Erie* doctrine was one of the many steps in the Supreme Court's federalism dance.<sup>45</sup> *Erie* requires federal courts to apply state law when sitting in diversity jurisdiction.<sup>46</sup> In *Erie*, the Court recognized that any contrary holding would allow the judiciary to exercise authority that Congress itself lacked.<sup>47</sup> In its Due Process and Equal Protection Clause jurisprudence the Court has retreated from subjectively weighing the merits and demerits of state regulation<sup>48</sup> and, now, accords state legislatures unyielding deference.<sup>49</sup> The Tenth Amendment,<sup>50</sup> moreover, has resurfaced as a substantive limit upon congressional authority.<sup>51</sup> Lastly, the Court has begun to curtail Congress' plenary Commerce Clause authority so as not to invade upon traditional state concerns.<sup>52</sup>

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<sup>45</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>46</sup> *Id.* at 78.

<sup>47</sup> *Id.* (declaring that, "Congress has no power to declare substantive rules of common law applicable in a state. . . . And no clause in the Constitution purports to confer such a power upon the federal courts").

<sup>48</sup> *See, e.g., Lochner v. New York*, 198 U.S. 45, 53 (1905) (espousing "right of contract" philosophy).

<sup>49</sup> *See, e.g., Nebbia v. New York*, 291 U.S. 502, 539 (1934) (upholding state price control scheme).

<sup>50</sup> U.S. CONST. amend. X.

<sup>51</sup> *See, e.g., New York v. United States*, 505 U.S. 144, 185-88 (1992) (invalidating an environmental statute forcing states to assume ownership of waste as exceeding the scope of congressional authority).

<sup>52</sup> *See, e.g., United States v. Lopez*, 514 U.S. 549, 564 (1995) (invalidating a federal criminal statute on the grounds that Congress' authority must be curtailed so as not to trample upon traditional state powers); *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820, 826-27 (4th Cir.) (en banc), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999) (invalidating a civil rights statute creating a federal private cause of action for

### A. *The Erie Doctrine*

As the Supreme Court's most recent trilogy reveals, the scope of judicial power is a vital aspect of federalism. In 1842, in *Swift v. Tyson*, the Court applied a broad view of the federal judiciary's power.<sup>53</sup> By insisting that universal common law—cognizable to only federal judges—should be applied in diversity cases, rather than the forum state's common law, the Court impinged upon state sovereignty by completely displacing a state's entire body of law.<sup>54</sup> Under *Swift*, a federal court sitting in diversity was not constrained to follow the forum state's common law as would a similarly situated state court.<sup>55</sup> The *Swift* Court "believed that the federal judiciary should develop a comprehensive body of substantive law to serve as a model for state courts, thereby stimulating uniformity in the legal doctrines applied by state courts."<sup>56</sup> The Court's decision in *Erie Railroad v. Tompkins*<sup>57</sup> overruled *Swift*. In a sharp turn of events, *Erie* held that Article III of the Constitution does not provide federal courts with the authority to create substantive law in diversity cases.<sup>58</sup>

Today, the *Erie* Doctrine requires a federal court sitting in diversity to apply the forum state's decisional and statutory law.<sup>59</sup> Diversity jurisdiction, therefore, does not modify common law privileges. Moreover, *Erie* gives the states a decided power advantage. If, for example, in a later decision, the state courts were to disagree with a federal court's earlier decision interpreting a state law rendered in a diversity suit, future federal courts would

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gender motivated violence on the grounds that it impermissible impedes upon state prerogatives).

<sup>53</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>54</sup> *Id.* at 18-19.

<sup>55</sup> *Id.* at 18 ("But admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this court.").

<sup>56</sup> JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.2, at 192 (2d ed. 1993).

<sup>57</sup> 304 U.S. 64 (1938).

<sup>58</sup> *Id.* at 78. "There is no federal general common law." *Id.*

<sup>59</sup> *Id.*

be bound by the state court's determination.<sup>60</sup> The *Erie* Court did not make reference to the specific constitutional authority upon which it based its decision: that Article III precludes federal judges from creating and applying federal common law.<sup>61</sup> The *Erie* Court found that the *Swift* doctrine "invaded rights which in our opinion are reserved by the Constitution to the several states."<sup>62</sup> Although the language is oblique, the Court was guided by the Tenth Amendment<sup>63</sup> and federalism principles.<sup>64</sup> Furthermore, the Court in *Hanna v. Plummer*, "reminded" itself that it was constitutionally impermissible to "fashion rules which are not supported by a grant of Federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no laws."<sup>65</sup>

Seven years after *Erie*, the Court had occasion to strengthen its respect for state sovereignty. In *Guaranty Trust Co. v. New York*,<sup>66</sup> the Court adopted what has come to be known as "the outcome-determinative test."<sup>67</sup> In *Guaranty Trust*, the Court

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<sup>60</sup> RICHARD A. POSNER, *THE FEDERAL COURTS CHALLENGE AND REFORM* 42 (2d ed. 1996).

<sup>61</sup> *Erie*, 304 U.S. at 78.

<sup>62</sup> *Id.* at 80.

<sup>63</sup> U.S. CONST. amend. X. The Tenth Amendment provides: "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." *Id.*

<sup>64</sup> John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 700-06 (1974) (noting that the Constitution does not grant the courts authority to fashion state substantive rules of law).

<sup>65</sup> 380 U.S. 460, 471-72 (1965). Article I provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. See also BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW* 85 (1994) (pointing out that "federal courts ordinarily have authority to adjudicate a case only if expressly authorized by the Constitution or valid statute implementing Article III of the Constitution").

<sup>66</sup> 326 U.S. 99 (1945).

<sup>67</sup> FRIEDENTHAL, *supra* note 56, § 4.3, at 200. The outcome determinative test, while recognizing that the federal and state "judicial systems are not identic," declares that diversity litigation in a federal forum should be "tried [as if it were] in a State court. . . . A policy so important to *our federalism* must be kept free from entanglements with analytic or terminological niceties." *Guaranty*

interpreted *Erie* so as to preclude a federal court from reaching a “substantially different result” from that of a state court.<sup>68</sup> In *Hanna*, the Court adopted a federalist perspective of the *Erie* doctrine as well. For example, Justice Harlan wrote that the best method of concluding whether a federal or state rule applies requires a steadfast adherence “to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.”<sup>69</sup> Thus, while veiled as a procedural prohibition against forum shopping, the *Erie* doctrine forces federal judges to yield to a state’s sovereign immunity.<sup>70</sup>

### *B. Due Process and Equal Protection Clauses*

The Fourteenth Amendment has had the effect of drastically reordering federal and state relations, especially in regard to the Court’s review of property regulation. Initially, the Court, using

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*Trust*, 326 U.S. at 108-09 (emphasis added). The gravamen of the outcome determinative test is as follows: a federal court is prevented “from reaching a decision at variance with the result that would obtain in a state court in a comparable case.” FRIEDENTHAL, *supra* note 56, § 4.3, at 200. Therefore, state law must govern the controversy if the application of federal law would yield an inapposite outcome. FRIEDENTHAL, *supra* note 56, § 4.3, at 200.

<sup>68</sup> FRIEDENTHAL, *supra* note 56, §4.3, at 200 (quoting *Guaranty Trust*, 326 U.S. at 109).

<sup>69</sup> *Hanna*, 380 U.S. at 475 (Harlan, J., concurring) (footnote omitted).

<sup>70</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938). For example, the Court explained:

[T]he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state and, to that extent, a denial of its independence.

*Id.*

natural law concepts,<sup>71</sup> acted to protect property owners from burdensome economic regulation.<sup>72</sup> The antecedents of this movement are found in *Calder v. Bull*, where the Court upheld a law that set aside a probate court's denial of inheritance to a beneficiary.<sup>73</sup> In so holding, Justice Chase declared: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control. . . . There are certain vital principles in our free Republic governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law."<sup>74</sup>

The high-water mark in the Court's history of frustrating state legislatures and natural law is the Court's decision in *Lochner v. New York*.<sup>75</sup> In *Lochner*, the Court struck down a New York law regulating the number of hours a baker could work on the grounds that it interfered with freedom of contract.<sup>76</sup> The Court rejected

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<sup>71</sup> See EVA H. HANKS ET AL. ELEMENTS OF LAW 459-497 (1994) (providing examples of both natural law and legal positivism).

The relationship between law and morality is one of the oldest issues of jurisprudence and central to an understanding of the nature of the judicial process . . . Natural law theories share the fundamental premise that law and morality are inextricably intertwined, with the latter setting absolute limits on the former. . . . Natural law combines nature and law. Neither of these constituent concepts has a unitary meaning or even generally accepted usage. Attempts to provide a univocal, exhaustive definition are doomed to failure.

*Id.* (internal quotation marks omitted). Justice Holmes was quite critical of natural law. "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted . . . as something that must be accepted." *Alden v. Maine*, 119 S. Ct. 2240, 2286 (1999) (Souter, J., dissenting) (quoting O. HOLMES, COLLECTED LEGAL PAPERS 312 (1920)).

<sup>72</sup> See CHEMERINSKY, *supra* note 43, at 471-94 (outlining the Court's historical approach to economic liberties).

<sup>73</sup> 3 U.S. (3 Dall.) 386, 387 (1798).

<sup>74</sup> *Id.* at 387-88. Justice Iredell, in a concurring opinion, took issue with Justice Chase and asserted that the Court cannot declare a state law void because the Justices' subjective and standardless notions of natural law are to the contrary. *Id.* at 399.

<sup>75</sup> 198 U.S. 45 (1905).

<sup>76</sup> *Id.* at 53. The Court, per Justice Peckham, held that the enactment

the argument that the law was an appropriate use of the state's police power.<sup>77</sup> Justice Peckham recognized that a state's police power encompasses "the safety, health, morals, and general welfare of the public."<sup>78</sup> However, Justice Peckham also indicated "that there is a limit to the valid exercise of the police power by the State."<sup>79</sup> The *Lochner* Court reasoned that a state, even with its plenary police power, cannot "assume the position of a supervisor, or *pater familias*, over every act of the individual."<sup>80</sup> In other words, the nexus between the law and the legislature's purported purpose was "too shadowy and thin" and it, therefore, must be rejected.<sup>81</sup> The *Lochner* opinion is more important for what it did not stand for, however. *Lochner* did not stand for the proposition that all state imposed economic regulation is invalid, but that the Court will decide whether the reason to regulate is good enough to surmount judicial scrutiny.<sup>82</sup>

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"necessarily interferes with the right of contract between the employer and employees . . . [and that] . . . [t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution." *Id.* (citation omitted).

<sup>77</sup> *Id.* at 58.

<sup>78</sup> *Id.* at 53. Justice Peckham's view of the police power seems to comport with James Madison's: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting THE FEDERALIST NO. 45 at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>79</sup> *Lochner*, 198 U.S. at 56.

<sup>80</sup> *Id.* at 62. See also BLACK'S LAW DICTIONARY 1126 (6th ed. 1990) (defining *pater familias* as "[t]he father of a family. In Roman law, the head or master of a family").

<sup>81</sup> *Lochner*, 198 U.S. at 62.

<sup>82</sup> See *id.* at 57-58. The Court indicated that

[a law] must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

*Id.* The difficulty with *Lochner* is that not only does the Court itself determine the correlation between mean and end, but also whether the end itself is

The Fourteenth Amendment is no longer a significant limitation on state substantive regulatory power. For example, in *Nebbia v. New York*, the Court upheld a state price control scheme, thus undermining *Lochner's* second-guessing of state legislatures.<sup>83</sup> In *Ferguson v. Skrupa*, the Court explained: "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."<sup>84</sup> In *Skrupa*, the Court upheld a Kansas statute that criminalized debt adjustment, that is, where a debtor consents to make certain time payments and, for a fee, the payments are funneled to creditors.<sup>85</sup> The Court then famously concluded by asserting that the Court will "refuse to sit as a super legislature to weigh the wisdom of legislation."<sup>86</sup> In fact, in *United States v. Carolene Products Company*, the Court indicated that "the existence of facts supporting the legislative judgment is to be presumed . . . [and] is not to be pronounced unconstitutional unless" the judgment is based upon

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appropriate. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 466 (13th ed. 1997). This judicial second-guessing of the sovereignty of state legislatures is exactly what prompted Justice Holmes to declare that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

<sup>83</sup> 291 U.S. 502, 539 (1934). In *Nebbia*, the New York legislature created a control board for the purpose of fixing minimum and maximum price values for milk. *Id.* at 515. Justice Roberts, writing for the Court, held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it." *Id.* at 537. For further examples of the Court retreating from *Lochner* and adopting a policy of respecting state legislative priorities see *Williamson v. Lee Optical*, 348 U.S. 483 (1955), upholding a state statute proscribing opticians from dispensing lenses without first receiving a prescription from an ophthalmologist or optometrist, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), upholding a state minimum wage law for women and minors, and *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), upholding a law delaying home foreclosure.

<sup>84</sup> 372 U.S. 726, 729 (1963).

<sup>85</sup> *Id.* at 726-28.

<sup>86</sup> *Id.* at 731 (footnote and internal quotation marks omitted).

some irrational basis.<sup>87</sup> The Court's penchant for deference to legislative judgments drove it to even uphold retroactive civil legislation.<sup>88</sup> Certainly, the Court's inquiries are far less searching when it comes to assessing state social welfare and economic regulation.

Modern Equal Protection Clause doctrine accords state legislatures equal deference with respect to regulatory matters. In deciding whether a governmental classification serves a sufficient purpose, the "Court has never insisted that a legislative body articulate its reasons for enacting a statute."<sup>89</sup> Justice Thomas, writing for the Court in *F.C.C. v. Beach Communications*, declared that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."<sup>90</sup> Justice Thomas further insisted that "a statutory classification . . . must be upheld against . . . challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>91</sup> Moreover, the Court, in analyzing a classification, allows

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<sup>87</sup> 304 U.S. 144, 152 (1938).

<sup>88</sup> See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (adopting rational basis analysis with respect to retroactive civil liability). The Court has also intimated that it is hesitant to strike down legislation as violating the Due Process Clause. For example, in *Railway Express Agency v. New York*, Justice Jackson pointed out that a due process violation "leaves ungoverned and ungovernable conduct which many people find objectionable." 336 U.S. 106, 112 (1949) (Jackson, J., concurring). A due process infraction displaces an entire field of activity from all regulation. Rather, invalidating a regulation based upon the Equal Protection Clause "does not disable any governmental body from dealing with the subject at hand." *Id.* It only implies that the "regulation must have a broader impact." *Id.*

<sup>89</sup> *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

<sup>90</sup> 508 U.S. 307, 313 (1993).

<sup>91</sup> *Id.* See also *McGowan v. Maryland*, 366 U.S. 420 (1961). In *McGowan*, the Court declared:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.* A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

*Id.* at 425-26 (Warren, C.J.) (citations omitted) (emphasis added).



a state legislature to proceed one step at a time. For example, in *Railway Express Agency v. New York*, the Court upheld a city ordinance that disallowed advertising on trucks.<sup>92</sup> The ordinance, however, did not apply if the advertisement was promoting the truck owner's own business, but did apply to "general advertisements."<sup>93</sup> Petitioners pressed that the distinction was irrational.<sup>94</sup> In response, the Court held that the ordinance did not violate the Constitution by attempting to eliminate one problem at a time.<sup>95</sup>

These decisions clearly indicate that the sovereignty of the state and representative democracy force the Court to accord due deference to state legislatures. Indeed, absent caprice, the Court grants enormous latitude to a state's internal matters. In so doing, the Court carefully avoids frustrating state legislative agendas.

### C. The Tenth Amendment

The Tenth Amendment, the most simply stated of the Bill of Rights,<sup>96</sup> has been the linchpin of the Court's most recent stance toward a judicial doctrine of federalism and social regulation. The Tenth Amendment provides that "[t]he 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."<sup>97</sup> The Court, has recently re-established its position that the Tenth Amendment serves as a guardian of state sovereignty.<sup>98</sup> The

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<sup>92</sup> 336 U.S. 106, 110 (1949).

<sup>93</sup> *Id.* at 109-10.

<sup>94</sup> *Id.* at 110.

<sup>95</sup> *Id.* The Court elaborated:

And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

*Id.* (citations omitted).

<sup>96</sup> U.S. CONST. amends. I-X.

<sup>97</sup> U.S. CONST. amend. X.

<sup>98</sup> The Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that congressional legislation is violative of the Tenth Amendment when that legislation interferes with government functions traditionally undertaken by

amendment, as presently interpreted, has the effect of creating two impenetrable spheres of influence by allowing the federal and state governments to govern coterminously in an effort to accomplish the amendment's laudable aim—the preservation of the liberty of our people.

The Tenth Amendment's resurgence began in *Gregory v. Ashcroft*.<sup>99</sup> In that case, the Court held that a federal law should not be applied to vital state government activities absent a clear statement from Congress.<sup>100</sup> While the Court did not strike down the law via the Tenth Amendment, it did rely upon its “considerations as a rule of construction.”<sup>101</sup> *Ashcroft* was a harbinger of

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state and local governments such as, the relationship between a state and its employees. *Id.* at 845. Nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985), the Court expressly overruled *National League of Cities*. The Court reasoned that the political process was the appropriate avenue of relief from laws that unduly burden states and rejected a Tenth Amendment challenge. *Id.* at 551. In *Garcia*, Justice Blackmun relied upon an influential article authored by Professor Wechsler. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) (arguing “that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states”). Dissenting in *Garcia*, Justice Powell pointed out that the majority effectively rendered the Tenth Amendment “meaningless rhetoric.” *Garcia*, 469 U.S. at 560 (Powell, J., dissenting). As a result of the Court's most recent decisions, however, this Note asserts that *Garcia* has arguably been overruled or at the very least forgotten. Cf. *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999). In *Alden*, the Court held Congress' Article I authority does “not include the power to subject nonconsenting States to private suits for damages in state courts,” and, in the process, non-suited a group of state employees. *Id.* This holding translates into the fact that Congress is effectively precluded from regulating the relationship between a state and its employees. This is essentially the same holding the Court rendered in *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). Thus, properly reconceptualized, *Alden* is simply *National League of Cities* in different clothes. But see *Alden*, 119 S. Ct. at 2292 (Souter, J., dissenting) (“*Garcia* remains good law, its reasoning has not been repudiated, and it has not been challenged here.”).

<sup>99</sup> 501 U.S. 452 (1991).

<sup>100</sup> *Id.* at 461.

<sup>101</sup> CHEMERINSKY, *supra* note 43, at 232. “Justice O'Connor . . . discussed the importance of autonomous state governments as a check on possible federal tyranny and stressed the significance of the Tenth Amendment as a constitutional

things to come, indeed. The Court, only one year later in *New York v. United States*, struck down a portion of the Low Level Radioactive Waste Policy Amendments Act,<sup>102</sup> which forced states into ownership, and assumption, of all liability for radioactive waste not properly disposed.<sup>103</sup> In *New York*, Justice O'Connor made clear that the Tenth Amendment acts as a limit upon the enumerated Article I powers allocated to Congress and, held, therefore, that the regulatory scheme impermissibly impinged upon state sovereignty.<sup>104</sup> Justice O'Connor asserted that from that point on, the Court, and not Congress, will determine "the constitutional line between federal and state power."<sup>105</sup> Put differently, the statute was tantamount to "outright coercion" that impermissibly trampled upon state sovereignty.<sup>106</sup>

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protector of state sovereignty." CHEMERINSKY, *supra* note 43, at 232.

<sup>102</sup> 42 U.S.C. § 2021b (1994). The Act established three different "types of incentives to encourage the States to . . . [provide] for the disposal of waste generated within their borders." *New York v. United States*, 505 U.S. 144, 152 (1992). This consisted of: (1) monetary incentives; (2) access incentives; and (3) a take title provision. *Id.* at 152-53. The take title provision provided that in the event a state did not properly dispose of its waste, it "shall take title to the waste, be obligated to take possession . . . and shall be liable for all damages . . . incurred." *Id.* at 153-54.

<sup>103</sup> *New York v. United States*, 505 U.S. 144, 185-88 (1992).

<sup>104</sup> *Id.* at 188.

<sup>105</sup> *Id.* at 155. It is worth noting that the Court in *New York* did not apply *Garcia*, whose political process approach clearly would have lead to a different approach. This, too, lends more credence to the fact that *Garcia's* status as good law is now questionable. Dissenting in *Garcia*, Justice Powell, speaking specifically to the political process thesis, emphatically declared: "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet the position adopted [by the majority] today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting).

<sup>106</sup> *New York*, 505 U.S. at 166. One commentator has suggested that as a result of *New York*, the Court has bestowed upon the states an entitlement protected by a property right. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 822 (1998). This entitlement is "protected by a property rule . . . [that] gives state governments a right to enjoin

The Court's next encounter with the Tenth Amendment was *Printz v. United States*.<sup>107</sup> In *Printz*, the Court struck down portions of the Brady Handgun Prevention Act<sup>108</sup> that forced local authorities to conduct background checks on putative handgun owners.<sup>109</sup> In rebutting the government's historical arguments,<sup>110</sup> The Court insisted that "Congress could not impose [responsibilities upon the States] without the consent of the States."<sup>111</sup> In conclusion, the Court noted:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.<sup>112</sup>

The Court in *Reno v. Condon*, its most recent federalism pronouncement, applied the newly ordained *Printz-New York* framework.<sup>113</sup> In *Condon*, South Carolina challenged the Driver's

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federal efforts to force state officials to implement national law." *Id.* As a result, "a vigorous intergovernmental marketplace" develops and allows states to bargain for governmental services much like private profit seeking actors. *Id.* at 819.

<sup>107</sup> 521 U.S. 898 (1997).

<sup>108</sup> 18 U.S.C. § 922 (1994). The Brady Act forced state officials to monitor and investigate proposed firearm transactions by initiating a background check with respect to the prospective firearm owner. *New York v. United States*, 521 U.S. 898, 902-03 (1992). If the conscripted state official were to find that proposed purchaser ineligible, then she must provide written notice to the firearms dealer of that determination and elucidate those reasons therein. *Id.* at 903. A violation of the Brady Act was punishable by imprisonment for up to one year. *See id.* at 902-04 (describing the operation of the Brady Act).

<sup>109</sup> *Printz*, 521 U.S. at 935.

<sup>110</sup> *See id.* at 905-19 (examining and dismissing historical evidence as inconclusive).

<sup>111</sup> *Id.* at 910-11 (citation omitted).

<sup>112</sup> *Id.* at 935.

<sup>113</sup> 120 S. Ct. 666 (2000).

Privacy Protection Act ("DPPA"),<sup>114</sup> which "regulate[d] the disclosure of personal information contained in the records of state motor vehicle departments."<sup>115</sup> South Carolina argued that the federal law forced it to implement federal policy and hence violated the Tenth Amendment.<sup>116</sup> The Court rejected this challenge insisting that the DPPA did "not require the States in their sovereign capacity to regulate their own citizens."<sup>117</sup> Rather, it regulates states as the proprietors of articles of commerce and is therefore in harmony with the *Printz-New York* framework.<sup>118</sup> The Court, in its decisions in *Ashcroft*, *Printz*, *New York*, and *Condon* made one thing patently clear: that it—and no other coordinate branch of government—will be the final arbiter of federalism and that the Court will take an active role in preserving our system of dual sovereignty.<sup>119</sup>

#### D. The Commerce Clause

Initially, the Commerce Clause was viewed as a prophylactic device to prevent states from regulating any activity occurring, or

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<sup>114</sup> 18 U.S.C. §§ 2721-2725 (1994 & Supp. III 1997). The DPPA precludes disclosure of personal information obtained in connection with state departments of motor vehicles. *Reno v. Condon*, 120 S. Ct. 666, 668-70 (2000) (outlining the DPPA's multiple provisions).

<sup>115</sup> *Condon*, 120 S. Ct. 666, 668 (2000).

<sup>116</sup> *Id.* at 671. "South Carolina emphasizes that the DPPA requires the State's employees to learn and apply the [DPPA's] substantive restrictions . . . and notes that these activities will consume the employees' time and thus the State's resources. South Carolina also notes that the DPPA's penalty provisions hang over the States as a potential punishment should the fail to comply with the [DPPA]." *Id.* at 671-72.

<sup>117</sup> *Id.* at 672.

<sup>118</sup> *Id.*

<sup>119</sup> *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 890 (4th Cir.) (en banc) (Wilkinson, C.J., concurring), *cert. granted sub nom.* *United States v. Morrison*, 120 S. Ct. 11 (1999). Chief Judge Wilkinson describes *Printz* and *New York* as being part of the "century's third and final era of judicial activism." *Id.* Chief Judge Wilkinson opines that "[t]he common thread of contemporary activism is an interest in reviving the structural guarantees of dual sovereignty." *Id.* at 893.

having its effects felt, beyond their own borders.<sup>120</sup> On the other hand, the Court, post-1937, was much more anxious to uphold such regulation.<sup>121</sup> The scope of Congress' regulatory authority—again, largely in response to marketplace conditions—rapidly began to expand.<sup>122</sup> Until recently, the Commerce Clause was interpreted so as never to challenge congressional authority.<sup>123</sup> The Court's decision in *United States v. Lopez* represents a marked retreat from this proposition.<sup>124</sup>

The Court in *Lopez* held that Congress' power "to regulate Commerce . . . among the several states"<sup>125</sup> reaches only to

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<sup>120</sup> See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (interpreting the Commerce Clause as precluding the federal government from regulating corporations with interstate operations); *Wabash, St. Louis & Pac. Ry Co. v. Illinois*, 118 U.S. 557, 575 (1886) (interpreting the Dormant Commerce Clause so as to preclude a state from regulating prices beyond its own borders). The Commerce Clause is an affirmative grant of power to the national government. U.S. CONST. art. I, § 8, cl. 3. As a result, the Constitution provides no guidance as to the proper course of action when a state law that regulates commerce is enacted and there is no federal law on point. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 281 (5th ed. 1995). The Court has addressed this situation by introducing the Dormant Commerce Clause concept. *Id.* The Dormant Commerce Clause creates "self-executing limitations on the scope of permissible state regulation. Without a dormant commerce clause, states would be free to enact legislation favoring local commerce and discriminating against out of state commerce." *Id.*

<sup>121</sup> See, e.g., *Wickard v. Fillburn*, 317 U.S. 111, 125 (1942) (adopting the substantial economic affects test to Commerce Clause litigation).

<sup>122</sup> See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 766 (1945) (holding that the Dormant Commerce Clause allows the state to concomitantly regulate activity within the sphere of federal authority); *Wickard*, 317 U.S. at 125 (adopting the aggregate impact approach to Commerce Clause litigation); *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 (1938) (holding that the Commerce Clause does "not foreclose all state action affecting interstate commerce").

<sup>123</sup> See H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 849 n.3 (1999). "*Lopez*, decided in 1995, marked the first time the Court had struck down a federal law as beyond the commerce power since 1936." *Id.*

<sup>124</sup> 514 U.S. 549 (1995).

<sup>125</sup> U.S. CONST. art. I, § 8, cl. 3.

commercial activities.<sup>126</sup> These commercial activities, which may be interpreted to include a wide variety of economic undertakings,<sup>127</sup> cannot be set loose from the operative constitutional term "commerce," which serves to anchor federal power in order to cover only aspects of business and trade interstate in nature.<sup>128</sup> On this basis, the Court struck down a federal statute making it a crime to possess a gun in a school zone.<sup>129</sup> Moreover, as the concurrence noted, "over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds."<sup>130</sup> Based, in part, on a textualist approach<sup>131</sup> to the

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<sup>126</sup> *Lopez*, 514 U.S. at 553.

<sup>127</sup> *See, e.g., Wickard*, 317 U.S. at 114 (holding that growing wheat for personal consumption affects commerce).

<sup>128</sup> *Lopez*, 514 U.S. at 553. *See also* *Reno v. Condon*, 120 S. Ct. 666, 671 (2000) (holding that drivers' personal information, once released into the stream of commerce, may be subject to congressional regulation). Chief Justice Rehnquist, writing for a unanimous Court, worded the opinion quite carefully in an attempt to emphasize the commercial character of the information. For example, the Chief Justice wrote: "Because drivers' information is, *in this context*, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation." *Id.* (emphasis added). In holding that personal information was an article of commerce, Chief Justice Rehnquist consistently employed qualifying language such as, "in this context" or "in the context of this case." *Id.* In *United States v. Jones*, the Seventh Circuit upheld against a Commerce Clause challenge, a federal arson statute as it applied to residential dwelling. 178 F.3d 479, 481 (7th Cir.), *cert. granted sub nom. Jones v. United States*, 120 S. Ct. 494 (1999) (mem.). "Although living in one's own house is not commerce," Judge Easterbrook explained, "the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these." *Id.* at 480.

<sup>129</sup> 18 U.S.C. § 922(q)(1) (1994), *amended* by 18 U.S.C. § 922(q)(1) (Supp. II 1996). The new language employed in the statute bears emphasis. The new statute reads as follows: "It shall be unlawful for any individual to possess a firearm that has moved in or that otherwise affects interstate commerce . . ." *Id.* The current version of the statute has not been challenged.

<sup>130</sup> *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

<sup>131</sup> Textualism seeks to distinguish between the subjective intent behind the use of certain words and their objective meaning. HANKS, *supra* note 71, at 258. Textualism, therefore, "forbids reference to anything but . . . [the] text in any and all cases." HANKS, *supra* note 71, at 258. As Justice Holmes put it, "we ask, not

term "commerce,"<sup>132</sup> the *Lopez* holding rang the dormant bell of federalism in Commerce Clause jurisprudence.<sup>133</sup> *Lopez* represents a retreat to the simple principle first enunciated in *Gibbons v. Ogden*: The Commerce power delegated to Congress "is the power to regulate; that is, the power to describe the rule by which commerce is to be governed."<sup>134</sup> This power, however, is limited by the very terms of the Commerce Clause itself and hence should not be used to invade upon traditional state endeavors and state sovereignty.<sup>135</sup>

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what this man meant, but what those words would mean in the mouth of a normal speaker." HANKS, *supra* note 71, at 258 (quoting OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-19 (1899), reprinted in COLLECTED LEGAL PAPERS 204, 207 (1920)).

<sup>132</sup> But see *Lopez*, 514 U.S. at 565 (Breyer, J., dissenting). Justice Breyer objected to this textualist approach by insisting that "commerce" was a vague term and this would, therefore, allow Congress to "rationally conclude that schools fall on the commercial side of the line." *Id.* Justice Breyer reached this conclusion by tangentially reasoning that schools inculcate children with human capital and thereby affect the productivity of the national work force and thus affect commerce. *Id.*

<sup>133</sup> *Lopez*, 514 U.S. at 552. For example, Chief Justice Rehnquist wrote in *Lopez*: "We start with first principles. The Constitution creates a Federal Government of enumerated powers" and "[t]he powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted). Likewise, Justice Kennedy asserted:

Were the Federal Government to take over regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

*Id.* at 577 (Kennedy, J., concurring).

<sup>134</sup> 22 U.S. (9 Wheat.) 1, 196 (1824).

<sup>135</sup> *Id.* at 194. Justice Marshall, writing with respect to the outer reach of the Commerce Clause, indicated:

It is not intended to say that these words comprehend that commerce, which is completely Internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.



Further evidence of the Court's more activist stance toward federalism was its treatment of congressional findings in *Lopez*. In striking down the Gun-Free School Zones Act ("GFSZA"),<sup>136</sup> the Court affirmed the decision of the Fifth Circuit, which partially based its holding on the fact that the regulated activity lacked a commercial nexus.<sup>137</sup> Significantly, the Fifth Circuit also noted the lack of legislative findings.<sup>138</sup> In an effort to correct its oversight, Congress adopted findings addressing the Fifth Circuit's

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*Id.*

Recently, the Fourth Circuit in *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir.) (en banc), cert. granted sub nom. *United States v. Morrison*, 120 S. Ct. 11 (1999), exhibited similar federalist concerns. The circuit court struck down a portion of the Violence Against Women Act, 42 U.S.C. § 13981 (1994) ("VAWA"), that created a private cause of action for victims of violence motivated by gender animus. *Brzonkala*, 169 F.3d at 826-27. Relying heavily on *Lopez*, the court stated that VAWA "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded." *Id.* See also Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 191 (1996) [hereinafter *Constitutional Faith*].

We do not have to sit pat with a constitutional faith that rests on an incorrect vision of what government is and what it can do. It is better to forge a renewed constitutional faith in the original designs that saw limited government not as a partial response to the new challenges of the economic order, but as the complete and adequate architecture for its own time, and for generations to come.

*Id.* See also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) ("I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and structure of our constitutional government."); Hon. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. PUB. POL'Y 1, 5 (1995) (asking "why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey you-can-do-whatever-you-feel-like Clause'").

<sup>136</sup> 18 U.S.C. § 922(q)(2)(A) (1994), amended by 18 U.S.C. § 922(q)(1) (Supp. II 1996). The pre-*Lopez* version of the statute was bereft of any reference to interstate commerce. The statute before the *Lopez* Court read as follows: "It shall be unlawful for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone." *Id.*

<sup>137</sup> *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

<sup>138</sup> *Id.*

concern.<sup>139</sup> Irrespective of Congress' newly discovered findings, the Court struck down the statute. While the Court did not rest its decision on a lack of findings, it did, in a brief aside, comment on their absence. Chief Justice Rehnquist noted that:

Although as part of our independent evaluation of the constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings. . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no substantial effect was visible to the naked eye, they are lacking here.<sup>140</sup>

In interpreting the above passage of the Court's opinion, one commentator surmises that "in a close case, findings could help" federal legislation pass Commerce Clause scrutiny.<sup>141</sup> More importantly, however, *Lopez* indicates that the Court will make an "independent evaluation" and will not passively defer to the legislature when matters of federalism present themselves.<sup>142</sup>

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<sup>139</sup> Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 758 (1996).

The question of congressional findings was a backdrop to the entire [Fifth Circuit] litigation . . . The only additional legislative history that dealt with the 1990 Act was the record of a House of Representatives subcommittee hearing. The hearings in the House revealed that the entire focus was upon youth violence and the problem of guns in schools. *No witness drew any connection between guns in schools and commerce.* To the contrary, Richard Cook, the witness for the Bureau of Alcohol, Tobacco and Firearms, expressed concern that "constitutional authority to enact the legislation is not manifest on the face of the bill." Representative Hughes pursued this point in questioning Cook, having Cook concede that the 1990 Act would be "a major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws."

*Id.* at 766 (footnotes omitted) (emphasis added).

<sup>140</sup> *Lopez*, 514 U.S. at 562-63 (citations and footnotes omitted) (emphasis added).

<sup>141</sup> Friedman, *supra* note 139, at 762.

<sup>142</sup> *Lopez*, 514 U.S. at 562. Note that the Court in *Reno v. Condon*, 120 S. Ct. 666, 668 (2000), accepted congressional findings that states reap large profits

After *Lopez*, the Court is, once again, taking the lead in judicially defining and preserving federalism as a task unto itself.

The foregoing cases and their underlying principles ostensibly indicate an advantage to criminal defendants charged under laws having a tenuous relation to commerce, and states facing an overreaching Congress. However, the juxtaposition of this line of cases represents much more than that. These cases have attempted to define the proper role of federal power, consistent with the history surrounding our social compact, and its relationship between states and individuals. One may dismiss these cases as mere pluralities or scattered anomalies, but their focal point is beyond doubt. When one adds up the *Erie* Doctrine, with the Due Process Clause, Equal Protection Clause, Tenth Amendment, and Commerce Clause jurisprudence, the sum is a judiciary actively pursuing federalism.<sup>143</sup>

## II. THE ELEVENTH AMENDMENT: OLD WINE IN A NEW BOTTLE

The Eleventh Amendment provides that “[t]he 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

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from the sale of personal information, but only relied on those findings in a single buried passage of the opinion, and it was undisputed by the litigants. *But see College Savings I*, 119 S. Ct. 2199, 2206-09 (1999) (examining congressional findings, with exacting analysis, by illuminating flaws in Senate and House committee reports, statements of committee members, and the paucity of evidence documenting constitutional infractions).

<sup>143</sup> See *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Ashcroft*, Justice O'Connor enumerated the virtues of federalism as follows:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry . . . the principle benefit of the federalist system is a check on abuses of government power.

*Id.* at 458 (citations omitted).

any Foreign State.”<sup>144</sup> By its very terms, the Eleventh Amendment creates a substantive limit on the jurisdiction of federal courts. The Eleventh Amendment simultaneously carves out the breadth of precious constitutional protections and delineates the proper boundary between what is truly federal and what is truly state. Far from being placed in a sea of tranquility, the Eleventh Amendment is one of the most widely debated provisions of the Constitution. The theories espoused by both the Court and the legal academy run the intellectual gamut. In order to truly grasp the gravity of the Eleventh Amendment, an examination of the competing theories is required.

In attempting to describe the voluminous case law interpreting the Eleventh Amendment, Professor Jeffries writes:

As everyone knows, the Eleventh Amendment is a mess. It is the home of self-contradiction, transparent fiction, and arbitrary stops in reasoning. Any hope of doctrinal stability is undermined by shifting paradigms, as the Eleventh Amendment is inconsistently conceptualized as a form of sovereign immunity, as an exception to federal jurisdiction, and as a structural constraint on the powers of the national government.<sup>145</sup>

The Court, however, has been relatively consistent in its application of Eleventh Amendment doctrine.<sup>146</sup> Instead, it is a series of commentators, lumping criticism upon novel theory, that have created the morass of which Professor Jeffries speaks. Currently there exist five relevant and differing viewpoints of the Eleventh Amendment. These viewpoints consist of (1) the Eleventh Amendment operating as a restriction on subject matter jurisdiction;<sup>147</sup> (2) the Eleventh Amendment operating as a restriction

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<sup>144</sup> U.S. CONST. amend. XI.

<sup>145</sup> John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1998) (footnotes omitted). Professor Jeffries is the Emerson Spies Professor of Law at the University of Virginia Law School.

<sup>146</sup> See *Alden v. Maine*, 119 S. Ct. 2240, 2253 (1999) (“The Court has been consistent in interpreting the adoption of the Eleventh Amendment.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 n.7 (1996) (listing case law spanning 103 years consistently affirming and applying Eleventh Amendment doctrine).

<sup>147</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (“It is also

upon diversity jurisdiction only;<sup>148</sup> (3) a textualist approach to the Eleventh Amendment;<sup>149</sup> (4) an Article I congressional abrogation theory;<sup>150</sup> and (5) state sovereign immunity created by the Tenth Amendment, rather than stemming from the Eleventh Amendment.<sup>151</sup>

The Supreme Court's current view regards the Eleventh Amendment as a circumscription of federal subject matter jurisdiction.<sup>152</sup> As a result, the Eleventh Amendment shields state gov-

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significant that in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (indicating that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III").

<sup>148</sup> *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting) (arguing that the Eleventh Amendment "bars only federal court suits against States by citizens of other States").

<sup>149</sup> Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1371 (1989) (declaring that there is "no justification for discarding the plain meaning of the text"). Professor Marshall is a professor of law at Case Western Reserve University Law School.

<sup>150</sup> Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693 (1976) (stating that the Court's Eleventh Amendment jurisprudence fails "to distinguish rights conferred against the federal judiciary from rights conferred against Congress"); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1415 (1975) (stating that the Court's Eleventh Amendment excursions fail to address whether "Congress has the power to create a federal cause of action against state governments"). Professor Tribe is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School. Professor Nowak is the David C. Baum Professor of Law at the University of Illinois School of Law.

<sup>151</sup> Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 66 (1989) (stating that when sovereign immunity "is viewed as a Tenth Amendment guarantee . . . the problems posed by the current debate are resolved"). Professor Massey is an associate Professor of Law at the University of California, Hastings College of Law.

<sup>152</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Note that this view is not without its doctrinal difficulties. As a general rule, subject matter jurisdiction may not be achieved by virtue of consent. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). But, the Court has also held that a state may consent to suit irrespective of its sovereign immunity. *Hans v. Louisiana*, 134

ernments from almost all suits.<sup>153</sup> This view is countenanced by the fact that Article III of the Constitution, which delineates the scope of the judicial power, begins by proclaiming that “[t]he judicial power of the United States *shall* extend to . . . .”<sup>154</sup> By contrast, the Eleventh Amendment begins by proclaiming that “[t]he Judicial Power of the United States *shall not* be construed to extend to . . . .”<sup>155</sup> A second theory, championed by the Court’s dissenters, also seeks recognition. This viewpoint claims that the Eleventh Amendment restricts federal subject matter jurisdiction, granted by section two of Article III, by disallowing suits against states in diversity only.<sup>156</sup> According to this theory, the Eleventh Amendment does not preclude suits against states brought pursuant to the remaining sections of Article III, mainly federal question jurisdiction.<sup>157</sup>

To be sure, commentators have not been silent on the issue. Professor Marshall would have the Court explore a textualist approach to the Eleventh Amendment.<sup>158</sup> Professor Marshall is

U.S. 1 (1890).

<sup>153</sup> See *infra* Part II.A-B (outlining the Court’s current view).

<sup>154</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>155</sup> U.S. CONST. amend. XI (emphasis added). See also *supra* note 7 (noting that the Eleventh Amendment is one of only two provisions in the Constitution that provides instructions regarding constitutional construction).

<sup>156</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting) (asserting that “the Amendment’s narrow and technical language [could not possibly] be understood to have instituted a sweeping new limitation on federal judicial power”).

<sup>157</sup> *Id.* Note that this view is completely inconsistent with the Court’s ruling in *Hans v. Louisiana*, 134 U.S. 1 (1890). See also *infra* Part II.A (outlining the history of the Eleventh Amendment). The majority of commentators have embraced this view as well. See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-84 (1987) (arguing that the Eleventh Amendment restricts a federal court’s diversity jurisdiction only); 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, 1060 (1983) (arguing that the Eleventh Amendment’s failure to mention in-state citizens suggests that only diversity jurisdiction is barred).

<sup>158</sup> Marshall, *supra* note 149, at 1345 (opining that “it is . . . difficult to think of any other facet of the Constitution with respect to which the Court has

critical of the Court for engaging "primarily in an originalist inquiry, relying on evidence and speculation about the original intent and purposes" of the amendment.<sup>159</sup> Professor Marshall places heavy emphasis on the words "any suit" contained in the Eleventh Amendment.<sup>160</sup> As a result, even diverse citizens would be precluded from bringing suit under federal question jurisdiction.<sup>161</sup> Non-diverse citizens, Professor Marshall believes, are not precluded from bringing any type of action against a state.<sup>162</sup> This latter assertion is somewhat similar to the diversity approach.<sup>163</sup>

Professors Nowak and Tribe are proponents of a congressional abrogation theory with respect to the Eleventh Amendment.<sup>164</sup> They argue that the Eleventh Amendment restricts federal courts from hearing cases against states, but only when a federal statute precludes such suits.<sup>165</sup> Congress, they suggest, can authorize suits against states via the Supremacy Clause and by superseding common law immunity.<sup>166</sup> "Nothing in the language or history of

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reached results so obviously inconsistent with the words used by the framers").

<sup>159</sup> Marshall, *supra* note 149, at 1344. For example, Professor Marshall chastises Justice Brennan for engaging in such an inquiry. Marshall, *supra* note 149, at 1334 n.10. Justice Brennan, according to Professor Marshall, pays "uncharacteristic attention to the intent of the framers" by virtue of his personal conviction that "state sovereign immunity is a pernicious doctrine, which is no more than an anachronistic and unnecessary remnant of a feudal legal system." Marshall, *supra* note 149, at 1344 n.10.

<sup>160</sup> U.S. CONST. amend. XI.

<sup>161</sup> Marshall, *supra* note 149, at 1346. Federal question jurisdiction is created by Article III of the Constitution. Article III provides: "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." U.S. CONST. art. III, § 2. Congress, with language tracking Article III closely, has empowered federal courts to adjudicate federal question controversies. 28 U.S.C. § 1331 (1994). Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

<sup>162</sup> Marshall, *supra* note 149, at 1346.

<sup>163</sup> Marshall, *supra* note 149, at 1346 n.14.

<sup>164</sup> Tribe, *supra* note 150, at 683; Nowak, *supra* note 150.

<sup>165</sup> Tribe, *supra* note 150, at 694; Nowak, *supra* note 150, at 1445.

<sup>166</sup> Tribe, *supra* note 150, at 693-99; Nowak, *supra* note 150, at 1445.

the eleventh amendment,” Professor Tribe asserts, “suggests that it must be construed to limit congressional power under” Article I of the Constitution.<sup>167</sup> In further support of his thesis, Professor Tribe elliptically points out that the political process will serve to protect states from unmitigated intrusion by Congress upon their sovereignty.<sup>168</sup> The Court, however, has eschewed this position.<sup>169</sup> Professor Nowak similarly opines that the “pragmatic problems of federalism posed by the eleventh amendment should be resolved by Congress, not by the judiciary.”<sup>170</sup> The enactment of the Eleventh Amendment, Professor Nowak further suggests, “does not necessarily connote a prohibition of congressional grants of jurisdiction in private suits against states.”<sup>171</sup> Again, the Court has explicitly rejected this position as well.<sup>172</sup> Moreover, it is patently clear that ever since *Marbury v. Madison*, Congress cannot

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<sup>167</sup> Tribe, *supra* note 150, at 693.

<sup>168</sup> Tribe, *supra* note 150, at 695. With respect to the Court’s most recent trilogy of cases, Professor Tribe believes that the rulings will probably have “pernicious consequences for the enforcement of federal statutes across the board.” Marcia Coyle & Harvey Berkman, *Justices Weigh in on Side of States: Back to Antebellum Federal Relations, Say Some Critics*, NAT’L L.J., July 5, 1999, at A1 (quoting remarks of Professor Tribe). Professor Tribe has also called the decisions “scary. They treat states’ rights in a truly exaggerated way, harking back to what the country looked like before the civil war and, in many ways, even before the adoption of the constitution.” THE ECONOMIST, *The Supreme Court: Activism in Different Robes*, July 3, 1999, at 22 (quoting remarks of Professor Tribe). To address Professor Tribe’s criticism of the Court’s recent federalism decisions, when one seeks a judicial vision of federalism it is for the purpose of securing the individual liberty of our citizens and not a harbinger of slavery. See *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (pointing out that “[i]n the tension between federal and state power lies the promise of liberty”) (O’Connor, J.). There is nothing scary or pernicious about being of the opinion that the Eleventh and Tenth Amendments operate as barriers to the exercise of federal power and not as empty rhetoric and constitutional surplusage.

<sup>169</sup> See *supra* note 98 (discussing the Court’s rejection of the political process approach).

<sup>170</sup> Nowak, *supra* note 150, at 1441.

<sup>171</sup> Nowak, *supra* note 150, at 1431.

<sup>172</sup> See *infra* Part II.B (analyzing *Alden*, *College Savings I*, and *College Savings II*).



expand the jurisdiction of federal courts beyond the boundaries demarcated in the Constitution.<sup>173</sup>

Professor Massey presents the final viewpoint of the Eleventh Amendment's meaning. Professor Massey is partially in accord with the Court's current views, but contends that state sovereign immunity emanates from the Tenth Amendment rather than the Eleventh.<sup>174</sup> Professor Massey accepts the text of the Eleventh Amendment at "face value."<sup>175</sup> Thus, it operates as a "jurisdictional trumpcard," precluding jurisdiction based on all the provisions contained in Article III.<sup>176</sup> Reconceptualizing sovereign immunity as a product of the Tenth Amendment, Professor Massey argues, affords Congress an opportunity "to invade that immunity" so long as it does not run afoul of the strictures of the Eleventh Amendment.<sup>177</sup> As a result,

Congress could enable the federal courts to hear claims against a state made by its own citizens asserting a violation of a federal statutory or constitutional right. Congress could not, however, enable the federal courts to hear the identical claim presented against a state by a citizen of another state.<sup>178</sup>

The Court has explicitly rejected this view as well.<sup>179</sup>

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<sup>173</sup> 5 U.S. (1 Cranch.) 137, 174 (1803). "[T]he power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States." *Id.*

<sup>174</sup> Massey, *supra* note 151, at 66.

<sup>175</sup> Massey, *supra* note 151, at 65.

<sup>176</sup> Massey, *supra* note 151, at 65.

<sup>177</sup> Massey, *supra* note 151, at 66.

<sup>178</sup> Massey, *supra* note 151, at 66.

<sup>179</sup> See *infra* Part II.B (analyzing *College Savings I*, 119 S. Ct. 2199 (1999); *College Savings II*, 119 S. Ct. 2219 (1999); *Alden v. Maine*, 119 S. Ct. 2240 (1999)).

### A. *The Eleventh Amendment's Evolution*

Article III of the Constitution delineates the scope of the judicial power.<sup>180</sup> For example, it allows federal courts to adjudicate controversies “between a State and Citizens of another State.”<sup>181</sup> It also authorizes suits between “a State and Foreign Citizens.”<sup>182</sup> While the ratification debates were raging, the question of state sovereignty presented itself in connection with Article III.<sup>183</sup> The central issue for determination was whether the common law doctrine of state sovereign immunity would survive given the language of Article III.<sup>184</sup> This fiery debate was largely fueled by the massive amount of debt the states had amassed as a result of the Revolutionary War.<sup>185</sup> The most prominent supporters of the Constitution vigorously attempted to assuage the states of their concerns. Alexander Hamilton, for example, wrote in the *Federalist Papers*:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This . . . general exemption . . . [is] one of the attributes of sovereignty . . . now enjoyed by the government of every

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<sup>180</sup> U.S. CONST. art. III, § 1. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.*

<sup>181</sup> U.S. CONST. art. III, § 2.

<sup>182</sup> *Id.*

<sup>183</sup> Massey, *supra* note 151, at 97.

<sup>184</sup> See Nowak, *supra* note 150, at 1425-30 (discussing ratification controversy). See also POSNER, *supra* note 60, at 42 (stating that “[t]he creation of the lower federal courts was controversial, which is why Article III merely authorized Congress to create them”).

<sup>185</sup> See Nowak, *supra* note 150, at 1434 (“During the Revolution, the states had incurred many debts and did not anticipate that they would be liable for them in federal courts.”). “Congress, understandably concerned that members’ home states might have to pay Revolutionary War debts they had largely ignored, quickly passed the Eleventh Amendment, relegating creditors to the more hostile arena of state courts.” KUKLIN & STEMPEL, *supra* note 65, at 79.

state in the union. *Unless therefore, there is a surrender of this immunity . . . it will remain with the states.*<sup>186</sup>

By the latter portion of this statement, Hamilton assured the state conventions that a state would only appear in federal court as a plaintiff, and would never be haled in as an unwilling defendant. George Mason, the foremost opponent of the Article III language, with unequaled rotundity declared: "It would be ludicrous to say that you could put the state's body in jail. How is the judgment then to be enforced? A power which cannot be executed ought not to be granted."<sup>187</sup> Attending the same convention debate, James Madison was forced to respond. Madison labeled Mason's fears as "groundless" and then enthusiastically proclaimed that "[i]t is not in the power of individuals to call any state into court."<sup>188</sup> At this point in our history, the matter appeared to be settled.

While the Constitution was ratified, the dispute over sovereign immunity did not end with the Constitution's adoption. The Court in *Chisholm v. Georgia*, held, despite the Founders' assurances indicating otherwise, that the plain import of Article III did not preclude a citizen of South Carolina from bringing suit against the state of Georgia.<sup>189</sup> Georgia contended that Article III should be construed so as to provide jurisdiction only when a state brings suit, and not when a diverse citizen sues a state.<sup>190</sup> Its argument

<sup>186</sup> THE FEDERALIST NO. 81, at 548-49 (A. Hamilton) (Jacob E. Cooke ed. 1961) (emphasis in original). See also THE FEDERALIST NO. 45, at 310 (J. Madison) (declaring that "the States will retain under the proposed Constitution a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded").

<sup>187</sup> 3 Elliot's Debates, *supra* note 1, at 527 (quoting remarks of George Mason at the Virginia state constitutional convention).

<sup>188</sup> 3 Elliot's Debates, *supra* note 1, at 527 (quoting remarks of James Madison at the Virginia state constitutional convention).

<sup>189</sup> 2 U.S. (2 Dall.) 419 (1793). See also Amar, *supra* note 157, at 1467 (describing *Chisholm* as "the first major constitutional case decided by the Supreme Court").

<sup>190</sup> Amar, *supra* note 157, at 1468. Professor Amar adopts a unique perspective of *Chisholm*. He contends that the threshold issue should have been whether jurisdiction was proper. Assuming proper jurisdiction, the next inquiry should be which law was to govern the controversy. Amar, *supra* note 157, at 1469. Under Georgia's common law at the time, a state could not be adjudged

regarding Article III's symmetry fell upon deaf ears, save Justice Iredell.<sup>191</sup> The *Chisholm* opinion was met with social opprobrium and outrage.<sup>192</sup> In fact, so visceral was the response that Georgia quickly responded to the decision by passing a law making it a crime, punishable by death, to file suit against her.<sup>193</sup> Approximately one month later, Congress overwhelmingly passed the Eleventh Amendment in its present form.<sup>194</sup> One year after that, it was ratified by the states.<sup>195</sup> The alacrity with which the Eleventh Amendment was passed and ratified clearly indicates the degree to which our founding generation placed faith in the sovereign immunity of the states.<sup>196</sup>

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liable in assumpsit, irrespective of any sovereign immunity defense. Amar, *supra* note 157, at 1469. Because petitioner did not bring suit pursuant to the Contracts Clause of the Constitution, state law should have governed the controversy. Amar, *supra* note 157, at 1470. In *Chisholm*, however, the Court disregarded Georgia's common law and applied its own federal common law. Amar, *supra* note 157, at 1470. In this respect, Professor Amar indicates, *Chisholm* is the precursor to *Swift v. Tyson*. Amar, *supra* note 157, at 1470.

<sup>191</sup> See *Chisholm*, 2 U.S. (2 Dall.) at 429 (opinion of Iredell, J.). Justice Iredell, in an extended dissent, held "that no such action as this before the Court can legally be maintained." *Id.* After analogizing the states to corporations, Justice Iredell declared: "A State does not owe its origin to the Government of the *United States*, in the highest or any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: *The voluntary and deliberate choice of the people*. . . . A State is altogether exempt from the jurisdiction of the Courts of the *United States*." *Id.* at 448 (emphasis in original).

<sup>192</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68-69 (1996) (deeming *Chisholm* as "now-discredited"); *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934) (indicating that *Chisholm* "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted"); *Hans v. Louisiana*, 134 U.S. 1, 11-14 (1890) (recounting the history surrounding the adoption of the Eleventh Amendment and discussing Justice Iredell's dissenting opinion in *Chisholm*).

<sup>193</sup> PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 810 (4th ed. 1998); Massey, *supra* note 151, at 111. See also *Alden v. Maine*, 119 S. Ct. 2240, 2250 (1999) (recounting the history surrounding the Eleventh Amendment).

<sup>194</sup> ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 395 (3d ed. 1999).

<sup>195</sup> *Id.*

<sup>196</sup> See *Alden*, 119 S. Ct. at 2261 ("The concerns voiced at the ratifying

With *Chisholm* rendered obsolete, the seminal case with respect to modern Eleventh Amendment doctrine is *Hans v. Louisiana*.<sup>197</sup> Hans, a citizen of Louisiana, brought suit against Louisiana to compel payment of the principal and interest due on state issued bonds.<sup>198</sup> Hans invoked federal question jurisdiction, by bringing his action pursuant to the Contracts Clause of the Constitution.<sup>199</sup> While acknowledging that the plain import of the Eleventh Amendment bars only diverse and foreign citizens from bringing suit against a state, the *Hans* Court concluded that it would be "anomalous" to force states into federal court when they are sued by their own citizens.<sup>200</sup> The *Hans* Court reasoned that cognizance of this action, which is "unknown to the common law[,] . . . was not contemplated by the constitution when establishing the judicial power of the United States."<sup>201</sup> In an effort to maintain jurisdiction, Hans appealed to the letter of the Eleventh Amendment, emphasizing that it lacks any reference to non-diverse citizens.<sup>202</sup> This argument, the Court responded, was "an attempt to strain the constitution and the law to a construction never imagined or dreamed of."<sup>203</sup> The Court concluded that the solu-

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conventions, the furor raised by *Chisholm*, and the speed and unanimity with which the Amendment was adopted, moreover, underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States.").

<sup>197</sup> 134 U.S. 1 (1890).

<sup>198</sup> *Id.* at 1.

<sup>199</sup> U.S. CONST. art. I, § 10. The Contracts Clause, in relevant part, provides: "No State shall . . . pass any Law impairing the Obligation of Contracts." *Id.*

<sup>200</sup> *Hans*, 134 U.S. at 10.

<sup>201</sup> *Id.* at 15.

<sup>202</sup> *Id.* at 9.

<sup>203</sup> *Id.* The Court, relying heavily upon statements made by the founding fathers and early Court decisions, opined:

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state.

*Id.* at 17 (quoting *Beers v. Arkansas*, 20 How. 527, 529 (1858) (internal quotation marks omitted)).

tion pressed by Hans would be “an absurdity on its face.”<sup>204</sup> Therefore, for the last 110 years, states have enjoyed sovereign immunity from suit in federal court brought by either diverse, non-diverse or foreign citizens, irrespective of the subject matter of the cause of action.<sup>205</sup>

Four years ago, the Court had occasion to revisit *Hans* in *Seminole Tribe of Florida v. Florida*.<sup>206</sup> In *Seminole Tribe*, a plurality held that the Eleventh Amendment estops Congress from authorizing suits to enforce legislation enacted pursuant to the Indian Commerce Clause.<sup>207</sup> Congress may abrogate the Eleventh Amendment, the Court explained, only when it is acting pursuant to the powers conferred to it by Section 5 of the Fourteenth Amendment.<sup>208</sup> Therefore, Congress cannot abrogate a state’s

<sup>204</sup> *Hans*, 134 U.S. at 15.

<sup>205</sup> See, e.g., *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 286 (1973) (opining that “we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly”). See also *In re New York*, 256 U.S. 490, 497 (1921) indicating:

[t]hat a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.

*Id.* This immunity has over the years been extended to include the following: *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding that the immunity of state officials shields them from suit to quiet title); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (holding that sovereign immunity bars suit by Native American tribes); *Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (extending sovereign immunity to include admiralty suits); *Monaco v. Mississippi*, 292 U.S. 313 (1934) (holding that sovereign immunity denies jurisdiction to foreign nations).

<sup>206</sup> 517 U.S. 44 (1996).

<sup>207</sup> *Id.* at 72-73. The Indian Commerce Clause provides that “Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

<sup>208</sup> *Seminole Tribe*, 517 U.S. at 59. Sections one and five of the Fourteenth Amendment, in relevant part, provide: “Section 1 . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. “Section 5 . . . The Congress shall have power to enforce, by

immunity pursuant to any of its other enumerated powers. Section 5 of the Fourteenth Amendment is qualitatively different from any other constitutional power, the Court explained, because it was specifically intended to be a limit upon state sovereignty.<sup>209</sup> The Fourteenth Amendment, therefore, curtails the vigor of the Eleventh Amendment.<sup>210</sup>

Making matters more interesting, the Court, one year after its decision in *Seminole Tribe*, drastically limited Congress' power to enact legislation pursuant to Section 5 in *City of Boerne v. Flores*.<sup>211</sup> The Court, in striking down the Religious Freedom

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appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. In its holding, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989). See *Seminole Tribe*, 517 U.S. at 59. The Court in *Union Gas* previously held that Congress may abrogate state sovereign immunity pursuant to its Interstate Commerce Clause power. Implicit in *Union Gas* was the notion that Congress must force states into compliance with federal law and that the Court should not play a role in protecting states from congressional overreaching. Chief Justice Rehnquist pointed out that the "plurality's rationale [in *Union Gas*] . . . deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*." *Seminole Tribe*, 517 U.S. at 64. He then went on to declare "that none of the policies underlying stare decisis require our continuing adherence of its holding." *Id.* at 66.

<sup>209</sup> *Seminole Tribe*, 517 U.S. at 59. Chief Justice Rehnquist made it clear that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. See also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (Rehnquist, J.) ("There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States.").

<sup>210</sup> *Seminole Tribe*, 517 U.S. at 59. A collateral issue that now plagues the lower courts as a result of *Seminole Tribe* is to determine whether a congressional statute is passed pursuant to § 5 or any other power enumerated in Article I of the Constitution. See, e.g., *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 1998) (holding that a copyright statute was not passed pursuant to § 5), *vacated and remanded*, 180 F.3d 674 (5th Cir. 1999); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997) (holding that the Americans With Disabilities Act was enacted pursuant to § 5); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997) (holding that the Equal Pay Act was enacted pursuant to § 5).

<sup>211</sup> 521 U.S. 507 (1997).

Restoration Act ("RFRA"),<sup>212</sup> asserted that Congress went well beyond its Section 5 authority.<sup>213</sup> The Court made clear that Congress acts unconstitutionally when it attempts to create new rights or attempts to expand upon the scope of substantive rights that have not been recognized by the Court.<sup>214</sup> Most recently in *Kimel v. Florida Board of Regents*, the Court, in a straightforward application of *City of Boerne*, held that the Age Discrimination in Employment Act ("ADEA")<sup>215</sup> was unsupported by Congress' Section 5 power.<sup>216</sup> Justice O'Connor's ringing pronouncement could not have been clearer: "Today we adhere to our holding in *Seminole Tribe*: Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands

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<sup>212</sup> 42 U.S.C. § 2000bb (1993) (repealed 1994). "RFRA prohibits government from substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden (1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997) (quoting 42 U.S.C. § 2000bb-1 (1993) (internal quotation marks omitted)).

<sup>213</sup> *City of Boerne*, 521 U.S. at 527. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id.*

<sup>214</sup> *Id.* at 519. In this regard, Justice Kennedy explained:

The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. 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. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

*Id.* As a result of *City of Boerne*, any law enacted pursuant to § 5 can be challenged as in excess of Congress' legislative authority. *Id.*

<sup>215</sup> 29 U.S.C. § 621 (1994). The ADEA precludes both states and private employers from refusing "to hire or to discharge any individual or otherwise discriminate against any individual . . . of such individual's age." *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 636 (2000) (quoting 29 U.S.C. § 623(a)(1)).

<sup>216</sup> *Kimel*, 120 S. Ct. at 650. "[W]e have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Id.* at 644.



of private individuals.”<sup>217</sup> Additionally, the ADEA was not promulgated pursuant to a proper exercise of Congress’ Section 5 powers.<sup>218</sup> Justice O’Connor buttressed her conclusions by addressing three salient facts. First, under Equal Protection Clause analysis, age classifications are only subject to rational basis scrutiny.<sup>219</sup> Second, age characteristics are not conducive to classification as “discrete and insular” minorities.<sup>220</sup> Lastly, the ADEA provides for a heightened level of scrutiny in contradistinction to the Court’s rational basis scrutiny.<sup>221</sup> This change in scrutiny, similar to the substantive change of the RFRA in *City of Boerne*, does not constitute enforcement and was therefore invalid.<sup>222</sup> As was the case in the Tenth Amendment and Commerce Clause cases,<sup>223</sup> the Court once again informed Congress that it will be the final arbiter of federalism issues.

### B. Enter The Trilogy

A majority of the justices of the Supreme Court certainly have proven themselves to be “keepers of the Federalist flame.”<sup>224</sup> Yet, while the Court’s recent federalism trilogy<sup>225</sup> has successfully fought to protect the rights of the states, this victory may have come at the expense of individual enforcement of property rights.

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<sup>217</sup> *Id.* at 643-44.

<sup>218</sup> *Id.* at 645.

<sup>219</sup> *Id.* at 646. “Under the rational basis test, a law will be upheld if it is rationally related to a legitimate government purpose.” CHEMERINSKY, *supra* note 43, at 415.

<sup>220</sup> *Kimel*, 120 S. Ct. at 645. Here, Justice O’Connor was referring to the fact that a statute may lose its presumption of constitutionality if it has the effect of retarding the political process; hindering the right to vote; is directed at a particular religious practice; targets racial minorities; or focuses on “prejudice against discrete and insular minorities.” *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>221</sup> *Kimel*, 120 S. Ct. at 648.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* See also *supra* Part I.A-D (discussing federalism with respect to major areas of constitutional law).

<sup>224</sup> Amar, *supra* note 157, at 1429.

<sup>225</sup> *College Savings I*, 119 S. Ct. 2199 (1999); *College Savings II*, 119 S. Ct. 2219 (1999); *Alden v. Maine*, 119 S. Ct. 2240 (1999).

In *Alden v. Maine* the Court prevented a group of state employees from bringing suit against the state of Maine in its own courts.<sup>226</sup> These employees, thus, were precluded from recovering overdue wages, and vindicating a property right.<sup>227</sup> *College Savings I* and *College Savings II*, moreover, confirm that the Eleventh Amendment was drawn as a Maginot Line, slashing across all of the jurisdictional heads of Article III. As a result, property rights created by Congress' Article I authority cannot be vindicated in court by those with such claims against a state. With respect to property rights, the Court's trilogy may have the effect of dividing the Constitution against itself.

### 1. *Alden v. Maine*

In *Alden v. Maine* the Court held that Congress may not subject an unwilling state to a private suit in its own courts under the guise of its Article I authority.<sup>228</sup> In *Alden*, a group of probation workers brought suit against the state of Maine, their employer, alleging a violation of the Fair Labor Standards Act ("FLSA").<sup>229</sup> Justice Kennedy immediately declared that the "sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."<sup>230</sup> Justice Kennedy reasoned that prior to the adoption of the Constitution, the states enjoyed sovereign immunity and that this doctrine was well established and stems from English law.<sup>231</sup> This immunity was "universal in the States

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<sup>226</sup> *Alden*, 119 S. Ct. at 2246.

<sup>227</sup> Cf. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 339 (1969) (deeming the garnishment of wages "a taking of property").

<sup>228</sup> 119 S. Ct. 2240, 2246 (1999).

<sup>229</sup> 29 U.S.C. § 201 (1994 & Supp. IV 1998). The FLSA, among other things, regulates minimum wages and maximum work hours. *Id.* at §§ 206, 207. Petitioners initially brought suit in federal court. Before the suit generated any momentum, the Court decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), whose holding patently barred such suits in federal court. After the case was dismissed, petitioners filed the same action in state court in the state of Maine. *Alden*, 119 S. Ct. at 2246.

<sup>230</sup> *Alden*, 119 S. Ct. at 2246.

<sup>231</sup> *Id.* at 2247.

when the Constitution was drafted and ratified.”<sup>232</sup> The history and text of the Eleventh Amendment, Justice Kennedy claimed, confirmed that its enactment served not as a redefinition of judicial power, but rather as a restoration of the original constitutional design.<sup>233</sup> Thus, the amendment does not “enact language codifying the traditional understanding of sovereign immunity” but rather serves “to preserve the States’ traditional immunity from private suits.”<sup>234</sup> Justice Kennedy boldly wrote that “[t]he Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated *not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.*”<sup>235</sup> Therefore, “there was no need to draft with a broader brush” as the less than elegant purpose of the amendment was to overrule *Chisholm*.<sup>236</sup>

Justice Kennedy next focused on the issue of whether the Eleventh Amendment’s restriction on jurisdiction applies to state courts.<sup>237</sup> Justice Kennedy pushed aside the fact that the Eleventh Amendment’s terms only apply to federal courts.<sup>238</sup> Relying on *Seminole Tribe* and *Hans*, Justice Kennedy opined that a historical pedigree approach was required, focusing on the structure of sovereign immunity and constitutional design.<sup>239</sup> Petitioners insisted that both Article I, section eight, which enumerates Congress’ legislative power, and the Supremacy Clause of Article VI<sup>240</sup> provide Congress with the authority to override state

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<sup>232</sup> *Id.* at 2248 (citations omitted).

<sup>233</sup> *Id.* at 2251.

<sup>234</sup> *Id.* at 2251-52.

<sup>235</sup> *Id.* at 2254 (emphasis added). *See also* *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (stating that “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms”).

<sup>236</sup> *Alden*, 119 S. Ct. at 2252.

<sup>237</sup> *Id.* at 2254.

<sup>238</sup> *Id.* at 2254-55.

<sup>239</sup> *Id.*

<sup>240</sup> U.S. CONST. art. VI. The Supremacy Clause provides: “This Constitution, and the Laws 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

immunity.<sup>241</sup> Justice Kennedy responded by indicating that resort to these constitutional provisions “merely raises the question of whether a law is a valid exercise of national power.”<sup>242</sup> “A contrary view,” Justice Kennedy elaborated, “could not be reconciled with *Hans v. Louisiana* which sustained Louisiana’s immunity in a private suit arising under the Constitution itself.”<sup>243</sup> Justice Kennedy then rejected the notion that legislation enacted by Congress via its own inertia emanating from Article I abrogates sovereign immunity.<sup>244</sup> The combination of the Supremacy Clause and Congress’ Article I powers, against which a state’s immunity stands as impregnable, Justice Kennedy concluded, “does not turn on the forum in which the suits were prosecuted.”<sup>245</sup>

The Court then addressed petitioners’ final averment—that Congress, pursuant to Article I, may abrogate a state’s immunity in its own courts.<sup>246</sup> While this presented “a question of first impression,” the Court relied on history as its guide.<sup>247</sup> Petitioners pressed that since the history of the Eleventh Amendment concerned only suits in federal court, the historical record was devoid of any instruction with respect to immunity in state court.<sup>248</sup> The Court disagreed stating that 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 . . . immunity” and, therefore, “the silence is most instructive.”<sup>249</sup> Justice Kennedy focused on the fact that even the discredited

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Constitution or the Laws of any State to the Contrary notwithstanding.” *Id.*

<sup>241</sup> *Alden*, 119 S. Ct. at 2255.

<sup>242</sup> *Id.* (citation omitted).

<sup>243</sup> *Id.* Justice Kennedy also indicated that petitioners’ assertion could not be reconciled with *Employees of Dep’t of Pub. Health & Welfare of Mo. v. Dep’t of Health & Welfare of Mo.*, 411 U.S. 279 (1973), which recognized that the Fair Labor Standards Act does not abrogate a state’s immunity although the state is bound by the Act itself. *Id.*

<sup>244</sup> *Alden*, 119 S. Ct. at 2255.

<sup>245</sup> *Id.* at 2256.

<sup>246</sup> *Id.* at 2260.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

*Chisholm* majority conceded that sovereign immunity was impregnable in the sovereign's own courts.<sup>250</sup> The combination of the "concerns voiced at the ratifying conventions, the furor raised by *Chisholm*, and the speed and unanimity with which the Eleventh Amendment was adopted, moreover, underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States."<sup>251</sup> Considering the foregoing, Justice Kennedy opined that it would be "difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity."<sup>252</sup>

Justice Kennedy concluded his paean to federalism by considering why the power to subject unwilling states to suits in their own courts is inconsistent "with the structure of the Constitution."<sup>253</sup> In so doing, Justice Kennedy set forth several powerful policy justifications. First, such a power in the hands of a federal body would insufficiently preserve the dignity of the states.<sup>254</sup> Such an abusive power would force a state to "face the prospect of being thrust, by judicial fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf."<sup>255</sup> Judgment creditors could possibly put a state in ruinous financial condition, resulting in a destruction of financial integrity as well as immunity and political autonomy.<sup>256</sup> Justice Kennedy reasoned that the

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<sup>250</sup> *Id.* Justice Kennedy stated:

When sovereigns are sued in their own Courts, such a method [a petition of right] may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.

*Id.* (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 452 (1793) (Blair, J.)).

<sup>251</sup> *Alden*, 119 S. Ct. at 2261.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 2263.

<sup>254</sup> *Id.* at 2264.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

political process determines a state's allocation of its scarce resources.<sup>257</sup> Judgment creditors would have the effect of removing this allocation process from the public arena.<sup>258</sup> Therefore, asserting jurisdiction over states "would place an unwarranted strain on the States's ability to govern in accordance with the will of their citizens" and not by judicial decree.<sup>259</sup>

The Court additionally reasoned that the power to force a state into its own courts undermines one of the purposes of federalism—the preservation of political accountability.<sup>260</sup> Assuming that such jurisdiction existed, it would have the deleterious effect of pitting "the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."<sup>261</sup> State level policy decisions would not only be partially transferred from the state government to the federal government, but also concomitantly transferred to the states' judicial department.<sup>262</sup> The judicial department, the Court reasoned, is institutionally incompetent to handle such a role.<sup>263</sup> Finally, were the Congress able to abrogate a state's immunity in its own courts, "the National Government would yield greater power in the state courts than in its own judicial instrumentalities."<sup>264</sup> To be sure, it would be anomalous and unwise to force a state to respond to suit in state court and hold it immune in federal court.

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<sup>257</sup> *Id.* at 2264-65.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 2265.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* Here, Justice Kennedy appears to be echoing the same concerns that were voiced during the constitutional ratification controversy. See 3 Elliot's Debates, *supra* note 1, at 527. "Thus, sir, it appears to me that the greater part of these powers are unnecessary, and dangerous, as tending to impair, and ultimately destroy, the state judiciaries, and, by the same principle, the legislation of the state governments." 3 Elliot's Debates, *supra* note 1, at 527 (quoting remarks of George Mason).

<sup>263</sup> *Alden*, 119 S. Ct. at 2265.

<sup>264</sup> *Id.*

## 2. *College Savings I*

In *College Savings I*, the Court struck down a federal statute that purported to abrogate Florida's sovereign immunity pursuant to Congress' Section 5 authority of the Fourteenth Amendment.<sup>265</sup> The Court, pointing to its recent decision in *City of Boerne v. Flores*,<sup>266</sup> held that the statute did not operate to enforce the strictures of the Fourteenth Amendment and therefore found it lacking.<sup>267</sup>

College Savings Bank ("CSB"), for jurisdictional purposes, a citizen of New Jersey, had obtained a patent based upon a unique administration of a financing technique it had created with respect to its educational finance activities.<sup>268</sup> CSB launched a patent infringement action pursuant to the recently enacted Patent Remedy Act<sup>269</sup> against Florida Prepaid Postsecondary Education Expense Board, an arm of the State of Florida that administered a similar financing program.<sup>270</sup> The Patent Remedy Act clearly indicated Congress' intent by unequivocally stating that its purpose was to abrogate state sovereign immunity.<sup>271</sup> Both CSB and the United

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<sup>265</sup> 119 S. Ct. 2199 (1999).

<sup>266</sup> 521 U.S. 507 (1997).

<sup>267</sup> *College Savings I*, 119 S. Ct. at 2202, 2211.

<sup>268</sup> *Id.* CSB issued certain commercial paper that incorporated a unique method of financing designed to provide sufficient funds in order to cover the costs of a future college education. *Id.* at 2202-03.

<sup>269</sup> 35 U.S.C. § 296 (1994). The Act declared that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent." *Id.* § 296(a). The Act also provides that "whoever without authority makes, uses or sells any patented invention . . . during the term of the patent therefore, infringes the patent." 35 U.S.C. § 271(a) (1994). The statute then goes on to define the term "whoever" as including "any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity." *Id.* § 271(h).

<sup>270</sup> *College Savings I*, 119 S. Ct. at 2203.

<sup>271</sup> *Id.*

States, as intervenor, attempted to defend the statute's constitutionality by contending that the abrogation of immunity was valid.<sup>272</sup>

After dispensing with the uncontroverted fact that Congress had properly expressed its intent to abrogate the states' sovereign immunity, the Court next addressed the issue of whether it was within the purview of Congress' power to actually effect such an abrogation.<sup>273</sup> Chief Justice Rehnquist, writing for the Court, first pointed out that *Seminole Tribe*<sup>274</sup> illustrated that Congress cannot abrogate a state's sovereign immunity pursuant to any of its Article I powers.<sup>275</sup> Therefore, by process of elimination, the only congressional authority remaining was Section 5 of the Fourteenth Amendment.<sup>276</sup> Thus, CSB was forced to defend the statute by painting it as a prophylactic measure designed to protect the deprivation of property absent due process.<sup>277</sup> Under *City of Boerne*, however, "the legislation must nonetheless be 'appropriate' under § 5."<sup>278</sup> Therefore, as a threshold matter, if Congress wishes to invoke its Section 5 authority, "it must identify [the] conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."<sup>279</sup> *City of Boerne* requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>280</sup>

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<sup>272</sup> *Id.* at 2202.

<sup>273</sup> *Id.* at 2205.

<sup>274</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>275</sup> *College Savings I*, 119 S. Ct. 2199, 2205 (1999).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 2204.

<sup>278</sup> *Id.* at 2206.

<sup>279</sup> *Id.* at 2207.

<sup>280</sup> *Id.* at 2206 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997)). See also Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM. & MARY L. REV. 665 (1998). Professor Gardbaum argues that the limits placed upon Congress' enforcement power in *City of Boerne* "reset the federal-state balance in the symbolically charged context of the Civil War Amendments." *Id.* at 666. Most commentators contend that the Civil War Amendments "reallocated powers from the states to the national government." *Id.* at 687. Professor Gardbaum argues that this "reconstitutionalization of political power from" state governments did not come to rest with the Congress. *Id.* at 688. Rather, this power was "enshrined in the Constitution" and that "[t]his is the



The Court scoured the congressional record in order to identify the evil Congress purportedly attempted to remedy.<sup>281</sup> The evil, it turns out, was the exact fact pattern exhibited by the current litigation; that is, a state clothed with immunity, violating a patent, but immune from litigation and damages.<sup>282</sup> Chief Justice Rehnquist, however, pointed out that "Congress identified no pattern of patent infringement by the states, let alone a pattern of Constitutional violations."<sup>283</sup> Thus, Congress described an evil that did not exist.<sup>284</sup>

Chief Justice Rehnquist was forced to admit that patents are clearly a form of property deserving of Constitutional protection.<sup>285</sup> Neither CSB nor the United States, however, argued that the Fifth Amendment's Just Compensation Clause<sup>286</sup> was a possible source of congressional authority.<sup>287</sup> Given that Congress explicitly invoked its Article I and Section 5 authority, the Chief Justice reasoned that as a result of this "omission," the Court was without the benefit of any briefing and thus precluded from considering the Just Compensation Clause argument.<sup>288</sup> Instead, the Court again reiterated the fact that "the legislative record . . . provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act."<sup>289</sup>

Relying on the text of the Fourteenth Amendment, the Court pointed out two truisms: (1) the deprivation of a constitutionally-

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most fundamental federalism issue raised in [*City of Boerne*]." *Id.*

<sup>281</sup> *College Savings I*, 119 S. Ct. at 2206-09.

<sup>282</sup> *Id.* at 2207.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* The Court pointed out that the House Report indicated that an overwhelming number of states fully comply with patent law. *Id.* The Circuit Court below illustrated that in the past 110 years (from the period spanning 1880-1990) only eight suits alleging patent infringement were brought against states. *Id.*

<sup>285</sup> *Id.* at 2208. See also *infra* note 371 (discussing patents as property interests).

<sup>286</sup> U.S. CONST. amend. V.

<sup>287</sup> *College Savings I*, 119 S. Ct. at 2208.

<sup>288</sup> *Id.* at 2208 n.7.

<sup>289</sup> *Id.* at 2208.

sanctioned property interest is not unconstitutional by itself; and (2) that the sole mandate of the text of the Fourteenth Amendment is that it requires due process be given.<sup>290</sup> “Instead,” the Court elaborated, “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.”<sup>291</sup> In adopting the legislation, the Court insisted, Congress gave scant consideration to the remedies made available by the states.<sup>292</sup> In fact, the Senate Report did not even mention the state remedies available, while the House Report “made only a few fleeting references.”<sup>293</sup>

Moreover, Congress failed to delineate what types of patent infringement were to be actionable: whether negligent, intentional, or reckless.<sup>294</sup> Furthermore, Congress made no effort to limit the scope of the statute so as to involve only constitutional violations stemming from a lack of due process.<sup>295</sup> With all of the foregoing in mind, Congress’ remedy to the imagined evil of states cloaking themselves with immunity while depriving its citizens of property, was, the Court concluded, incongruent and unproportional.<sup>296</sup>

### 3. *College Savings II*

In *College Savings II*, CSB brought another suit against Florida Prepaid Postsecondary Educational Expense Board for allegedly violating its patent and for making misrepresentations in its literature with respect to its college tuition plans.<sup>297</sup> The latter charge was predicated upon the Trademark Act of 1946, commonly

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.* (citations omitted).

<sup>292</sup> *Id.* at 2209. These state remedies included: a petition for a claims bill demanding payment in full; a takings claim; or a conversion claim. *Id.* at 2209 n.9.

<sup>293</sup> *College Savings I*, 119 S. Ct. at 2209.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 2210.

<sup>296</sup> *Id.*

<sup>297</sup> *College Savings II*, 119 S. Ct. 2219 (1999).

referred to as "the Lanham Act,"<sup>298</sup> which purported to authorize suits against states by revoking their immunity.<sup>299</sup> Here, the Supreme Court was presented with, *inter alia*, the issue of whether the foregoing averments constituted deprivations of property rights secured by the Due Process Clause of the Constitution. CSB insisted that the Lanham Act was passed pursuant to Congress' Section 5 enforcement powers by arguing that Congress was attempting to "remedy and prevent state deprivations without due process of two species of 'property rights': (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests."<sup>300</sup> Justice Scalia quickly concluded that the foregoing do not constitute property rights deserving of due process protection.<sup>301</sup> He explained that "[t]he hallmark of a protected property interest is the right to exclude others."<sup>302</sup> Justice Scalia conceded that patents are traditional forms of property, but refused to recognize the Lanham Act's false advertising sections,<sup>303</sup> as they "bear no relationship to any right to exclude."<sup>304</sup> The misrepresentation provisions of the statute, Justice Scalia opined,

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<sup>298</sup> 15 U.S.C. § 1125 (1994 & Supp. IV 1998). The statute creates a cause of action against any "person" for intellectual property disputes. *Id.* § 1125(a)(1). The term "person" was defined to include "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." *Id.* § 1125(a)(2). The Lanham Act also declares that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court." 15 U.S.C. § 1122(b) (1994).

<sup>299</sup> *College Savings II*, 119 S. Ct. at 2223.

<sup>300</sup> *Id.* at 2224.

<sup>301</sup> *Id.* at 2225.

<sup>302</sup> *Id.* at 2224.

<sup>303</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1018 (5th ed. 1984). Dean Prosser describes the elements of the tort of false advertising as follows: "The competitor who falsely advertised his own goods, but who did not pass them off as those of the plaintiff, and who did not disparage the plaintiff's goods, might be liable to a buyer who was deceived by the false statements." *Id.*

<sup>304</sup> *College Savings II*, 119 S. Ct. at 2224-25. See also *College Savings I*, 119 S. Ct. 2199, 2208 (1999) (emphasizing the right to exclude aspect of patents).

invaded “no interest over which petitioner had exclusive dominion.”<sup>305</sup>

CSB attempted to create a property interest by analogy to the common law tort of unfair competition,<sup>306</sup> which, it insisted, protected property interests protected by the Fourteenth Amendment.<sup>307</sup> Using this analogy, it argued that, Congress was attempting to remedy property deprivations by enacting such legislation.<sup>308</sup> Furthermore, CSB argued that an ongoing business operation is a form of property per se.<sup>309</sup> Justice Scalia rebutted these contentions by asserting that “as a logical matter . . . not everything which protects property interests is designed to remedy or prevent deprivations of those property interests.”<sup>310</sup> Finally, Justice Scalia insisted, that while business assets may be considered property, ongoing business activity may not be: “the activity of making a profit is not property in the ordinary sense—and it is only that, and not any business asset, which is impinged upon by a competitors’ false advertising.”<sup>311</sup>

With CSB’s property claims rejected, the Court was not compelled to consider whether the legislation at issue was enacted

<sup>305</sup> *College Savings II*, 119 S. Ct. at 2225.

<sup>306</sup> See KEETON, *supra* note 303, § 130, at 1014-15. Dean Prosser enumerates the elements of unfair competition as follows:

[U]nfair competition . . . can be found when the defendant engages in any conduct that amounts to a recognized tort and when that tort deprives the plaintiff of customers or other prospects . . . [C]ertain unfair competition torts appear to involve less a question of tortious activity than a question of property to be protected.

*Id.*

<sup>307</sup> *College Savings II*, 119 S. Ct. at 2224.

<sup>308</sup> *Id.* at 2225.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* Justice Scalia arrived at this conclusion by pointing out that the Due Process Clause should not serve as a “font of tort law.” *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). This assertion, in all likelihood, represents a fear of possibly opening the gates to the federal courts, thereby flooding the Court’s docket and increasing administrative costs. This fear is a legitimate one. As Chief Judge Posner of the Seventh Circuit Court of Appeals has documented, 283,688 cases were filed in the district courts and 49,625 cases were filed with the courts of appeals in 1995 alone. POSNER, *supra* note 60, at 60.

<sup>311</sup> *College Savings II*, 119 S. Ct. at 2225.

pursuant to Congress' authority under Section 5. The Court, instead, examined the issue of whether a state can constructively waive its sovereign immunity.<sup>312</sup> A state can impliedly waive its sovereign immunity, CSB argued, by allegedly engaging in activity proscribed by a federal law.<sup>313</sup> Justice Scalia, however, noted that the Court's precedents reveal that a state can be stripped of its immunity in only two ways: (1) by virtue of Congress properly authorizing a suit pursuant to its Section 5 enforcement power; or (2) by a state's voluntarily waiver of its sovereign immunity, consenting to such suit.<sup>314</sup> The Court, contrary to CSB's assertion, held that a state does not constructively waive its sovereign immunity by acting as a "market participant" and rejected any analogy to its Dormant Commerce Clause jurisprudence.<sup>315</sup> Rather, the "test for determining whether a State has waived its immunity from [jurisdiction] is a stringent one."<sup>316</sup> As such, a state's waiver of immunity must be unequivocal.<sup>317</sup> Justice Scalia indicated that constructive waiver is simply a stalking horse for abrogation.<sup>318</sup> He remonstrated that the "statutory provision relied

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<sup>312</sup> *Id.* at 2226.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 2223.

<sup>315</sup> *Id.* at 2228, 2230-31. See also *supra* note 120 (explaining the Dormant Commerce Clause concept).

<sup>316</sup> *College Savings II*, 119 S. Ct. at 2226 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)).

<sup>317</sup> *Id.* at 2226. In so holding, the Court overruled *Parden v. Terminal Railway of Alabama Docks Dep't*, 377 U.S. 184 (1964), which held that a state may constructively waive its immunity by participating in a market activity that is federally regulated. *College Savings II*, 119 S. Ct. at 2226-27. The decision had been distinguished several times and overruled in part on one occasion. *Id.* at 2226-31 (discussing treatment of *Parden*). Justice Scalia described it as "an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign immunity) jurisprudence." *Id.* at 2226. Justice Scalia based his reasoning, in part, on Chief Justice Rehnquist's opinion in *Edelman v. Jordan*, 415 U.S. 651 (1974), wherein the Chief Justice declared that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Id.* at 673. Comparing sovereign immunity with the personal liberties guaranteed by the Constitution provides us with a useful barometer of how far the present Court will go in preserving federalism.

<sup>318</sup> *College Savings II*, 119 S. Ct. at 2230.

upon to demonstrate that Florida constructively waived its sovereign immunity is the very same provision that purported to abrogate it.”<sup>319</sup> Justice Scalia’s final contention in support of the Court’s holding was, indeed, both the simplest and the most lethal to CSB. As CSB was a citizen of New Jersey, and the defendant, an arm of the state of Florida, the present case fell precisely within the purview of the text of the Eleventh Amendment.<sup>320</sup> Thus, the Court had no jurisdiction whatsoever.

### III. THE CONFLUENCE OF PROPERTY RIGHTS AND JUDICIAL FEDERALISM

The nexus of constitutionally guaranteed property rights and the Court’s protection of state sovereignty presents problems for the former. The Fifth<sup>321</sup> and Fourteenth<sup>322</sup> Amendments act as substantive restraints on the power of both the federal and state governments, respectively: They prevent them from tampering with property rights without affording due process. The Tenth<sup>323</sup> and Eleventh<sup>324</sup> Amendments, as well as the structure of the Constitution, limit the powers of the federal government with respect to the states. The Court’s recent federalism trilogy<sup>325</sup> secured the correct result from the perspective of federalism. In doing so, however, it erred in its treatment of property rights. In *College Savings II*, the Court rejected a property interest that it should have recognized, threatening the security of constitutionally protected property interests.<sup>326</sup> Instead, by recognizing such interests under the law that safeguards them, the Court can harmonize its federalism jurisprudence with its vigorous protection of property rights.

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 2232. See U.S. CONST. amend. XI. “The Judicial power . . . shall not . . . extend to *any* suit . . . commenced . . . against one of the United States by *Citizens of another State.*” *Id.* (emphasis added).

<sup>321</sup> U.S. CONST. amend. V.

<sup>322</sup> U.S. CONST. amend. XIV.

<sup>323</sup> U.S. CONST. amend. X.

<sup>324</sup> U.S. CONST. amend. XI.

<sup>325</sup> See *College Savings I*, 119 S. Ct. 2199 (1999); *College Savings II*, 119 S. Ct. 2219 (1999); *Alden v. Maine*, 119 S. Ct. 2240 (1999).

<sup>326</sup> *College Savings II*, 119 S. Ct. at 2225.

A. *The Supreme Court's Protection of Property Rights: The Invigorated Takings Clause*

The Supreme Court has historically and currently taken a firm stance in vouchsafing property rights, thus insulating these interests from overzealous regulators. Nowhere has this been more evident than in cases concerning governmental takings of property. The national government, as well as state governments, enjoy the power of eminent domain, that is, the power to appropriate private property in order to further governmental ends.<sup>327</sup> This power, ultimately utilitarian in nature,<sup>328</sup> is curtailed by virtue of the Fifth Amendment to the United States Constitution.<sup>329</sup> The Fifth Amendment, in relevant part, provides that "private property [shall not] be taken for public use without just compensation."<sup>330</sup> The importance of protecting property to the early Court is evidenced by the fact that the Fifth Amendment was the first amendment made applicable to the states through the Fourteenth Amendment.<sup>331</sup>

Early on, the Court eagerly protected property rights from governmental incursion. For example, in *Pennsylvania Coal v. Mahon*, the Court struck down a state law by insisting that its

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<sup>327</sup> BLACK'S LAW DICTIONARY 523 (6th ed. 1990). "The power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." *Id.*

<sup>328</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (explaining that the Takings Clause precludes "the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

<sup>329</sup> U.S. CONST. amend. V.

<sup>330</sup> *Id.* A government can appropriate private property via two principle mechanisms: a possessory taking or a regulatory taking. CHEMERINSKY, *supra* note 43, at 504-05. "A possessory taking occurs when the government confiscates or physically occupies property. Alternately, a regulatory taking is when government regulation leaves no reasonable economically viable use of property." CHEMERINSKY, *supra* note 43, at 55.

<sup>331</sup> See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234 (1897) (stating that "a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment").

regulatory side effect traveled "too far."<sup>332</sup> The state statute had the burdensome effect of not allowing a coal compact to employ its mining rights, effectively resulting in forcing it to leave its valuable coal reserves dormant.<sup>333</sup> Justice Holmes, while candidly recognizing that all government action thrusts costs upon the polity,<sup>334</sup> boldly held that "when [government action or regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to support the act."<sup>335</sup>

Beginning in the 1920s, the Court, however, set off on a course of irrational reasoning that temporarily proved the Fifth Amendment to be a dead letter. Indeed, absent resulting economic impracticality,<sup>336</sup> forcible invasion,<sup>337</sup> or transfer,<sup>338</sup> the Court perfunctorily upheld the "taking" of private property without compensation.<sup>339</sup>

<sup>332</sup> 260 U.S. 393, 415 (1922).

<sup>333</sup> *Id.* at 412-13.

<sup>334</sup> *Id.* at 413. Justice Holmes reasoned that a government would cease to operate if it had to compensate for all of its externalities. *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> See *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (deeming rate of return resulting from government action unprofitable).

<sup>337</sup> See *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."). For other modern examples, see, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 165 (1980) (holding that a taking occurs when the government confiscates interest payments); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (rendering the imposition of navigable servitude upon a private waterway a taking).

<sup>338</sup> *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414 (1922) (announcing that the statute at issue "purports to abolish what is recognized . . . as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding plaintiffs").

<sup>339</sup> For examples of the Court's misconceived reasoning see generally *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987), rejecting a Takings challenge to a statute forcing 50% of coal to lay dormant. *DeBenedictis* is an interesting case because the Court was presented with the same facts as in *Pennsylvania Coal v. Mahon*. The principle dispute between the majority and dissent was that of proportionality—that is, whether the determination of a taking should be based on the relative or absolute value of property



Recently, the Court has taken a much more receptive stance toward the rights of aggrieved property holders. For instance, in *Nollan v. California Coastal Commission*, the Court held that a taking occurs when the government conditions a permit regarding the development of private property on an owner's granting of a public easement.<sup>340</sup> The Nolan's initially leased a parcel of property with an option to buy and subsequently decided to exercise that option.<sup>341</sup> The exercise of the option was conditioned by the state "on their promise to demolish [a rental unit located on the property] and replace it."<sup>342</sup> As a result, a development permit had to be obtained.<sup>343</sup> The state commission, however, "recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property."<sup>344</sup> In deeming the state's action a taking, the Court reasoned that a state's plenary police power allows it to place a condition upon development, but only if it is rationally related to eliminating any harm that would occur as a result of the development itself.<sup>345</sup> The Court insisted that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'"<sup>346</sup>

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displaced. The majority stressed that only two percent of the coal would remain idle. *DeBenedictis*, 480 U.S. at 496 n.24. The dissent, meanwhile, emphasized the fact that 27 million tons of coal were effectively appropriated. *Id.* at 518 (Rehnquist, C.J., dissenting). See also *Agins v. Tiburon*, 447 U.S. 255, 263 (1980) (rejecting a takings challenge to an ordinance that required the elimination of multiple family dwellings); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (holding that no taking exists when the government designates private property as a landmark); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (holding that a zoning ordinance resulting in a 75% decrease in market value per acre was not a taking).

<sup>340</sup> 483 U.S. 825, 832 (1987).

<sup>341</sup> *Id.* at 827.

<sup>342</sup> *Id.* at 828.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 837.

<sup>346</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

Expanding upon the principles set out in *Nollan*, the Court in *Dolan v. City of Tigard*, required that there be a “rough proportionality” between the burden created by the government’s condition and the government’s justification for thrusting that condition upon a rightful property holder in the first place.<sup>347</sup> The requirements of *Nollan* and *Dolan* effectively shift the burden of proof onto the government—where it properly belongs—and requires it to calculate its findings. Thus, by forcing the government to second-guess itself, these holdings translate into a lessened willingness by the Court to impede upon property rights, by making it much more costly, or at the very least, prompting a more careful cost-benefit analysis.

Furthermore, the Court in *Lucas v. South Carolina Coastal Council*, found a taking when an environmental law prevented construction of any structures on a recently purchased beachfront plot.<sup>348</sup> The Court also reinforced the principle that a deprivation of economic viability constitutes a taking.<sup>349</sup> Moreover, the Court asserted that a taking might be a function of a property owner’s reasonable investment-backed expectations.<sup>350</sup> In *Lucas*, the plaintiff purchased two plots of land for approximately one million dollars.<sup>351</sup> Only after the parcel was purchased was the environmental measure unexpectedly thrust upon him.<sup>352</sup> Thus, a future plaintiff may ostensibly present objective evidence with respect his future economic plans,<sup>353</sup> and then shift the burden of going forward to the government, which has the additional burdens set forth in *Nollan* and *Dolan*. Finally, the Court also intimated that a less than complete evisceration of economic viability might also create the basis for a taking.<sup>354</sup>

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<sup>347</sup> 512 U.S. 374, 391 (1994).

<sup>348</sup> 505 U.S. 1003 (1992).

<sup>349</sup> *Id.* at 1019.

<sup>350</sup> *Id.* at 1031.

<sup>351</sup> *Id.* at 1006.

<sup>352</sup> *Id.* at 1008.

<sup>353</sup> *Id.* For example, Lucas’ intention was to “erect single family residences . . . [and] commissioned architectural drawings for this purpose.” *Id.*

<sup>354</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). For instance, Justice Scalia added:

*B. Property Rights in the Face of Strident Federalism*

The portion of the Court's opinion in *College Savings II* discarding CSB's property interest demonstrates its cognitive dissonance with respect to the intersection of federalism and property rights. While the Court's final judgment is satisfactory from the perspective of federalism, it appears to make property rights, something the Court has painstakingly sought to protect,<sup>355</sup> much more difficult to enforce. The Court's opinion in *Alden v. Maine*, errs only insofar as its discussion pays no attention to the textual provisions of the Constitution that protect property rights.<sup>356</sup> The Court's opinions in the *College Savings* cases set odious precedents for the future recognition of property rights. In *College Savings II*, for example, the Court should have recognized the property interests at stake, and then, at a minimum proceeded to its due process or Section 5 analysis. By adopting a cramped and ancient definition of property in *College Savings II*<sup>357</sup> with respect to the fluid transactions that constitute business, the Court appears to have adopted a policy at odds with itself, thus creating a property paradox.

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Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the value of the tract as a whole. Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.

*Id.* (citations omitted).

<sup>355</sup> See *supra* Part III.A (discussing Takings Clause jurisprudence).

<sup>356</sup> 119 S. Ct. 2240, 2251 (1999).

<sup>357</sup> See *supra* Part II.B.3 (discussing the Court's rejection of CSB's property interest claims).

The Court first came to terms with this paradox in *Ex Parte Young*.<sup>358</sup> *Ex Parte Young* involved, *inter alia*, a substantive due process property challenge stemming from a state's effort to regulate railroad rates.<sup>359</sup> The Railroad company involved in the litigation sought an injunction to prevent the regulation from taking effect and a declaratory judgment deeming the law unconstitutional.<sup>360</sup> The lower court granted the injunction<sup>361</sup> and Edward T. Young, the Attorney General of Minnesota, was held in contempt due to his disregard of the court's order by persisting in prosecuting the action.<sup>362</sup> Mr. Young then petitioned for habeas corpus relief relying on the Eleventh Amendment.<sup>363</sup> In *Ex Parte Young*, the Court surprisingly held that a state officer is stripped of his state's sovereign immunity when he acts unconstitutionally.<sup>364</sup> Justice Peckham explained that "[t]he sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility the supreme authority of the United States."<sup>365</sup> In effect, therefore, a state retains its full sovereign immunity, but a state officer allegedly acting unconstitutionally cannot seek refuge behind its veil. This has come to be known as the *Ex Parte Young* fiction.<sup>366</sup> As a result, an action can be maintained effectively

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<sup>358</sup> 209 U.S. 123 (1908).

<sup>359</sup> *Id.* at 130. Interestingly enough, the *Ex Parte Young* opinion was authored by Justice Peckham who also authored the Court's opinion in *Lochner v. New York*, 198 U.S. 45 (1905), only three years earlier.

<sup>360</sup> *Ex Parte Young*, 209 U.S. at 144-45.

<sup>361</sup> *Id.* at 133.

<sup>362</sup> *Id.* at 134.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 159-60. "In the case of the interference with property, the person enjoined is assuming to act in his capacity as an official of the state. . . . Such official cannot so justify when acting under an unconstitutional enactment of the legislature." *Id.* at 167.

<sup>365</sup> *Id.* at 167 (citation omitted). This passage is the only instance where Justice Peckham even uses the words "sovereignty" and "state" in the same sentence; he mentions the Eleventh Amendment only twice in his opinion. *Id.* at 149, 155.

<sup>366</sup> See LOW & JEFFRIES, *supra* note 193, at 819 (describing *Ex Parte Young* as resting "on a fictional tour de force"); Amar, *supra* note 157, at 1478-79 (describing the *Ex Parte Young* fiction as "doctrinal gymnastics").

against a state in the name of the state actor who allegedly acted unconstitutionally.<sup>367</sup> Justice Peckham, in the end, acknowledged that this “distinction” would be “difficult to appreciate.”<sup>368</sup> He concluded, however, by asserting that “[t]here is nothing in the case before us that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character.”<sup>369</sup> While Justice Peckham must have recognized the conflict between the Eleventh Amendment and the property rights at issue, he pretended as if it did not exist.<sup>370</sup>

The species of property at issue in the *College Savings* cases creates a sharp federal interest, as intellectual property is distinctly sought to be protected by the Constitution.<sup>371</sup> Therefore, Justice

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<sup>367</sup> See Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997) (explaining that “[u]nder *Ex Parte Young*, a suit to secure future compliance with federal law, brought against a state officer, is not regarded as one against the State for purposes of the Eleventh Amendment”) (footnote omitted).

<sup>368</sup> *Ex Parte Young*, 209 U.S. at 168.

<sup>369</sup> *Id.*

<sup>370</sup> See *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 890 (4th Cir.) (en banc) (Wilkinson C.J., concurring), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999). For Chief Judge Wilkinson, what he describes as judicial activism “falls in three general stages,” the first epoch commencing with *Lochner* and its prodigy. This era’s hallmark, as championed by Justice Peckham, was a “mobilization of personal judicial preference in opposition to state and federal social welfare legislation.” *Id.* In the midst of all this judicial activism one can easily see how Justice Peckham in *Ex Parte Young* was driven by the substantive due process aspect of the litigation. Creating the exception allowed the railroads to bring suit and vindicate their property rights. See also Jackson, *supra* note 367, at 511 (explaining that “[t]he harshness of the *Hans* immunity has long been mitigated by the availability of injunctive relief against state officers to prevent violations of federal law”) (footnote omitted).

<sup>371</sup> See U.S. CONST. art. I, § 8, cl. 8. “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* See also 28 U.S.C. § 1368 (1994) (providing for original jurisdiction for intellectual property disputes). It is well settled that patents are property interests. See, e.g., *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 399 (1906) (stating that “[a] trademark, or a tradename, or a title, is property”). Our tax and bankruptcy laws treat patents as property as well. See, e.g., 26 U.S.C. § 1235(a) (1994); 11 U.S.C. § 101(35A) (1994).

Scalia's implicit concern in *College Savings II*<sup>372</sup> that the Constitution is a charter of negative liberties, as opposed to an invitation to the federal courts to bring the whole business of the states under their wing, is misplaced. Justice Scalia, a professed originalist,<sup>373</sup> has forgotten Madison's broad definition of the term "property." Madison defined property as embracing "everything to which a man may attach value and have a right."<sup>374</sup> While the term as used in the Constitution is not given such a construction,<sup>375</sup> Madison's idea of property should be given weight when, at a very minimum, a federal interest is at stake.<sup>376</sup> However, Madison's definition, by its very terms, becomes operative only when a deprivation of that property would provide the offended with a legal "right." *Marbury v. Madison* teaches us that for every legal right transgressed, the law supplies a remedy.<sup>377</sup> The fact that the

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<sup>372</sup> 119 S. Ct. 2219 (1999).

<sup>373</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1997). "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." *Id.* at 38. See also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) ("originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system.").

<sup>374</sup> *Vail v. Board of Educ. of Paris Union Sch. Dist. No. 95*, 706 F.2d 1435, 1450 (7th Cir. 1983) (Posner, J., dissenting) (quoting ESSAY ON PROPERTY, 6 MADISON, WRITINGS 101 (Hunt ed., 1906)).

<sup>375</sup> *Vail*, 706 F.2d at 1450.

<sup>376</sup> The Court's First Amendment jurisprudence has also experienced the intersection of property rights and strong federal interests. For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that the First Amendment does not "immunize the media [from damages liability] when they broadcast a performer's entire act without his consent" thus infringing upon his right of publicity, a proprietary interest. 433 U.S. 562 (1977). See also *Harper & Roe v. Nation Enter.*, 471 U.S. 539 (1985) (holding magazine liable for infringing property rights by publishing excerpts from a soon-to-be memoir of President Ford). In the First Amendment arena the Court has also seen fit to vigorously guard commercial speech as well. See, e.g., *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (emphasizing a right to receive information with respect to commercial transactions).

<sup>377</sup> 5 U.S. (1 Cranch) 137, 163 (1803). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is

Constitution goes out of its way to safeguard property rights is beyond dispute.<sup>378</sup> The Court, although in another context, has previously indicated that “[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source as state law.”<sup>379</sup> In a forceful dissent, Judge Posner once wrote:

We infer the existence of a property right from the remedies the law gives to protect it. A right protected by an injunction, by specific performance, or by criminal penalties is a property right. But if the only remedy the law provides for some wrong is damages, we speak of a liability rule rather than a property right.<sup>380</sup>

Given Judge Posner’s explication, the Court easily could have found a viable property interest in the *College Savings* cases, especially where the interference and false advertising claims were coterminous with a trademark claim, specifically protected by the Constitution and federal law.<sup>381</sup>

The Lanham Act, at issue in *College Savings II*, specifically provides for a nationwide injunction as one of the possible remedies afforded to aggrieved parties.<sup>382</sup> The right to an injunc-

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to afford that protection.” *Id.* See also Amar, *supra* note 157, at 1489 (opining that *Marbury* dictates a narrow reading of sovereign immunity).

<sup>378</sup> The Constitution specifically protects property rights. For example, the First, Second, Third, Fourth, Fifth and Fourteenth Amendments all protect forms of property rights. The Patents Clause, together with the Contracts Clause and Bankruptcy jurisdiction of Article I, protect property rights as well. Justice Holmes, furthermore, once admonished the Court to be weary of governmental power over property. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). He wrote: “When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.” *Id.*

<sup>379</sup> *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>380</sup> *Vail*, 706 F.2d at 1453 (citation omitted). In effect, Judge Posner is indicating that while property is not created by the Constitution, it is created by federal and state legislatures as well as the common law.

<sup>381</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>382</sup> 15 U.S.C. § 1125 (1994 & Supp. IV 1998). Section 1125(c)(1), in relevant part, provides: “The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person’s commercial use in commerce of a mark

tion—"[t]he traditional property law remedy"—may be regarded as an assignment of a property right in and of itself.<sup>383</sup> It constitutes forward-looking relief in order to prevent future harm to a property holder's interests.<sup>384</sup> For example, an injunction granted by a court disallows the enjoined from using the petitioner's property absent some agreed upon resolution and compensation to the property holder.<sup>385</sup> In such an instance, the injunction becomes a property right, and one ordained by the full force of federal law.<sup>386</sup> Judge Posner has opined that "[o]nly interests substantial

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or trade name . . . ." *Id.* The Patent Remedy Act, at issue in *College Savings I*, also provides for an injunction. 35 U.S.C. § 283 (1994). "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." *Id.*

<sup>383</sup> ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 140-41 (2d ed. 1997).

<sup>384</sup> *Id.*

<sup>385</sup> "If one views an injunction as always and forever prohibiting the offensive activity, then its inflexibility is costly. However, if one views an injunction as an instruction to the parties to resolve their dispute through voluntary exchange, then it is an attractive remedy." *Id.* See also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 29 (1987). "A property right is an exclusive right to the use, control, and enjoyment of some resource . . . irrespective of any argument that the general welfare, whether defined in economic or any other terms, would be increased by transferring the right to someone else." *Id.* See also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.").

<sup>386</sup> See Calabresi & Melamed, *supra* note 385, at 1092. When promulgating the Lanham Act, Congress came to the realization that "[t]here is no essential difference between trade-mark infringement and what is loosely called unfair competition. Unfair competition is the genus of which trade-mark infringement is one of the species . . . All trade-mark cases and cases of unfair competition involve the same legal wrong." Brief for Petitioner at 3, *College Savings II*, 119 S. Ct. 2219 (1999) (quoting S. REP. NO. 79-1333 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275). There is no question that Congress can legislatively create property interests. U.S. CONST. art. I, § 8. Viewed with the foregoing in mind, the Lanham Act should be read as codifying the common law torts of unfair competition and false advertising. *SK & F Co. v. Primo Pharm. Lab.*, 625



enough to warrant the protection of federal law and federal courts are Fourteenth Amendment property interests.”<sup>387</sup> Given the substantiality of the federal interest and the facts of *College Savings II*, a property interest should have been found.<sup>388</sup> To be sure, we must be careful not to belittle the Constitution in such a manner as to get federal courts involved in matters of common law tort. But, the strong federal interest involved with respect to trademark or patent claims is not to be denied, as they are intertwined.<sup>389</sup>

The cramped definition of property adopted in *College Savings II* was completely unnecessary to its central holding. The lower court in *College Savings II* was clearly devoid of jurisdiction by virtue of the Court’s previous holdings in *Seminole Tribe*<sup>390</sup> and *City of Boerne*,<sup>391</sup> the lack of a due process infraction, and, more importantly, the text of the Eleventh Amendment itself.<sup>392</sup> In fact, as the Court determined in *College Savings I*, there had been no

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F.2d 1055, 1066 (3d Cir. 1980). See also KEETON, *supra* note 303, § 130, at 1019 (“The language [of the Lanham Act] is so broad that it has brought within its scope much of the law of unfair competition, so that the state law of that subject is now substantially federalized.”) (footnote omitted).

<sup>387</sup> Brown v. Brien, 722 F.2d 360, 364 (7th Cir. 1983).

<sup>388</sup> Cf. Epstein, *Constitutional Faith*, *supra* note 135, at 191. Professor Epstein explains that “the institutions of sound government do not rise and fall with each advance in technology. Instead, they depend in large measure on the creation and enforcement of a strong system of property rights; a judicious use of regulation and condemnation for the provision of public goods; and an abiding awareness that the dangers of self-interest lie as much in ourselves as governors as it does in ourselves as the governed.” Epstein, *Constitutional Faith*, *supra* note 135, at 191 (emphasis added).

<sup>389</sup> See *supra* note 376 (discussing the First Amendment and federal interests).

<sup>390</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>391</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>392</sup> See *College Savings II*, 119 S. Ct. 2219, 2223 (1999). CSB was a citizen of New Jersey attempting to sue the state of Florida. *Id.* The Eleventh Amendment denies cognizance of “any suit” (this includes an action predicated upon federal question jurisdiction as well) “against one of the United States” by a diverse citizen. U.S. CONST. amend. XI (emphasis added). The question of the existence of a property right, and the subsequent narrowing taxonomy, should not have occurred.

widespread deprivation of property which could have made Section 5 legislation appropriate.<sup>393</sup> Therefore, while unfair competition and false advertising are, according to the Court, not deserving of property right status, CSB's underlying trademark and patent rights, and the concomitant federal interest are sufficient to implicate Fourteenth Amendment property interests.<sup>394</sup> The question of proper due process, jurisdiction, and the appropriate forum for remedy are separate and distinct. A property right existed in *College Savings II*, and while the Court did not have to address its existence in the first place, the Court refused to recognize it.<sup>395</sup>

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<sup>393</sup> 119 S. Ct. 2199, 2209 (1999) ("Congress . . . barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment.").

<sup>394</sup> Cf. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). The Court, per Justice Stewart, declared that:

The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

*Id.* (citations omitted). The Court on one occasion had admitted that it has had some trouble defining what exactly constitutes a property interest. For example, in *Paul v. Davis*, the Court explained: "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." 424 U.S. 693, 710 (1976). For a drastically more fluid view of due process, see William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492 (1977) (stating that "[o]ur decisions enforcing the guarantee of due process clause have elaborated the essence of that 'liberty' and 'property' in light of conditions existing in contemporary society").

<sup>395</sup> As a result of the Court's opinions, Senator Leahy has tentatively introduced legislation attempting to effect waivers of sovereign immunity with the Court's current framework. Senator Leahy's Intellectual Property Protection Restoration Act ("IPPra") attempts to restore protections and safeguards to those holders of intellectual property against unlawful infringement. The IPPRA

The Court's trilogy may indeed be nectar for those only concerned with preserving the structural components of the Constitution. But one must be cognizant of the fact that, at a certain juncture, this constant evasion of the federal yoke yields diminishing returns. As this analysis has suggested, the Court's decision in *College Savings II* is a perfect example of this inefficient departure.<sup>396</sup> With today's technology-driven economy, property rights, especially intellectual property rights, need to be safeguarded.<sup>397</sup> Federalism, as historically advanced,<sup>398</sup> and as advanced in *Alden v. Maine*<sup>399</sup> and *College Savings I*<sup>400</sup> are the proper results of a Court adhering to our social compact. When property rights are at stake, however, the Court, at a minimum, must not cavalierly disregard the recognition of a property interest when trampling down the highway of federalism. The Court's trilogy has showed us at least this much.

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induces states to participate in a federal intellectual property system along with private corporations. Entry into the IPPRA is conditional. That is, a state can only partake of the benefits of the federal intellectual property system if they unconditionally waive their sovereign immunity. If a state chooses not to enter the federal intellectual property system, then remedies against the state for alleged violations of intellectual property rights are allowed to the maximum extent available under the strictures of the Constitution. Note that Senator Leahy has not committed himself to the IPPRA but has circulated a tentative draft for comment. Intellectual Property Protection Restoration Act of 1999, S. 1835, 106th Cong. For examples of states waiving their immunity and consenting to suit, see, e.g., CAL. GOV'T CODE § 98004 (West 1998) (partially waiving sovereign immunity with respect to suits arising from a gaming compact); CAL. PUB. RES. CODE § 6814 (West 1977) (waiving immunity with respect to actions to quiet title); S.D. CODIFIED LAWS § 21-32A-1 (Michie 1987) (waiving sovereign immunity with respect to insurance coverage); VT. STAT. ANN. PUBLIC PROPERTY & SUPPLIES § 1403 (1989) (waiving sovereign immunity by municipal corporations and counties).

<sup>396</sup> 119 S. Ct. 2219 (1999).

<sup>397</sup> Cf. Brennan, *supra* note 394, at 503 ("Federalism need not be a mean spirited doctrine that serves to limit the scope of human liberty.").

<sup>398</sup> See *supra* Part I (discussing federalism with respect to major areas of constitutional law).

<sup>399</sup> 119 S. Ct. 2240 (1999).

<sup>400</sup> 119 S. Ct. 2199 (1999).

## CONCLUSION

The Supreme Court has historically acted in a manner with federalism lurking in the background. As of late, the Court has been at the vanguard of a movement to enforce a vision of federalism in consonance with the Framers' writings, the text, structure, original understanding, and history of the Constitution. The Court concomitantly has undertaken a similar movement toward protecting property rights and property holders from overreaching and confiscatory government action. Both of these movements are to be applauded. However, one must notice that these two paths may, in certain situations, intersect. The point of intersection produces a seemingly irreconcilable paradox. It yields a locus of property rights in combat with states' rights.

The text of the Fourteenth Amendment is exquisitely simple: "No State shall . . . deprive any person of . . . property, without due process of law."<sup>401</sup> One of the effects of the Court's trilogy, *College Savings II* in particular, was to exclude property rights created via Article I from the sweeping command of the Fourteenth Amendment.<sup>402</sup> The Fourteenth Amendment is without qualification; it safeguards all property.<sup>403</sup> In *College Savings I*, the Court held that Article I cannot be used to pierce a state's sovereign immunity.<sup>404</sup> This, at bottom, is a question of jurisdiction. In *College Savings II*, the Court denied the existence of a property interest in claims stemming from a law enacted under the aegis of Article I.<sup>405</sup> The Court did not have to reject these property interests, as it was devoid of jurisdiction and no due process infraction was found. As the Court put it in *Alden v. Maine*, the Eleventh Amendment stands as a restoration of the original constitutional design.<sup>406</sup> Constitutional design is one thing, but the

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<sup>401</sup> U.S. CONST. amend. XIV, § 1.

<sup>402</sup> *College Savings II*, 119 S. Ct. at 2225.

<sup>403</sup> U.S. CONST. amend. XIV, § 1.

<sup>404</sup> *College Savings I*, 119 S. Ct. at 2205.

<sup>405</sup> *College Savings II*, 119 S. Ct. at 2225.

<sup>406</sup> 119 S. Ct. 2240, 2251 (1999). But see *College Savings I*, 119 S. Ct. at 2219 (Stevens, J., dissenting) (accusing the majority of relying on "constitutional

actual text of the Constitution is quite another. The Constitution is imbued with protections to safeguard property interests.<sup>407</sup> While the Court should strive to protect both property and state sovereignty, it should act with even more vigor when state governments or the federal government infringe upon property rights. The Court's most recent trilogy errs in only this respect. This balance is in congruence with both the Court's precedents and, more importantly, the text of the Constitution, and the Court should adopt it.

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penumbras rather than constitutional text").

<sup>407</sup> See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972). The Court, on one occasion, put it this way:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

*Id.* (quoting *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948)).