ON DIGNITY AND DEFERENCE: THE SUPREME COURT’S NEW FEDERALISM

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The conservative side of the Supreme Court seems intent on devising a way for courts to take state interests into account.1 Press reports tend to characterize this side of the Court as “States’ Rights” adherents,2 a label that connotes a wildly outmoded form of deference, a throwback to pre-Civil War days.3 But there are really two ways of thinking about this deference to the states, and I want to address the distinction between these two approaches. I will not elaborate on the position of the liberal side of the Court, which is essentially that no judicially enforced protection of state interests is either necessary or desirable.4 I want to offer some commentary and advice for those inclined to enforce federalism.

The first of the two ways of thinking about deference to the states deserves the label that journalists are eager to apply: “states’ rights.” In the states’ rights model, the states can claim their autonomy as a matter of right. The second model is based on structural and normative analysis: the states are accorded autonomy because of the good to be achieved through separate functioning. I will call the second model normative federalism.

How have the conservative Justices on the Burger and Rehnquist Courts conceptualized their deference to the states and expressed that deference with new

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1 The belief that the political process should determine the degree of deference due the states reached a high point in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Since that time, the conservative side of the Supreme Court has attempted to restructure doctrine to take account of the states. See, e.g., Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not “commandeer” state and local executive officials to carry out a federal policy); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate state sovereign immunity using the commerce power); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not “commandeer” the state legislature to carry out a federal policy); Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that Congress must make a clear statement of its intent in order to disrupt the state-federal balance).

2 See, e.g., Fiddling With Federalism, N.Y. TIMES, Oct. 15, 1999, at A34 (referring to the Court’s conservative majority as the “states’ rights five”); Joan Biskupic, State Age-Bias Liability At Issue Before Justices, WASH. POST, Oct. 14, 1999, at A02 (referring to the Court’s “pattern of bolstering states’ rights at the expense of congressional power”); David G. Savage, Rehnquist Leads Court ‘Back to the Future,’ L.A. TIMES, Sept. 27, 1999, at A1 (claiming that the Chief Justice “has revived the once-discredited doctrine of states’ rights and reigned in the power of the national government”); Edward P. Lazarus, Court’s states’-rights decisions endanger the Union, HOUST. CHRON., June 30, 1999, at A23 (“the central enterprise of the Rehnquist court has been to reconfigure the balance of power between states and the federal government in favor of ‘states’ rights’”). For criticism of this connection of the Supreme Court’s federalism to the notion of “states’ rights,” see Harvie Wilkinson III, Fear of Federalism, WASH. POST, Nov. 26, 1999, at A45.

3 See Edward P. Lazarus, Court’s states’-rights decisions endanger the Union, HOUST. CHRON., June 30, 1999, at A23 (tying Rehnquist Court “states’ rights” ideology to “[t]he principle of states’ rights [that] provided the legal lifeblood for slavery, and . . . [that has served as a legal excuse for those who would circumvent the constitutional amendments enacted after the Civil War”).

doctrine? To a great extent, the normative federalism model explains their work, perhaps because the votes of the more moderate Justices have depended on normative, structural reasoning justifying the judicial protection of state autonomy. Yet today this sort of reasoning has declined; the majority now seems to perceive the states’ rights model as a more effective justification for the enforcement of state interests. This change in rhetoric, most visible in last year’s case of Alden v. Maine, has made it all too easy for the Court’s critics to denounce it for pointlessly favoring the states with exemptions from the rule of law.

I want to examine the way the Burger-Rehnquist Court has written about federalism and state sovereignty over the past three decades and show how the theme of deference to the states has drifted from normative, structural analysis to a states’ rights approach. Why has this drift occurred? Does the Court think a more formal rhetoric makes its activism seem more legitimate? Has the Court extended its deference beyond what normative reasoning can support?

At the dawn of the Burger-Rehnquist Era, the Court began what has become a continuing search for ways to enforce federalism. In 1971, the Court decided the case of Younger v. Harris, which provided the general rule that federal courts should abstain from exercising jurisdiction in cases asserting constitutional rights as a reason for enjoining state court criminal proceedings.

If the states were really entitled to an extreme sort of sovereign autonomy, the Court would never have reached the issue of abstention, because sovereign immunity would have absolutely barred any attempt by the plaintiff, an individual who faced criminal prosecution in state court, to bring a lawsuit against the state. But long ago, in 1908, Ex Parte Young removed this sovereign immunity obstacle to suit; it permitted suits against individual officials who act for the state. As long as one avoids the blunder of naming the states as defendants, sovereign immunity does not thwart attempts to enjoin state violations of federal law. By naming his prosecutor as the defendant, the Younger plaintiff easily overcame sovereign immunity. If sovereignty were a right of the states, this transparent device for controlling state behavior could not have been condoned. Yet Harris still could not obtain the injunction against his prosecutor Younger, because of abstention. Federal courts would have to assume that state courts live up to their obligation under the Supremacy Clause and follow any applicable federal law that defendants may raise in their criminal prosecutions.

Although the Younger doctrine sent Harris back to state court, the doctrine devised in the case did not express an absolute sort of deference to the state prosecutor or to the state courts. It contained an exception permitting access to federal court if the individual suing the state could demonstrate that he could not obtain relief within the state court system –

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7 209 U.S. 123 (1908).
8 See id.
an exception built on the 1965 Warren Court case of Dombrowski v. Pfister.\footnote{380 U.S. 479 (1965).} \textit{Dombrowski} may have appeared in its time to authorize federal court access whenever a state court defendant wanted to rely on a federal right to enjoin the proceeding against him, but Younger reframed \textit{Dombrowski} as an exception to a general rule against interfering with state court proceedings. The exception permits enjoining the state when the individual faces the harassment of prosecutions brought in bad faith. Limiting \textit{Dombrowski} to situations where the state courts were not being put in a position to enforce federal law, Younger declared that the “normal thing to do”\footnote{Younger, 401 U.S. at 45.} is to leave the state court alone to deal with the federal law in the context of that case.

The 1971 version of Burger Court federalism clearly fits what I call the normative federalism model. Justice Black, who authored \textit{Younger}, wrote that state courts should be left alone because they serve a useful function in a system in which federal law is supreme. There was no recognition of any state right to resist intrusions when the state courts do not serve that function. The deference did not extend to the state legislature, which wrote a statute that may have violated constitutional rights or to the state prosecutor enforcing that statute. The deference was given to the state court, with its capacity to apply law pursuant to the traditional legal methods that prevail in both state and federal courts. The state court was not conglomerated with other state institutions and suspected of untoward bias in favor of the challenged state law. The Supreme Court looked upon the state court as another court, at one with the standardized agenda of courts, which is to enforce the law that applies.

The tendency to view state courts as \textit{courts} rather than as the state also appears in the key case of \textit{Testa v. Katt},\footnote{330 U.S. 386 (1947).} which established that the state courts cannot resist federal law. They must take questions of state and federal law without exhibiting any favoritism for state law.\footnote{The Emergency Price Control Act provided for concurrent state and federal court jurisdiction in cases brought by consumers to enforce its required ceilings on prices of various products. See 56 Stat. 32, as amended, 58 Stat. 632, 640, 50 U. S. C. app., Supp. V, § 925 (c). Under the Act, consumers could recover triple the amount of any overcharge. See id. A purchaser who had paid $1100 for an automobile that should have cost no more than $890 sued a car dealer in Rhode Island state court and received a judgment for three times the $210 overcharge. See Testa, 380 U.S. at 386. The state supreme court, regarding treble damages as penal, reversed this judgment, using a choice of law proposition imported from international law: one government will not enforce the penal laws of a foreign government. See id. The Supreme Court, in a unanimous opinion written by Justice Black, pointing to the Supremacy Clause of the Constitution and to acts of the earliest Congress using the state courts to enforce federal criminal laws, objected to the characterization of the United States as a government foreign to the individual states that compose it. See id. at 389-90. The state court’s basic obligation under the Supremacy Clause did not end where the national law became penal in character. If Congress saw fit to provide criminal penalties that was a matter for Congress to determine. See id. It did not make sense for the state to advert to a state policy against treble damages; the supreme federal law contained a policy and that policy then became the state’s policy. See id. The Testa Court traces this doctrine to the Marshall era case \textit{The Antelope}, 10 Wheat. 66, 123 (1825), and to an even earlier English case, \textit{Folliott v. Ogden}, 1 H. Bl. 124 (1789), aff’d, \textit{Ogden v. Folliott}, 3 T. R. 726 (1790), 4 Bro. P. C. 111. See Testa, 380 U.S. at 393 n.10. The earlier case law had bound the state courts to apply federal law except where they had a ”valid excuse”: but a policy against the federal law is not valid, for it amounts to a state’s exerting its own conception of the wisdom of a choice Congress had decided to make. See id. Congress, representing all the states, had made that choice, superseding any contrary state policies. See id. at 386. Nevertheless, the Court ends its opinion by noting that Rhode Island law does not have a general policy against awarding multiple damages; the ”same type” of claims have already been enforced. See id. at 394. This leaves open the possibility that a state that never permitted a multiplication of damages might have the ”valid excuse” needed to decline to apply federal law.} Federal law must receive equal treatment, for it is every bit as much the law within the state as the state’s own law. To assume that state courts will live up to that
Supremacy Clause\(^\text{13}\) duty is to assume the orderly operation of *249 judicial institutions, not as a way of paying respect to the states, but out of a pragmatic recognition that the state courts are an abundant resource for the enforcement of federal law. Using the state courts to enforce federal law quite possibly serves the federal interest in the enforcement of federal law more than it serves any state interest in autonomy. Conversely, the more extreme inference from *Dombrowski*, that the mere invocation of federal rights justifies a federal lawsuit aimed at stopping a state court proceeding, would create burdens on the federal courts that, from a completely pragmatic standpoint, could hurt federal interests.

Justice Black dealt with the idea of federalism so summarily in 1971 that it provoked criticism from commentators who had grown accustomed to the Warren Court’s generosity toward individuals claiming federal rights in federal courts.\(^\text{14}\) But looking back at *Younger*, one can see that it recounts the argument for normative federalism with nice concision. Justice Black barely paused to mention the Constitution’s framers. In those days reading through the Court’s historical analysis was a breeze. One could even regret its extreme thinness – a regret I have become quite nostalgic about – as the Court now writes hundreds of pages of self-serving historical exegesis. Without a single citation, Justice Black supported abstention doctrine with the declaration that anyone “familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of ‘Our Federalism’.”\(^\text{15}\) What was this special version of federalism Black cozily termed “Our Federalism”? It was:

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.\(^\text{16}\)

Note the pragmatism of that statement: Our Federalism is an arrangement that represents a belief that things will work best if the institutions of different governments function separately. There is no reference to abstract concepts of the state and its attendant dignities or the abstraction of sovereignty. Indeed, Black appends a special denial of any belief in states’ rights when he writes, “[i]t does not mean blind deference to ‘States’ Rights’ any more than it means *250 centralization of control over every important issue in our National Government and its courts.”\(^\text{17}\) Justice Black backed up his statements about federalism with a sort of “seat-of-the-pants” historical claim, “[t]he Framers rejected both [states’ rights and complete centralization] ... It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”\(^\text{18}\) The Court in 1971 saw federalism as important and rooted in history but

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\(^{13}\) U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").


\(^{15}\) *Younger*, 401 U.S. at 44.

\(^{16}\) Id.

\(^{17}\) Id.

\(^{18}\) Id. at 44-45.
found no need to delve into the details of what it meant to the framers. Federalism is some sort of balanced, workable structure that will enable the states to function separately but also provide for the enforcement of federal law.

Compare Justice Black’s style of reasoning about federalism to the way Justice Anthony Kennedy wrote about the states in last term’s case of *Alden v. Maine.* In *Alden,* the Supreme Court held that limits on Congress’s power to abrogate sovereign immunity applied in cases brought in state court as well as in federal court. Justice Anthony Kennedy invoked the notion of the states’ dignity: “[The Constitution] reserves to [the states] a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.” Later he writes, “[The states] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.” Justice Kennedy relies on this way of thinking about the states to generate new enthusiasm for the doctrine of sovereign immunity. He writes: “[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”

This insistence on “dignity” for the states sounds like what *Younger* explicitly disclaimed: “blind deference to ‘States Rights.’” Is the Court moving toward a states’ rights model of enforcing state interests and away from the normative federalism represented in *Younger?* “Dignity” connotes worthiness, the idea that honor and esteem are deserved. To *Younger* find dignity inherent in the state’s mere status as a state and then to design doctrine to express honor and esteem toward the state is, I think to embrace the states’ rights model. The normative model would stop to ask what the state deserves and why.

Did Justice Kennedy originate this “dignity” talk in *Alden?* I had come to think of Justice Kennedy, along with Justice Sandra Day O’Connor, as a pragmatic thinker, likely to write concurring opinions explaining the normative value of the structure of federalism. Most notable is Kennedy’s concurring opinion in *United States v. Lopez,* the 1995 case that surprised the Court-watchers by invalidating a federal statute – the Gun-Free School Zones Act – as beyond the commerce clause. Chief Justice Rehnquist wrote

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20. Id. at 2247.
21. Id.
22. Id.
23. See, e.g., Webster's Third New International Dictionary 632 (1963) ("the quality or state of being worthy: intrinsic worth"). The more common usage of the word "dignity" in Supreme Court cases applies to human beings. Searching for the word "dignity" in the LEXIS file of Supreme Court cases, immediately predating *Alden,* yields Olmstead v. L.C., 119 S. Ct. 2176, 2191 (1999) (Kennedy, J. concurring) (noting that "deinstitutionalization" has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity"); see, e.g., *Wyoming v. Houghton,* 526 U.S. 295 (1999) (rejecting claim of Fourth Amendment violation, referring to "the degree of intrusiveness upon personal privacy and indeed even personal dignity"); *United States v. Balsys,* 524 U.S. 666, 715-16 (1999) (Breyer, J., dissenting) ("the insult to human dignity, created when a person must convict himself out of his own mouth," "respect for individual dignity and privacy"); *Spencer v. Kemna,* 523 U.S. 982, 988 (1997) ("the court's dignity and authority").

the majority opinion insisting on the need to preserve constitutional structures, and Justice Kennedy wrote separately to emphasize the present day good to be achieved by preserving this area of traditional local concern for the diversity and experimentation that comes from local regulation. In the Kennedy version of Lopez, the states were left alone not because of their inherent dignity, but because the matter to be regulated did not form a part of any interrelated national market or network that requires or even benefits from uniform regulation. Decentralized regulation actually serves a positive end: different localities can look at the nature of the problem of violence in their particular schools and design remedies that express local values. Perhaps holding parents responsible for their children’s violence or having a gun exchange program is a better idea than imposing strict prison terms on children, at least in some localities. Even if the idea is not better, trying it out in one location does not affect other localities with different preferences, and the experience of trying it out – as an experiment in democracy – may yield useful information for future efforts at dealing with school violence.

I consider Justice Kennedy’s concurring opinion in Lopez to be an excellent example of how the Court should analyze federalism issues. So I was quite disappointed to see how he analyzed state sovereign immunity in Alden, though, as I will explain, I do agree that Congress’s ability to subject the state to suits in state court should be no greater than its ability to impose suits in federal court. After reading Alden, I went searching for recent vintage talk about state “dignity” and found the source, a 1993 case, written by Justice Byron White, called Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc. There, the Court provided for an interlocutory appeal after the trial judge denied the defense of sovereign immunity. If the state is immune from suit, the reasoning goes, it is not enough that it win an appeal after trial and thus avoid liability; the state ought also to be freed from the burdens of litigation. That is a practical concept easy to express in straightforward normative, structural terms: litigation costs money and absorbs

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25 See id. at 551.
26 See id. at 568 (Kennedy, J., concurring).
27 See id. at 574-83 (stating that “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy ... It does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance ... The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise ... Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.”).
28 See id. at 581-82.
29 Compare the use of commerce power where a uniform national rule is the only effective legislation. In Wickard v. Filburn, 317 U.S. 111 (1942), in what might appear to be a very broad exercise of the commerce power, Congress had attempted to stabilize the price of wheat by placing limits on production, and the Court held that this regulation could reach even a farmer growing a few extra acres of grain to feed his own livestock. Only production regulation at the national level would work to stabilize prices, and any state attempting to control production on its own would do nothing more than impose a disadvantage on its own citizens to the benefit of nonresidents. Thus, no normative decentralization was even possible. To deny power to legislate on the national level would represent a decision to leave the market unregulated, not a decision to allow the states to perform their separate functions in their separate ways. The ineffectuality of state power would thus place this matter beyond the reach of government regulation the way individual rights are beyond any regulation or the way U.S. Term Limits v. Thornton, 514 U.S. 779 (1994), makes it impossible for either the states or Congress to impose term limits on the members of Congress.
31 See infra notes 57, 81-91 and accompanying text.
32 506 U.S. 139 (1993). Yes, ironically, it was a sewer authority that provoked concern about dignity. The Court avoided the question whether the Commonwealth of Puerto Rico ought to be treated like a state for Eleventh Amendment purposes, but noted that that is the case law in the First Circuit. See id. at 142 n.1 (citing Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 697 (1983)).
the time and attention of state officials, and an earlier opportunity to free the state from those burdens will serve state interests with little disruption to federal interests. Indeed, federal interests may be well served by avoiding a trial in federal court. But instead of speaking in such frank terms, Justice White wrote:

“The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. It thus accords the States the respect owed them as members of the federation... [and is justified by] the importance of ensuring that the States’ dignitary interests can be fully vindicated.

One might wonder what happened to the pragmatic Justice White who once attacked Justice O’Connor’s ideas about deference to the states as a “civics lecture” with “a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem.” But although over the years Justice White decided in favor of broad powers for Congress on many occasions, he also repeatedly voted in favor of state sovereign immunity. Most notably, he provided the fifth vote for preserving the 1890 precedent of Hans v. Louisiana, which held that the states retained their sovereign immunity even in cases based on federal law. Consistent with his longstanding

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33 28 U.S.C. § 1291 restricts federal appellate jurisdiction “final decisions of the district courts,” but under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949), immediate appeal is permitted after final determination of “claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,” such as the denial of a motion to require posting of a bond in a shareholder derivative action, id., or a denial of official immunity. See Nixon v. Fitzgerald, 457 U.S. 731 (1982); Mitchell v. Forsyth, 472 U.S. 511 (1985). The Mitchell Court explicitly noted that part of the entitlement embodied in immunity is to be free of the burden of litigation, and immediate appeal is needed to preserve this entitlement. See Mitchell, 472 U.S. at 511. One could discount Justice White’s invocation of In re Ayers, 123 U.S. 443, 505 (1887), see infra note 34 and accompanying text, as a throwaway. His Puerto Rico Aqueduct opinion relies heavily on Mitchell, and Mitchell is clearly analyzed through pragmatic balancing. I would infer that this sort of pragmatism motivates the Court in Puerto Rico Aqueduct. See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); Mitchell, 472 U.S. at 511. But Puerto Rico Aqueduct is a very brief opinion, and the dignity discussion taken from In re Ayers seems to be an ill-thought out makeweight. See Puerto Rico Aqueduct, 506 U.S. at 146 (emphasis added) (citations omitted) (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

34 Puerto Rico Aqueduct, 506 U.S. at 146 (emphasis added) (citations omitted) (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

35 Puerto Rico Aqueduct, 506 U.S. at 146 (emphasis added) (citations omitted) (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

36 See New York v. United States, 505 U.S. 144, 206 (1992) (White, J., dissenting). An interesting side note in keeping with this lecture’s inquiry into language usage: there is only one other use of the phrase “civics lecture” in the Supreme Court case law. In Texas v. Johnson, 491 U.S. 397, 434 (1989), Chief Justice Rehnquist denounced part of Justice Brennan’s opinion, which found that the First Amendment protected flag burning, as “a regrettable patronizing civics lecture.” Justice White joined the Chief Justice’s opinion.


38 134 U.S. 1 (1890).

39 See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). In Atascadero, Justice White, along with Chief Justice Burger and Justices Rehnquist, and O’Connor, joined Justice Powell’s opinion. This group of five Justices (and later a group of five in which Justice Scalia took the place of Chief Justice Burger) resisted vigorous efforts to overturn Hans. Atascadero is the case in which the Court’s liberal minority, led by Justice Brennan, made its most elaborate and vigorous assault on Hans, which relied on the theory that the Eleventh Amendment was only intended to refit the impeachment, given by the language of Article III, that the states lacked immunity in cases in which federal jurisdiction was premised only on citizen-state diversity. Under this theory, widely supported by commentators, see William A. Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. CHI. L. REV. 1261 (1989); 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 (1983); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1895–1941 (1983); Herbert Hovencamp, Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions, 96 COLUM. L. REV.
enthusiasm for federal legislative power, Justice White also accepted the notion that Congress could nevertheless abrogate the states’ sovereign immunity by statute. White accepted abrogation under all of Congress’s legislative powers. Thus, he provided the fifth vote in *Union Gas v. Pennsylvania*, as he agreed with the four liberal members of the Court who would have preferred to abolish all state sovereign immunity in federal question cases.

Subsequent personnel changes on the Supreme Court, most notably the arrival of Justice Clarence Thomas, solidified a conservative majority, one that would not only, like Justice White, protect sovereign immunity in the absence of congressional action but would also constrain Congress in the name of federalism. Justice White's own “dignity” talk from *Puerto Rico Aqueduct* resurfaces in Chief Justice Rehnquist’s opinion *Seminole Tribe of Florida v. Florida*, the case that overturned Justice White’s vote in favor of congressional power, *Union Gas*. Holding that Congress’s power under the commerce clause does not include the power to abrogate sovereign immunity, the Chief Justice wrote for the Court in *Seminole* that sovereign immunity does not exist solely to protect the state’s treasury, it also serves to spare the states from having to participate in litigation. Rather than expressing this idea in functional terms – that state institutions ought to be freed to pursue their own agendas and not have their resources consumed by the process of litigation – the Chief Justice adopted the *Puerto Rico Aqueduct* style of conceptual analysis: sovereign immunity exists to spare the states “the indignity” of being subjected to lawsuits brought by individuals.

Justice Stevens reacted to the Chief Justice’s concern about the states’ dignity. His dissenting opinion in *Seminole* invoked the venerable precedent of *Cohens v. Virginia*.

There, Chief Justice John Marshall discussed the original meaning of the Eleventh Amendment:

That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be

2213 (1996); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. Cal. L. Rev. 51, 58 (1990), there would be no state sovereign immunity in cases based on federal law. Justice Brennan had four votes for overruling Hans: in addition to his own vote, Justices Marshall, Blackmun, and Stevens. Today, only Justice Stevens remains of the minority that came so close to overruling Hans. Justices Brennan, Marshall, and Blackmun have been replaced by Justices Souter, Thomas, and Breyer. Justice Thomas consistently votes with the Court's conservative group, but even Justices Souter and Breyer, who generally vote on the liberal side of the Court, see, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999), have expressed their opposition to overruling Hans. See *Seminole Tribe v. Florida*, 517 U.S. 44, 159 (1996) (Souter, J., dissenting) (relying on stare decisis). Justice Ginsburg, who replaced Justice White, also opposes overruling Hans. See id.


40 Justice White was the only member of the Court who accepted both Hans, 134 U.S. 1, and broad abrogation power. See *Union Gas*, 491 U.S. at 1. The four Justices with whom he voted in *Union Gas* objected to sovereign immunity in federal question cases quite aside from whether Congress had an interest in overcoming immunity. See id. Though White's opinion in *Union Gas* is notoriously opaque, see id. at 57, we can infer from White's other opinions that his position had to do with deferring to Congress and permitting Congress to set the balance of federalism, rather than the concern for the plaintiffs that affected Justice Brennan and the Justices who joined his opinion. See id. at 45, 57.

41 Justice Thomas replaced Justice Marshall, who had consistently voted with the liberal side of the Court.

42 517 U.S. 44 (1986).

43 See id. at 58 (quoting *Puerto Rico Aqueduct*, 506 U. S. at 146 (internal quotation marks omitted)) (emphasis added).

44 19 U.S. 406 (1821) (quoted in *Seminole*, 517 U.S. at 96 (Stevens, J., dissenting)).
inferred from the terms of the amendment. ... We must ascribe the amendment, then, to some other cause than the dignity of a State.\textsuperscript{45}

If the principle underlying sovereign immunity is not respect for the state simply because it is a state, what is it? It is something more practical, as John Marshall wrote: concern about the states’ many creditors with “considerable” demands to make upon the states’ treasuries.\textsuperscript{46}

Normative, structural analysis does not necessarily demand that we agree with Justice Stevens that Congress may abrogate state sovereign immunity even under its expansive Article I powers. Normative, structural arguments can justify reining in Congress out of concern over its excessive enthusiasm for imposing retrospective liability on states that must, after all, mediate innumerable demands upon their limited resources. (We will remember that prospective injunctions against the states can be had through the device, endorsed in \textit{Ex Parte Young}, of suing only the official who acts for the state.) I would like to hear both sides of the Court speak frankly about the real good or ill that they attribute \textsuperscript{256} to protecting or not protecting the separate and independent functioning of state institutions.\textsuperscript{47}

Consider, as a good example of normative, structural reasoning, the 1984 case of \textit{Pennhurst State School and Hospital v. Halderman}.\textsuperscript{48} There, the conservative majority, in an opinion written by Justice Lewis Powell, held that sovereign immunity barred plaintiffs from using state law as a basis for enjoining the state to change conditions in a state-run hospital, even though the state law claim arose along with federal law claims that could be heard in federal court. To press their federal claims, plaintiffs could use the \textit{Ex Parte Young} device of naming the officials acting for the states. According to the rhetoric of the \textit{Young} case itself, a lawsuit against the official is simply not a suit against the state, and thus no sovereign immunity is warranted. Justice Powell in \textit{Pennhurst} brushed aside this justification. \textit{Ex Parte Young} would not be understood according to this abstract concept. That concept is a legal fiction, accepted not because it satisfies logic, but because it is “necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’”\textsuperscript{49} But the interests of the states count too. Justice Powell wrote of “accomodat[ing] the constitutional immunity of the States” with the “need to promote the vindication of federal rights.”\textsuperscript{50} Balancing federal and state interests easily decided \textit{Pennhurst} for

\begin{itemize}
\item[45] Id.
\item[46] See id.
\item[47] One can perhaps understand the reluctance the majority feels toward openly discussing the "normative value" of sovereign immunity: it is hard to make grandiose statements about saving the states money. Although I am in no way surprised that the Court shies away from speaking in these terms, it is my position that the Court must defend its doctrine on normative, structural grounds to justify its doctrine.
\item[49] Id. at 105 (quoting \textit{Ex parte Young}, 209 U.S. 123, 160 (1906)).
\item[50] Id. at 105. This is why one cannot use the device of naming the official who acts for state as a way of obtaining retrospective relief from the state. See id. (citing Edelman v. Jordan, 415 U.S. 651 (1974)).
\end{itemize}
Justice Powell; the rights to be enforced are state-created and not based on federal law, so the federal interest cannot outweigh the state interest in immunity.\footnote{I disagree with Powell's contention that there is no federal interest at all: permitting consolidation of the state and federal claims facilitates bringing the federal claim in federal court. Under Pennhurst, the plaintiff with both federal and state claims who wants to avoid bifurcation or the abandonment of the state claim, must file in state court. Justice Powell ignores this problem. But a more complete balancing of federal and state interests would still justify the doctrine established in Pennhurst, because it permits the state to maintain control of the claims against itself that it creates. This control is analogous to the way Congress can provide for exclusive federal jurisdiction in federal law cases. The states cannot restrict the jurisdiction of the federal courts by directly creating exclusive state court jurisdiction, but when the state law claim is against the state itself, sovereign immunity doctrine enables them to do the equivalent. They can then choose to include the federal courts in the adjudication of state law claims by waiving sovereign immunity. I consider this interest of the state in controlling these state law claims worthy because such claims only come into being when a state chooses to expose itself to liability. Permitting federal jurisdiction in the absence of state consent would set up a disincentive to states that are considering expanding their exposure to lawsuits. It is only when the state claim is attractive in comparison with the federal claim that a plaintiff will be tempted to file in state court. This creates a positive incentive: the state legislature, if it wants to attract more litigation against the states into the state courts, should create strong state law claims against the state. This position was originally stated in Ann Althouse, \textit{How to Build a Separate Sphere: Federal Courts and State Power}, 100 Harv. L. Rev. 1485 (1987).} *257

Many other examples of this sort of interest balancing exist, including Justice Kennedy's own opinion in the sovereign immunity case of \textit{Idaho v. Coeur d'Alene Tribe}.\footnote{521 U.S. 261 (1997).} Justice Kennedy, writing for the majority, addressed whether the plaintiff Indian tribe could use the \textit{Ex Parte Young} device to establish its ownership of land to which the state also claimed ownership. Note that the suit did not run afoul of the prospective-retrospective distinction: the tribe sought prospective relief only. And the tribe premised its claim on federal law, so the limitation designed in \textit{Pennhurst} did not apply. Yet the Court would not permit the device of naming the state official instead of the state itself to overcome sovereign immunity. There were two ways of expressing the basis for this limitation. One would be to say that since the tribe's ownership of the land would expunge the state's own political sovereignty over the land, it is simply not true that the suit is only against the official. But of course, the \textit{Young} device always entails believing something that we know is not true. This conceptual way of talking about sovereign immunity nevertheless commanded a majority of the Court. (I suppose you might say that the fiction is more obviously untrue than usual.) Justice Kennedy's opinion also contained a section that spoke about sovereign immunity more frankly. He wrote:

The \textit{Young} exception may not be applicable if the suit would “upset the balance of federal and state interests that it embodies.” The exception has been “tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights.”\footnote{Id. at 277 (quoting Papasan v. Allain, 478 U.S. 265, 277 (1986)).}

... Of course, the State’s interests are almost always implicated to a certain extent in \textit{Young} actions, but the statements we cite reflect the Court’s recognition “that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States.”\footnote{Coeur d’Alene Tribe, 521 U.S. at 278 (quoting Pennhurst, 465 U.S. at 105).}

Our recent cases illustrate a careful balancing and accommodation of state interests when determining whether the \textit{Young} exception applies in a given case ... As no one disputes, the \textit{Young} fiction is an exercise in line drawing. There is no reason why the
line cannot be drawn to reflect the real interests of States consistent with the clarity and certainty appropriate to the Eleventh Amendment’s jurisdictional inquiry.\footnote{55}

Justice Kennedy would limit \textit{Young} here because the state’s interest in its own sovereignty over land outweighed the federal interest in the enforcement of federal law, at least where the state courts were available to adjudicate the dispute.\footnote{56} This balancing approach actually cost Kennedy the support of three Justices – O’Connor, Scalia, and Thomas – who dropped out of this section of his opinion.\footnote{57}

Let us turn now to \textit{Alden}. I have said that I do not think the \textit{Alden} outcome is a bad one.\footnote{58} \textit{Alden} denies Congress the power to abrogate \textit{sovereign immunity} in state court, just as Congress lacks the power to abrogate sovereign immunity in federal court. The point is that the powers delegated to Congress through the original Constitution did not include the power to subject the states to suits. To refuse to distinguish between suits in federal and state courts is consistent with the way \textit{Younger} and \textit{Testa} view state courts as courts, instead of seeing them as institutions in league with the political branches of state government. Justices who are willing to view the states as biased toward the state’s own interests would tend to reject sovereign immunity generally and cast dissenting votes in cases like \textit{Seminole} and \textit{Alden}. The conservative side of the Court that has preserved sovereign immunity also tends to rely on a presumption that state courts will follow orthodox judicial methodology and decide cases in a properly disinterested fashion.

\footnotesize{56} Presumably, then, \textit{Young} would work if the state asserted sovereign immunity in state court, which is possibly a strange result seen now in light of \textit{Alden}’s attempt to allow the states to have immunity in state as well as federal court. See \textit{Young}, 209 U.S. at 123; \textit{Alden}, 119 S. Ct. at 2240.
\footnotesize{57} Justices O’Connor, Scalia, and Thomas do not join Parts II-B, II-C, and II-D of Justice Kennedy’s opinion. See \textit{Young}, 209 U.S. at 123.
\footnotesize{58} I do not mean to endorse the whole body of sovereign immunity doctrine, but, given the structure of the doctrine at this point, \textit{Alden} preserves a good balance. See \textit{Alden}, 119 S. Ct. at 2240. The Court has adhered to Hans v. Louisiana for over a century, which included the recent fierce period of attack. See Hans v. Louisiana, 134 U.S. 1 (1890). Hans is now accepted by everyone on the Court except Justice Stevens. See id.; supra note 37 and accompanying text. Hans establishes that sovereign immunity survived the original grant of power to Congress, so that the states have sovereign immunity even when they assert claims based on federal law. See Hans, 134 U.S. at 1. Ex Parte \textit{Young} permits the prospective enforcement of federal law, except in the unusual Coeur d’Alene situation. So the only real problem for plaintiffs suing states is obtaining retrospective relief. Can Congress abrogate the immunity that prevents actions for retrospective relief? As long as it makes an unmistakably clear statement of its intent to abrogate sovereign immunity, Congress may abrogate using the powers granted by the Fourteenth Amendment, but under \textit{Seminole}, it may not use the commerce power to make retrospective relief available in suits brought by individuals. See \textit{Seminole} Tribe v. Florida, 517 U.S. 44 (1996). Yet the United States itself may always sue the state: the state has no sovereign immunity when actions are brought by the federal government. Thus, if Congress cares enough to put federal resources behind the enforcement, it can make retrospective relief available. In \textit{Alden}, the Secretary of Labor had the statutory power to bring lawsuits on behalf of the very persons who lacked power to seek retrospective relief on their own. See \textit{Alden} v. Maine, 119 S. Ct. 2240 (1999). The dissenting side of the Court viewed this route to relief as inadequate, given the large number of state employees and the relatively of the conservative side of the Court, this purported inadequacy actually represents a beneficial structure. See id. Congress has the power to impose liability using its extensive commerce power, but sovereign immunity protects the states from the burdens of the excessive litigation that might take place if individuals made the decisions about when to bring suit. See id. Limiting retrospective relief to cases brought by the Secretary of Labor introduces an element of accountability. See id. The politically responsible executive branch must deem the case worthy of the burden on federal resources. See id. This limitation thus structures consideration of state interests into the process. See id. In this sense, it is like the clear statement rule in Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that Congress must make a clear statement of its intent in order to disrupt the state-federal balance). The conservative majority has refrained from overruling Garcia, but has offset the effect of federal power against the states by creating various procedures designed to force the political branches to take state interests into account. See supra note 1. Given the breadth of congressional power that may be wielded against the states, the Court’s current sovereign immunity doctrine works to restore a reasonable balance of federalism. This position is elaborated in Ann Althouse, \textit{The Alden Trilogy: Still Searching for a Way to Enforce Federalism}, 31 Rutgers L. Rev. 631 (2000).}
Disaggregating the state judicial institutions from the rest of the state is an important and, I think, positive step. Note that it explains why the state courts can be compelled to enforce federal law\textsuperscript{59} when the other branches of the state's government can take advantage of the federalism-based doctrine that denies Congress the power to commandeer the state. Let's look briefly at the key cases expounding this doctrine: \textit{New York v. United States} and \textit{Printz v. United States}.

\textit{New York v. United States}\textsuperscript{60} dealt with a federal law that set up a legal structure to force the creation of more sites for the disposal of low-level radioactive waste and left to the individual state legislatures the quite undesirable task of choosing exactly where to locate these sites. Justice O’Connor wrote for the Court’s conservative majority, striking down the portion of the law that “commandeered” the state legislative process.\textsuperscript{61} Justice O’Connor considered the normative and structural problems inherent in this blending of federal and state tasks. Congress could take credit for solving what was a very serious problem, but the state legislatures would have to do the politically damaging part of the work-deciding whose “backyard” would become the waste dump. Justice White, dissenting, also analyzed federalism in a pragmatic mode: *260 he thought “cooperative federalism” was good, because it achieved results and exhibited even more sensitivity to the states by including them in the decisionmaking; besides, the state governors had themselves proposed the legislation that Congress adopted.\textsuperscript{62}

But the majority cared less about getting problems solved and more about political accountability. Congress, it reasoned, ought to have to take responsibility for the details of difficult choices and not be allowed to foist the decisionmaking on the states, and the state legislatures ought to be left free to address problems as they see fit and not to have their agendas filled with assignments from Congress. Keeping functions separate would work in a normative way to make responsibility visible to the electorate. Notably, Justice O’Connor disclaimed reliance on a states’ rights model as a reason for deferring to the states. She wrote:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States.\textsuperscript{63}

For this reason, it did not matter that various state officials had collaborated in reaching the agreement embodied in the federal legislation.

\textsuperscript{59} For a discussion of \textit{Testa v. Katt}, see supra note 10 and accompanying text.
\textsuperscript{60} 505 U.S. 144 (1992).
\textsuperscript{61} See id. at 161. The law actually gave the state a choice between legislating or simply being compelled to take title to all of the low-level radioactive waste produced in the state and be left with all of the responsibilities and liabilities of ownership. See id. at 175. The existence of this option could not make the provision constitutional if both choices were unconstitutional, as the Court found they were. See id. at 175-77. By contrast, legislation under the Spending Clause of the Constitution could offer the states money on the condition that they comply with some requirement that the state could not be compelled to accept, because the alternative, the choice to receive no money at all, is not an unconstitutional imposition on the state of any kind. See \textit{South Dakota v. Dole}, 483 U.S. 203 (1987).
\textsuperscript{62} See \textit{New York}, 505 U.S. at 188, 194. (White, J., dissenting).
\textsuperscript{63} Id. at 181.
To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”

Seeing federalism as existing for the benefit of the people makes it look dysfunctional for office holders to obscure their actions from the view of the people. Democracy demands that the two governments not collude in self-defense against the wrath of the electorate. Keeping them separate and independent serves the normative goal of making government accountable. This is, in Justice O’Connor’s words, “a healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front.” Please note that this doctrine of separateness is built on normative reasoning, not “blind deference to ‘States’ Rights’” or any sort of obeisance to the states’ “dignity.”

Four years after New York v. United States, the Court considered whether this limitation on Congress’s powers would also cover attempts to exploit the resources of local law enforcement officials. Arguably, because legislatures lie at the very core of the state’s sovereignty, federal impositions on their work are particularly offensive. But in Printz v. United States, the Court extended its anti-commandeering principle to the states’ executive functions. Justice Scalia wrote the opinion for the same conservative majority that decided New York v. United States and this past year’s sovereign immunity cases. The Printz Court struck down the provisions of the Brady Handgun Violence Prevention Act that required state and local law enforcement officials to perform background checks on persons attempting to buy handguns. Justice Scalia, like Justice O’Connor in New York v. United States, noted the political dysfunction in the “cooperative federalism” approach, “Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.” Moreover, the law enforcement official would be the one “who stands between the gun purchaser and immediate possession of his gun” and would thus incur the citizen’s anger.

In Printz, the proponents of the Brady Act tried to use Testa v. Katt to distinguish New York v. United States by arguing that perhaps the state and local executive officials

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64 Id. (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Quite interestingly, the dissenting opinion Justice O’Connor quoted was a harsh criticism of one of her own opinions and seemed to represent a sense that it was necessary to support federalism with normative reasoning. I discussed this point at some length in Ann Althouse, Variations on a Theory of Normative Federalism: A Supreme Court Dialogue, 42 DUKE L.J. 979 (1993).

65 New York, 505 U.S. at 181-82 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (citing THE FEDERALIST No. 51 (Alexander Hamilton))).


67 See id. at 933. The dissenters accepted the distinction. See id. at 939 (Stevens, J., dissenting).

68 That is, he was joined by Chief Justice and Justices O’Connor, Kennedy and Thomas. The dissenters in Printz were Justices Stevens, Souter, Ginsburg, and Breyer. This group has changed since New York v. United States, when Justices Blackmun and White were still on the Court, but the balance of conservative and liberal votes on the Court has remained the same—at least on the issue of Congress’s role in setting the federalism balance.


70 Printz, 521 U.S. at 930.

71 Id.
were more like the state courts and quite different from state legislatures.\textsuperscript{72} Rejecting the equation of executive officials and judges, Justice Scalia relied heavily on the Supremacy Clause, the explicit text requiring state courts to apply federal law.\textsuperscript{73} No comparable text obligates state executive officials to devote their efforts to the enforcement federal law. But the \textit{Printz} Court was also particularly concerned with the way Congress might be tempted to use enforcement of federal law by the states as a kind of political cover.

Interestingly, the Court also rejected an attempt to distinguish \textit{Printz}\textsuperscript{262} from \textit{New York v. United States} on the ground that the law was directed at individual officials rather than the state itself.\textsuperscript{74} The Court viewed this distinction as insignificant, even though this is the very distinction central to the reasoning of \textit{Ex Parte Young}. Justice Scalia wrote in \textit{Printz}:

\begin{quote}
To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance. Indeed, it merits the description “empty formalistic reasoning of the highest order.” By resorting to this, the dissent not so much distinguishes \textit{New York} as disembowels it.\textsuperscript{75}
\end{quote}

The Court's new federalism did not allow formalism to stand in the way of what it saw as fundamental constitutional policy. Nor did it matter that the law addressed local government as opposed to state officials.\textsuperscript{76} Even though sovereign immunity has been limited to the state level, concerns about federalism apply to local government as well.\textsuperscript{77}

This broader application of ideas about federalism underscores that federalism analysis is a kind of normative, structural analysis, rather than abstract reasoning based on ideas about sovereignty – the “states’ rights” pitfall I've been attempting to highlight. Yet this exposes a key problem about sovereign immunity: if it really is – as I've argued – a matter of normative, structural analysis, why deny it outright to local government? That denial suggests that only “states’ rights” ideas support sovereign immunity. Yet I do think sovereign immunity is generally shaped to accord with ideas about using government institutions in a beneficial way. The notion of sovereign immunity – a somewhat unwieldy historical artifact – offers the Court a convenient justification to begin its activism on behalf of state, but not local, government interests. Then a subtractive process yields normative doctrine – the Court pares away the states’ immunity until what is left expresses the appropriately balanced structure of state autonomy and national uniformity.

Is it fair to consider Justice Scalia’s \textit{Printz} opinion as an example of normative federalism? In response to the argument that the intrusion of the Brady Act ought to be

\begin{itemize}
\item \textsuperscript{72} See id. at 928-29.
\item \textsuperscript{73} See id.
\item \textsuperscript{74} See id. at 930-31.
\item \textsuperscript{75} Id. at 931 (footnote and citation omitted). The internal quote - “empty formalistic reasoning of the highest order” - comes from the dissenting opinion of Justice Stevens, and perhaps intended as mere echoic namecalling meant to deride the dissenters' reasoning, rather than as an expression of the majority's disapproval of formalistic reasoning. See id. at 952.
\item \textsuperscript{76} See id. at 931 n.15.
\item \textsuperscript{77} See id.
tolerated because it was minimal and temporary, Justice Scalia openly denounced the use of balancing in federalism doctrine: ‘compromise[s] the structural framework of dual sovereignty, ... [so] a ‘balancing’ analysis is inappropriate.’”

That may sound like an explicit endorsement of the “states’ rights” model of federalism, I'm afraid. He also writes: “[i]t is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.”

Justice Scalia’s opinion in Printz has elements of normative, structural reasoning but then seems to give way to a formalistic deference to state autonomy, which is particularly odd, given his earlier rejection of an argument as “empty formalistic reasoning.”

One can reconcile this seeming incoherence. Strictly enforced separateness should be maintained because it works well and serves a good end. Allowing little incremental impositions on local government officials erodes their ability to function as agents of local policy and allows the national government to fall short in implementing its own policy. Indeed, Justice Scalia, quoting Justice O’Connor in New York v. United States, does ultimately take that position. He writes:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

That is to say, enforced separation preserves for the long term valuable institutions, that might otherwise be whittled away by various expediencies. More concisely, formalism is a means, not an end.
Now let's return one last time to the new case, Alden, and consider it in light of the New York v. United States-Printz distinction between state courts and other state institutions. Does it really make sense to deprive Congress of the power to abrogate the states’ sovereign immunity in actions brought in state court? Alden cites Printz for the proposition that the states are “sovereign entities” whose autonomy is not surrendered along with the powers delegated to Congress. The states reserved power over some subjects, but over time the Congress’s powers have received such broad interpretation so as to leave little room, even after Lopez, for arguing that there are some subjects that Congress cannot regulate. But, according to Printz, the states have also reserved a certain amount of entitlement to autonomy, which allows the Court to find a limitation on the way Congress can exercise its powers: it cannot treat the institutions of state government as agents for carrying out federal policy. Yet, as Printz acknowledges, state courts fare differently in this analysis; they are expected to enforce federal law as a matter of course. So one might ask: why not allow Congress to abrogate sovereign immunity in the state courts?

I think the answer is this. Abrogating sovereign immunity should not be seen as an imposition on the courts that will have to hear the case against the state. When Congress creates federal law that binds the states, it is not suddenly enlisting the state courts in a new form of activity. The state court goes on as ever, applying the law that applies, and federal law applies, by force of the Constitution. Congress’s binding of the state to federal regulation and subjecting them to suit should be seen as an imposition on the state party that will be the defendant in that lawsuit. Suits in state courts can be characterized as a lesser imposition on this state party defendant only to the extent that one believes that state courts are in league with the political branches of state government.

This disbelief in the “myth of parity” is of course usually embraced by those who emphasize the importance of access to federal court to serve the federal interest in the vindication of federal law, not the side of the Supreme Court that now searches for ways to enforce federalism. In Alden, Justice Kennedy writes that state court lawsuits are “in some ways even more offensive” than suits in federal court. He writes:

A power to press a State’s own courts into federal service to coerce the other branches of the State … is the power first to turn the State against itself and ultimately to

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82 See Alden v. Maine, 119 S. Ct. 2240, 2247 (1999) (citing Printz, 521 U.S. at 898)).
83 In New York v. United States, Justice O’Connor explained the connection between this idea of reserved sovereignty and the text of the Tenth Amendment:

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York, 505 U.S. at 156-57.
84 Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977) (itemizing the basis for viewing the federal courts as preferable for plaintiffs claiming violations of constitutional rights).
commandeer the entire political machinery of the State against its will and at the behest of individuals.”

There is a good portion of “dignity” talk here that I must complain about. The point should not be that it is “offensive” to impose suits on the state or that the state courts are being “coerce[d],” or that the state court’s exercise of jurisdiction “turns the state against itself.” And we should not worry about “commandeer[ing] the entire political machinery of the State against its will and at the behest of individuals” if it is done by a court enforcing valid law. That happens all the time. If we were really concerned about “commandeering” the states with lawsuits, we shouldn’t tolerate the injunctions that can be had through the Ex Parte Young device or the lawsuits permitted when sovereign immunity is abrogated using the Fourteenth Amendment power. Current doctrine approves of all of these things, and it does so because federal interests decisively outweigh the good that might be achieved by leaving the states alone. It is simply intolerable in a constitutional system of laws that immunity could insulate the states as they continue to violate valid federal law. Indeed, we go so far as to maintain a legal fiction – Ex Parte Young – to prevent that state of affairs.

The real, practical concern – it must be admitted by those who would keep the sovereign immunity defense alive – is to protect the states as independently functioning government institutions by sparing them the impact of accumulated liability for their past violations of law. Even this *266 protection is denied when Congress abrogates sovereign immunity under its Fourteenth Amendment powers or when the United States brings the lawsuit. The decision to do no more than order the state to follow the law in the future, to go easy on the state, amounts to a recognition that the states must survive. They cannot, like a private entity, simply go out of business; and they cannot limit their attentions to matters that appear profitable after factoring in the risk individuals, that law ought to regulate, but that can generate too many lawsuits, with too much accumulated damages, the payment of which will sap the states’ ability to serve other important public needs.

I realize the opponents of sovereign immunity will continue to assert that the states ought to have to fork over the damages just like any private corporation. Concerns about the states’ survival will be countered with assertions of trust that Congress in deciding what immunity to abrogate, will just naturally-as the majority said in Garcia87 – watch out for the interests of the states. But I think the conservative majority of the Court correctly believes that the survival of the states as independently functioning institutions is required and cannot depend on the will of Congress. State autonomy should be preserved by the courts, and not just because the framers intended it or because the states survived the constitutional founding period with their sovereignty – or at least some of it – intact. State autonomy ought to be preserved because it serves a beneficial function. Even if it could be certified as true that the founders intended the states to have some measure of “sovereignty,” that would not be all that helpful in determining the fine points

86 Alden, 119 S. Ct. at 75. “Commandeer” is, of course, a fighting word in the federalism arena. See Printz v. United States, 521 U.S. 898 (1997).
of sovereignty-related doctrine, like the question raised in *Alden*. I would like to see the conservative majority minimize its reliance on history and abstractions like “dignity” – which I suspect convince no one who actually reads Supreme Court opinions. The Court should return to more sensible and honest reasoning about when and why it is a good thing to leave the states alone.

The conservative side of the Court could use its majority power to overturn *Garcia* and to say that Congress cannot use its Article I powers to impose liability on the states at all. The question of overruling *Garcia* came up in oral argument last month in a case involving the constitutionality of a federal statute that bars states from selling address lists collected in their drivers’ licensing programs. Simply to place the states outside of the purview of Congress’s famously expansive commerce power would probably result in much more straightforward and easily defensible doctrine than the complex web of sovereign immunity law we struggle to understand today. Opponents of sovereign immunity law ought to consider the possibility that it represents a moderate compromise, an alternative to overruling *Garcia*. Congress can bind the states to laws passed using the commerce power, but those laws can only be enforced prospectively in lawsuits brought by individuals. Note that Congress still has the alternative of setting up sufficient federal enforcement mechanisms, because sovereign immunity doctrine does permit lawsuits brought by the United States against the states. So Congress already has the ability to exact retrospective relief against the states. If it is truly concerned about retrospective relief, it must express that concern by putting enough federal resources behind enforcement. For example, it has empowered the Secretary of Labor to sue for lost wages if the state violates minimum wage law.

It's a bit like *Printz*. Congress must provide federal enforcement for its gun law, not use state and local law enforcement officials. And Congress must use the federal executive function to pursue retrospective relief against the states, not leave it to individual litigants. In one sense, those individuals are not at all like the state law enforcement officials who cannot be commandeered; they are acting on their own motivation, not compelled but empowered. Yet there is a similarity in the problems that lie at the heart of both *Printz* and *Alden*. In both cases, there was a lack of federal

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88 At a symposium on the Court's new sovereign immunity cases that took place at Rutgers Law School in September 1999, not one of the eight panelists, who took quite different positions otherwise, found the Court's historical analysis worth anything more than a passing mention. Nor did anyone in the audience seem to miss the lack of attention to the material that took up the great bulk of the Court's written opinions. My comment on this lack of attention did not draw a single good word on behalf of the Court's efforts at history.


90 The position that existing sovereign immunity law is relatively moderate is elaborated in Althouse, supra note 58.

91 Critics of sovereign immunity doctrine complain that the Labor Department lacks adequate resources or motivation to pursue every claim. It is certainly true that individual litigants will generate more lawsuits. What sovereign immunity doctrine does is require the accountability of public officials to make the decisions about when these lawsuits justify consuming state resources. This is the deference the states receive, and I would argue that this is not a states' rights idea: it is a rational device for identifying the most important claims and the ones most deserving of retrospective relief. To the extent that the federal government must now bear the cost of bringing the lawsuits, rather than being able to leave litigation to private resources, I think that too is a fair expression of good federalism values: it forces Congress to put tax money, for which it is politically accountable, behind its regulation of the states. It is one thing to write laws that bind the states, quite another to pay for enforcing them. Making Congress pay for enforcement holds it to a higher standard in imposing on the states. This position is discussed in more detail in Althouse, supra note 58.
governmental responsibility for the consequences that flow to the states after the initial congressional decision to go ahead and expose the states to burdens.

I respect the attempt by the Court’s conservative majority to try to design safeguards against these burdens and think that it is preferable to take the more drastic step of overruling *Garcia*. Existing federalism doctrine seems quite easy to attack; it is so complex that it is bound to contain incoherencies, especially as the Court unwisely moves in the direction of explaining and justifying itself with history and abstractions about the inherent meaning of sovereignty. But current federalism doctrine deserves to be recognized as a creditable and moderate attempt to balance divided powers with the goal of benefiting individuals. Justice O’Connor wrote in *New York v. United States*: “State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”\(^{92}\)

\(^{92}\) New York, 505 U.S. at 181 (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).