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**Symposium:  
The Eleventh Amendment, Federalism, and Judicial Activism:  
Questions and Answers**

**THIS ACTIVIST COURT**  
Fall, 2002 (Inaugural)  
1 Geo. J.L. & Pub. Pol'y 111

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If we are going to play the game of pinning the “activist” tail on the donkey—or rather, the elephant—then the Rehnquist Court needs to guard its rear. Nobody would say, I think, that the Rehnquist Court is “conservative” in the Burkean sense.<sup>1</sup> The Rehnquist Court has been unsettling 20th century constitutional settlements as energetically as it can. The federalism cases are the conspicuous example.<sup>2</sup> With assertions of states’ rights that only yesterday seemed consigned to history, the Rehnquist Court is disabling laws that only yesterday would have seemed unassailable—and along with them, dismantling our 20th century understandings of the powers of Congress.<sup>3</sup>

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1. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 33-34 (L. G. Mitchell ed. 1993) (1790) (arguing for gradual progress that retains the best of the past: “By preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete”). On conservatism in constitutional adjudication, see, e.g., Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990); see also my colleague’s excellent essay, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

2. For interesting current commentary, see, e.g., Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002); Vicki C. Jackson, *Narrative of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 253 (2001); Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741 (2000). See also my colleagues’ excellent discussion in Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001).

3. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567-85 (1995) (striking down the Gun-Free School Zones Act as beyond Congress’s commerce power; ruling that the possession of a gun near a school was not a “commercial” activity); *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (striking down the provision of the Americans with Disabilities Act imposing damages liability upon a state violator; holding that Congress has insufficient Article I and Fourteenth Amendment powers to lift the bar of the Eleventh Amendment); *United States v. Morrison*, 529 U.S. 599, 627 (2000) (striking down the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (striking down the state liability provision of the Age Discrimination in Employment Act). *Garrett*, *Morrison*, and *Kimel* seem to inhabit a different legal universe even from that of the bellwether case of *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (refusing to read the Age Discrimination in Employment Act as applying to mandatory retirement of state judges absent a clear statement in the language of the statute). See also *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding Congress

**(2002) Geo. J.L. & Pub. Pol’y 112** I am not generally a proponent of states’ rights. The Marshall Court and the Warren Court impressed their nationalism upon me in my law school days. And I confess I am somewhat unnerved by the blatancy and confidence of the current Court’s attack on national power. But I have felt some discomfort in joining in the universal hand-wringing. There are elements of the Court’s new federalism thinking that are convincing or at least defensible. The ideas in these cases, new and old, fall along a range that may wind up with “worth our condemnation,” but that begins, I think, with “worth our consideration.”

The “anti-commandeering” cases, it seems to me, are the Rehnquist Court’s best federalism cases—those most likely to stand the test of time. Justice O’Connor imported the anti-commandeering principle<sup>4</sup> into modern federalism jurisprudence in her seminal (if cloudy<sup>5</sup>) opinion for the Court in *New York v. United States*.<sup>6</sup> There, the Court struck down a provision of federal law attempting to coerce the states into finding disposal sites for their radioactive waste. If a state failed to do so, it would have to take title to the waste and become liable for any harms caused by

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without Article I power to impose liability for damages upon a state in its own courts, building on *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-76 (1996)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that Congress has insufficient Article I power and insufficient Fourteenth Amendment power to lift a state’s Eleventh Amendment immunity in a patent infringement suit). *See also* *City of Boerne v. Flores*, 521 U.S. 507, 530-35 (1997) (limiting Congress’s Fourteenth Amendment power; using the said limitations to strike down the Religious Freedom Restoration Act). *See also* the “anti-commandeering” cases, *Printz v. United States*, 521 U.S. 898, 933 (1997) (under the Tenth Amendment, striking down the temporary background checks provision of the Brady Handgun Violence Prevention Act; ruling that state officials cannot be “commandeered” to administer a federal program); *New York v. United States*, 505 U.S. 144, 188 (1992) (under the Tenth Amendment, striking down the “take title” provision of the Low-Level Radioactive Waste Management Act; ruling that the nation cannot compel a state legislature to enact a federal program). *See also* the other side of that coin in, *e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (striking down a state constitutional amendment mandating term limits for members of Congress) (Kennedy, J., concurring) (finding state term limits to intrude upon the “federal domain”).

4. *New York v. United States*, 505 U.S. 144, 161 (1992) (O’Connor, J.) (“As an initial matter, Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’” (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981))).

5. It is not obvious why the “take title” provision of the Low-Level Radioactive Waste Act “commandeered” the state’s legislative processes. Justice Stevens, writing for four of the Justices in *Printz*, thought that a state’s taking title to hazardous waste was “almost certainly a legislative act,” presumably because in essence it is a subsidy from the state to the producer. 521 U.S. at 963. In this “almost certainly” one senses that the Justices themselves may not be very clear about what in the “take title” provision at issue in *New York* commandeered the state’s “legislative processes.” Perhaps commandeering occurred when the “take title” provision made the state assume all liabilities. Liabilities for damages caused by hazardous waste would almost certainly be imposed under state law. *See, e.g.*, *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that the federal common law of interstate environmental tort was displaced by the Clean Water Act amendments of 1972, but saving the state common law of environmental tort). Since federal environmental statutes typically provide no private rights of action beyond specialized citizen suits and actions for cleanup costs, damages for environmental tort are typically recoverable only under state law. Thus, if the states were compelled to become liable for their hazardous wastes, state environmental tort law would be “commandeered” to enforce national environmental policy. It would seem to be immaterial whether the state law in question was case or statute law.

6. 505 U.S. 144 (1992).

it.<sup>7</sup> Justice O'Connor evidently did not have the temerity in *New York* to cite Justice Story's opinion in *Prigg v. Pennsylvania*,<sup>8</sup> a relevant but hair-raising antebellum slave-catcher case. Although *Prigg* does not quite sink to the *Dred Scott* level of infamy, it is as perverse a relic of antebellum wrongheadedness as you are otherwise likely to find. But one of **(2002) Geo. J.L. & Pub. Pol'y 113** *Prigg's* holdings commended itself at the time, and may still commend itself—I mean Justice Story's inconspicuous ruling that the nation may not require the states to carry out a federal program.<sup>9</sup> In *Prigg*, the federal program in question was enforcement of the first Fugitive Slave Act. National policy at the time, in the supposed interest of preserving the Union, was to encourage Northern enforcement of the fugitive slave law.<sup>10</sup> Of course it was a delusion that the North could appease Southern resentments by forcing a few black people in the North into captivity. To antebellum opponents of slavery, *Prigg's* anti-commandeering principle would have seemed a good thing. It meant that the Fugitive Slave Act could be enforced, if at all, only with the expenditure of considerable fresh federal resources. *Prigg* thus seems very much a forerunner of *New York*, and, more specifically, of the followup case of *United States v. Printz*,<sup>11</sup> in which the anti-commandeering principle was extended to protect the state's administrative as well as its legislative processes. In *New York*, Justice O'Connor rightly hastened to exempt from her anti-commandeering principle a state's *judicial* processes.<sup>12</sup> Under the Supremacy Clause, the state courts are under an explicit duty to enforce federal law.<sup>13</sup> But the anti-commandeering point was well worth its reinvigoration vis-a-vis state legislatures and agencies. As Justice O'Connor pointed out,<sup>14</sup> the national powers are properly understood as having their just operation directly upon the

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7. *New York*, 505 U.S. at 161.

8. 41 U.S. (16 Pet.) 539 (1842). I raised this interesting parallel in Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1338 (1997), a symposium contribution.

9. *Prigg*, 41 U.S. at 622 (stating that state magistrates may assist in slave recapture and rendition “unless prohibited” by state law). Although *Prigg* preempted state ameliorative law and discovered the slavemaster's constitutional right of “recaption” of a slave in a free state, Justice Story defended *Prigg* as a “triumph of liberty,” presumably because this passing remark in *Prigg* denied the government the resources of unwilling states for enforcement of the Fugitive Slave Act. However, legal historians tell us that Story immediately got to work drafting legislation that would eventually commission federal officers in every county to enforce the Act. Story's proposal was adopted by Congress in the Fugitive Slave Act of 1850. See KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC 126 (1985). For those who find value in teaching *Prigg*, you could not do better than my colleague's excellent casebook, PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000).

10. For discussion see Louise Weinberg, *Methodological Interventions and the Slavery Cases: Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1346-50 (1997).

11. *Printz*, 521 U.S. at 933 (under the Tenth Amendment, striking down the Brady Handgun Violence Prevention Act's temporary provision for background checks by local police authorities; ruling that state officials cannot be commandeered to administer a federal program).

12. *New York*, 505 U.S. at 177-79.

13. For extended commentary on the position, see Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 B.Y.U. L. REV. 733 (1995).

14. *New York*, 505 U.S. at 162-65.

people, as the Founders intended,<sup>15</sup> rather than, as under the Articles of Confederation, indirectly upon the people through the states. The dissenting Justices in *New York* made the point that the nation's powers to govern the states *survived* the Constitution.<sup>16</sup> I think (2002) **Geo. J.L. & Pub. Pol'y** 114 that is true.<sup>17</sup> But that does not mean that the power of governance *through* the states without their consent survived the Constitution. Both *New York* and *Prigg*, of course, hold to the contrary. For all I know there may be traditional usages that suggest the continued existence of a power of the nation to govern through the states. If so, there is no need to recognize the power beyond its traditional usages. The nation ought to bear the expenses of—and the responsibility for<sup>18</sup>—implementation of national policy. Certainly, if the nation is unwilling to shoulder the costs of a particular national program, national policy would seem to be too weak to sustain that program. The counter-argument, that *New York* invites an extensive federal bureaucracy,<sup>19</sup> begs these antecedent questions. More fundamentally, if the nation can make the states do its bidding, then a presumed bulwark of individual liberty is likely to be compromised *pro tanto*—the “double security” that the states, as James Madison understood, could give the people.<sup>20</sup>

The nation in recent years has generally been perceived as the more progressive force, but that is not invariably the case;<sup>21</sup> and in the past was not invariably the case.<sup>22</sup> In reading *Prigg*, we see a very good example of state law that is more progressive than federal law. In those days, some of the northern states enacted “liberty laws,”<sup>23</sup> like the Pennsylvania statute struck down in *Prigg*, in an effort to give some procedural fairness to the summary slave renditions under the Fugitive Slave Act.

But we cannot predict today, without some hesitation, that *New York* and its progeny will always serve us well. Assuming that we continue our war against Islamist terror, exigencies may arise. I do not doubt that help from the states for the war on terror would be forthcoming should

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15. The Federalist No. 15 (Alexander Hamilton).

16. *New York*, 505 U.S. at 203 (White, J., dissenting in part); *id.* at 210 (Stevens, J., dissenting in part).

17. *See, e.g.*, *Garcia v. Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that Congress has commerce power, notwithstanding the Tenth Amendment, to impose fair labor standards upon the states as employers).

18. Justice O'Connor's chief policy argument had to do with the desirability of keeping clear the lines of political accountability. *See New York*, 505 U.S. at 168-69.

19. *Printz*, 521 U.S. at 970 (Stevens, J., dissenting).

20. “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.” THE FEDERALIST NO. 51 (James Madison).

21. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts' sanctions against human-rights abuses in Myanmar as in conflict with more nuanced federal sanctions). *See infra* notes 69-72 and accompanying text.

22. The story of opposition in northern states, particularly in the courts of Ohio and Wisconsin, to national policy under the Fugitive Slave Act is told in Weinberg, *Night-Thoughts of a Legal Realist*, *supra* note 10, at 1337-59.

23. *Id.*

the nation require it. Nothing in *New York* or *Printz* or *Prigg* would stand in the way. But conceivably in some future national emergency an exception might have to be carved out of these cases.

(2002) **Geo. J.L. & Pub. Pol’y 115** *United States v. Lopez*<sup>24</sup> may be another example of new federalism law that is more helpful than its critics suggest. To be sure, in its attempt in *Lopez* to limit the commerce power of Congress, the Court clearly disturbed the post-1937 settlement. I do not mean that Chief Justice Rehnquist was saying something new or shocking when he insisted that Congress could regulate only those activities having a “substantial effect” on interstate commerce. The effective new restriction lay in the other part of his test, requiring that the regulated activity be *commercial*.<sup>25</sup> Concededly, and as Rehnquist acknowledged,<sup>26</sup> courts are unlikely to find a bright line that divides commercial activities from non-commercial activities. The futility of the Court’s pre-1937 attempts to trace out other boundaries for the commerce power suggests as much.<sup>27</sup> So does the Court’s recent resort to a particularistic level of abstraction in the *Morrison* case,<sup>28</sup> when it struck down the Violence Against Women Act. The Court took *Morrison* simply as a case about “rape”—obviously not a “commercial” activity. The Court thus treated as essentially irrelevant the massive findings by Congress of the impact on interstate commerce of women’s fears of using the ordinary channels and instrumentalities of interstate commerce. Nevertheless, it is precisely with its new restriction, that the regulated activity be “commercial,” that *United States v. Lopez* may prove beneficial.

You will recall that *Lopez* struck down, as beyond the commerce power, a federal law criminalizing the possession of guns near schools.<sup>29</sup> *Lopez* may have seemed somewhat puzzling, because there is so much existing federal regulation of guns. Concededly, possession seems not to be “commercial” in the sense that sale is. But one has only to conceptualize *guns* as “things in” interstate commerce, rather than conceptualizing the *possession* of guns as “activities affecting” interstate commerce, to reach a conclusion different from the *Lopez* Court’s. Perhaps Chief Justice Rehnquist would think it piling “inference on inference,”<sup>30</sup> but one could conclude that, although the gun in *Lopez* came to rest within Texas, it was a “thing in” interstate commerce, such that Congress could regulate its possession within the state. I take this view reflecting that ultimate possessors, whether direct or indirect, form the economic market for the goods they possess. On

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24. *United States v. Lopez*, 514 U.S. 549, 565-66 (1995) (holding that Congress has insufficient commerce power to criminalize the possession of guns near schools). For interesting commentary on *Lopez*, see, e.g., Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 *FORDHAM L. REV.* 2161 (2001).

25. *Lopez*, 514 U.S. at 566.

26. *Id.*

27. These difficulties are summarized in *United States v. Darby*, 312 U.S. 100, 115-20 (1941).

28. *Morrison*, 529 U.S. at 599 (reasoning that rape is not an economic activity and that the link between violence against women and interstate commerce is too attenuated to justify an exercise of the commerce power).

29. *Lopez*, 514 U.S. at 564-65.

30. *Id.* at 567 (Rehnquist, C.J.).

the same ground I would sustain commerce power over the possession of narcotics. Congress can assume that (2002) *Geo. J.L. & Pub. Pol’y* 116 these sorts of goods have moved in interstate or international commerce, and that their possession is the satisfied demand which, in the aggregate, is the purpose of the interstate traffic.

But that analysis to one side, I think the new insistence on a “commercial” test for “activities affecting interstate commerce” may give judges some of the footing they will need to keep the nation from sliding down a very slippery slope. I have suggested elsewhere that *Lopez* might be viewed as a case not so much about *guns* as about *schools*.<sup>31</sup> One of the horrors on Chief Justice Rehnquist’s parade of horrors in *Lopez* was a federal *curriculum*.<sup>32</sup> I think the Chief Justice was quite right to fear a federal school curriculum, whether or not he would be right to fear national testing or national educational standards. Admittedly, some states have made very poor progress in solving our education problems. Some have yielded to the demands of religious extremists for antiscience teaching in science. It is hard not to look to the nation for some solution. But I believe we are better off relying on state rather than federal efforts to supply the *content* of primary education, however wrongheaded or unambitious state efforts may be. National funding assistance, to be sure, is badly needed, but it must be very indirect. One has only to dust off one’s *Meyer v. Nebraska*<sup>33</sup> and *Pierce v. Society of Sisters*,<sup>34</sup> not to mention the *Flag Salute Case*,<sup>35</sup> to see the issue.<sup>36</sup> It is true that *Meyer* and *Pierce* struck down state, not federal, laws, and protected private, not state, education. And of course those were due process, not commerce, cases. But those classics, together with the *Flag Salute Case*, are powerful reminders of the centrality to American thinking of the principle that our children not be inculcated with any single set of values or ideas.<sup>37</sup> Our valuable assimilationist goals, and the goal of instilling American ideals, can be reached, one hopes, in some manner consistent with *Meyer* and *Pierce*.

So I do share Chief Justice Rehnquist’s concern in *Lopez* about national power over school curricula. But on the other side, there is the more substantial problem *Lopez* creates for civil rights legislation. Because of a technical difficulty in protecting civil rights against private

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31. Weinberg, *Fear and Federalism*, *supra* note 8, at 1332.

32. *Lopez*, 514 U.S. at 549.

33. 262 U.S. 390 (1923) (under the Due Process Clause, striking down state law forbidding the teaching of German in schools notwithstanding the legitimate state interest in inculcating immigrants’ children in American ideas).

34. 268 U.S. 510 (1925).

35. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (holding, under the First Amendment, that government cannot prescribe what shall be orthodox).

36. These cases permit parents to choose to educate their children privately. An exception probably should have been made in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (approving home schooling for the Amish, partly on free exercise grounds). Amish home schooling at that time would have stopped before the child would have been prepared for higher education. *See*, analogously, *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting) (characterizing the lives of child laborers as “ruined”).

37. *Meyer*, 262 U.S. at 401-03 (contrasting the regimentation of children in ancient Sparta and in Plato’s *Republic* with American “ideas”).

infringement—the legacy of the **(2002) Geo. J.L. & Pub. Pol’y 117** *Civil Rights Cases*<sup>38</sup>—modern civil rights legislation has been sustained under Congress’s commerce power rather than its Fourteenth Amendment power.<sup>39</sup> Now we are finding, in the post-*Lopez* world, that the commerce power will not work for civil rights in the old, reliable way. This is one of the things that went seriously wrong for the plaintiff in *Morrison*, when the Court plausibly failed to see rape as a post-*Lopez* “commercial activity,” and plausibly failed to see rape as having a “substantial effect” upon interstate commerce. To the *Lopez* story, moreover, the Court was to add a further chapter, when, the following year, in *Seminole Tribe v. Florida*,<sup>40</sup> the Court invoked an ancient principle that strips Congress of commerce power to make a state liable for its violations of federal law—including, presumably, civil rights law. Since, under the Fourteenth Amendment and the *Civil Rights Cases*, no private person, but only the state and localities can violate the civil rights protected by the Fourteenth Amendment, *Seminole Tribe* has been injurious even in cases *Lopez* does not affect. The commerce power would extend to discrimination in employment, for example—a commercial activity which, in the aggregate has substantial effects on interstate commerce. But if the discriminatory employer is a state, *Seminole Tribe* renders the commerce power useless. The egregious examples are the *Garrett*<sup>41</sup> and *Kimel*<sup>42</sup> cases, striking down the Americans with Disabilities Act and the Age Discrimination in Employment Act in cases in which a state is the employer. Yet the states are perhaps the largest single employer in the nation.

It is a mistake to suppose that in *Garrett* and *Kimel* the Court is at least guarding the structural constitution—that the Court was obliged in these cases to protect the states, as states, from regulation by Congress. These cases are not about the states as states, but rather about the *states as employers*. That is a very different matter. To be sure, it is difficult to sort the governmental function from the employment function when one is talking about such “employees” as appointed state judges.<sup>43</sup> But nothing of that sort was involved in *Garrett* and *Kimel*. These cases are subversive of the Court’s recognition in *Garcia*<sup>44</sup> that nothing in the Tenth Amendment stands in the way of imposing fair labor standards on the states. That is a crucial power of Congress in its governance of **(2002) Geo. J.L. & Pub. Pol’y 118** a great national labor market. More

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38. 109 U.S. 3 (1883).

39. *See, e.g.*, *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964) (sustaining, as an exercise of the commerce power, Title II of the Civil Rights Act of 1964, governing the obligations of places of public accommodation).

40. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-76 (1996).

41. *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (striking down the provision of the Americans with Disabilities Act imposing liability upon state violators).

42. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (striking down the state liability provision of the Age Discrimination in Employment Act).

43. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (refusing to construe the Age Discrimination in Employment Act to protect a state’s judiciary from mandatory retirement absent clear language in the statute).

44. *Garcia v. Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding the Tenth Amendment no bar to regulation of the states as employers).

fundamentally, in immunizing the states from their statutory wrongs, these cases are subversive of the rule of law.

Thus, I part company with the Court on those of its federalism cases, beginning with *Seminole Tribe*, which have made something altogether more encompassing out of the Eleventh Amendment than has ever been anticipated. The Court has gone so far as to create a new federal defense of sovereign immunity for a state *in its own courts*. To be sure, among the new Eleventh Amendment cases, it was only *Alden v. Maine*<sup>45</sup> that was truly “activist.” It was only with *Alden* that the Court stepped markedly beyond any point to which previous understandings could be stretched. *Seminole Tribe*, after all, basically reaffirmed a case over a hundred years old.<sup>46</sup> It took *Alden* to shut down state as well as federal courts. *Alden* departs radically not only from prior Eleventh Amendment understandings, but even from customary federal jurisdictional thinking. Before *Alden*, if—on any theory—the Supreme Court decided to deny access to federal courts in some cases, as it often does,<sup>47</sup> it was typically on the understanding that state courts would be available. The typical federal door-closing rule came with a built-in “adequate-alternative-state-forum” test. But *Alden* blocks access to both sets of courts willy-nilly.<sup>48</sup>

On general understandings, suit against a named state has not been a big feature of American litigation. But suit against state universities and agencies—those have presented a very different picture. *Alden*’s progeny now flatly permit these government actors to violate federal law. In cases involving intellectual property, or cases on facts like *Alden*’s itself,<sup>49</sup> *Alden* hands these government actors a license to steal. And, as we have already seen, we are losing large parts of valuable civil rights legislation.<sup>50</sup> The Court’s concern for the state fisc may seem prudent to you, but as long as the states are represented in Congress, that concern does not seem to warrant the

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45. *Alden*, 527 U.S. 706 (1999). For commentary on *Alden*, see, e.g., Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L. J. 741 (2000); William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000); David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L. J. 753 (2000); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113 (2000).

46. *Hans v. Louisiana*, 134 U.S. 1, 11-12 (1890) (holding that the Eleventh Amendment, although referring only to controversies against a state by citizens of another state, and intended only to overrule *Chisholm v. Georgia*, 2 U.S. 419 (1793), in which no immunity was furnished in an ordinary state-law action on a contract, protects states from federal suit even in actions by a citizen of the same state, even in actions arising under federal law).

47. See Louise Weinberg, *The Article III Box*, 78 TEX. L. REV. 1405, 1408-09 (2000) (arguing that the Court more frequently than Congress narrows federal jurisdiction); see also Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977) (arguing generally that the Court’s array of new bars to federal adjudication amounted to an attack on the underlying substantive rights).

48. I raise the obvious due process question in Weinberg, *Of Sovereignty and Union*, *supra* note 45, at 1170-79; and in Weinberg, *The Article III Box*, *supra* note 47, at 1422-30.

49. *Alden* was an action by state employees for overtime wages earned and illegally withheld.

50. See *supra* notes 2, 28, 41-42 and accompanying text.

Court's sledgehammer approach to acts of **(2002) Geo. J.L. & Pub. Pol'y 119** Congress.<sup>51</sup> And as long as ours is a nation of laws, no concern for the condition of the state fisc could justify the Court's disregard even of the vested rights of patentees in *Florida Prepaid*,<sup>52</sup> and of state employees in *Alden*. It could not justify the Court's disdain for the claims of a vulnerable population of the aged in *Kimel*. I suppose reasonable people can disagree, but I felt embarrassment for the Court when it spoke of the rational economizing interests of the state to justify state employment discrimination against the disabled in *Garrett*.

But all that is just a small part of the new dispensation. New limits on Congress's power to enforce the Fourteenth Amendment seem to me at least as important and much less justifiable than the new limits on Congress's commerce powers. The *Boerne* case<sup>53</sup> has so circumscribed Congress's power to enforce the Fourteenth Amendment that these days Congress can act only to remedy the most obvious violations of our most fundamental constitutional rights—and then only when the violations are sufficiently widespread or the remedy sufficiently limited<sup>54</sup> to satisfy the Court's new black-letter tests of "proportionality and congruence"<sup>55</sup>—standards measured largely in the eye of the beholder. Thus, today the Court duels with civil rights statutes brandishing no less than four swords. The Court will strike the legislation down because Congress did not have sufficient Fourteenth Amendment power to enact it; strike it down **(2002) Geo. J.L. & Pub. Pol'y 120** again because the Commerce Clause can no longer fill the power gap *The Civil Rights Cases*

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51. *But see* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (arguing that the political safeguards of federalism are insufficient to justify a hands-off approach to judicial review of federalism issues); *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing for judicial restraint in federalism cases).

52. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648 (1999) (holding in part in a patent infringement suit that Congress has insufficient Article I power to lift a state's Eleventh Amendment immunity).

53. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding, under Section 5 of the Fourteenth Amendment, and on principles of federalism, that Congress may not enact remedies for violation of the Fourteenth Amendment unless the remedies are proportional and congruent to a substantial pattern of violation; striking down at least as to state actors the Religious Freedom Restoration Act); *see also* *Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-74 (2001) (holding, under *Boerne*, that Congress's Fourteenth Amendment power is insufficient to overcome state sovereign immunity in an action under the Americans with Disabilities Act; holding also that discriminations against the disabled are subject only to minimal rational-basis scrutiny); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (striking down, in part under *Boerne*, the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66-67, 91-92 (2000) (holding, under *Boerne*, that Congress's Fourteenth Amendment power is insufficient to overcome state sovereign immunity in an action under the Age Discrimination in Employment Act). For interesting commentary on *Boerne*, *see, e.g.*, Christopher L. Eisgruber, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79 (1997); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

54. *See, e.g.*, *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (holding, under *Boerne*, that Congress cannot make the patent laws enforceable as against an infringing state on a theory that the state deprives the patentee of property without due process of law, since there is no widespread pattern of state infringements arising to the level of constitutional violations).

55. *City of Boerne*, 521 U.S. at 533.

long ago blasted open in the Fourteenth Amendment;<sup>56</sup> strike it down yet a third way, again for want of commerce power, whenever the defendant is the very defendant contemplated by the Fourteenth Amendment—the state—on the ground that the commerce power can never defeat state immunity; and finally, for good measure, strike it down because, under *Boerne*, the Fourteenth Amendment power will not be allowed to defeat state immunity either. Astonishingly, the terms of the positive grant of power to Congress in the Fourteenth Amendment are now to be read as a ceiling on Congress’s ability to enforce constitutional rights.

I also must confess to grave doubts about a federalism case in which the Court stripped the *states*, rather than the nation, of power—the so-called “Burma Case,” *Crosby v. National Foreign Trade Council*.<sup>57</sup> *Crosby* struck down sanctions Massachusetts had imposed on Myanmar in protest against Myanmar’s abysmal human rights record. The Court felt that Massachusetts’ sanctions were not precisely as nuanced as Congress’s, and preempted them. Congress had provided a mix of incentives and deterrents, and had given the President discretion to vary the mix as needed, a sensitive scheme into which Massachusetts’ sanctions did not fit. Nevertheless this deletion of Massachusetts’ sanctions troubles me. I am not clear why, in a country that values “free trade in ideas,”<sup>58</sup> and values the state as a “laboratory” for ideas,<sup>59</sup> a state should not be allowed to have a slight difference of opinion with the nation on a matter of foreign policy—at least on a question as to which any conflict can have only a minor practical effect. In *Crosby*, after all, Massachusetts’ sanctions were in addition to, and in the same spirit as, Congress’s. The Massachusetts sanctions, moreover, unlike Congress’s, would have barred no private individual transactions, but only *the state’s own*.<sup>60</sup> To permit the state to regulate *itself* on a matter of foreign policy, even if it is forbidden to regulate its residents, would seem to be a plausible accommodation—a recognition of the state’s interest in protecting itself from an association which does not reflect its residents’ values.

I am thinking of the decision in *Boy Scouts of America v. Dale*,<sup>61</sup> in which the Boy Scouts were found to have rights of “expressive association” that free them to exclude gay members. The Court accepted the Boy Scouts’ argument that gay members would send a message opposed to the message the Boy Scouts prefer **(2002) Geo. J.L. & Pub. Pol’y 121** to convey—that homosexuality forms no part of what the Boy Scouts stand for.<sup>62</sup> I hasten to assure the reader that I do not mean to

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56. The Civil Rights Cases, 109 U.S. 3, 18 (1883) (holding that Congress has no Fourteenth Amendment power to remedy denials of civil rights by non-governmental actors).

57. 530 U.S. 363 (2000) (striking down narrow state sanctions against human rights violations in Myanmar).

58. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

59. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

60. These are not my formulations; I am echoing Justice Souter’s opinion in *Crosby*, 530 U.S. at 366-67.

61. 530 U.S. 640 (2000).

62. Here the Court was building upon the almost equally depressing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 574 (1995) (Souter, J.) (holding that gay Irish persons could be excluded from Boston’s

associate *my* message with *Dale*. To borrow from Justice Kennedy's opinion in *Romer v. Evans*, only "animosity to the class" could explain the Boy Scouts' position in *Dale*.<sup>63</sup> That said, if the Boy Scouts have "expressive associational rights" to exclude a class of unwanted members, one might suppose the Court could recognize similar expressive associational interests in a *state*. Why not permit a state to refuse to transact, as a transactor, with persons from disapproved foreign countries?<sup>64</sup> Of course one must tread carefully here. A right not to associate is, after all, a right to discriminate. No state government can be afforded that right, unless consistent with the Equal Protection Clause, in its dealings with persons within its jurisdiction. If Massachusetts excluded homosexuals from its agencies' transactions, the exclusion would be arbitrary and therefore discriminatory and unconstitutional.<sup>65</sup>

We are looking at one of the corners into which the Rehnquist Court has painted itself. Here we have a developing doctrine of "expressive associational rights" that applies to large corporate entities but cannot be applied to local governments in their corporate capacities. I should note, however, that this analysis was not the basis of the thinking in the relevant and much-discussed *Cuffley* case in the Eighth Circuit.<sup>66</sup> There, Missouri was not permitted to exclude the Ku Klux Klan from its "adopt-a-highway" program. Missouri very (2002) **Geo. J.L. & Pub. Pol'y** 122 much wanted not to associate itself with the Klan. But the Eighth Circuit reasoned that the First Amendment barred state discrimination among highway adopters based on their "viewpoints."<sup>67</sup>

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St. Patrick Day parade, because they would interfere with the organizers' rights of expressive association): ("[A] . . . contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics"). I set to one side that this language could be misconstrued as reflecting Justice Souter's rather than the parade organizers' bias. But, with respect, let me suggest that he might have looked at the supposed right of expressive association "in the aggregate," as one looks at commercial activity when measuring its effect on interstate commerce. A private right to exclude, that is to shun, however expressive an associational right, in the aggregate amounts to informal apartheid. The experience of those who live in segregated societies is that they isolate those shunned, and can render the necessities of life unavailable to the shunned as a practical matter. For this reason, at the end of the trails of diverging analyses, I am left with a feeling that *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (holding unconstitutional government authorization of private shunning of a class of Americans, based on animosity to the class), is in tension with both *Dale* and *Hurley*. For good discussion of *Romer*, see, e.g., Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, even though Romer v. Evans Didn't*, 49 DUKE L.J. 1559 (2000).

63. *Romer*, 517 U.S. at 634-35.

64. I raised the question of the bearing of *Dale* on *Crosby*, as did my colleague, Sandy Levinson, in our panel presentations at a faculty colloquium on *Crosby* at Texas, September 8, 2000 (with co-panelists Sarah Cleveland and Ernest Young).

65. *Romer*, 517 U.S. at 635.

66. *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (holding, under the First Amendment, that the state could not exclude the Ku Klux Klan from its Adopt-a-Highway cleanup program based on the Klan's beliefs and advocacy), *cert. denied sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001).

67. *Cuffley*, 208 F.3d at 705.

*Cuffley* is a four-square example of contemporary conservative enthusiasm for the First Amendment. The case is fully in accord with the Rehnquist Court's late jurisprudence on viewpoint-based regulation of speech. Other commentators may find that jurisprudence refreshingly liberal,<sup>68</sup> but I do not. I assume that the state may inculcate views opposite to the Klan's in its schools. Moreover, it seems to me that education and inculcation in civic virtue are not reserved exclusively for the young; the state takes a position, and "speaks" the position out loud, for example, every time it enacts a law. A state's sanctions against the human rights violations of Myanmar and the Ku Klux Klan leave both Myanmar and the Klan as free as *they* always were to express their own points of view. The only speech being stifled in cases like *Crosby* and *Cuffley* is the speech of the states themselves. Worse: after *Cuffley*, Missouri may be forced either to abandon the whole program or to put up proud-looking road signs, as it does for other "adopters," announcing to its otherwise welcome tourists from out of state the "adoption" by the Ku Klux Klan of the part of the highway on which the tourists are driving.

My earlier argument (that state actors are not free, as the Boy Scouts now are, to enjoy a right of expressive association *because* the state is not free to discriminate among viewpoints) loses force in foreign relations cases like *Crosby*, since neither state nor nation owe constitutional duties to foreign governments, and to nonresidents acting abroad. The policy argument that ordinarily a citizen of a foreign country should not be punished for the misdeeds of that country,<sup>69</sup> concededly, is a difficulty for Massachusetts in this position; but it is also a difficulty for the State Department. In any given case, as in *Crosby* itself, the federal government might come under greater practical constraints than a state government in its effort to take a clear moral position through its laws and acts. In such cases, as in *Crosby*, and on facts like *Crosby*'s as well as *Cuffley*'s, *the moral value of a state's independent voice* needs to be taken into account. That voice needs to be heard, not stifled. Although there is much to be said for Philip Jessup's observation that the nation should speak to the world in one, not fifty divergent, "and perhaps parochial, state voices,"<sup>70</sup> it is hard to see how substantially parallel legislation in one or a few states, even if **(2002) Geo. J.L. & Pub. Pol'y 123** depriving the President of some bargaining power (Justice Souter was worried about presidential bargaining power in his opinion for the *Crosby* Court<sup>71</sup>), could make much practical difference. So my feeling is that *Crosby* should have come out the other way. I am glad to say that I am hardly alone in this view.<sup>72</sup>

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68. See, e.g., Michael J. Klarman, *What's So Great About Constitutionalism*, 93 NW. U. L. REV. 145, 191 (1998).

69. Cf. *Zschernig v. Miller*, 389 U.S. 429 (1968) (holding preempted by the inchoate foreign affairs power those state succession statutes which would deny citizens of foreign countries the right to inherit land here, if the foreign country would deny Americans the right to inherit land there).

70. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (quoting Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM J. INT'L L. 740 (1939)). I raised this "one-voice" issue in a panel presentation on *Crosby*, supra note 59.

71. *Crosby*, 530 U.S. at 387.

72. See, e.g., my colleague Sarah Cleveland's excellent discussion in *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 40 VILL. L. REV. 975 (2001).

In the extreme ultraviolet at the far right of the spectrum of federalism cases, there is one that seems to me actually unconstitutional in itself—not in its result or its reasoning, but in its *happening at all*. I mean *Bush v. Gore*.<sup>73</sup> In *Bush v. Gore*, the Court stepped surreally out of the constitutional frame, and, disguised in the majesty of the Article III power, performed the ultimate political act.<sup>74</sup> The Court chose the next President of the United States. But because the Court aborted the electoral process within the state<sup>75</sup> and then failed to restore the election to that process, when the music stopped there was no presidential chair for George W. Bush to sit down in. There was no completed election of which George W. Bush could be the winner. The Court’s selection of the President was free-standing. To achieve this feat of levitation, the Court took from Congress, to whom the Constitution confided it, the final mediation of the deadlocked election. And by first taking the election from the electoral process within the state, the Court took the election ultimately from the voters themselves. The Court prevented the counting of those machine-rejected votes in Florida that were legal votes under Florida law. If ever a case was an “unconstitutional assumption of power,”<sup>76</sup> this was it. Was this stunning *coup d’etat* in furtherance of the Court’s conflicting interest in facilitating strategic resignations? Was the Court maneuvering to ensure that its successors would be to its liking? If so, as I have argued at length elsewhere,<sup>77</sup> the Court was seeking to entrench its own ideologies and interpretive strategies by projecting them not only beyond the ordinary reaches of *stare decisis*, but beyond the temporal limits of Article III.<sup>78</sup> And in thus laying its thumb on the scale of selection of future Supreme (2002) **Geo. J.L. & Pub. Pol’y 124** Court nominees, the Court was trenching on powers that the Constitution confides to the President, with the advice and consent of the Senate.<sup>79</sup> The Court plunged into this abyss, incredibly, despite a 5:4 partisan division. After a willful disgrace of this magnitude, played out before a half-jeering, half-horrified world, the critique of the Court as “activist” scarcely seems strong enough to be worth making.

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73. 531 U.S. 98 (2000). For interesting commentary on *Bush v. Gore*, see, e.g., Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 721 (2001). See also books and articles cited in Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 613-16 (2002).

74. Weinberg, *The Constitutionality of Bush v. Gore*, *supra* note 73, at 620 (arguing, on two independent grounds, that *Bush v. Gore* was an unconstitutional arrogation of political power). I hasten to note that in the wake of September 11, George W. Bush has become a very popular president; and if he can recover the first fine moral direction of his September 20 speech in which he assumed the mantle of world leadership in the fight of civil society against Islamist terrorism, he will be a great one. I do not doubt that he has legitimacy in fact.

75. See the crucial stay order, *Bush v. Gore*, 531 U.S. 1046, 531 U.S. 1048 (Dec. 9, 2000) (staying Florida’s electoral process). This stay became, in effect, permanent after the December 12 decision in *Bush v. Gore*.

76. *Cf. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (characterizing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

77. See Weinberg, *The Constitutionality of Bush v. Gore*, *supra* note 73.

78. *Id.*

79. *Id.*

The federalism cases, then, can be seen to range from “all right” through “activist” all the way to “unconstitutional.” It is sometimes said that the Court follows rather than leads the country<sup>80</sup>—that it cannot help but be influenced by the election returns. Under that theory, after the election of 2000, the Court should not be acting as though George Bush had enjoyed a landslide in the popular vote. Under that theory, the Court should not now be as activist as if it had covered itself in glory in *Bush v. Gore*, or somehow enjoyed the mandate for change that Bush never had. Perhaps it is time for some reflection and quiet consolidation, if not retrenchment. The President has warned us that dangers gather. Soon enough the Court may need to summon to its service all the reverence and submission it can command. Let us hope that we have seen the last radical case in this activist Court.

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["The Power of Congress Over Courts in Nonfederal Cases,"](#) 1995 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 731.

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80. See, for recent powerful work arguing that even the Warren Court followed rather than led the nation, LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

"[Political Questions and the Guarantee Clause \[Rothberger Conference on Constitutional Law\]](#)," 65 UNIVERSITY OF COLORADO LAW REVIEW 849 (1994).

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"[Federal Common Law](#)," 83 NORTHWESTERN UNIVERSITY LAW REVIEW 805 (1989). .

"[Choice of Law and Minimal Scrutiny](#)," 49 UNIVERSITY OF CHICAGO LAW REVIEW 440 (1982). [Anthologized in A CONFLICT-OF-LAWS ANTHOLOGY 339 (Gene R. Shreve ed.; Cincinnati: Anderson Publishing Co., 1997).]

"[The New Judicial Federalism](#)," 29 STANFORD LAW REVIEW 1191 (1977). [Indexed in CONCEPTS OF FEDERALISM (William Stewart ed.; Lanham, MD: University Press of America, 1984).]