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# Mr. Justice Holmes's Constitutionally Crooked Path Part II: The State Sovereignty Jurisdictional Stopgap

Mitchell B. Weiss

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MR. JUSTICE HOLMES’S CONSTITUTIONALLY CROOKED  
PATH PART II: THE STATE SOVEREIGNTY JURISDICTIONAL  
STOPGAP

MITCHELL B. WEISS<sup>1</sup>

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For I say to you in all sadness of conviction that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought.

MR. OLIVER WENDELL HOLMES, JR.<sup>2</sup>

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<sup>2</sup>RICHARD A. POSNER, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., 220 (1996) (from a lecture delivered to the undergraduates of Harvard University on February 17, 1886).

Meet Mr. Justice Oliver Wendell Holmes. “He is philosopher become king.”<sup>3</sup> Seventy-five years ago, he plotted a constitutional path that, while crooked, most contemporary jurists have been willing to travel—at least partially. He *accepted* a restrictive notion of economic freedoms, such as freedom of contract,<sup>4</sup> but later *rejected* a restrictive notion of non-economic freedoms, such as freedom of speech.<sup>5</sup> This path is not only crooked. It is also paradoxical: citizens are free to say what they want, but the States—the political institutions best able to listen—are powerless to act if the federal government has enacted what it believes is a better idea. That may be the end-result, but only if that is the end of the path. As the Supreme Court has only recently begun to realize, however, it is not.

This article analyzes the last turn in Justice Holmes’s constitutionally crooked path, largely by penetrating to the very core of the Supreme Court’s recent decision in *Alden v. Maine*.<sup>6</sup> In this case, the Court upheld the Maine State courts’ dismissal of a federal private right of action against a non-consenting State, the Supremacy Clause itself notwithstanding. *Alden* resolves, albeit only partially, a fundamental issue that strikes at the heart of our coordinate system of government: whether a non-consenting State is absolutely immune from suit in any state court if the right of action arises under a federal law that is properly within the constitutional ambit of Congress’s regulatory authority. It is hard to believe that this basic issue has been lying in wait for more than 200 years, but it has, and so it is not surprising that this case unearths some of the weightiest issues federalism and federal jurisdiction have to offer. It necessitates a theory of the Tenth Amendment that accords with the Supremacy Clause; it questions the outer jurisdictional limits of our legislative courts; and it casts considerable doubt on the obligatory nature of concurrent state court jurisdiction.

Unfortunately, the *Alden* decision is woefully inadequate, as it offers virtually no guidance in dealing with these issues.<sup>7</sup> So by analyzing and reconciling these issues, this article hopefully fills the void, for deep below the surface there is, indeed, a cohesive and consistent theory of federalism: the Commerce Clause gives Congress the power to regulate the inner-workings of the States, but the Tenth Amendment evidences the States the exclusive power to regulate the jurisdiction of their own courts. Put more broadly, Congress can regulate the States to practically no end, but if Congress believes its laws are economically sound, then it must incur the judicial and, at times, prosecutorial resources to enforce them, or persuade (but not coerce) the state legislatures to do the same.

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<sup>3</sup>PHILIP B. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 122 (1970).

<sup>4</sup>*See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 74-75 (1905) (Holmes J., dissenting).

<sup>5</sup>*See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes J., dissenting).

<sup>6</sup>*Alden v. Maine*, 527 U.S. 706 (1999).

<sup>7</sup>Commentators, moreover, are equally perplexed. *See, e.g.*, *The Supreme Court: Foot on Brake*, THE ECONOMIST, Jan. 22-28, 2000, at 32 (quoting Professor Douglas Kmiec: the Justices “know what direction they want to go in, but I don’t think they yet have a theory to guide them.”). If the Supreme Court has not yet found this guiding theory, if nothing else, this article surely offers one.

This is Justice Holmes's "jurisdictional stopgap." But to fully appreciate its vigor requires a much fuller understanding of the road that has been traveled thus far. So with that end in mind, our first stop is the Commerce Clause. A judicial forum, after all, is but an empty plate if the claim against the State is itself unconstitutional. Part I therefore traces the Court's waffling attitude towards the division of regulatory power between the state and federal governments. Then, against this backdrop, Part II takes the jurisdictional turn by analyzing the Court's most recent attempt to resuscitate the Tenth Amendment's check on Congress's Commerce Power. To sharpen the focus, much of this article will focus on the Fair Labor Standards Act, a federal statute that always seems to sit at the center of the Court's federalism storm.

#### I. CONGRESS'S (IN)ABILITY TO REGULATE THE STATES' INTERNAL AFFAIRS

No one can argue that the Fair Labor Standards Act [FLSA]<sup>8</sup> does not best exemplify the Court's near-schizophrenic attitude towards the division of power between the federal and state governments. For not only is the FLSA a by-product of the "switch in time" that supposedly "saved the Nine," but its divisive antecedents and its rich history summon most of the issues and arguments that have persisted to today.

##### A. *Before the New Deal*

In 1916, for example,<sup>9</sup> Congress passed the federal Child Labor Act, which prohibited the interstate or foreign transportation of certain products. Two years later, in a five-to-four decision, the Court struck this law down in *Hammer v. Dagenhart*.<sup>10</sup> The thrust of the Court's disagreement turned on the Tenth Amendment's check on Congress's regulative power. Does the Tenth Amendment impose a limitation on Congress's expressly<sup>11</sup> enumerated powers just as the First

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<sup>8</sup>See 29 U.S.C.A. § 201 *et seq.*

<sup>9</sup>For just a sampling of decisions that have considered the constitutionality of Congress's authority to regulate distinct segments of the labor force, see *Baltimore & Ohio R. Co. v. ICC*, 221 U.S. 612 (1911) (prohibiting a maximum number of hours in the interstate railway industry); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the NIRA's "Live Poultry Code"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating the NIRA's Petroleum Code).

<sup>10</sup>*Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>11</sup>During the first session of Congress, Representative Tucker proposed that the States retain all of the powers not "expressly" delegated to the federal government, so that the Tenth Amendment would read "the powers not expressly delegated to the United States by the Constitution," (emphasis added) but the federalist controlled Congress rejected this proposal stating that such a limitation "was one of the great defects" of the Articles of Confederation. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1900-01, 752-54 (1833); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 112 n.443 (1997). Despite this clear refutation, however, the majority opinion in *Hammer* slipped the word "expressly" into its reiteration of the Tenth Amendment, as did the authority upon which it relied: "[T]he powers not expressly delegated to the national government are reserved." (emphasis added) (citing *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868), which noted that the States retain "all powers not expressly delegated to the national government.") (emphasis added).

Amendment does and, if so, to what extent? Or is the Tenth Amendment merely a tautology?

The majority favored the former interpretation, and Justice Holmes dissented in favor of the latter. First, the majority distinguished a number of prior decisions that upheld a number of federal regulatory statutes on the ground that those statutes, unlike the Child Labor Act, attacked an inherently evil activity or product.<sup>12</sup> While employing children under certain circumstances is no doubt evil, the degree to which such employment is prohibited is arguably not. All of the States had already regulated this purely local activity. Thus, prohibiting the transportation of those products that failed to comply with these more exacting federal requirements, the Court held, was tantamount to “requir[ing] the states to exercise their police power.”<sup>13</sup> Although the state and federal laws clashed with one another, the Court nonetheless did not believe that the Supremacy Clause should prevail. This is because the States’ enactment of “such laws as seem wise to the local authority is inherent and has never been surrendered to the general government.”<sup>14</sup> Thus the Court invalidated the Child Labor Act, holding that it unconstitutionally impinged the States’ regulatory prerogative.

Writing for the dissent, Justice Holmes agreed that the state legislatures retained the authority to regulate the working conditions of the labor force, but he disagreed with the majority’s conclusion that Congress’s exclusive authority over interstate commerce could not indirectly alter those laws.<sup>15</sup> In other words, the federal judiciary could not prohibit Congress from accomplishing indirectly what it could not accomplish directly. Any relief, he argued, is only available if “placed there by congressional action.”<sup>16</sup> Consider *Standard Oil v. United States*,<sup>17</sup> where the Court upheld the use of the Commerce Clause to break up monopolies, even though the Sherman Act indirectly interfered with the States’ exclusive control over their intrastate manufacturing activities.<sup>18</sup> So in Justice Holmes’s mind, the collateral effect the Commerce Clause has on the Tenth Amendment is a necessary consequence of the application of the Supremacy Clause; and the availability of any relief from this result necessarily redounds to the national political process.

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<sup>12</sup>So that no one could misunderstand why these prior decisions were distinguishable, the Court quoted its reasoning for upholding the Mann Act in *Hoke v. United States*, 227 U.S. 308 (1913):

If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to, and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

*Id.* at 322.

<sup>13</sup>*Id.* at 276.

<sup>14</sup>*Id.* at 275.

<sup>15</sup>*Id.* at 277.

<sup>16</sup>*Hoke*, 227 U.S. at 280 (quoting *Leisy v. Hardin*, 135 U.S. 100, 108 (1890)).

<sup>17</sup>221 U.S. 1, 68-69 (1912).

<sup>18</sup>*See Hammer*, 247 U.S. at 279.

The essence of the Court's disagreement, then, boiled down to whether the Tenth Amendment (or the Constitution as a whole) implicitly embodies any core regulatory activities that are wholly immune from federal intrusion, not whether the States had already regulated those activities. If the unconstitutionality of a federal statute depended on the existence of an overlapping state statute, the Tenth Amendment would essentially embody a reverse Supremacy Clause. That is, Congress could indirectly regulate purely local matters only so long as the state legislatures had not. While this wild animal may sound perverse, the majority actually took it one step further, holding that the Tenth Amendment embodies something of a reverse negative Commerce Clause.<sup>19</sup>

Just two months after the *Hammer* decision, Congress tried again. This time it enacted the Child Labor Tax Law of 1919,<sup>20</sup> which, as its name gives away, taxed the profits generated from the use of this purportedly evil activity; otherwise it was essentially identical to the Child Labor Act of 1916. It never stood a chance. We would have "to be blind," the Court blistered, "not to see that the so-called tax [was] imposed to stop the employment of children."<sup>21</sup>

During the next term, however, the Court encouraged Congress to take a different path, one that has proved to this day virtually impervious to constitutional attack. In *Massachusetts v. Mellon*,<sup>22</sup> the State of Massachusetts argued that the federal Maternity Act, which provided the States with federal grants so long as they complied with the statute's mandate, violated the Tenth Amendment because it induced the States into ceding a portion of their sovereignty over to the federal government. Not true, this statute, the Court held, did not "require the states to do, or to yield anything," it merely gave them the option to do so.<sup>23</sup> So even if this statute violated the Constitution, since it did not actually or potentially invade the States' sovereignty, the States had no standing; and without standing, the outcome again depended on the national political process.<sup>24</sup>

#### B. During and After the New Deal

The foregoing negative "activism" incensed President Franklin D. Roosevelt. In a radio address on March 9, 1937, he announced that his court-packing plan was necessary to "save our National Constitution from hardening of the judicial arteries."<sup>25</sup> Coincidentally(?), just three weeks later the Court abandoned its interventionist course; and for the next 34 years, deference to congressional

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<sup>19</sup>Though alien to contemporary ideology, it does appear that the majority floated such an idea: "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution." *Id.* at 275.

<sup>20</sup>See Tax on Employment of Child Labor of 1919, 40 Stat. 1057, 1138 (1919), amended by Revenue Act of 1921, 42 Stat. 227, 306 (Title XII 1921).

<sup>21</sup>*Bailey v. Drexel*, 259 U.S. 20, 37 (1922).

<sup>22</sup>*Mass. v. Mellon*, 262 U.S. 447 (1923).

<sup>23</sup>*Id.* at 482.

<sup>24</sup>*Id.* at 489.

<sup>25</sup>GERALD GUNTHER, CONSTITUTIONAL LAW 129-30 (11th ed. 1985).

intrusions reigned supreme.<sup>26</sup> Congress seized this opportunity by enacting the FLSA in 1938, which, as then worded, only applied to private employers. The following year,<sup>27</sup> Justice Holmes's "powerful and now classic dissent"<sup>28</sup> in *Hammer* gained currency and ultimately won sway with the Court in 1941.

In *United States v. Darby*,<sup>29</sup> Justice Stone delivered the unanimous Court's requiem for the Tenth Amendment, first putting to rest any idea of a reverse Supremacy Clause, and then interpreting the Tenth Amendment out of existence. Just because the Commerce Clause may preclude a State's regulation of an interstate activity, even if Congress has not regulated that activity,<sup>30</sup> the Court held, does not mean that Congress can not regulate an intrastate activity on a subject a State has already regulated, so long as the federal regulation substantially affects interstate commerce. Of course the Commerce Clause has its limits, the Court continued, but only to the extent the Constitution specifically and substantively provides.<sup>31</sup> As for the Tenth Amendment, it provides nothing, for it merely reaffirms that which the enumeration of powers implies—namely, that those powers which are not conferred are retained. The Tenth Amendment is therefore "but a truism."<sup>32</sup> Thus, Congress

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<sup>26</sup>See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), and upholding a state minimum wage law for women). It may be perilous to assume that President Roosevelt intimidated the Court into submission, for Justice Roberts voted on December 19, 1936, well before President Roosevelt even announced his court-packing plan. See PHILIP B. KURLAND, *FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION* 518 (1970) ("It is one of the most ludicrous illustrations of the power of lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations."); but see Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994) (arguing that Justice Frankfurter actually rewrote the history of Roosevelt's court-packing plan in order to lessen the incessant scrutiny that was being leveled against the Court's holding in *Brown v. Bd. of Topeka*, 347 U.S. 483 (1954)).

<sup>27</sup>See, e.g., *Mulford v. Smith*, 307 U.S. 38, 47 (1939) (citing the authority weakly distinguished in *Hammer*, the Court held that Congress may regulate the interstate commerce of intrastate activities to the vanishing point).

<sup>28</sup>*United States v. Darby*, 312 U.S. 100, 115 (1941).

<sup>29</sup>See *id.*

<sup>30</sup>Even the vitality of this so-called "negative" or "dormant" Commerce Clause has recently been put into play. See *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78-79 (1993) (Scalia J., concurring) ("[T]he Commerce Clause contains no 'negative' component, no self-operative prohibition upon the States' regulation of commerce," though prior precedents may still be upheld).

<sup>31</sup>*Id.* at 116.

<sup>32</sup>*Id.* at 124. Whether the Tenth Amendment is a truism, or even a tautology, see *New York v. United States*, 505 U.S. 144, 156-57 (1992), depends on your view of the foundation of the constitutional plan. Surely you cannot both give and retain the *same* power, but the Tenth Amendment does not explicitly say *who* gave the power in the first place. If the *people* were the parties to this "new" Constitution, then the Tenth Amendment actually "reserved to the States" the powers the people did not reserve to themselves or delegate to the federal government. Under this assumption of the constitutional plan, the Tenth Amendment is not a

may prescribe a national minimum wage because labor conditions substantially affect interstate commerce;<sup>33</sup> and since Congress can constitutionally impose this primary obligation, the Court further held that it can likewise impose any such “incidental . . . means of enforcing” it.<sup>34</sup>

No doubt emboldened by the Court’s considerable deference, Congress further extended the FLSA’s coverage, first to employees of public schools and hospitals in 1966, and then to virtually all state governmental employees in 1974.<sup>35</sup> In *Maryland v. Wirtz*,<sup>36</sup> twenty-eight States joined together in attacking the 1966 amendments, arguing that its constitutionality would usher in “the utter destruction of the state[s] as . . . sovereign political entit[ies].”<sup>37</sup> But such an apocalyptic prediction, the Court chimed, is simply not tenable. The FLSA does not “tell the States how to perform [their] medical and educational functions,” it just tells them the minimum amount such services is worth.<sup>38</sup> Since a public hospital or a school’s activities obviously affect interstate commerce, the Court found no justification for distinguishing between a State’s governmental and proprietary functions and thus upheld the 1966 amendment.<sup>39</sup>

Congress’s victory in *Wirtz*, however, turned to defeat in *National League of Cities v. Usery*.<sup>40</sup> Justice Rehnquist delivered the majority opinion for a rancorously divided Court. It is one thing, the Court held, for Congress to regulate the maximum hours and minimum dollars that a private employer can pay its employees, but it is quite another thing to impose those same restrictions on a state employer.<sup>41</sup> Unlike

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redundancy, because it does not say that the States retained those powers *they* did not give to the federal government.

<sup>33</sup>To just briefly veer down a policy lane, the States, not the federal government, are plainly in a better position to determine what impact a minimum wage will have on the widely varying commercial communities within their borders. Perhaps these experimental “laboratories” might even discover that the problem is actually in the medicine the federal government prescribes. See *New State Ice. Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting) (advancing the idea that the States should operate as “laboratories” of trial and error).

<sup>34</sup>*Darby*, 312 U.S. at 124-25.

<sup>35</sup>A narrow band of employees remain exempt. Section 213(a)(1) excepts, for example, professional employees from the FLSA’s overtime provisions. And it is this professional employee exclusion that precipitated the Court’s decision in *Alden v. Maine*, 527 U.S. 706 (1999). See Part II, *infra*.

<sup>36</sup>*Maryland v. Wirtz*, 392 U.S. 183 (1968).

<sup>37</sup>*Id.* at 196.

<sup>38</sup>*Id.* at 193-94. The three-headed district court that initially heard this case exposed the obvious weakness in this argument. See *Maryland v. Wirtz*, 269 F. Supp. 826, 849 (Md. 1967) (pointing out that the power to regulate can be just as destructive as the power to tax).

<sup>39</sup>Seemingly troubled by the potentially crippling effect this decision could have on the States’ autonomy, the Court took the unusual step of reserving judgment on a related Eleventh Amendment issue. See *Wirtz*, 392 U.S. at 200.

<sup>40</sup>*National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>41</sup>*Id.* at 845.



the private sector, the States constitute a coordinate part of our constitutional system of government.<sup>42</sup> The Tenth Amendment, though it has been characterized as a truism, is none the less an “express”<sup>43</sup> declaration of “the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”<sup>44</sup>

The Court then held that both the 1966 and the 1974 amendments to the FLSA impose significant burdens on the States, displace their policy-making decisions and thereby “have the effect of coercing the States” into relinquishing, taxing, or at least reducing their “traditional governmental functions,” such as police and fire protection.<sup>45</sup> In so holding, the Court overruled *Wirtz* but left intact *Darby* and the long line of decisions upholding Congress’s plenary power to regulate private interstate and foreign commerce.

Justice Brennan’s stinging dissent resonated with so much enmity that, at times, it practically defied credibility. He roundly condemned the majority for manufacturing an “abstraction without substance,”<sup>46</sup> and one that will surely “astound scholars of the Constitution,”<sup>47</sup> because it is entirely devoid of constitutional support—either from the text of the Constitution or from the Court’s 150+ years of precedent. It was this “overly restrictive” view of the Commerce Clause, he reminded the majority, that not only provoked the “constitutional crisis” of the 1930s, but also nearly destroyed the institutional integrity of the judicial branch.<sup>48</sup> The dissent then went on to extol the virtues of the national political process, arguing that the States are adequately represented at the national level, and that the political process is therefore the only effective means of safeguarding the States’ sovereignty.<sup>49</sup> Anything more, the dissent concluded, is nothing less than a “catastrophic judicial body blow [to] Congress’ power under the Commerce Clause.”<sup>50</sup>

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<sup>42</sup>*Id.* at 848-49.

<sup>43</sup>That the Tenth Amendment expressly declares a “policy” that restricts the Commerce Clause is but a roundabout way of saying the Tenth Amendment itself “expressly” restricts the Commerce Clause. Yet, in the prior term, Justice Rehnquist acknowledged that the Tenth Amendment did *not* restrict the Commerce Clause “by its terms.” See *Fry v. United States*, 421 U.S. 542, 557 (1975); see also William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (approving Justice Holmes’s opinion in *Missouri v. Holland*, 252 U.S. 416 (1920)).

<sup>44</sup>*Usery*, 426 U.S. at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

<sup>45</sup>*Id.* at 850, 852.

<sup>46</sup>*Id.* at 860.

<sup>47</sup>*Id.* at 862.

<sup>48</sup>*Id.* at 868.

<sup>49</sup>*Usery*, 426 U.S. at 857, 876; see also 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).

<sup>50</sup>*Usery*, 426 U.S. at 880. Despite the dissent’s polemic, it nonetheless acknowledged that Congress could readily achieve its objectives through the use of conditional grants; and in so saying, it conceded the limited practical effect the majority’s holding would actually have on the division of power. *Id.* at 878.

It is far from clear why the Court overruled *Wirtz* but not *Darby*. The majority tried to reconcile these two cases by pointing to an unavailing, question-begging distinction: "A State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy, . . . but is itself a coordinate element in the system established by the Framers for governing our Federal Union."<sup>51</sup> While this distinction is undeniably true, it fails to explain why, on the one hand, the federal government can displace the States' ability to regulate the private sector, but, on the other hand, it cannot displace the States' ability to regulate certain "traditional governmental functions." After all, if the Constitution protects certain core activities, then would one not expect to find the legislative function—a (if not *the*) quintessential function of a State's sovereignty—at the top of the list? Hospitals, fire fighters, sanitation, public health, and all of the other functions the Court pegged to the "essentials" of state sovereignty can be carried out by the private sector, but the States' legislative function cannot. What can be more "essential" to the States' sovereignty than those very functions the private sector cannot perform?

Because of these difficulties, as well as the elusive nature of this essential-function test, the demise of *National League of Cities* seemed almost inevitable. After a series of decisions that refined but consistently rejected the applicability of this essential-function test,<sup>52</sup> the Court finally gave up in 1985 and overruled *National League of Cities*. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>53</sup> the Court was asked to consider whether a municipally-owned mass transit system constituted a traditional governmental function, and was thereby immune from the FLSA's mandate. Justice Blackmun, writing for the five member majority, four of whom dissented in *National League of Cities*, concluded that such an inquiry is bankrupt: it is "unsound in principle and unworkable in practice."<sup>54</sup> States are sovereign to the extent their powers are not vested in the federal government, but the Tenth Amendment, the Court then believed, "offers no guidance about where the frontier between state and federal power lies."<sup>55</sup> Thus relying on Professor Wechsler's seminal work on judicial review,<sup>56</sup> the Court held that the States' primary protection from federal interference resides in the political process.

The dissent denounced the majority's wholesale abandonment of the Court's unique role in determining the constitutional status of the States' sovereignty. The majority offers no explanation, the dissent argued, why the principles of the Court's most famous case, *Marbury v. Madison*, are somehow no longer applicable to the

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<sup>51</sup>*Id.* at 849.

<sup>52</sup>*See, e.g.,* Holdel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981) (reformulating *National League of Cities* into a three-part test); *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982) (rejecting a state autonomy challenge to the Railway Labor Act); *FERC v. Mississippi*, 456 U.S. 742 (1982) (rejecting a state autonomy challenge to the Public Utility Regulatory Policies Act).

<sup>53</sup>*Garcia v. San Antonio Metro. Hous. Auth.*, 469 U.S. 528 (1985).

<sup>54</sup>*Id.* at 546.

<sup>55</sup>*Id.* at 550.

<sup>56</sup>*See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 542 (1954).

Court's role in supervising Congress's regulation of the States.<sup>57</sup> The dissent also objected to the majority's statement that the States would retain some degree of sovereignty. It lacks credibility, the dissent asserted, because the majority has not indicated a single aspect of the States' sovereignty that "would remain when the Commerce Clause is invoked to justify federal regulation."<sup>58</sup> Indeed, by overruling *National League of Cities* and reaffirming *Wirtz*, "all that stands between the remaining essentials of state sovereignty and Congress" Justice O'Connor concluded, "is the latter's underdeveloped capacity for self-restraint."<sup>59</sup> Finally, Justices Rehnquist and O'Connor confidently predicted that the constitutional status of federalism would "in time again command the support of a majority of this Court."<sup>60</sup> How prophetic indeed!

## II. THE STATE SOVEREIGNTY JURISDICTIONAL STOPGAP

### A. *Charting the Course*

Justice Brennan's resignation in the summer of 1990—if not Justice Rehnquist's elevation to the Chief Justice post in 1986—signaled yet another shift in the Court's ever-elusive conception of constitutional federalism.<sup>61</sup> This time, however, in contrast to *National League of Cities v. Usery*,<sup>62</sup> the Court gradually yet systematically reconstructed a protective sphere of state autonomy. Indeed, what started out as a distant rumble, a mere prediction,<sup>63</sup> has recently materialized into a variegated attack on Congress's ability to regulate State activities.

At first, the Court moved with some degree of caution, adopting what Professor Shapiro has called a "sub-constitutional"<sup>64</sup> insistence on congressional accountability: States cannot fend for themselves in the national political process if

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<sup>57</sup>469 U.S. 557 (Powell, J., dissenting).

<sup>58</sup>*Id.* at 581.

<sup>59</sup>*Id.* at 588.

<sup>60</sup>*Id.* at 580 (Rehnquist, J., dissenting); *see also id.* at 589 (O'Connor, J., dissenting).

<sup>61</sup>A similar shift in ideology has occurred in both the Executive and Legislative branches. In 1993, President Clinton issued Executive Order 12,866, 58 Fed. Reg. 51,735 (1993), and in 1995, Congress enacted the Unfunded Mandate Reform Act, 2 U.S.C. § 1501 *et seq.*, both of which evince a heightened concern for state autonomy. Executive Order 12,866 requires federal agencies to consult with state officials before promulgating any regulations that may affect the States' autonomy; and the Unfunded Mandate Reform Act restricts Congress's ability to regulate certain federally assisted state activities.

<sup>62</sup>426 U.S. 833 (1976).

<sup>63</sup>*See Garcia*, 469 U.S. at 580, 589; William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships* 78 VA. L. REV. 1657, 1660 (1992) ("Circumstances have changed, and the nation can no longer afford the luxury of state and federal systems that work at cross-purposes or that irrationally duplicate each others' efforts.").

<sup>64</sup>*See* DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 64, 71, 118 (1995).

the magnitude of the federal intrusion is not readily apparent.<sup>65</sup> So now before Congress can legislate away the States' autonomy, its intention to do so must be perfectly plain. This substantive canon of construction,<sup>66</sup> ingeniously linked to the Court's justification for overruling *National League of Cities*, was then aggressively employed in strengthening the States' interests under the Tenth, Eleventh, and Fourteenth Amendments. However, the Court did not truly turn the corner until its landmark decision in *New York v. United States*.<sup>67</sup> There, for the first time since 1976, the Court severed and then struck down a portion of a federal statute, ironically on the ground that it coerced the state legislature, and thereby infringed the state political process.<sup>68</sup>

Caution gave way in 1995, and with it, the Supreme Court has since overthrown a number of intrusive federal statutes with almost annual regularity. In *United States v. Lopez*,<sup>69</sup> the Court awoke from its dogmatic slumber, and, for the first time in nearly sixty years,<sup>70</sup> struck down a federal statute that regulated a private activity under the Commerce Clause. In 1996, *Seminole Tribe of Fla. v. Florida*<sup>71</sup> put a partial end to Congress's ability under the Commerce Clause to abrogate the States' sovereign immunity in federal court, thereby channeling future congressional incursions into the civil war amendments. And in 1997, the Court extended and strengthened its holding in *New York* by invalidating yet another federal statute, this time on the ground that it compelled state officials to implement and enforce a federal regulatory scheme.<sup>72</sup>

Largely untouched during this state sovereignty spree was the seminal decision of *Testa v. Katt*,<sup>73</sup> where the Court seemingly held the state judiciary has an obligation to adjudicate concurrent federal question claims. Few questioned *Testa's* continuing viability—few, that is, until now.

#### B. The Jurisdictional Turn

So the Court's latest reformulation of federalism began well before *Seminole Tribe*, but the Court's logical and, indeed, sensible holding in *Alden v. Maine* has

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<sup>65</sup>See, e.g., *Dellmuth v. Muth*, 491 U.S. 223 (1989) (refusing to subject a State to suit in federal court unless the statute plainly shows a congressional intent to do so); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that a State's mandatory retirement requirement applies to state appointed judges because the ADEA does not expressly prohibit it).

<sup>66</sup>See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

<sup>67</sup>505 U.S. 144 (1992).

<sup>68</sup>See *id.* at 168-69. This is ironic because, until 1992, the last decision that invalidated a federal statute was itself invalidated in 1985; and the reversal of that case, *National League of Cities*, was based on respect for the federal political process.

<sup>69</sup>*United States v. Lopez*, 514 U.S. 549 (1995).

<sup>70</sup>See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>71</sup>*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>72</sup>See *Printz v. United States*, 521 U.S. 898 (1997).

<sup>73</sup>330 U.S. 386 (1947).

clearly been in progress since then. *Alden* may very well mark the beginning of a constitutional epoch. For not only has the issue in *Alden* been simmering for more than 200 years, but it also lies at the very root of our coordinate system of government: Is a non-consenting State absolutely immune from suit in any state court if the right of action arises under a federal law that is properly within Congress's regulatory authority? *Alden* only answers a piece of this question. The most restrictive (from the States' point of view) reading of *Alden* yields symmetry: A non-consenting State is immune from suit in its own courts if, and to the same extent, it is immune from suit in the federal courts. Yet it is doubtful that that is what the Court actually intended to say. About all that is clear is the precise holding of the case, namely, that a State is constitutionally immune from any Article I private right of action that is brought in a State's own courts.<sup>74</sup>

Beyond that, however, the Court offers no guidance. What about the counterfactual: is a non-consenting State subject to suit in its own courts to the same extent that it *is* subject to suit in the federal courts? If, for example, Congress successfully abrogates the States' immunity from federal suit, has it likewise abrogated the States' immunity from suit in their own courts? To what extent, if any, will the state courts remain open if Congress cannot abrogate the States' sovereign immunity? For example, may the United States bring an action against a non-consenting State in its own courts? Does an *Ex parte Young*<sup>75</sup> action pierce a State's immunity from suit in its own courts?<sup>76</sup> Are municipalities not immune from suit in their State's own courts? Finally, is there any doctrinally consistent answer to all of these questions in light of the Court's failure to confront its holding in *Testa v. Katt*, the seminal case concerning the state courts' constitutional obligation to adjudicate federal question claims. These questions—and their seemingly elusive answers—are the focus of the following section of this article. Surprisingly, the answers to these questions lie not in the *Alden* opinion itself, which is cemented on a rather shaky

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<sup>74</sup>*Alden v. Maine*, 527 U.S. 706, 712 (1999).

<sup>75</sup>*Ex Parte Young*, 209 U.S. 123 (1908).

<sup>76</sup>Without reflection, these questions may seem nonsensical. If a litigant has the option of suing a State in either state or federal court, the choice is obvious. But therein lies the rub. A litigant may soon not have any choice in the matter. Indeed, Congress may attempt to stave off the federal courts' ever-expanding docket by enacting statutory restrictions on the accessibility of the federal judiciary. Though a whole host of options are available, the following illustrate the point: Congress could (1) reinstate the federal question "jurisdictional amount" for cases brought in federal (but not state) courts; (2) enact a so-called "reverse removal" device, whereby a federal court (or a multi-district panel) could transfer related cases to the state courts for consolidation and adjudication; (3) confer, for certain causes of action, exclusive state court federal question jurisdiction; or (4) cap the maximum number of Article III judges that may be appointed. See generally William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1 (1993); JUDICIAL CONFERENCE OF THE UNITED STATES: LONG RANGE PLAN FOR THE FEDERAL COURTS 23-39 (1995); Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1033-36 (1993). Since some, though perhaps not all, of these options are no doubt constitutionally permissible, the state courts may well find themselves saddled with federal question claims that constitutionally can—but statutorily cannot—be adjudicated in the federal courts. Thus obvious gains may result from this inquiry, that is, from exploring the States' constitutionally protected jurisdictional sovereignty.

foundation, but rather in the Court's prior holdings, which paradoxically includes *Testa*. What follows, then, is a brief summary of the *Alden* decision, followed by an in depth analysis of several of the Court's prior holdings.

*C. Alden, et al. vs. The State of Maine*<sup>77</sup>

After *Garcia*, the FLSA once again took hold in the State of Maine, although not entirely.<sup>78</sup> Maine decided that its probation officers were not eligible for overtime pay because they were "professional employees" within the meaning of § 213(a)(1).<sup>79</sup> The probation officers thought otherwise, however, and brought suit against Maine in federal court.<sup>80</sup> The district court held in favor of the probation officers, resulting in Maine's compliance with the FLSA's overtime provisions.<sup>81</sup> However, while a special master was calculating the back-pay judgment, the Supreme Court decided *Seminole Tribe*, which held that a non-consenting State is immune from suit in federal court if the statute giving rise to the private right of action was based on Congress's Commerce Power.<sup>82</sup> In light of that decision, the district court dismissed the case for want of jurisdiction, and the Court of Appeals for the First Circuit affirmed.<sup>83</sup>

The probation officers did not seek Supreme Court review at that time, nor would it have been fruitful had they done so. This is because the federal courts have uniformly held that the FLSA's wage and overtime provisions are exclusively bottomed on the Commerce Clause. Thus, even though the FLSA now unequivocally subjects the States to suit—in both the federal and state courts—the federal courts have unanimously held that *Seminole Tribe* thwarts Congress's ability to subject the States to an FLSA suit in federal court.<sup>84</sup> So it is not surprising that instead of seeking Supreme Court review, the probation officers turned to Maine's state courts, although this too proved unavailing. In a terse opinion, the Supreme Judicial Court of Maine affirmed the Maine Superior Court's dismissal, holding that a State's immunity from suit in the state courts is coextensive with its immunity from suit in the federal courts.<sup>85</sup>

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<sup>77</sup>527 U.S. 706 (1999).

<sup>78</sup>See *Blackie v. Maine*, 75 F.3d 716, 719 (1st Cir. 1996).

<sup>79</sup>See *id.* at 719-20.

<sup>80</sup>See *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993).

<sup>81</sup>See *Alden v. Maine*, No. 98-436, 1999 WL 66190 at \* 3 (U.S. Me. Resp. Brief Feb. 11, 1999). Because the probation officers only sought to recover their back-pay, an *Ex parte Young* action was not available.

<sup>82</sup>See *Mills v. State*, No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996).

<sup>83</sup>See *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997).

<sup>84</sup>See *Abril v. Virginia*, 145 F.3d 182, 186-89 (4th Cir. 1998); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206-11 (6th Cir. 1997), *modified on other grounds*, 107 F.3d 358 (1998).

<sup>85</sup>See *Alden v. State*, 715 A.2d 172, 174 (Me. 1998).

The Supreme Court granted certiorari on June 23, 1999, and in another 5-to-4 decision affirmed the state courts' dismissal and invalidated the FLSA's jurisdictional grant.<sup>86</sup> The Court's sovereign immunity decisions often cling to an historical analysis of the ratification and adoption of the Constitution in general and its Eleventh Amendment in particular. Such constitutional questions, as is also so often the case, are soaked in controversy. *Alden*—in both respects—is no exception.

The opinion begins with the undeniable: The Constitution preserves to the States the dignity, though not the full authority, of a sovereign nation.<sup>87</sup> From there, the Court reasoned that sovereign immunity has generally been a fundamental aspect of the States' sovereignty; that the Eleventh Amendment confirmed rather than established the States' sovereign immunity; and that the scope of this immunity is defined not by the text of the Eleventh Amendment but by the "fundamental postulates" that are implicit in the structure of the Constitution.<sup>88</sup> In support of these points, the Court considered the States' reaction to its holding in *Chisholm v. Georgia*,<sup>89</sup> a case that unquestionably triggered the adoption of the Eleventh Amendment.<sup>90</sup> In *Chisholm*, the Court held that Article III's grant of jurisdiction over controversies "between a State and Citizens of another State" empowered the federal courts to hear a suit against a State, notwithstanding the latter's assertion of sovereign immunity.<sup>91</sup> The country reacted to this holding swiftly and extremely. The very next day, Congress began designing a constitutional amendment that would overthrow the *Chisholm* decision.<sup>92</sup> The States, moreover, were equally outraged.<sup>93</sup> To amplify the point, the Court quoted one scholar's findings that Georgia's House of Representatives passed a bill that made it a crime for anyone to attempt to enforce the *Chisholm* decision; those who did, would "suffer death, without benefit of clergy, by being hanged."<sup>94</sup> The country's reaction to the *Chisholm* decision, the

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<sup>86</sup>See *Alden v. Maine*, 527 U.S. 706 (1999). Section 216(b) sets forth the following jurisdictional grant: "An action to recover the liability . . . may be maintained against any employer (including a public agency) in any federal or state court of competent jurisdiction by any one or more employees." 29 U.S.C. § 216(b) (Law. Co-op. 1999).

<sup>87</sup>See *Alden*, 527 U.S. at 715. The Tenth Amendment, for example, reserves to the States those powers that are not prohibited by the Constitution nor delegated to the federal government; Article IV, § 3, prohibits the involuntary modification of a State's territory; and Article V permits the States to amend the Constitution by a three fourths vote. State sovereignty, moreover, is also implicit in the very notion of a federal government of limited and enumerated powers. *Id.*

<sup>88</sup>*Id.* at 729. See also *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>89</sup>*Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>90</sup>See *Alden*, 527 U.S. at 717-24.

<sup>91</sup>See *id.* at 719.

<sup>92</sup>See *id.* at 720-24 (citing DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, 196 (1997)).

<sup>93</sup>See *Alden*, 527 U.S. at 720-21.

<sup>94</sup>The dissent, however, responded in kind, arguing that Georgia's reaction was an aberration, and that even the "author on whom the Court relies has [said that] 'there was no unanimity among the Framers that immunity would exist.'" *Id.* at 793.

*Alden* Court thus concluded, underscores the settled doctrinal understanding that the Constitution in general, and the Tenth Amendment in particular, implicitly recognizes the States' sovereign immunity.<sup>95</sup>

Thus freed from the restrictive language of the Eleventh Amendment, the Court proceeded to imply meaning from historical silence—a perilous endeavor indeed.<sup>96</sup> Nothing in the Constitution suggests that the States are not immune from suit in their own courts; and although neither the ratification debates nor the Eleventh Amendment address this issue, no discussion was necessary. Everyone just assumed that the Constitution did not alter this fundamental and well-entrenched right.<sup>97</sup> This right, the Court believed, is apparent when one considers the backdrop against which the Constitution and the Eleventh Amendment were adopted.<sup>98</sup> The States were on the brink of insolvency.<sup>99</sup> They could not discharge their wartime debts, and thus understandably feared raids on their state treasuries, an inevitable result if the States were amenable to suit in any court.<sup>100</sup> Moreover, during the congressional debates on the adoption of the Eleventh Amendment, the House of Representatives outright rejected a proposal that would have left open the federal courts while the state courts were closed.<sup>101</sup> Implicit in this proposal, the Court surmised, is the “evident . . . premise that the States retained their immunity and the concomitant authority to decide whether to allow private suits against the sovereign in their own courts.”<sup>102</sup>

Prolonged congressional inaction, the Court continued, further accentuates the point.<sup>103</sup> For nearly 200 years, Congress has not *required* the state courts to entertain federal suits, but it has *permitted* them to do so since 1789.<sup>104</sup> Indeed, the FLSA is among the first generation of statutes that purports to subject the States to suit in their own courts.<sup>105</sup> Thus Congress's prolonged inaction in enacting any such obligatory statutes, the Court concluded, also “suggests an assumed absence of such

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<sup>95</sup>*See id.* at 713-15, 722-26.

<sup>96</sup>*See id.*; William N. Eskridge, Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522 (1998) (“Debating history or general background surrounding the Constitution adds context that is substantively slanted, not just toward the value of federalism in ways that the Reconstruction Amendments sought to offset, but also systematically against the interests of people of color (constitutional slaves in 1789), women (legal servants), poor people (nonvoters), and religious and social nonconformists (social outcasts), in ways that subsequent amendments and judicial constructions have sought to ameliorate.”).

<sup>97</sup>*See Alden v. Maine*, 527 U.S. 706, 740-46 (1999).

<sup>98</sup>*See id.*

<sup>99</sup>*See id.* at 750.

<sup>100</sup>*See id.* at 720-22, 741.

<sup>101</sup>*See id.* at 720-22. *See also* CURRIE, *supra* note 92, at 196-97.

<sup>102</sup>*Alden*, 527 U.S. at 743.

<sup>103</sup>*See id.* at 743-44.

<sup>104</sup>In fact, not until 1875 *could* the inferior federal courts adjudicate federal question claims. *See* Act of Mar. 3, 1875, 18 Stat. 470; FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 64-68 (1927).

<sup>105</sup>*See Alden*, 527 U.S. at 744.



power.”<sup>106</sup> So based on the Framers’ silence, the Constitution’s silence, the Eleventh Amendment’s silence and Congress’s prolonged inaction, the Court held that sovereign immunity is constitutionally cognizable in a State’s own courts.<sup>107</sup>

#### D. *The Tenth Amendment vs. The Supremacy Clause*

Obviously, there is virtually no substance to the Court’s opinion. It is largely, if not entirely, based on what the Constitution and its elusive history do not say. At most, all that *Alden* does say is that a State is constitutionally immune from suit in its own courts if the private right of action is brought under Article I. To test the validity of this holding, and thereby extract its underlying logic, the next section of this article examines the problem under an entirely different and, I think, more principled lens. Somewhat surprisingly, the Court’s holding holds up.

Read literally, the Tenth Amendment<sup>108</sup> says that all powers, regardless of their origin, are allocated among the governments and the people in the following order: (1) to the federal government to the extent provided in the Constitution; (2) to the people to the extent the Constitution prohibits giving such powers to the States; and then (3) to the States to the extent such powers have not already been delegated. Thus understood, the Tenth Amendment serves as a jurisdictional filter, albeit an imprecise one. All powers, regardless of their origin, are allocated among the federal government, the people and the States in accordance with the above formula. For example, by applying this formula, it becomes clear that the power over speech is placed in the peoples’ hands.<sup>109</sup> This is because the First Amendment prohibits Congress from abridging the freedom of speech or the press,<sup>110</sup> and the Fourteenth Amendment likewise prohibits the States from doing the same.<sup>111</sup> So the power over

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<sup>106</sup>*Id.* (quoting *Printz v. U.S.*, 521 U.S. 898, 907-08 (1997)).

<sup>107</sup>*See Alden*, 527 U.S. at 711.

<sup>108</sup>The actual text of the Tenth Amendment reads more succinctly as follows: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

<sup>109</sup>Of course I am not suggesting, though others have, *see, e.g., Konigsberg v. State Bar of California*, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting) (arguing for an absolutist view of the First Amendment), that the people’s power over speech is always immune from governmental intrusion. But the Tenth Amendment should be the starting point. Indeed, the permissible extent of the government’s intrusion should depend on the extent the Constitution’s remaining provisions are or are not in accord with the result achieved under the Tenth Amendment. For example, national security concerns may enable the federal government to impose restrictions on speech that the First Amendment would otherwise protect. *See Snapp v. United States*, 444 U.S. 507, 511 n.3 (1980) (“[E]ven in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.”).

<sup>110</sup>Since freedom of speech is not an enumerated power, the result would have been the same even if the First Amendment did not exist.

<sup>111</sup>*See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (opining that “freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”).

speech, in other words, only gets us to step two before it is then allocated to the people.

But in the sovereign immunity context, the result is less clear, not because of what the Constitution does not say, but because of what it does say. The text of the Constitution says nothing about sovereign immunity. It does not say whether the federal government is or is not vested with this power. Nor does it say whether the States are prohibited from exercising this power. Therefore, from a purely textual perspective, the Tenth Amendment vests the sovereign immunity power in the States. Yet such a conclusion is far from clear because other constitutional provisions seem to counteract this state-court-sovereign-immunity presumption. Take the Supremacy Clause, for example. It says that the “Judges in every State shall be bound” by the U.S. Constitution and all of the federal laws that are “made . . . Pursuan[t]” to the Constitution, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>112</sup> Thus by constitutionalizing the States’ sovereign immunity, the *Alden* Court created a standoff that it only partially resolved. If the FLSA is constitutional, as *Garcia* has and continues to hold, the state judges are bound by it. However, the state judges are also bound by the Constitution, which now recognizes the States’ sovereign immunity.<sup>113</sup>

Perhaps one way of breaking this deadlock is to default in favor of the States’ sovereign immunity. After all, state court sovereign immunity, unlike the FLSA, is now inherent in the Constitution itself, and whenever a statute is invalidated, the Constitution implicitly prevails. *National League of Cities v. Usery*<sup>114</sup> is a case in point. There, the Tenth Amendment prevailed over a statute Congress enacted under the Commerce Clause. But alas, in that case the Court found that the Commerce Power itself did not extend so far; it had not been “made” pursuant to the Constitution, and so it had never achieved “supreme” status.<sup>115</sup>

*Alden*, however, is of a different order. The FLSA’s overtime provision was plainly “made” in accordance with the Constitution. Not only does *Garcia* say so, but the probation officers also conceded the point.<sup>116</sup> So does it follow that the FLSA’s jurisdictional grant was also “made” in accordance with the Constitution? If so, there is no textually apparent reason why the state courts would not be obligated to hear the case. The law would then have achieved “supreme” status, and nothing in the Constitution could have plausibly countered this effect. But since the Court did not overrule *Garcia*, but nevertheless upheld the States’ state-court-sovereign-immunity, the Court—for the first time in its history—disconnected Congress’s power to provide a forum from its power to provide a right. No one (that is, until now) would have doubted Congress’s power to provide some forum, if the right sought to be adjudicated was properly within Congress’s regulatory power. But by

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<sup>112</sup>U.S. CONST. art. VI, cl. 2.

<sup>113</sup>Although, at the outset, the Court in *Alden* simply glossed over the Supremacy Clause, stating that it simply begs the constitutionality question, later the Court did consider it, however so cryptically in connection with *Testa v. Katt*, 330 U.S. 386 (1947). The actual holding in *Testa* is explored extensively below.

<sup>114</sup>426 U.S. 833 (1976).

<sup>115</sup>*See id.* at 844-53.

<sup>116</sup>*See Alden*, 527 U.S. at 808-10 (Souter, J., dissenting).

constitutionalizing the States' sovereign immunity, the Court unavoidably drove a wedge between Congress's power to regulate the States' intrastate activities and its power to provide (at least) a private right of action to enforce the same.

Such a far-reaching departure from the past, one would imagine, would not be achieved inferentially; yet that is the *sine qua non* of the Court's holding. An attentive examination of the constitutionality of the FLSA's jurisdictional grant is thus sorely needed, for if it alone is constitutional, the Court's loose holding in *Alden* substantively falls apart.

One way to determine this is to ask whether the constitutionality of the jurisdictional grant necessarily trains on the constitutionality of the statute's substantive right. Put differently, is the constitutionality of a statute's substantive and jurisdictional grants coextensive with one another?<sup>117</sup> Chief Justice Marshall thought so. In *Cohens v. Virginia*,<sup>118</sup> after being convicted in state court for violating a Virginia law that prohibited selling lottery tickets, the defendants appealed to the Supreme Court, arguing that the Supremacy Clause immunized their conduct because a District of Columbia law authorized the ticket sales in the State of Virginia. Chief Justice Marshall first addressed the Court's jurisdiction: "If any proposition may be considered . . . a political axiom, this, we think, may be so considered[:] that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."<sup>119</sup> The Court then rejected the State's immunity defense, holding that (at least insofar as writs of errors are concerned) the Eleventh Amendment does not apply, but affirmed the State's conviction nonetheless.<sup>120</sup>

This "coextensive axiom" is inapposite. Even if it springs from the Constitution, the FLSA's jurisdictional grant may still be unconstitutional because, to quote Hamilton, there exists "a constitutional method of giving efficacy to [the FLSA's] provisions."<sup>121</sup> As the Court in *Alden* made somewhat clear,<sup>122</sup> absent the State's

<sup>117</sup>Though analytically related, this question is unlike the theory of "protective jurisdiction" in two respects. First, the jurisdictional grant at issue in *Alden* is tied to a substantive federal right; and second, the issue here is whether that jurisdictional grant obligates the state courts, not the federal courts, to adjudicate the substantive claim. For a general discussion of the variant theories of protective jurisdiction, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 469-84 (1957) (Frankfurter, J., dissenting); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 898-907 (1996). The Supreme Court has never explicitly adopted this theory. See, e.g., *Mesa v. California*, 489 U.S. 121, 137 (1989) (seeing no need to adopt it). See also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (rejecting on First Amendment grounds the "greater-includes-the-lessor" argument).

<sup>118</sup>*Cohens v. Virginia*, 19 U.S. 264, 376 (1821).

<sup>119</sup>*Id.* at 384.

<sup>120</sup>See *Cohens*, 19 U.S. at 406-12, 448. Chief Justice Marshall reaffirmed this principle in *Osborn v. Bank of the United States*, 22 U.S. 738, 818 (1824) ("The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law.").

<sup>121</sup>THE FEDERALIST NO. 80 (Alexander Hamilton), reprinted in FALLON, *supra* note 117, at 21-23.

consent, there remains one, perhaps two, ways an employee can still recover back pay from his state employer. The State may still be brought to book indirectly through a suit brought by the Secretary of Labor;<sup>123</sup> and it may also be possible for the employee to simply bring an action against the State in a neighboring state court.<sup>124</sup> Thus every substantive right the FLSA gives, the federal courts, at a minimum, may adjudicate. Whether the former may be brought in the States' own courts, or whether the latter may be brought at all, the Court did not say. What is important, at least at this point, is the constitutionality of the FLSA's jurisdictional grant—an inquiry that Chief Justice Marshall's "coextensive axiom" simply does not resolve.

Rather than asking whether the constitutionality of Congress's power to confer jurisdiction trains (or is included within) Congress's power to substantively legislate, another approach may be to ask whether the jurisdictional grant is itself a "law" within the meaning of the Supremacy Clause. While no authority lies directly on this point, the Court's interpretation of the term "law"—for purposes of Article III—may cast some discerning light on how the Court would interpret the term "law" for purposes of the Supremacy Clause. Both provisions, after all, contain the phrase "the laws of the United States."

Here again, Chief Justice Marshall begins but does not end our analysis. *Osborn v. Bank of the United States*<sup>125</sup> is, to be sure, a fixed star in the Court's "arising under" firmament. The Bank of the United States brought an action in federal court to enjoin one Ralph Osborn, a state auditor, from levying and collecting an unconstitutional state tax.<sup>126</sup> Hypothesizing on the facts of a companion case,<sup>127</sup> the

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<sup>122</sup>See *Alden*, 527 U.S. at 756-57.

<sup>123</sup>See 29 U.S.C. § 216(c).

<sup>124</sup>See *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that a State is not immune from a *state law* claim that is brought in *another* State's courts). In *Alden*, the Court reaffirmed its holding in *Nevada*, without so much as mentioning the *state law* character of that case, and for good reason. Were the Court to distinguish *Nevada* on the basis of its "font of the law"—that is, on the basis that that suit concerned a state, rather than a federal, law—it would have opened Pandora's box. According to the Eleventh Amendment, the federal courts are incapable of adjudicating *any* suit that is brought against a non-consenting State by a "Citizen[] of another State." Since the lower federal courts were incapable of hearing federal question claims until 1875, state law necessarily filled up much of what the Eleventh Amendment was initially all about. So to even suggest that sovereign immunity, in any of its forms, is predicated on the existence of a federal claim would be tantamount to overruling everything except *Chisholm*, the case that unquestionably triggered the adoption of the Eleventh Amendment in the first place! Thus, so long as personal jurisdiction and venue exist, it seems inconceivable, on this basis alone, to deny an employee the opportunity to sue his State on a federal question claim, if that claim is filed in a sister State's courts. In fact, as the discussion below demonstrates, when a federal question is at issue, the sister state court may not have any choice in matter.

<sup>125</sup>22 U.S. 738 (1824).

<sup>126</sup>See *id.* at 739-42. Several years earlier, the Court held that Congress has the power to establish a national bank, and that the States do not have the power to tax it. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Court concluded that the Bank could have brought a garden variety breach of contract action in federal court because the case would necessarily involve the adjudication of a federal “ingredient,” namely, the Bank’s capacity to acquire property, to enter into contracts, and to sue and be sued thereunder.<sup>128</sup> *Osborn’s* “federal ingredient” theory thus defines the outer limits of what constitutes the “laws of the United States” for purposes of Article III jurisdiction.<sup>129</sup> But could a jurisdictional grant constitute a “federal ingredient”?

Although at least one commentator has suggested that a jurisdictional grant is itself an Article III “law,” so long as some national interest is at stake,<sup>130</sup> the orthodox and, indeed, overwhelmingly persuasive view rejects this proposition. In *Verlinden B.V. v. Central Bank of Nigeria*,<sup>131</sup> a breach of contract action, a Dutch corporation sued an arm of the Government of Nigeria in federal court. Although the district court had neither diversity nor statutory federal question jurisdiction,<sup>132</sup> the Court found the presence of a federal “law,” nonetheless. Contrary to two of its prior decisions<sup>133</sup> that “*rejected* the view that the jurisdictional statute itself constituted . . .

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<sup>127</sup>*See* *Bank of the United States v. Planters’ Bank of Ga.*, 22 U.S. 904 (1824). Because the Bank sought to enjoin the collection of an unconstitutional state tax, the Court in *Osborn*, at least under today’s view, was well within the limits of Article III.

<sup>128</sup>*See id.* at 824-25.

<sup>129</sup>Actually, the Court slightly extended this holding in the *Pacific Removal Cases* (*Texas & P.Ry. v. Kirk*), 115 U.S. 1 (1885), by holding that a suit brought by or against a federally chartered railroad, regardless of its nature, was a “law of the United States” within the meaning of Article III. That this case was, indeed, a “sport,” (*see Lincoln Mills*, 353 U.S. at 481 (Frankfurter, J., dissenting)), is apparent when one considers the Court’s effort in lobbying Congress to “nullify its own decision in the *Pacific Railroad Removal Cases*.” Frankfurter & Landis, *supra* note 104, at 272-73. Congress agreed and enacted what is now 28 U.S.C. § 1349, which eliminates federal question jurisdiction based solely on the existence of a federal charter that establishes the juridical existence of one of the parties, unless the United States owns a majority of that party’s capital stock. While this statute significantly pares back the application of the federal ingredient doctrine, that doctrine continues to define the “laws of the United States” for purposes of Article III. *But see* *American Nat’l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 255 (1992) (slighting the effect of § 1349 and potentially limiting the scope of Article III’s arising under jurisdiction to federal charters that “specifically mention[] the federal courts.”).

<sup>130</sup>*See* Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731, 803 (1995) (“The widely-held view endorsed by the Court in *Mesa* and *Verlinden*—that federal jurisdiction cannot constitutionally ‘arise under’ a purely jurisdictional statute—is a fallacy.”).

<sup>131</sup>461 U.S. 480, 483 (1983).

<sup>132</sup>*See* 28 U.S.C. §§ 1332, 1331, respectively. Diversity jurisdiction did not exist because the case did not involve “a State, or the Citizens thereof, and foreign States” under Article III; and statutory federal question jurisdiction did not exist because a federal question did not appear on the face of a well-pleaded complaint. *See Verlinden*, 461 U.S. at 491-92, 494.

<sup>133</sup>*See* *Mossman v. Higginson*, 4 U.S. 12, 14 (1800); *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 451-53 (1851).

'arising under' jurisdiction," the Court held that the statute in question in this case<sup>134</sup> "necessarily raises questions of substantive federal law."<sup>135</sup>

Now it is true that the statute at issue in *Verlinden* arguably did *not* create any substantive federal rights; yet however specious the Court's assertion—that a federal law did in fact exist—is, this defect in the Court's holding is not relevant for our purposes. The FLSA *does* confer a substantive federal right. The important point *Verlinden* provides is that the Court interpreted its prior decisions as rejecting the idea that a jurisdictional grant is itself a "law" within the meaning of Article III. And if there remains any doubt on this point, one need only turn to Justice O'Connor, who has said that a "pure jurisdictional statute[] which seek[s] to do nothing more than grant jurisdiction over a particular class of cases cannot support Art. III 'arising under jurisdiction.'"<sup>136</sup>

So it seems clear that the FLSA's jurisdictional grant is not an Article III "law," and given the Tenth Amendment's presumptive finding in favor of the States retaining the sovereign immunity power, it seems almost equally clear that the FLSA's jurisdictional grant is not a "law" under the Supremacy Clause. But there is more. A congressional enactment is not supreme nor, for that matter, is it even valid if it is not in accord with Congress's enumerated powers. In fact, such a law is by definition "an usurpation of power."<sup>137</sup> Yet there is one enumerated power that calls for pause. According to Article I, § 8, "Congress shall have [the] Power . . . To constitute Tribunals inferior to the supreme Court."<sup>138</sup> Thus, it might be argued that this provision, as augmented by the Necessary and Proper Clause,<sup>139</sup> somehow arms Congress with the power to impose jurisdiction on the state courts; and that by doing so, Congress has made a "law" pursuant to one of its enumerated powers. Such a view, however, does not wash, for it is manifestly at odds with the Court's prior holdings, and it is inconsistent with the interrelated structure of Articles I and III.

Congress need not create any inferior courts—or at least that is what Article III, § 1, says.<sup>140</sup> Instead, Congress may create so-called "legislative courts" whose

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<sup>134</sup>See 28 U.S.C. § 1330 (2000).

<sup>135</sup>See *Verlinden*, 461 U.S. at 493, 496.

<sup>136</sup>*Mesa v. California*, 489 U.S. 121, 136 (1989). See also *Lincoln Mills*, 353 U.S. at 473-74 (Frankfurter, J. dissenting) (chiding an application of protective jurisdiction that would "construe[] 'laws' to include jurisdictional statutes where Congress could have legislated substantively in a field.").

<sup>137</sup>THE FEDERALIST NO. 33 (Alexander Hamilton).

<sup>138</sup>U.S. CONST. art. I, § 8, cl. 9.

<sup>139</sup>*Id.*

<sup>140</sup>Whether all or at least some of Article III's original and appellate jurisdiction must be vested in an Article III court(s) has been hotly contested ever since Justice Story's seminal opinion in *Martin v. Hunter's Lessee*, 14 U.S. 304, 328-36 (1816). For an exhaustive contemporary argument that draws on Justice Story's view that only certain Article III jurisdictional tiers must be vested in an Article III court(s), see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362-66, 1371-74 (1953).

jurisdictional authority might extend beyond the limits of Article III. In fact when it comes to legislative courts, Congress has never felt constrained by Article III.<sup>141</sup> In 1823, for example, Congress enacted a law that greatly fortified Florida's territorial government.<sup>142</sup> Not only did this law empower the territorial council to pass all laws over "all rightful objects of legislation," but it also authorized the territorial courts to hear "all civil cases arising under . . . the laws . . . which may at any time be enacted by the legislative council."<sup>143</sup> By thus conferring general jurisdiction, this statute obviously exceeded the scope of Article III. But in *American Insurance Co. v. Canter*,<sup>144</sup> Chief Justice Marshall nonetheless upheld the constitutionality of this statute because these territorial courts were not Article III courts; they were so-called "legislative courts." Hence since at least 1823, it has been apparently<sup>145</sup> established that a jurisdictional grant may constitutionally exceed the scope of Article III. But would the "judicial power" under Article III open up to accommodate the full scope of these territorial courts' jurisdiction?

A majority of the Court in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*,<sup>146</sup> took the position that it could not, although one would be hard pressed to find that holding in Justice Jackson's plurality opinion. In this case, the Court upheld a district court's diversity jurisdiction over a suit brought by a District of Columbia citizen against a citizen of Maryland, even though the Court had previously held<sup>147</sup> (and did not overrule its holding) that the District of Columbia is

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Despite the permissive language of Article III, § 1, this article accepts this portion of Justice Story's position.

<sup>141</sup>Congress may have enacted a general jurisdictional grant as early as 1787. See CURRIE, *supra* note 11, at 104 (finding that the First Congress "adapt[ed]" the Northwest Ordinance, which, in turn, authorized the creation of a three-judge panel that, in conjunction with an appointed Governor, would "adopt 'such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district'"); *Capital Traction Co. v. Hof*, 174 U.S. 1, 6 (1899) (explaining that this congressional enactment authorized "judicial proceedings according to the course of the common law.").

<sup>142</sup>Act Cong. 1823, § 5, 3 St. at Large, p. 751 (*cited in* *American Insurance Co. v. Canter*, 26 U.S. 511 (1828)).

<sup>143</sup>*Canter*, 26 U.S. at 546.

<sup>144</sup>*Id.*

<sup>145</sup>The conclusion of this issue, however, is open to some debate. See Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 252 n.62 (1990), (raising without resolving the issue). For example, it may be possible to treat the legislative grant as a *de facto* federalization of all of the laws the territory's legislature subsequently enacted. Although possible, it is improbable. The Court in *Canter* seemed to assume that this did not happen. There, the issue concerned a territorial court's capacity to exercise exclusive Article III admiralty jurisdiction, not "arising under" jurisdiction. See *Canter*, 26 U.S. at 546. (holding that the territorial court was competent to adjudicate this claim because the Article III exclusivity "limitation does not extend to the territories.") But since the resolution of this issue—that is, whether Article III cabins a legislative court's jurisdiction—is unclear, both sides of this argument are considered.

<sup>146</sup>337 U.S. 582 (1949).

<sup>147</sup>See *Hepburn & Dundas v. Ellzey*, 6 U.S. 445 (1805).

not a “State” within the meaning of Article III.<sup>148</sup> In order to get there, however, Justice Jackson’s opinion, joined by only two other Justices, took the position that Congress could—and in this case did—expand the district court’s jurisdiction beyond the limits of Article III.<sup>149</sup> The other six Justices, however, flatly rejected this “dangerous doctrine.”<sup>150</sup> Justice Frankfurter profoundly pressed the point: “It was because Article III defines and confines the limits of jurisdiction of the courts which are established under Article III that the first Court of Claims Act fell.”<sup>151</sup> To this day, a majority of the Court has never agreed with Justice Jackson’s opinion.

Thus by combining *Canter* and *Tidewater*, one rule seems to emerge: Article III caps an Article III<sup>152</sup> but not a legislative court’s jurisdiction.<sup>153</sup> Applying this rule, it might appear that the state courts in *Alden* were required to hear that case. After all, the state courts are not Article III courts, and Article I permits Congress to “constitute Tribunals inferior to the supreme Court.” Consequently, it might be argued that the FLSA’s jurisdictional grant converts the state courts into legislative courts, at least with respect to the FLSA’s substantive provisions. In that event, there would be no need to consider whether the jurisdictional grant is a “law” under the Supremacy Clause because it only created the state court’s legislative existence. All that would then remain would be a federal question claim in a court that is not bound by the limits of Article III. The state legislative courts could thus entertain the action, even though the Article III courts could not.

However, coming full circle, one could again argue that the FLSA’s substantive and jurisdictional grants are not constitutional; according to *Osborn*, *Verlinden*, and *Mesa*, only the substantive grant is. While this is true, there is another, more definitive reason why this argument is empty. The Court has consistently held that the Constitution’s Tribunals Clause is limited to the creation of Article III courts: “The power given Congress in Art. I, § 8, cl. 9, ‘To constitute Tribunals inferior to the Supreme Court,’ plainly relates to the ‘inferior Courts’ provided for in Art. III, § 1; it

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<sup>148</sup>See *Tidewater*, 337 U.S. at 583-603.

<sup>149</sup>See *id.* at 603-04.

<sup>150</sup>See *Tidewater*, 337 U.S. at 626 (Rutledge, J., concurring in result). Only Justices Rutledge and Murphy believed that the District of Columbia was a “State” under Article III’s Diversity Clause, and only Justices Jackson, Black, and Burton believed that Congress could use its Article I powers to expand the jurisdictional limits of Article III. So even though six of the nine Justices took the position that Congress could *not* use Article I to expand Article III, Justice Jackson’s plurality opinion says that it can.

<sup>151</sup>*Id.* at 652.

<sup>152</sup>Chief Justice Marshall is in accord: Article III is “that pure fountain from which all the jurisdiction of the Federal Courts is derived.” *Canter*, 26 U.S. at 545.

<sup>153</sup>The Bankruptcy and Tax Courts are typically called “Article I courts” because they were, predictably enough, enacted under Article I. But not all legislative courts are Article I courts. The territorial courts in *Canter*, for example, were enacted under either the federal government’s “general right of sovereignty” or, more likely, Article IV. Thus to use the term “Article I” in the generic sense is not only misleading. It is also a misnomer. Although the phrase (à la Chief Justice Marshall) “legislative courts” is more confusing, it is clearly the more accurate of the two.



has never been relied on for the establishment of any other tribunals.”<sup>154</sup> Indeed the territorial courts in *Canter*, for example, were created under either Congress’s “general right of sovereignty,” or its Article IV power to “make all needful rules and regulations, respecting the territory belonging to the United States.”<sup>155</sup>

That the Constitute Tribunals Clause carries the inherent power to establish legislative courts is also inconsistent with *Tidewater*, not the mention the interrelated structure of Articles I and III. If the Constitutes Tribunals Clause *could* constitute a legislative court, the latter would necessarily be “inferior to the Supreme Court.” Yet for that to happen, the legislative court’s jurisdictional capacity would have to be at least as restrictive as the Supreme Court’s original and appellate jurisdiction. But *Tidewater* teaches us that the Supreme Court could not review this case because its jurisdiction is subject to Article III, and Article III does not cover this case. Thus the state legislative courts’ holdings would be beyond the Supreme Court’s reviewing capacity. So in what sense, then, would the state legislative courts be “inferior” to the Supreme Court? Because a state legislative court is not an “inferior Tribunal,” at least to the extent that its jurisdiction exceeds the scope of Article III, the state courts in *Alden* were not legislative courts.<sup>156</sup>

Yet perhaps Congress has never conferred more jurisdiction than Article III permits. It might be argued that *Canter* is akin to *Osborn*, in that the Territory’s very existence was dependent on a federal statute, and thus its capacity to govern constituted the federal ingredient at issue. However, this proposition is doubtful. In *Canter*, the Court held that even though the territorial courts were not Article III courts, they could nevertheless exercise jurisdiction over an admiralty claim that, according to Article III, could only be adjudicated in an Article III court.<sup>157</sup> Chief Justice Marshall based this holding on the theory that the legislative courts “could not receive” the Article III judicial powers, and were thus not subject to Article III’s exclusivity limitation.<sup>158</sup> Although the Court may have subsequently repudiated this “theological” approach,<sup>159</sup> its supposition that the territorial court’s jurisdiction

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<sup>154</sup>*Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (holding that the Court of Claims and the Court of Customs and Patent Appeals are Article III courts). Legislative courts have been enacted under a number of other provisions, however. *See, e.g.*, *Kendall v. United States*, 37 U.S. 524, 619 (1838) (upholding the creation of legislative courts in the District of Columbia under Article I, § 8, cl. 17); *Nash Miami Motors, Inc. v. Commr.*, 358 F.2d 636 (5th Cir. 1966), *certiorari denied* 385 U.S. 918 (upholding the creation of the Board of Tax Appeals under Article I, § 8, cl. 1); *Northern Pipe Construction v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (rejecting an argument that Article I, § 8, cl. 4 authorized Congress to enact the Bankruptcy Act of 1978).

<sup>155</sup>*Canter*, 26 U.S. at 546.

<sup>156</sup>The *Alden* Court has at least intimated that it is in accord. *See Alden*, 527 U.S. at 753 (“[A]rticle [III] in no way suggests, however, that state courts may be required to assume jurisdiction that could not be vested in the federal courts.”) This is no doubt correct; as more fully fleshed out below, Congress cannot “require” the state courts to assume jurisdiction over any federal claim.

<sup>157</sup>*See Canter*, 26 U.S. at 546.

<sup>158</sup>*Id.*

exceeded the scope of Article III has never been doubted. Moreover, if the federal statute that created the Territory's legislature federalized all of the Territory's laws, there would have been no reason for the Court to consider the justiciability of this admiralty limitation in the first place.

This is no doubt an "abstruse issue,"<sup>160</sup> and one that may still need to be resolved, but it only proves the point all the more. If Article III caps both the Article III and the legislative courts' jurisdictional capacity, then the state courts could never wear their "legislative" hats to adjudicate a Commerce Clause private right of action against their own non-consenting State. According to *Seminole Tribe*,<sup>161</sup> those claims are outside the scope of Article III, and therefore outside the scope of the state legislative court's jurisdiction.<sup>162</sup>

At this point, if just one hardened rule has emerged it is this: A jurisdictional grant is not a "law" within the meaning of the Supremacy Clause. So it would appear that there is a partially symmetrical relationship between an Article III "law" and an Article VI "law."

The Court in *Alden* also looked to Article III, although not to interpret what a law is, but to confine the possible obligations that could be imposed on the state courts.<sup>163</sup> This exposes the key to the Court's dilemma. At one point in the opinion, the Court brushed off the Supremacy Clause as if it was utterly beside the point.<sup>164</sup> The Supremacy Clause, the Court quipped, merely begs the question of whether the law is itself constitutional.<sup>165</sup> As a textual matter this is true, but then the Court never analyzed whether the jurisdictional grant—the very law (or at least piece of the law) that it ultimately invalidated—was constitutional. Instead, the Court, not surprisingly, silently invalidated the FLSA's jurisdictional grant. First, the Court put a good face on the standoff, holding that even though a constitutionally enacted substantive right is the supreme law of the land, it does not follow that the State's constitutionally based immunity defense must yield.<sup>166</sup> Then much later, after it had well established the absence of any prohibitory precedent, the Court came back to

<sup>159</sup>See Bator, *supra* note 145, at 242-43. *But see* Collins, *Article III Cases, State Courts Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 156 (1995) (demonstrating persuasively from a historical perspective that the state courts are "incapable of receiving" any jurisdiction from Congress because their jurisdictional power is "granted to them as a matter of state law.") Professor Collins's historical findings are fully consistent with this Article's analytical conclusions, namely, that only the States can define their own courts' jurisdiction.

<sup>160</sup>See Bator, *supra* note 145, at n.62.

<sup>161</sup>517 U.S. 44 (1996).

<sup>162</sup>At the cusp of the Court's sovereign immunity spree, one commentator argued that state courts *could* wear both hats. See Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1961 (1993). Besides the arguments made thus far, however, it appears that this conclusion is based on "spotty" historical findings. See Michael G. Collins, *Article III, Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 137-39 (1995).

<sup>163</sup>See *Alden*, 572 U.S. at 706.

<sup>164</sup>Indeed, the Court devoted less than one page of its lengthy opinion to an analysis of both the Supremacy Clause and the Tenth Amendment. See *Alden*, 572 U.S. at 713, 753.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.*

the Supremacy Clause and delivered the definitive *ipse dixit*: “The Supremacy Clause does impose specific obligations on state judges. There can be no serious contention, however, that the Supremacy Clause imposes *greater obligations* on state-court judges than on the Judiciary of the United States itself.”<sup>167</sup> There can be no serious doubt about the first assertion, but the second is merely a cobbled attempt to avoid overruling *Testa sub silentio*.<sup>168</sup> While it is unclear whether the Court has done that, the discussion that follows demonstrates that the Court should not overrule *Testa* because it is entirely consistent with *Alden*’s holding.

*E. Employees of Dep’t of Pub. Health & Welfare vs. Dep’t of Pub. Health & Welfare*

Thus far, it would appear that *Testa* presents a heavy counterweight to *Alden*’s holding. Justice Thurgood Marshall thought so, but he was mistaken. The Court in fact broached this exact issue in *Employees of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*.<sup>169</sup> Yet however tempting, the Court wisely resisted resolving it because this case had nothing to do with state-court-sovereign-immunity.<sup>170</sup> Rather, it considered whether a Missouri citizen could bring an FLSA action against the State of Missouri in federal—not state—court.

In concurring with the majority’s holding, Justice Marshall disagreed with the majority in all respects, save one: that the State of Missouri did not implicitly consent to federal jurisdiction.<sup>171</sup> Justice Marshall agreed with the dissenting opinion in two particulars: that a State’s immunity from suit derives not from the Constitution but from the common law; and that Congress attempted to lift the State’s sovereign immunity.<sup>172</sup> But Justice Marshall also believed that attempt was ineffective because Article III strips the federal courts of jurisdiction whether a non-citizen brought the suit or not.<sup>173</sup> Thus, Justice Marshall sided with the majority’s holding that the federal courts lacked jurisdiction.<sup>174</sup>

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<sup>167</sup>*Id.* at 753 (emphasis added).

<sup>168</sup>Even worse than the Court’s Supremacy Clause discussion, both the majority and the dissent devoted a combined total of less than one sentence to *Testa*, the case that Justice Thurgood Marshall believed resolved the exact issue in this case. *See Employees of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 297-98 (1973) (Marshall J., concurring). The Court avoided dealing with this apparent conflict, and probably granted certiorari, because the probation officers failed to raise this and a related waiver issue in the state trial court. *See Brief for Respondent*, 1999 WL 66190, at \* 41. Although the Court briefly dealt with the waiver issue, *see Alden*, 527 U.S. at 737, it nevertheless ignored *Testa*’s implications all together.

<sup>169</sup>411 U.S. 279, 287 (1973).

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* at 296-97. This aspect of the Court’s holding demonstrates its uneasiness, if not its open hostility, towards the Court’s prior holding in *Parden v. Terminal Railway*, 377 U.S. 184 (1964), which ruled that Alabama had implicitly waived its sovereign immunity by merely engaging in interstate commerce.

<sup>172</sup>*Id.* at 288, 289.

<sup>173</sup>*Id.* at 294.

<sup>174</sup>This holding—that the FLSA did not evince an unequivocal congressional intent to abrogate the States’ sovereign immunity—instigated Congress’s 1974 amendments. Two

However, the absence of federal jurisdiction, Justice Marshall unnecessarily continued, does not mean that state employees “are without a forum in which personally to seek redress against the State[:]”

Section 16(b)'s authorization for employee suits to be brought ‘in any court of competent jurisdiction’ includes state as well as federal courts. . . . Congress has the power to lift the State’s common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. . . . While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa v. Katt* 330 U.S. 386 (1947).<sup>175</sup>

Since Missouri’s courts were empowered to hear “suits of this character,” and since federal law stands supreme, the Constitution, Justice Marshall argued, requires that the state courts “enforce it, even if it conflicts with state policy.”<sup>176</sup>

Viewed from any angle, however, *Testa* does *not* support Justice Marshall’s obligatory view of state court jurisdiction.<sup>177</sup> In fact, as the following analysis amply demonstrates, *Testa* actually (and no doubt ironically) supports the *en masse* rejection of Justice Marshall’s position.

#### F. *Testa, et al. vs. Katt*

Harry Katt sold a car to Alfred Testa in violation of the Emergency Price Control Act, which pursuant to Congress’s war powers<sup>178</sup> imposed price caps on the sale of certain goods and services. So Testa sued Katt in state court but ultimately lost.<sup>179</sup> Since this federal law provided *Testa* with a triple damages remedy “in any court of competent jurisdiction,” the state court concluded that it was a penal law and dismissed the case.<sup>180</sup> The Supreme Court granted certiorari and *unanimously* reversed.<sup>181</sup>

Scholars have generally read *Testa* in one of two ways. Some, relying on the opinion’s strong Supremacy Clause prose, believe that the Court adopted a broad

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years later, however, the Court’s holding in *National League of Cities* neutralized the effect of these amendments; and nine years after that, the Court again reversed itself and overruled *National League of Cities* in *Garcia*. See discussion in Part I, *infra*.

<sup>175</sup>*Id.* at 297-98.

<sup>176</sup>*Id.* at 298.

<sup>177</sup>See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 184 n.45 (1988).

<sup>178</sup>See Federal Emergency Price Control Act of 1942, *amended* by the Stabilization Extension Act of 1944, 50 U.S.C.A. App. § 925(e); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding the delegation of legislative authority to the Office of Price Administration); see also David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 37 CATH. U. L. REV. 1, 27-33 (1987).

<sup>179</sup>See *Testa v. Katt*, 47 A.2d 312 (1946).

<sup>180</sup>*Id.* at 313.

<sup>181</sup>See *Testa v. Katt*, 330 U.S. 386 (1947).

view of the state courts' duty to adjudicate concurrent federal question claims.<sup>182</sup> Under this approach, the existence of an analogous state law claim is irrelevant. The Supremacy Clause imposes an independent obligation on the state courts to exercise jurisdiction over concurrent federal question claims.<sup>183</sup> Relying on the opinion's last paragraph, however, other scholars believe that *Testa* merely reaffirms the Court's holding in *Mondou*.<sup>184</sup> According to this view, Congress could require the state courts to adjudicate concurrent federal claims only if they have jurisdiction over an analogous state law claim.<sup>185</sup> The "fact that both possibilities are conceivable" is no doubt "a clue that neither is probable."<sup>186</sup> Another clue turns on Justice Frankfurter's silence in light of his unshakable belief that a state court's jurisdiction lies solely in its creator's hands.<sup>187</sup> It thus seems doubtful that he would stand idly by if he

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

<sup>183</sup>See, e.g., Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposal for a Revised Doctrine*, 1965 SUP. CT. REV. 187, reprinted in THE SUPREME COURT AND THE JUDICIAL FUNCTION 155 (Philip B. Kurland ed. 1975) (arguing for a broad interpretation); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1165-71, 1182 (1984). Justice Marshall clearly subscribed to this view. See *Employees of Dep't of Pub. Health & Welfare*, 411 U.S. at 297-98 (1973) (Marshall J., concurring).

<sup>184</sup>See *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 55 (1912). Here, the Court considered whether a federal statute "may be enforced, as of right, in the courts of the states when their *jurisdiction, as prescribed by local laws*, is adequate." *Id.* (emphasis added). This case in no way concerned Congress's ability to compel the state courts to entertain a federal claim that was outside the scope of their jurisdiction "*as defined by the Constitution and laws of the state.*" *Id.* (emphasis added) Rather, this case held that once the state courts have jurisdiction over the matter, the state courts cannot decline to hear the federal claim because (1) they disagree with the substantive merits of the federal claim (i.e., its "policy") or (2) they would be confused or inconvenienced. See *id.* at 55-56. Before holding that the state courts could do neither of these, the Court thrice mentioned that "there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of [the] state courts." *Id.* at 55, 56. Yet from this opinion somehow arose the notion that the state courts are *obligated* to enforce analogous federal claims. This view simply confounds the state courts' substantive obligation under the Supremacy Clause with their state-prescribed jurisdictional obligations.

<sup>185</sup>See, e.g., TRIBE, *supra* note 117, at 113 n.13 (1988) (eschewing the First Edition's narrow view in favor of an ambivalent view); Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 971 (1947) (interpreting the holding narrowly).

<sup>186</sup>RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 297 (1990).

<sup>187</sup>Justice Frankfurter subscribed to the view, consistent with this article, that the state courts were only compelled—and, indeed, were only empowered—to hear those claims that were in accord with their State's legislative mandate. See *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) ("Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the *only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the State of New York—* enables them to enforce rights no matter what the legislative source of the right may be.") (emphasis added).

Professor Wechsler believed that *Testa's* "final paragraph may have been a concession to [the] Justices who thought, as Justice Frankfurter did, that there were limits to federal

believed *Testa* recognized *any* such federal power. The third and in fact dispositive clue requires a rigorous analysis of the real issues that were at stake in this case.

*Testa* casts no cloud over the Court's previous, and near obsessive, intimations that Congress cannot alter the jurisdiction of the States' courts.<sup>188</sup> In fact, *Testa* practically says so. A careful review of *Robinson v. Norato*,<sup>189</sup> the case upon which the state court in *Testa* relied, reveals the key to the *Testa* decision. Precisely the same issue was presented in both cases: Are the state courts "without jurisdiction over the subject matter of the case at bar."<sup>190</sup> Tackling that question, the state court in *Robinson* worked the syllogism: (1) international law prohibits the enforcement of the penal laws of another sovereign;<sup>191</sup> (2) the States are sovereign and thus cannot enforce the penal laws of another State;<sup>192</sup> (3) the federal government is akin to the States, and thus its penal laws are not enforceable in the States' courts;<sup>193</sup> and (4) the Emergency Price Control Act is a penal statute.<sup>194</sup> Therefore, the state courts cannot entertain an action under the Emergency Price Control Act.

In support of its first two premises, the *Robinson* court cited *Wisconsin v. Pelican Ins. Co.*,<sup>195</sup> where Justice Gray held that the Supreme Court did not have jurisdiction over a suit to enforce a Wisconsin State Court's criminal conviction of a Louisiana citizen. Although the Eleventh Amendment does *not* bar suits brought *by a State* against a citizen of another State, the Supreme Court held that it nevertheless could not entertain jurisdiction over the Louisiana defendant because Louisiana's courts did not have jurisdiction over the matter.<sup>196</sup> This is so because state courts do not enforce another State's penal laws.<sup>197</sup> Thus the Supreme Court held, and this is key, that *if it could* exercise original jurisdiction, the result would be no different than if

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mandates to state courts." Gordon & Gross, *supra* note 183, at 1159 n.62. There is surely more to this opinion than meets the causal eye. A more plausible view, however, is that the federal courts desperately needed the state courts' assistance in enforcing this War-time measure—a measure that essentially federalized state law contracts and certain rental activities. So the Court hid the ball. See BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 359 (1963) (tendering the view that the States did not much like this statute); see also *Robinson v. Norato*, 43 A.2d 467, 468 (1945) (opining that the Emergency Price Control Act "constitute[s] a direct interference with interests in realty and indirectly affect[s] the incidence of tenure . . . which heretofore have never been considered to be within the domain of federal power either in peace or war.").

<sup>188</sup>See Gordon & Gross, *supra* note 183, at 1159 n.169.

<sup>189</sup>43 A.2d 467 (R.I. 1945).

<sup>190</sup>*Id.* at 258; *Testa*, 71 A.2d at 474 ("If, under the established law of Rhode Island, the act . . . is penal in its nature, *must* our courts take jurisdiction?") (emphasis added).

<sup>191</sup>See *id.* at 468 (citing *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825), and, more importantly, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888)).

<sup>192</sup>See *id.*

<sup>193</sup>See *id.* at 471 (citing *Clafin v. Houseman*, 93 U.S. 130 (1876)).

<sup>194</sup>See *id.* at 263.

<sup>195</sup>27 U.S. 265 (1888).

<sup>196</sup>See *id.* at 287-89.

<sup>197</sup>See *id.* at 291.

the defendant's courts exercised jurisdiction, and that is something they cannot do. In other words, exercising original jurisdiction in this case would be no different than requiring the state courts to do the same; the Supreme Court cannot constitutionally require the state courts to exercise jurisdiction, and so the Supreme Court cannot exercise its original jurisdiction.<sup>198</sup>

Since the *Pelican* case dealt with a state penal statute, the state court in *Robinson* needed to find some authority that would extend this rule to the reverse fact pattern—that is, to a state court applying a federal statute. Although the *Robinson* court could find no binding federal authority on this point, Justice Gray again fit the bill. In *Huntington v. Attrill*,<sup>199</sup> Justice Gray let loose the dictum: “Upon similar grounds, the courts of a state cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States.”<sup>200</sup> This case, however, had nothing to do with a federal statute,<sup>201</sup> but it did pin cite some even weightier dictum, that of Justice Story in *Martin v. Hunters Lessee*.<sup>202</sup> There, Justice Story turned today's orthodox view of the Madisonian Compromise on its head.<sup>203</sup> He posited the riddle that has since puzzled scholars and courts alike: Does the Constitution require that all (or at least some) of Article III's jurisdictional grants be vested in the Article III courts? He believed it did *because Congress could not compel the state courts to exercise jurisdiction*.<sup>204</sup> Later on in this opinion, Justice Story stated that the Constitution prohibited Congress from *permitting* the States to adjudicate the criminal laws of the U.S.<sup>205</sup> Justice Gray based his dictum in *Huntington* on these last two points. He claimed that a State could not enforce a federal penal law because (1) Congress cannot impose a jurisdictional obligation on the state courts; and (2) federal criminal laws could not be adjudicated in the state

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<sup>198</sup>See *id.* at 299-300. Now it is true that the Court never explicitly said that accepting jurisdiction is tantamount to an obligatory expansion of the state court's jurisdiction, but the inference is unavoidable. Otherwise, there would be no reason for the Court to have gone to such great lengths to explain that the state courts are barred from enforcing the penal laws of another State.

<sup>199</sup>146 U.S. 657, 672 (1892).

<sup>200</sup>*Id.* at 672.

<sup>201</sup>This case merely concerned the state law enforcement of a New York state court penal conviction against a Maryland defendant.

<sup>202</sup>14 U.S. 304 (1816).

<sup>203</sup>See Collins, *supra* note 159, at 105-35, for an excellent discussion of the Madisonian Compromise.

<sup>204</sup>See *Martin*, 14 U.S. at 330 (“Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.”). This mandatory vesting view is gaining in popularity. See, e.g., Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction* 65 B. U. L. REV. 205 (1985); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990).

<sup>205</sup>See *Martin*, 14 U.S. at 337 (“No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals.”).

courts. The court in *Robinson* largely based its holding—that the state courts did not have jurisdiction over the federal penal statute—on Justice Gray’s dictum.<sup>206</sup>

On appeal, the Supreme Court had to reject one of Justice Gray’s aforementioned claims. If the Court rejected Justice Gray’s first point, it would have had to overrule the *Pelican* case. However, since Justice Gray’s second point was based only on Justice Story’s dictum, the Court rejected it and left the *Pelican* case intact. The Court accomplished this in three steps. First, the Court stated that it was “conceded” that under the State’s laws, the state court had jurisdiction over this type of claim.<sup>207</sup> Then the Court short-circuited the state court’s jurisdictional argument by attacking its essential premise. The States, the Court held, “do not bear the same relation to the United States that they do to foreign countries” or sister States.<sup>208</sup> Indeed, the Supremacy Clause rejects this notion. It essentially converts the federal laws into state laws. That is, “[w]hen Congress . . . adopted th[is] act, it spoke for all the people and all the states . . . as if the act had emanated from [the States’] own legislature.”<sup>209</sup> So to summarize, at this point the Court had effectively held (1) that the federal law is treated as if it was a state law; and (2) that the state court had “conceded” that it has jurisdiction over the state (and therefore the federal) claim.<sup>210</sup>

Finally, the Court had to reject Justice Story’s second point, that the federal penal laws cannot be enforced in the State’s courts. To do this, the Court turned to one of its prior decisions, which merely confirmed the States’ ability—but not their obligation—to adjudicate federal claims.<sup>211</sup> The case was *Clafin*, where the Court held that if “an act of Congress give[s] a penalty to a party aggrieved . . . there is no reason why it should not be enforced . . . in a state court.”<sup>212</sup>

At bottom, then, the Court never held that the States are obligated to enforce the federal laws. Rather, the Court only held that a state judge could not substantively discriminate against a federal law, and that a federal penal law could be adjudicated in the States’ courts. So for purposes of this article, the real holding in *Testa* is not much of a holding at all. It merely reaffirms the Court’s holding in *Clafin*, that the “federal laws can[not] be considered by the states as though they were laws emanating from a foreign sovereign.”<sup>213</sup> The Supremacy Clause already said that. Therefore, the importance of this case lies in the fact that the Court specifically avoided overruling its holding in the *Pelican* case, implying at least that Congress cannot require the States to exercise jurisdiction over any federal claim.

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<sup>206</sup>See *Robinson*, 43 A.2d 467 (R.I. 1945).

<sup>207</sup>See *Testa*, 330 U.S. at 394. The Court actually placed this point at the end of its opinion.

<sup>208</sup>*Id.* at 390.

<sup>209</sup>See *id.* at 392.

<sup>210</sup>*Id.*

<sup>211</sup>See *Clafin v. Houseman*, 93 U.S. 130 (1876).

<sup>212</sup>*Testa*, 330 U.S. at 391 (quoting *Clafin*, 93 U.S. at 137).

<sup>213</sup>*Testa*, 330 U.S. at 391.



*G. Mr. Justice Holmes's Jurisdictional Stopgap*

Up to this point, it seems clear that a federal jurisdictional grant is not a “law” within the meaning of the Supremacy Clause, and that the Supreme Court has never required the States to exercise jurisdiction over any federal claim that was outside the scope of their States’ state-imposed jurisdictional duties. All that remains is a coherent and consistent theory that supports this result—enter Mr. Justice Oliver Wendell Holmes. The dissent in *Alden* welcomed his holding in *Kawananakoa v. Polyblank*<sup>214</sup> with open arms, referring to it as a “logically impeccable theory” that no one could “escape from.”<sup>215</sup> Justice Holmes surely would have appreciated these compliments, but he would not have appreciated the dissent’s misreading of what he actually said in *Kawananakoa*.

In that case, after mortgaging their property, the Kawananakoas conveyed a portion of their property to Damon, who in turn conveyed the property to the Territory of Hawaii.<sup>216</sup> When the Kawananakoas defaulted, the mortgagee foreclosed on all of the property except the piece the Territory owned, bringing suit against the Kawananakoas for the deficiency.<sup>217</sup> The Kawananakoas argued that they were only responsible for the deficiency that would persist after all the property was sold. However, the Supreme Court of the Territory of Hawaii held that that would require “joining the Territory as a party defendant, and that cannot be done.”<sup>218</sup>

Justice Holmes, writing for a unanimous Court, affirmed. The correctness of the lower court’s holding, he philosophized, “has been public property since before the days of Hobbes. A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”<sup>219</sup> Since the Territory is itself the “fountain from which rights ordinarily flow,” if it says it is immune, it is immune.<sup>220</sup>

Careful reflection reveals that *Alden*’s dissenters cannot escape Justice Holmes’s impeccable logic. Now it is true, as the dissent pointed out, that he tied the source of the immunity to the law upon which it arose; and by way of example, he claimed that the District of Columbia would be subject to suit in the Circuit Court of the District of Columbia if a federal statute said so.<sup>221</sup> However, that would be true even if a state law created the right of action upon which the suit in the Circuit Court of the District of Columbia was based. This is because “there can be no legal right as against the authority that makes the *law* on which the *right* depends.”<sup>222</sup> The dissent

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<sup>214</sup>205 U.S. 349 (1907).

<sup>215</sup>See *Alden*, 527 U.S. at 798.

<sup>216</sup>See *Polyblank v. Kawananakoa*, 1905 WL 1418, at \* 1 (Haw. Terr. Oct. 23, 1905).

<sup>217</sup>See *id.*

<sup>218</sup>See *Polyblank*, 1905 WL 1418 at \* 1.

<sup>219</sup>*Kawananakoa*, 205 U.S. at 353.

<sup>220</sup>*Id.* at 353-54.

<sup>221</sup>See *Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 4, 11 (1889) (approvingly referred to in *Kawananakoa*, 205 U.S. at 353, 354).

<sup>222</sup>*Kawananakoa*, 205 U.S. at 353 (emphasis added). The precise meaning of this phrase is only discernible if you keep in mind that a “legal dut[y] is logically antecedent to [a] legal

assumed that what Justice Holmes meant by “law” was the common law or statute that created the mortgagee’s right to foreclose. While erroneous, such an assumption is understandable. As the discussion thus far amply demonstrates, a “law” within the meaning of both the Supremacy Clause and Article III does not include jurisdictional grants.

Justice Holmes, however, did not subscribe to such rigid formalities. He looked at the law backwards. To him, the “law” is a command that tells its recipient what they cannot do.<sup>223</sup> As for the other side of the coin, i.e., the right, it is not always coextensive with the duty:

To put it more broadly, and avoid the word duty, which is open to objection, the direct working of the law is to limit freedom of action or choice on the part of a greater or less number of persons in certain specified ways; while the power of removing or enforcing this limitation which is generally confided to certain other *private persons*, or, in other words, a right corresponding to the burden, is not a necessary or universal correlative.<sup>224</sup>

*Kawananakoa* is a case in point. If the Territory of Hawaii did not own a piece of the property at issue in this case, the landowner’s duty would extend as far as the mortgagee’s right. The mortgagee would have a right to the property, and the owner would have a duty to give up the property. But since the Territory was involved, the owners’ duty did not extend as far as the mortgagee’s rights. The private owner was under a duty to give up the property but the Territory was not; we know this because the Territory’s right to retain possession of the property was essentially transformed into a duty imposed on the judge. The judge was under a duty to deny the mortgagee’s right against the State; and this duty was the “law” Holmes was referring to in *Kawananakoa*. Indeed, in his mind, a legal right was secondary, if not incidental, to the proper functioning of the judicial machine.

Against this backdrop, one can see that Justice Holmes never said that “sovereign immunity may be invoked only by the sovereign that is *the source of the right* upon which suit is brought,” as the dissent stated.<sup>225</sup> In fact, he specifically counseled against looking at the source of the right, as opposed to the source of the duty.<sup>226</sup> The only relevant duty in *Kawananakoa* was whether the judge should immunize the Territory of Hawaii, and to determine that required looking at the source of the

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right[.]” O.W. HOLMES, JR., *THE COMMON LAW* 173 (1881). Thus considered, it is apparent that the right, being dependent on the “law,” only takes hold after a duty is imposed on the judge to adjudicate the right.

<sup>223</sup>See O.W. HOLMES, *THE COMMON LAW* 42 168 (1881) (“[t]he purpose of criminal law is only to induce external conformity to rule . . . [l]aw, being a practical thing, must found itself on actual forces.”); Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

<sup>224</sup>See *id.* at 173.

<sup>225</sup>*Alden*, 527 U.S. at 796 (emphasis added).

<sup>226</sup>See O.W. HOLMES, *THE COMMON LAW* 173-74 (1881) (stating that not all rights are created by the law, and that the law is best understood by looking at the back of its shield—that is, by looking at its power to *restrict* persons from using their rights).

*court's* existence, not the “source of the right upon which [the] suit [was] brought.”<sup>227</sup>

With this distinction in mind, it thus becomes readily apparent why Justice Holmes believed a suit against the District of Columbia in the Circuit Court of the District of Columbia is different than a suit against the Territory of Hawaii in the Territory's courts.<sup>228</sup> Only a federal jurisdictional grant could (and did) bind the judge in the former case,<sup>229</sup> whereas only a Territory of Hawaii jurisdictional grant could (and did) bind the judge in the latter case.<sup>230</sup> The result would have been the same regardless of the fountains from which these private rights of action arose.

#### *H. A Synthesis of the Jurisdictional Stopgap Model*

Federalism is a complicated mosaic. It is perhaps the most elusive area of our law, especially in the arcane area of jurisdictional law. Layer upon layer, the Court's holdings tug at the consistent limits of the preceding layer; and when you throw the rich and eloquent history of the constitutional debates into the mix, you sometimes border on complete confusion. This article has traveled across many of these mine fields, not through the Framers's eyes, but through the Court's holdings that have crystallized since then. In the process, an odd basic consequent has emerged: the Constitution does indeed strike a state-federal balance. Both spheres retain “a residuary and inviolable sovereignty,”<sup>231</sup> yet there will unavoidably be some overlap. The simple solution, and the one the Framers no doubt envisioned, is compromise. Congress's Commerce Power extends into virtually every crevice. The Framers may not have envisioned that result, but the animal cannot be caged. Only common sense—not hollow formulas—can do that, and the best proxy for common sense is self interest vis-a-vis the national and state political processes.

The States' however have plenary power over the jurisdiction of their judiciary. The Framers must have envisioned that, for they gave Congress the ability to establish inferior federal courts should the States resist.<sup>232</sup> Justice Holmes must have seen this jurisdictional stopgap, for it is evident in his view of the law: law is a command; rights are a necessary by-product; and sometimes the power that commands retains some of these rights. This is the case in the law of jurisdiction. The courts are dependents, mere appendages, of their sovereign, and as such they may be destroyed should they refuse “to submit themselves” to their sovereign.<sup>233</sup> This is the “public property” Justice Holmes and Hobbes were both well aware of. Jurisdiction, in other words, is an all or nothing proposition. It can only arise from

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<sup>227</sup>*Id.*

<sup>228</sup>*See* Metropolitan R. Co. v. District of Columbia, 132 U.S. 1, 4, 11 (1889) (approvingly referred to in *Kawananakoa*, 205 U.S. at 353, 354).

<sup>229</sup>*See* Metropolitan R. Co. v. District of Columbia, 132 U.S. 1, 11 (1889).

<sup>230</sup>*See* *Kawananakoa*, 205 U.S. at 354.

<sup>231</sup>THE FEDERALIST NO. 39 (Alexander Hamilton).

<sup>232</sup>*See* U.S. CONST. art. III, § 1.

<sup>233</sup>HOBBS, LEVIATHAN (1651), *reprinted in* LORD LLOYD OF HAMPSTEAD AND MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 151-52 (5<sup>th</sup> ed. 1985).

the source of its creation, and thus it is “incapable of receiving” the judicial power from any other source.

And so it is. Congress may regulate interstate commerce to practically no end, and it can, nay it must, provide a forum for the vindication of these rights. Although a citizen may not necessarily bring a federal action against a State in federal court, the federal government no doubt can. The Supreme Court has never said otherwise. But bringing these actions is not cheap, nor should they be. The federal government, after all, is effectively coercing the States to submit to its regulatory policy—a policy over which the States may not agree; because if they did, they would have consented to the suit in the first place. As for the remaining federal claims, i.e. those against private citizens, the federal doors open up without the assistance of the Executive Branch. These claims, while infringing on the State’s interstitial role as regulator, are only coercive in the negative sense—that is, they may prohibit the States from occupying the field. The States may of course disagree with these laws, and accordingly close their doors.<sup>234</sup> Should that happen, the drain on (and thus the continued expansion of) the federal judiciary may be significant. But it should be. If all of the States disagree with the federal law, it just might be a bad idea. To coerce the States into enforcing a law they disagree with is to encourage its de facto nullification. Most of the state judges, after all, are elected. Moreover, to require state judges to do that which their very existence is against unquestionably constitutes a failing in the state political process, not to mention a drain on the other laboratory experiments that may be brewing.<sup>235</sup>

Simply because the federal government cannot coerce the state courts directly, however, does not mean that it cannot effectively do so indirectly. It can accomplish its desired result by persuading State legislatures to open up the jurisdiction of their courts to accommodate a federal claim. Once the state courts have jurisdiction over the matter, they then cannot refuse to hear the claim, regardless of the existence of an analogous state law claim.<sup>236</sup>

### I. Conclusion

The Supreme Court tried to save the State’s sovereignty by caging the Commerce Power. That cannot be done, as *National League of Cities* woefully demonstrates. So this time, instead of delimiting the reach of the Commerce Clause, the Court pared back Congress’s ability to abrogate the States’ immunity from certain suits filed in the federal courts. This was entirely proper because the very existence of the federal judiciary is dependent on the federal government, though the Supreme Court, unlike the state courts, has the power to define its own jurisdiction within the limits

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<sup>234</sup>It may appear that this jurisdictional stopgap essentially swallows *Mondou*’s discrimination model. It doesn’t. *Mondou* specifically dealt with the *court’s* discrimination, not the state legislature. The States can discriminate all they want, but they won’t if what the federal government has to offer is in accord with what the States’ constituents want.

<sup>235</sup>For an excellent discussion of the economics for and against a strong and weak federal government, see SHAPIRO, *supra* note 64, at 34-44, 75-91, 118-31 (1995).

<sup>236</sup>The requirement that there be an analogous state law claim is really just a circuitous way of saying that the state court has jurisdiction.

of Article III.<sup>237</sup> The Supreme Court simultaneously reinvigorated cooperative federalism by rejecting Congress's ability to coerce and commandeer the legislative and executive branches. Finally, the Court recognized that the States are at least as immune from suit in their own courts as they are from suit in the federal courts. Now all that remains is for the Supreme Court to recognize the last turn in Justice Holmes's constitutionally crooked path and begin to move to the measure of his thoughts.

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<sup>237</sup>That is, the federal judicial power (or at least a large portion of it) must be vested in some court. And if the state courts do not have jurisdiction, and if Congress does not confer that jurisdiction, then the Court must either insist that the inferior federal courts exercise that jurisdiction or the Court itself must exercise original jurisdiction over the matter. If there are no inferior federal courts, only the last alternative remains available, as the Court clearly cannot require Congress to create the inferior courts, for that would be an exercise over the purse.