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**Touro Law Review**

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Volume 16 | Number 2

Article 6

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2000

## Supreme Court Federalism Decisions

Leon Friedman

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### Recommended Citation

Friedman, Leon (2000) "Supreme Court Federalism Decisions," *Touro Law Review*. Vol. 16: No. 2, Article 6.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol16/iss2/6>

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## Supreme Court Federalism Decisions

Cover Page Footnote

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## SUPREME COURT FEDERALISM DECISIONS

*Leon Friedman\**

*Hon. Leon D. Lazer:*

Now, our next speaker is one that we are always proud to have here.

He is widely regarded as a profound constitutional law authority and he is a professor at the Hofstra Law School. He was director of the Committee for Public Justice, Staff Attorney for the Civil Liberties Communication Communion, and has written extensively on numerous Supreme Court issues of critical importance.

The federalism cases are probably among the most startling and interesting ones that came down in the last term and we have asked Professor Friedman to talk to us about them. Professor Friedman.

*Professor Friedman:*

### I. INTRODUCTION

Thank you very much. In this era of baseball statistics I thought I would give you a few numbers relating to the United States Supreme Court. Since *Marbury v. Madison*,<sup>1</sup> when the Supreme Court established the principal of judicial review, the Supreme Court has found one hundred fifty federal laws unconstitutional. Which is, the last time I looked, a little less than one per term. It

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<sup>1</sup> 5 U.S. 137 (1803).

was not until *Dred Scott v. Sanford*,<sup>2</sup> in 1857, that the Supreme Court declared the next federal law unconstitutional.<sup>3</sup>

The Warren Court was a very activist court. Justice Warren was chief justice for sixteen years, and in that sixteen-year period they declared nineteen laws unconstitutional, which is approximately 1.19 laws per year. While, in the last five years the Rehnquist court, a very conservative court, has declared twenty-one federal laws unconstitutional, an average of 4.1 federal laws declared unconstitutional per year.

Just so we have all the numbers correct, over the entire thirteen years of the Rehnquist court they declared twenty-nine laws unconstitutional, an average of 2.23 federal laws per year. Now, who is the activist court? If we think that Congress represents the people and that the Supreme Court should be very reticent about exercising its power of judicial review, how can you explain twenty-one federal laws being struck down in a five-year period?

Now, of those twenty-one laws struck down in this five-year period, seven of them were on federalism grounds. These did not concern constitutional rights (i.e. "you violated my constitutional right"), but rather involved federalism grounds (i.e. "you have violated the structure of the Constitution" and "you have taken power away from state governments, not necessarily local governments"). That is an astounding switch in the way in which the Supreme Court applied its power of judicial review.

## II. FEDERALISM AND THE COURT

There are four areas in which the Supreme Court has in effect raised the power of federalism. The first of the four is the *United States v. Lopez* line of cases.<sup>4</sup> *Lopez* involved a law passed by Congress, the Gun Free School Zone Act,<sup>5</sup> which said that if you

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<sup>2</sup> 60 U.S. 393, (1857). The Court held that Dred Scott had not become a free man during his residence at Fort Snelling, Wisconsin despite his claim of freedom under the Missouri Compromise, because the Missouri Compromise was unconstitutional from the beginning, as it was in violation of the Fifth Amendment guarantee against deprivation of property without due process of law. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *United States v. Lopez*, 115 S. Ct. 1624 (1995).

<sup>5</sup> 18 U.S.C. § 921(a), 922(q) (1990).

possess a gun within a thousand feet of a school zone you have violated a federal law, and it is a five-year felony.<sup>6</sup> However, in 1995, the Supreme Court held that the Act exceeded Congress' power under the Commerce Clause.<sup>7</sup> The Supreme Court had not told Congress that they had gone too far in exercising their power under the Commerce Clause since 1936.<sup>8</sup> If you look before *Lopez*, maybe go back through the late New Deal period, it was sixty years before the Supreme Court told Congress that they did not have these powers.

As an aside, the Commerce Clause is back before the Supreme Court this year in a case involving the Violence Against Women Act.<sup>9</sup> In a badly split opinion, the Fourth Circuit reviewed the Violence Against Women Act, another law passed by a virtually unanimous Congress, which made it a federal crime to engage in an act of violence on the basis of gender.<sup>10</sup> The original panel decision upheld the Act on the basis of the Commerce Clause, saying that if you kill and murder and rape enough women, they would not go to work in the morning and won't produce enough goods and services that move across state lines.<sup>11</sup> However, on rehearing *en banc*, the Fourth Circuit said, it does not substantially affect commerce and we do not think Congress made sufficient findings that rape, murder and assault on women really affects commerce.<sup>12</sup> The Supreme Court will look at that case this year.<sup>13</sup>

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<sup>6</sup> 18 U.S.C. § 922(q).

<sup>7</sup> U.S. CONST. art. I § 8, cl. 3. The Commerce Clause provides in pertinent part: "The Congress shall have the power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." *Id.*

<sup>8</sup> *United States v. Butler*, 297 U.S. 1 (1936). This was the last of a series of cases in which the Supreme Court struck down various "New Deal" legislation. Following his election in 1936, Roosevelt revealed his Court Packing Plan, which would have increased the number of Supreme Court Justices to fifteen, six of whom would be Roosevelt appointees. After the "court-packing" plan was presented to Congress the Court curtailed their review of economic reform. *Id.*

<sup>9</sup> 42 U.S.C. § 13981 *et. seq.* (1999).

<sup>10</sup> *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999) (*en banc*).

<sup>11</sup> 132 F.3d 949 (4th Cir. 1997), *vacated* 169 F.3d 840 (4th Cir. 1999).

<sup>12</sup> *Id.*

<sup>13</sup> *United States v. Morrison*, 120 S. Ct. 11 (1999).

The second area in which the Supreme Court has raised the issue of federalism involves the line of Tenth Amendment cases, beginning with *Printz v. United States*,<sup>14</sup> which dealt with the Brady Handgun Violence Act.<sup>15</sup> In the decision by Justice Scalia, he said that the federal government cannot make state officials carry out federal policy; they are not your servants, they (i.e. county attorneys, city attorneys and state attorneys) are not the instruments of federal policy.<sup>16</sup> If you want to do something, have your own federal officials do it. Do not make state officials carry out a federal policy,<sup>17</sup> even a policy as small making a handgun check to find out whether a person who is trying to buy a handgun fell within one of the prohibited categories (i.e. had a criminal conviction, mental health problem, etc.).<sup>18</sup> Therefore, since the Brady Act placed an obligation on local chief law enforcement officers to make background checks, the Supreme Court held, in a five to four decision, that the Tenth Amendment prohibits the federal government from forcing state officials to carry out federal policy.<sup>19</sup>

This year, the Supreme Court has another case involving the Drivers Privacy Protection Act.<sup>20</sup> This is yet another law passed by a unanimous Congress that says we do not want state officials to sell motor vehicle information for commercial purposes.<sup>21</sup> In the past, the states' motor vehicle division would sell motor vehicle information to a commercial outfit who would then make some money reselling the information.<sup>22</sup> Unfortunately, a stalker found out where some actress lived by buying motor vehicle information

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<sup>14</sup> *Printz v. United States*, 521 U.S. 898 (1997); *see also* U.S. CONST. amend. X. The Tenth Amendment provides in pertinent part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

<sup>15</sup> 18 U.S.C. § 922 *et. seq.* (1999).

<sup>16</sup> *Printz*, 521 U.S. at 898.

<sup>17</sup> *Id.*

<sup>18</sup> 18 U.S.C. § 922.

<sup>19</sup> *Printz*, 521 U.S. at 936.

<sup>20</sup> 18 U.S.C. § 2721 (1999).

<sup>21</sup> *Id.*

<sup>22</sup> *Reno v. Condon*, 120 S. Ct. 666 (2000). "The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers . . . to contact drivers with customized solicitations." *Id.* at 667.

available through a commercial outfit, found and killed her.<sup>23</sup> Congress thought this was not a good idea, so they passed the Drivers Privacy Protection Act, which prohibited States from selling this information for commercial purposes.<sup>24</sup>

The Fourth Circuit held that the Act was unconstitutional, a Tenth Amendment violation because Congress is forcing the states to carry out a federal policy.<sup>25</sup> However, I am not sure if preventing the sale of motor vehicle information is carrying out a federal policy, because they are prohibiting the states from doing something. So that is the Tenth Amendment line of cases.

The third line of cases are the combination of Eleventh and Fourteenth Amendment cases.<sup>26</sup> Again of the seven federal laws that were declared unconstitutional on federalism grounds, four of them are on Eleventh Amendment grounds.

In 1996, the Supreme Court, in *Seminole Tribe of Florida v. Florida*,<sup>27</sup> held that Congress cannot overturn a state's Eleventh Amendment immunity unless two things are done.<sup>28</sup> Number one, it must make its intention clear, absolutely clear.<sup>29</sup> Number two, there must be some other constitutional basis for overturning the state's immunity.<sup>30</sup> That is to say, Congress can overturn a state's Eleventh Amendment immunity if they are exercising their powers

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<sup>23</sup> Pryor v. Reno, 171 F.3d 1281, n.4 (1999) (During floor debate on the Senate version of the Act, Senators invoked the example of Rebecca Shaeffler, an actress from California, who was murdered by an obsessed fan who obtained her address from the department of motor vehicles through a private investigator. See 139 Cong.Rec. § 15, 766, Comments of Senator Harkin. See also (Feb. 4, 1994) (statement of Rep. Moran): 139 Cong.Rec. § 15, 762 (Nov. 16, 1993) (statement of Sen. Boxer); 139 Cong. Rec. § 15, 765 (Nov. 16, 1993) (statement of Sen. Robb); 139 Cong.Rec. § 15, 765 (statement of Sen. Biden)).

<sup>24</sup> 18 U.S.C. § 2721 (1999).

<sup>25</sup> Pryor v. Reno, 171 F.3d 1281 (1999).

<sup>26</sup> See U.S. CONST. amend XI. Providing in pertinent part: "The judicial power of the United States shall not be construed to extend to any situation . . . against one of the United States by citizens of another State." *Id.*; see also, U.S. CONST. amend XIV § 5. (authorizing Congress to enforce the other provisions of the Fourteenth Amendment, which insure protection against the deprivation of life, liberty or property without due process of law).

<sup>27</sup> 517 U.S. 44 (1996).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 56.

<sup>30</sup> *Id.* at 40.

under the Fourteenth Amendment.<sup>31</sup> The *Seminole Indian* decision overturned *Pennsylvania Union Gas*,<sup>32</sup> which held that Congress could overturn Eleventh Amendment immunity pursuant to the Commerce Clause, the Court created a much stricter constitutional rule for overturning Eleventh Amendment immunity.<sup>33</sup>

The final line of cases follows *City of Boerne v. Flores*,<sup>34</sup> in which the Supreme Court said when Congress exercises its Fourteenth Amendment power, it must do so to remedy an already existing constitutional violation.<sup>35</sup> In other words, Congress cannot declare what the Constitution means and afford a remedy for violations.<sup>36</sup>

In *Boerne*, the Supreme Court reviewed the Religious Freedom Restoration Act,<sup>37</sup> which broadened religious freedom beyond that which the Supreme Court had defined, and the Act established a remedy for violations.<sup>38</sup> The Supreme Court held that this was beyond the power of Congress.<sup>39</sup> The Supreme Court defines what the constitutional right is, and Congress is then empowered to provide a proportional remedy.<sup>40</sup> Accordingly, Congressional power under Section 5 is limited to preparing, creating, or establishing a proportionate remedy to a Constitutional violation already found by the Supreme Court.<sup>41</sup>

The whole point of the Fourteenth Amendment, by the way, is to put restrictions on the states. Section 1 says, "No state shall deprive a person of life, liberty or property without due process of law, or deprive any person of . . . equal protection of the law."<sup>42</sup> Therefore, since the Fourteenth Amendment speaks to the states,

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

<sup>32</sup> *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989).

<sup>33</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

<sup>34</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>35</sup> *Id.* at 518. (prohibiting Congress from creating new Constitutional rights, but allowing Congress to remedy or prevent a Constitutional wrong).

<sup>36</sup> *Id.* at 508.

<sup>37</sup> *Id.* at 507.

<sup>38</sup> 42 U.S.C.A. § 2000bb.

<sup>39</sup> *Flores*, 521 U.S. at 520.

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

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

<sup>42</sup> U.S. CONST. amend XIV.



and Section 5 of the Fourteenth Amendment, the Enabling Act,<sup>43</sup> is the vehicle by which Congress passes these laws, what *Boerne* really says to Congress is you have to be very careful when you exercise that power.

All of these three things came together in the very last day of the term when the Supreme Court, on June 23, 1999, declared three separate federal laws unconstitutional.<sup>44</sup> The three cases are *Alden v. Maine*,<sup>45</sup> *Florida Prepaid v. College Savings Bank*,<sup>46</sup> and *College Savings Bank v. Florida Prepaid*.<sup>47</sup> Remember, from the beginning of time until today, one hundred fifty federal laws have been declared unconstitutional. Now in one day they declared three federal laws unconstitutional. Big day!

### III. *ALDEN V. MAINE*

*Alden* dealt with the Fair Labor Standards Act.<sup>48</sup> If ever the Supreme Court has had a flip-flop, their view on this Act is the biggest flip-flop of all time. The Fair Labor Standards Act, which applies to all employers across the country (i.e. private employers, county employers and local government employers), created a forty hour work week, and says that if employees work overtime, they must be paid time and a half for overtime, and double time for weekends.<sup>49</sup> However, the longstanding question facing the Court was whether this law could be applied to the state governments?

The first case dealing with the Fair Labor Standards Act, *Maryland v. Wirtz*,<sup>50</sup> was heard in the 1970's. Federal law said that the Fair Labor Standards Act applied to state schools as well as to

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<sup>43</sup> U.S. CONST. amend XIV § 5. this section provides that "Congress shall have power to enforce, by appropriate legislation the provisions of this article."  
*Id.*

<sup>44</sup> The Fair Labor Standards Act, The Patent Remedy Act, and The Trademark Remedy Act.

<sup>45</sup> 119 S. Ct. 2240 (1999).

<sup>46</sup> 119 S. Ct. 2219 (1999).

<sup>47</sup> 119 S. Ct. 2199 (1999).

<sup>48</sup> Fair Labor Standards Act, 29 U.S.C.A. § 201 (1938).

<sup>49</sup> *Id.*

<sup>50</sup> *Maryland v. Wirtz*, 392 U.S. 183 (1968).

hospitals.<sup>51</sup> The Supreme Court, in *Wirtz*, saw no problem with this.<sup>52</sup>

However, when Congress later expanded the Act to all state employees,<sup>53</sup> the Fair Labor Standards Act once again came before the Supreme Court, this time in *National League of Cities v. Usery*.<sup>54</sup> In *Usery* the Supreme Court found the new provision, which made all state government employees subject to the Fair Labor Standards Act, unconstitutional under the Tenth Amendment.<sup>55</sup> It was a Tenth Amendment case because the financial obligation placed on the states and local governments may be so onerous that the states and local governments may not be able to perform their functions.<sup>56</sup> In other words, if you have to pay time and a half to a fire person or police person, the financial drain could be so severe that the states could not do what they are supposed to do. Well, the Court's opinion *National League of Cities* only lasted nine years, because the Supreme Court once again went the other way in *Garcia v. San Antonio Metro. Transit Authority*.<sup>57</sup>

So, first in *Wirtz*, the Court said that Fair Labor Standards Act can be applied to states.<sup>58</sup> Then in *National League*, it said no, it cannot be applied to the states.<sup>59</sup> However once again, in *Garcia*, the Court said it can be applied to the states.<sup>60</sup> So now what happens in *Alden v. Maine*? The Supreme Court says it cannot be applied to the states.<sup>61</sup> So they have flip-flopped on this issue three times.

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<sup>51</sup> 29 U.S.C.A. § 216.

<sup>52</sup> *Wirtz*, 329 U.S. 183.

<sup>53</sup> Fair Labor Standards Act of 1938, 29 U.S.C. § 201 as amended by 29 U.S.C. § 203(s)(5).

<sup>54</sup> 426 U.S. 833 (1976).

<sup>55</sup> *Id.* at 842.

<sup>56</sup> *Id.*

<sup>57</sup> 469 U.S. 528 (1985). In *Garcia*, the Supreme Court held that the Transit Authority was not entitled to Tenth Amendment Immunity from the minimum wage and overtime pay provisions of the Fair Labor Standards Act.

<sup>58</sup> *Wirtz*, 329 U.S. at 197.

<sup>59</sup> *Usery*, 426 U.S. at 842.

<sup>60</sup> *Garcia*, 469 U.S. at 557.

<sup>61</sup> *Alder v. Maine*, 119 S.Ct. 2240 (1999) holding that the Fair Labor Standards Act cannot be applied to the states because the federal system established by our Constitution preserves the sovereign status of the states. *Id.*

*Alden v. Maine* is not a Tenth Amendment decision, it is an Eleventh Amendment decision.<sup>62</sup> In *Alden*, state probation officers in Maine wanted overtime pay.<sup>63</sup> They worked a lot, so they brought an action in federal court for their overtime relying on the Fair Labor Standards Act.<sup>64</sup> While the case was pending, the *Seminole Indian* case was decided, holding that Congress cannot overturn Eleventh Amendment immunity unless it is relying on the Fourteenth Amendment, and can not do it pursuant to the Commerce Clause.<sup>65</sup> As a result, the First Circuit threw out the case saying that the Fair Labor Standards Act was not passed pursuant to the Fourteenth Amendment.<sup>66</sup> In response, the probation officers bring their action in state court.<sup>67</sup>

The Eleventh Amendment says two things, both of which the Supreme Court has totally disregarded since the beginning. It says the judicial power of the United States shall not extend to a suit between a state and a citizen of another state.<sup>68</sup> If you want to be textualists, that is the text. "The judicial power of the United States shall not extend to a case between a state and a citizen of another state."<sup>69</sup> *Alden* brings a suit against Maine, his own state, in the state court.<sup>70</sup> Therefore, on two grounds the Eleventh Amendment should not be a problem. In numerous cases the Supreme Court said again and again that the Eleventh Amendment only prohibits suits against states in federal court, and does not in any way affect a suit against a state in a state court.<sup>71</sup> This is a Supreme Court that looks at the text, after all, we should not read our own view into the Eleventh Amendment. We have to read the

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<sup>62</sup> *Id.* at 2247.

<sup>63</sup> *Id.* at 2246.

<sup>64</sup> *Id.* Fair Labor Standard Act, 29 U.S.C. § 201 (1938), which provides for the standards of labor in the United States.

<sup>65</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996).

<sup>66</sup> *Id.* at 75.

<sup>67</sup> *Alden v. Maine*, 715 A.2d 172 (1998).

<sup>68</sup> U.S. CONST. amend XI, which states in pertinent part: "[t]he judicial power of the United States shall not be extended to a case between a state and a citizen of another state." *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See generally *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991).

text and here the text of the Eleventh Amendment tells us that on two grounds it should not be a problem.

The Amendment is read that way because back in 1789 one could not sue a state in federal court on general federal question grounds, the only basis for suing a state was diversity jurisdiction. Diversity jurisdiction was the only way you could get the case into federal court, because the general federal question jurisdiction statute was not passed until 1875.<sup>72</sup> All cases, except cases where there was diversity, had to be brought in state court. Then, of course, if a state was sued in state court, it could apply whatever sovereign immunity doctrine it might have. So a hundred years ago in *Hans v. Louisiana*,<sup>73</sup> the Supreme Court says, "Oh, well, it doesn't say between a state and its own citizen, but that is what they meant, I know we have to violate the text of the Constitution, but that is really what they meant."<sup>74</sup>

In the 1970's and 1980's there was an effort to overturn this ruling by, I have to call them the liberals, Blackman, Stevens, Marshall and Brennan, who asserted that the restrictive *Hans* decision was against the Constitution. It only deals with diversity cases, it does not deal with federal question cases, so one should be able to sue a state in federal court if you are relying on general federal question jurisdiction. Thus, you should be able to sue your own state in federal court on the basis of some federal statute. There are a series of cases in which all the Justices were getting closer and closer to overruling *Hans*, and going back to the text of the Eleventh Amendment. However, that never happened. Forget throwing the Eleventh Amendment out the window, the Eleventh Amendment had become enormously strong. That whole effort to read the Eleventh Amendment in accordance with its text did not happen.

Indeed, *Alden* itself is an expansion of the Eleventh Amendment way beyond its actual text. The Supreme Court in *Alden* said that

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<sup>72</sup> See, 28 U.S.C. § 1331, which provides in pertinent part: "[T]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, treaties of the United States. *Id.*

<sup>73</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890). The *Hans* case held that a State cannot be sued by a citizen of another state or a foreign state. *Id.*

<sup>74</sup> *Id.* at 11, "[The Eleventh Amendment] did not in its terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits." *Id.*

whatever immunity a state would have in federal court, it must also have in its own state courts.<sup>75</sup> Therefore, if a state establishes a sovereign immunity doctrine, it can apply that doctrine in any federal claim brought in the state courts.<sup>76</sup> That is an extraordinary expansion of the Eleventh Amendment, and to do so the Supreme Court had to overrule or explain away a whole series of earlier cases.<sup>77</sup>

Justice Kennedy accomplished this feat by noting that if you want to read the textbooks, read the text.<sup>78</sup> How did he get there? He used history, practice, precedent and structure.<sup>79</sup> When we started, states historically had sovereign immunity.<sup>80</sup> The practice at the time was that states could not be sued in their own courts.<sup>81</sup> Whatever precedents we have, I know we have to explain away about half a dozen cases, but those all can be explained away. However, most importantly, the structure of the Constitution prohibits this.<sup>82</sup> There is a wonderful phrase in which he talks about the states, and asserts that the states are not provinces as in France or a subsidiary of a corporation.<sup>83</sup> Accordingly, the Court held that they can not make states subject to suit in their own courts.<sup>84</sup>

I will now review the manner in which he did this. I mean the history, practice, precedent and structure. The history was a little more complicated, and Justice Souter has a much longer dissent.<sup>85</sup>

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<sup>75</sup> *Alden v. Maine*, 119 S.Ct. 2240, 2245 (1999). The Court found that “Congress cannot abrogate States’ sovereign immunity in federal court; were the rule different the National Government would wield greater power in state courts than in federal courts. *Id.*”

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2258. *see also* *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

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

<sup>79</sup> *Id.* at 2246.

<sup>80</sup> *See generally* *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)(noting that “[t]he states entered the federal system with their sovereignty intact.”

<sup>81</sup> *Id.*

<sup>82</sup> *Alden*, 119 S.Ct. at 2246.

<sup>83</sup> *Id.* at 2250.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2269 (J. Souter, dissenting).

The discussion goes back to the Federalist Papers, back to the ratification debates.<sup>86</sup> As a matter of fact the colonies were not immune, and Justice Souter goes into this in great detail.<sup>87</sup> So when did this long established doctrine of state sovereign immunity arrive? States were independent states for a very short period of time and it was not all that clear.

Besides, the whole point of the Constitution and the social contract theory is that we the people are sovereign, not the states. We give to government very limited powers, and only those powers that are necessary to function. We give to the states certain limited powers, and we give to the federal government certain limited power. So where does the state get its sovereignty? The people. If we give Congress certain powers, why is not the congressional exercise of those powers superior to whatever it was we gave the states? Thus, there is a little theoretical problem about where the sovereignty comes from.

The big fight in the historical debate was all about *Chisholm v. Georgia*.<sup>88</sup> In *Chisholm*, as part of the post revolutionary war, there was a big fight over land grants.<sup>89</sup> The states had seized the land of the royalists who left the country, and then proceeded to sell the land. The fight was outlined in the case *Hunter v. Martin*.<sup>90</sup> Pursuant to the Jay Treaty and the Paris Treaty, the federal government agreed to give the land back to the original landowners.<sup>91</sup> Naturally, many fights ensued over the title to this land. *Chisholm*, a resident of South Carolina, sued the State of Georgia in a federal court in Georgia.<sup>92</sup> The case went to the Supreme Court, and they held it was okay to sue the state in federal court.<sup>93</sup> Of the four justices who voted in the majority, two of them were at the Philadelphia Convention, and they should know whether the Constitution permitted a suit against the state or not.

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<sup>86</sup> *Id.* at 2292.

<sup>87</sup> *Id.* at 2271-73.

<sup>88</sup> 2 Dall. 419 (1793).

<sup>89</sup> *Id.*

<sup>90</sup> 1 Wheat. 304 (1816).

<sup>91</sup> The Jay Treaty, 1794, U.S.-Gr.Brit., 8 Stat. 116; The Treaty of Paris, 1783, U.S.-Gr.Brit., 8 Stat. 80.

<sup>92</sup> 2 Dall. at 426.

<sup>93</sup> *Id.*

Thus, the historical evidence concerning sovereign immunity was not all that clear.

The very fact that states could be sued in federal court was a radical departure from the prevailing ethos at the time. The Eleventh Amendment was passed in response to *Chisholm*, and was a very quick answer to that decision. Consequently, the history and practice is not all that clear.

There is a lot of confusion about how well established sovereign immunity was even in the state's own courts. As for precedents, that is not so easy. The Supreme Court had a case that was directly on point, *Hilton v. South Carolina Public Railway Commission*.<sup>94</sup> In *Hilton*, a suit was brought in federal court in South Carolina under the Federal Employees Liability Act.<sup>95</sup> The issue was whether an employee of the state railroad could be subject to this federal statute?<sup>96</sup> The Supreme Court said yes, the employee could.<sup>97</sup>

Justice Kennedy said they did not raise the argument.<sup>98</sup> They did not know they had this wonderful argument about the Eleventh Amendment and that is why the case ended up the other way.<sup>99</sup> There were a couple of other problem cases. In *Hall v. State of Nevada*,<sup>100</sup> the State of Nevada was sued in California State Court.<sup>101</sup> The question was whether Eleventh Amendment immunity applied where the state of Nevada was sued in a California State Court.<sup>102</sup> The answer was no, the state of Nevada did not have immunity.<sup>103</sup> Well, that is another precedent you have to forget about. The whole idea, and a major part of the *Alden*

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<sup>94</sup> 502 U.S. 197 (1991).

<sup>95</sup> 45 U.S.C. § 51, this section provides in pertinent part that "[E]very common carrier by railroad while engaging in commerce between any of the several States or Territories ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee to his or her personal representatives." *Id.*

<sup>96</sup> *Hilton*, 502 U.S. at 199.

<sup>97</sup> *Id.* at 204-05.

<sup>98</sup> *Id.* at 200.

<sup>99</sup> *Id.* at 205.

<sup>100</sup> 440 U.S. 410 (1979).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 411.

<sup>103</sup> *Id.* at 414.

decision, is trying to explain away a whole bunch of precedents that would seem to say that states do not have all that sovereignty.

Another problem for the Court, lurking in the *Alden* case, is an argument that was made below, that you can not make a state court hear a federal claim. This is a Tenth Amendment argument because it comes out of the *Printz* case.<sup>104</sup> If you cannot make a state sheriff do a background check to enforce the Brady Bill, how can you make a state judge hear a federal claim? That is a Tenth Amendment problem. If Congress wants to carry out a federal policy, then have federal courts do it. Why should a state court hear a Section 1983 case or a Title VII case, a RICO case, or any other federal case? We have been doing this for a couple hundred of years. Indeed at the very beginning the state courts were the only courts that could hear federal claims since there was no federal question jurisdiction.

One of the arguments that was made here was to forget suing in state court.<sup>105</sup> State courts should not be the vehicle for hearing federal claims. If you have a federal claim go to federal court, do not burden the state courts. Do not clog our courts with your federal claims.<sup>106</sup> Moreover, there was an earlier precedent, *Howlett v. Rose*,<sup>107</sup> which relied upon the Supremacy Clause, and held that Congress can require state courts to hear federal claims.<sup>108</sup> Again, this is not a claim against just the state, but any federal claim.

In *Alden*, the majority said that they were not going to overrule that precedent.<sup>109</sup> As far as we are concerned, state courts are obligated to hear federal claims against everyone else (i.e. counties, cities, local governments, private people), but not against the state, if the state has a sovereign immunity doctrine that would apply.<sup>110</sup> Thus, whatever sovereign immunity doctrine it has with respect to its own causes of action it can apply to any federal cause

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<sup>104</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>105</sup> *Id.* at 924.

<sup>106</sup> *Id.*

<sup>107</sup> 496 U.S. 356 (1990).

<sup>108</sup> *Id.* at 367-68.

<sup>109</sup> *Alden*, 119 U.S. at 2245.

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



of action. Why? Because of the structure of the Constitution, not the text of the Constitution.<sup>111</sup>

There is nothing in the Tenth Amendment, Eleventh Amendment or any other part of the Constitution that requires the result. It is the structure of the Constitution. The whole point of our system is that power is divided. We have state governments and local governments. We have the separation of powers, and the more power that is divided and diffused, the better. Accordingly, if the states have to be sued in their own state courts on a federal claim, that will somehow upset the structure of the Constitution.<sup>112</sup>

I am on the Federal Legislation Committee of the City Bar Association, and we just issued a report,<sup>113</sup> that is soon to be published in the City Bar Association record, in which we say the reason why the states had the separate power back in 1789 was because they had just established the federal government and gave the federal government the power to have a standing army.<sup>114</sup> The big fear back in 1789 was that the federal government, with its standing army, would somehow march on the states and take away their power. However, that problem does not seem to be a big one today. It does not seem to have been a big problem for one hundred eighty years. Therefore, there has to be a better reason for saying we want the states to have this separate identity.

The second part of our report asserts that the states have plenty of political power (i.e. the electoral college, two senators for each state, the fact that the qualifications for voters are set by the states), and they do not need any assistance from the Supreme Court. It is not as if we allow states to be sued in federal court on a federal claim, that this will somehow take away from the political power the states have. It struck us as a little bit unrealistic. There has to be a reason for this. If you are not looking to the text of the Constitution, and there is nothing in the text that supports this

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<sup>111</sup> *Id.*

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

<sup>113</sup> See appendix I, *The New Federalism: A Report of the Committee on Federal Legislation of the Bar of the City of New York*, 54 *The Record* 712 (1999).

<sup>114</sup> U.S. CONST. amend. II, allowing the state to establish a well regulated Militia and the right to bear arms. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed. *Id.*

result, you really have to have a better reason for coming to this result, so our committee said.

Nevertheless, it was a five to four decision and that is just the first one.<sup>115</sup> The bottom line is that the Fair Labor Standards Act cannot be applied to a state employee, but may be applied to private and local employees.<sup>116</sup> However, there are four and a half million people working for the states, it is about two to three percent of the entire work force, and they are not subject to the protection of the Fair Labor Standards Act.

Two days ago, the Supreme Court heard arguments as to whether state employees are subject to the Age Discrimination Law.<sup>117</sup> Therefore, it is likely we may get the same five to four decision with respect to the Age Discrimination Law.<sup>118</sup> We still have the Family Leave Act,<sup>119</sup> the American with Disabilities Act,<sup>120</sup> and half a dozen other federal laws designed to protect employees in the United States. The only employer within the United States that will not be subject to these protective measures is state government. That is a peculiar result, but that apparently is the way in which the court is moving.

#### IV. COLLEGE SAVINGS BANK & FLORIDA PREPAID

The two other cases are not quite as visible as the implications of the *Alden* case.<sup>121</sup> In 1992, Congress passed three laws; the Patent Remedy Act,<sup>122</sup> the Trademark Remedy Act<sup>123</sup> and the Copyright Remedy Act.<sup>124</sup> All three of these laws made the states amenable to suits for trademark infringement, copyright infringement and patent infringement in federal court. These laws were passed pursuant to *Pennsylvania v. Union Gas*.<sup>125</sup> Congress established

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<sup>115</sup> *Alden* 119 U.S. at 2445.

<sup>116</sup> *Id.* at 2246.

<sup>117</sup> 29 U.S.C. § 621 *et. seq.* (1999).

<sup>118</sup> 29 U.S.C. § 633 *et. seq.* (1999).

<sup>119</sup> 29 U.S.C. § 2611 *et. seq.* (1999).

<sup>120</sup> 42 U.S.C. § 12111 *et. seq.* (1999).

<sup>121</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>122</sup> 35 U.S.C. § 281 *et. seq.* (1999).

<sup>123</sup> 15 U.S.C. § 1051 *et. seq.* (1999).

<sup>124</sup> 17 U.S.C. § 501 *et. seq.* (1999).

<sup>125</sup> 491 U.S. 1 (1989).

that there really is a problem about state universities, subject to Eleventh Amendment copying people's writings, stealing their inventions, or engaging in commercial activity generally.<sup>126</sup> Furthermore, there is no reason why the states, when engaging in proprietary commercial activities, should not be subject to the same laws as anyone else.

In *College Savings Bank v. Florida*, suit was brought in a district court in New Jersey because the State of Florida had established some sort of student loan system that copied a student loan program established by a bank in New Jersey.<sup>127</sup> The College Savings Bank, which had a patent on a particular procedure for arranging student loans, sued the Florida Prepaid Secondary Education Expense Board, which was an agency of the State of Florida, for trademark infringement and patent infringement.<sup>128</sup>

Patent cases get appealed through the Court of Appeals for the Federal Circuit. The appeal on the patent claim went to the Federal Circuit. Since all other cases are appealed to the circuit court in which the district court sits, the appeal on the trademark claim went to the Third Circuit. The Third Circuit found that the Trademark Remedy Act was unconstitutional, because it violated the Eleventh Amendment.<sup>129</sup> However, the Federal Circuit found that the Patent Remedy Act was a proper exercise of Congress' power under the Fourteenth Amendment.<sup>130</sup> Subsequently, both cases went to the Supreme Court.<sup>131</sup>

In deciding these cases, the Supreme Court utilized the two-part test for Eleventh Amendment immunity.<sup>132</sup> First, did Congress make its intention clear? Give me a break. The law clearly mandates that the states shall be amenable to suits in federal court for trademark infringement and patent infringement.<sup>133</sup> There was nothing else in the law. The whole purpose of the law was to make

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<sup>126</sup> See *supra* notes 128-130.

<sup>127</sup> *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 948 F. Supp. 400 (D. N.J. 1996).

<sup>128</sup> *Id.* at 402.

<sup>129</sup> *College Savings Bank*, 131 F.3d at 366.

<sup>130</sup> *College Savings Bank*, 148 F.3d at 1355.

<sup>131</sup> *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

<sup>132</sup> See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

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

the states amenable. That one was easy, and no one had any doubt that Congress made its intention clear.

However, one of the reports I saw about *Kimel v. Florida Bd. of Regents*<sup>134</sup> the other day indicates that Justice O'Connor said: "Did Congress mention the Eleventh Amendment when it made the states amenable?"<sup>135</sup> You've got to mention the Eleventh Amendment? The Age Discrimination Act has a very tortured history because Congress simply adopted the provisions of the Fair Labor Standards Act and did not come right out and scream and yell and say we mean to make the states amenable to suit, and we mean to overrule their Eleventh Amendment immunity.<sup>136</sup> That indeed may be how the age discrimination case comes out. Nevertheless, there was no doubt about it in the patent and trademark case.

Now you have a *Boerne* problem, which is that you cannot expand on the definition of any right and there must be a proportional remedy.<sup>137</sup> Remember the structure of the Fourteenth Amendment. Section 1 provides that every citizen is a citizen of the state in which he or she resides, as well as a citizen of the United States.<sup>138</sup> In addition, no state shall deprive any person of life, liberty or property without due process, nor violate the privileges and immunities of any citizen, nor deny any person equal protection of the law.<sup>139</sup> Section 5, specifies that Congress shall enforce this provision by appropriate legislation.<sup>140</sup>

Section 5 had been given the broadest interpretation by the Supreme Court in a whole series of cases during the 1960's and

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<sup>134</sup> *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000)

<sup>135</sup> *Id.* at 640.

<sup>136</sup> *Id.*

<sup>137</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court cut back on Congress' Section 5 powers by making those powers remedial and preventive. That is, Congress cannot create a new Constitutionally protected right, but may remedy an existing Constitutional wrong or prevent one from occurring. The Court also opined that when Congress does enact a law which is either remedial or preventive it must follow a rule of proportionality or congruence; meaning that the law must be somehow proportionately or congruently related to the Constitutional violation Congress is attempting to remedy or prevent from occurring. *Id.*

<sup>138</sup> U.S. CONST. amend. XIV.

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

<sup>140</sup> *Id.*

1970's. Section 5 is equivalent to the necessary and proper clause.<sup>141</sup> The Supreme Court, in *Katzenbach v. Morgan*,<sup>142</sup> gave section 5 a very broad reading.<sup>143</sup> We all know about the Necessary and Proper Clause and *M'Culloch v. Maryland*,<sup>144</sup> in which the Supreme Court permitted Congress to do whatever is appropriate for them to do in exercising their powers.<sup>145</sup> Thus, the Supreme Court give Congress the broadest possibly powers in Section 5.

The Fourteenth Amendment is anomalous because the only power that is talked about is the power of the federal government vis-a-vis the states. Therefore, the real question is, are you going to read Section 5 that broadly when the effect of the law is to restrict the power of the states? It's one thing to say that the Necessary and Proper Clause should be read broadly, however, if the states have this residuary sovereignty, then how broad are you going to read Section 5 power? This was the issue that the Supreme Court had to decide in the *Florida Prepaid* case.<sup>146</sup>

The trademark case was easy.<sup>147</sup> The decision, written by Justice Scalia, addressed the question "how was Congress enforcing the Fourteenth Amendment when it passed the Trademark Remedy Act?"<sup>148</sup> The Fourteenth Amendment provides that "No state shall deprive any person of life, liberty or property without due process of the law."<sup>149</sup> Is trademark property? Are you depriving anybody of property if you engage in unfair competition? Well, the Supreme Court said that there is no property right.<sup>150</sup> We do not think you can justify it on the grounds of the Fourteenth Amendment.<sup>151</sup>

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<sup>141</sup> U.S. CONST. art. 1, § 8, cl. 18. This clause expands Congress' powers under Art. 1 § 8. While Congress has been granted expressed powers in the Constitution this clause allows for Congress to enact laws which are "necessary and proper" to the carrying out of the expressed powers. *Id.*

<sup>142</sup> 384 U.S. 641 (1966).

<sup>143</sup> *Id.* at 648-49.

<sup>144</sup> 17 U.S. 316 (1819).

<sup>145</sup> *Id.* at 330.

<sup>146</sup> *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct at 2204.

<sup>147</sup> *College Savings Bank*, 119 S. Ct. 2219.

<sup>148</sup> *Id.* at 2222.

<sup>149</sup> U.S. CONST. amend. XIV.

<sup>150</sup> *College Savings Bank*, 119 S. Ct. at 2225.

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

There had been an earlier doctrine in the 1960's, called the *Parden* Doctrine, under which the Supreme Court unanimously said that Congress may pass a law saying that if you engage in this activity you can be sued in federal court.<sup>152</sup> The *Parden* case was a railroad case, and the law provided that if you start a railroad and take any of the proscribed actions, then you can be sued in federal court.<sup>153</sup> In *Parden*, a state had started a railroad, and they were sued in federal court.<sup>154</sup> The Supreme Court, nine to nothing, said that taking such actions as proscribed by the law is implied waiver of the state's Eleventh Amendment immunity.<sup>155</sup> Therefore, if Congress tells you that to engage in this activity shall waive your immunity, and you engage in this activity, well then you waive your immunity.

However, the Supreme Court in *Florida Prepaid* said "so what," and they overruled *Parden*,<sup>156</sup> finding no implied waiver.<sup>157</sup> The whole *Parden* Doctrine mandating that if you engage in proscribed activity you can be sued in federal court and you waive your Eleventh Amendment immunity, goes right out the window. Accordingly, *College Savings Bank* gets dismissed since that was the only basis for holding the state in the trademark case.<sup>158</sup>

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<sup>152</sup> *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964), *reh'g denied* (June 22, 1964) *overruled by* *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987).

<sup>153</sup> Petitioners in *Parden* sued under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (FELA). FELA made it clear that any state operating a common carrier railway while engaging in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . ." *Id.* at § 51. Congress set the appropriate jurisdiction for such a cause of action in the district courts. *Id.* at § 56.

<sup>154</sup> *Parden*, 377 U.S. at 1208-09.

<sup>155</sup> The *Parden* decision was a 5-4 decision with Justices White, Douglas, Harlan and Stewart dissenting, however, all nine Justices agreed it is consistent with Congress' power to base a State's participation in the interstate transportation business "on a waiver of the State's sovereign immunity from suits arising out of such business." *Id.* at 198 (J. White, dissenting).

<sup>156</sup> *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199, 2204-05 (1999).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2211.

Incidentally, the vote was five to four.<sup>159</sup> You know who the five are, and you know who the four are. So the key is can our side get Kennedy or O'Connor? That is the question in every case, because you know you are not going to get Scalia, Thomas or Rehnquist. Therefore, you have to get Kennedy or O'Connor if you want to win one of these cases. Every time a federalism argument is made you must look at Kennedy and O'Connor. Ask yourself what did they say in previous cases; what questions did they ask; are they leaning in our direction; is there something in their earlier decisions that we can rely on to get them on our side?

The more interesting case is the patent case, because a patent is property. That is the *Florida Prepaid* case while *College Savings Bank* is the trademark case.<sup>160</sup> In the patent case, they all agreed that it was property, and a patent is property.<sup>161</sup> The state's argument was that we have not deprived any person of property without due process of law.<sup>162</sup> The Fourteenth Amendment does not say, "Nor shall any state deprive any person of life, liberty or property", it says, "Nor shall any state deprive any person of life, liberty or property without due process."<sup>163</sup>

The state said we have a condemnation action, therefore you can come into state court.<sup>164</sup> If your patent is infringed, go to the Court of Claims in New York and bring an eminent domain action. Unfortunately, there are a few problems with that. You can't get an injunction, which is very important in a patent case. More importantly, there is no longer uniformity because you are going to have fifty states deciding what a patent is. The whole point of establishing the Court of Appeals for the Federal Circuit is to have some sort of uniformity in patent cases.<sup>165</sup> Uniformity goes out the window.

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<sup>159</sup> Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas voted in the majority while Justices Stevens, Souter, Ginsburg and Breyer dissented.

<sup>160</sup> *Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. at 2204.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 2203.

<sup>163</sup> U.S. CONST. amend. XIV.

<sup>164</sup> *Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. at 2213.

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

The most important part of the whole decision was the restriction on Congress' power under Section 5. Justice Rehnquist said, and here is the magic phrase, in enacting the Patent Remedy Act Congress identified "no pattern" of patent infringement.<sup>166</sup> Unlike the established record of pervasive racial discrimination confronting Congress in the voting rights issue, Congress came up with little evidence of infringing conduct on the part of the state.<sup>167</sup> Therefore, when enforcing Section 5 it is not enough to say there is a problem. There must be a pattern, a big problem, before Congress can exercise its power under Section 5.

You can never say that about the Necessary and Proper Clause. The Supreme Court cannot tell Congress that it cannot pass a law pursuant to the Necessary and Proper Clause unless there is a big problem. It cannot be a little problem, it has to be a big problem; it has to be a pattern. Nevertheless, in passing laws that take away the state's Eleventh Amendment immunity, you must have a pattern. That one is a rather serious block to the way in which Congress exercises power under Section 5.

## CONCLUSION

So this year, there are four more federal laws under challenge this year on federalism grounds. However, I am not going to predict their outcome, as I do not want to eat my words next year. So, thank you very much.

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<sup>166</sup> *Id.* at 2207.

<sup>167</sup> *Id.* at 2205.