Suing States for Money: Constitutional Remedies After Alden and Florida Prepaid

Michael Wells

University of Georgia School of Law, mwells@uga.edu
I. **ALDEN'S REAFFIRMATION OF REICH v. COLLINS**..........................773
   A. Implying a Cause of Action Directly From the Constitution......775
   B. The Specter of Consent.............................................................778
   C. Alden on Reich ............................................................................780

II. **SECTION 5 SUITS IN THE FEDERAL AND STATE COURTS**.........783
   A. Section 5 Becomes Critical: Seminole Tribe and
      City of Boerne ...........................................................................785
   B. Limiting the Reach of Section 5....................................................789
   C. The Implications of Florida Prepaid .............................................791

III. **CONGRESS, THE STATE COURTS, AND THE FEDERAL SYSTEM** ....792
   A. Congress' Power to Allocate Jurisdiction Between
      Federal and State Courts............................................................793
   B. Florida Prepaid and the Madisonian Compromise .......................795

IV. **CONCLUSION** ................................................................................800

On June 23, 1999, the Supreme Court handed down three noteworthy
decisions bearing on the law of constitutional remedies. *Alden v. Maine*¹
struck down an attempt by Congress, acting under its Article I powers, to
subject states to suits in state court on federal statutory grounds. *Florida
Prepaid Postsecondary Education Expense Board v. College Savings Bank*²
curbed Congress' power under Section 5 of the Fourteenth Amendment to
authorize suits against state governments on constitutional grounds,
reasoning that a case cannot be made for the federal cause of action unless
state law remedies are inadequate. A companion case, *College Savings Bank
v. Florida Prepaid Postsecondary Education Expense Board*,³ repudiated
the notion that a state may "constructively" waive its sovereign immunity by
engaging in conduct that is regulated by federal law.

---

¹ 119 S. Ct. 2240 (1999).
Viewed as decisions about federal-state relations, these cases demonstrate once again the determination of the contemporary Court’s conservative majority to find ways to shield states from Congress’ regulatory agenda. In terms of the allocation of decision making between federal and state courts, Alden, Florida Prepaid, and College Savings Bank are the latest in an even longer line of cases, stretching back to Younger v. Harris, in which the post-Warren Supreme Court has, by one means or another, channeled constitutional litigation to the state courts and limited the remedies available to persons injured by state governments’ violations of federal law.

While the cases have much in common, a closer inspection reveals that they are not all cut from the same piece of theoretical cloth. My assigned topic is the impact of Alden on remedies for constitutional violations. But Alden cannot be fully understood in isolation. Much can be learned by examining Florida Prepaid as well, for the Court’s treatment of Section 5 probably poses far greater danger than does Alden for an effective system of constitutional remedies.

This Article makes three points. First, contrary to concerns some have expressed about the implications of Alden, the reasoning of the opinion rests on the implicit premise that, as a matter of due process, state courts must be open for certain constitutional claims. This is not an original contribution to constitutional doctrine. But, a footnote in Seminole Tribe of Florida v.

4. See, e.g., Printz v. United States, 521 U.S. 898 (1997) (finding that Congress lacks power under the Commerce Clause to require state law enforcement officers to administer a federal regulatory scheme); United States v. Lopez, 514 U.S. 549 (1995) (finding that Congress exceeds its power under the commerce clause when it forbids possession of guns near schools); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not compel the states to provide for the disposal of radioactive waste generated within their borders).


8. I have nothing to say about College Savings Bank, except to reiterate my view, which the Court rejected, see 119 S. Ct. at 2228, that constructive waiver is appropriate where states have engaged in proprietary activities. See also Michael Wells & Walter Hellerstein, The Governmental-Proprietary Distinction in Constitutional Law, 66 Va. L. Rev. 1073, 1089-1110 (1980).

Florida cast doubt on the authority of Reich, and Alden provides a needed correction.

My second point addresses the ruling in Florida Prepaid and its interaction with Alden. Though the Court purported to be applying relatively uncontroversial principles developed in earlier cases, it in fact forged novel restrictions on the scope of Congress' Section 5 power. Taken together, Alden's holding that states enjoy sovereign immunity in their own courts against suits based on federal law and Florida Prepaid's limits on Congress' Section 5 power demonstrates that Congress may subject states to suit in the federal or state courts only when the statute satisfies the Court's new and as yet undefined conditions for Section 5 legislation.

Third, the similarities between Alden and Florida Prepaid conceal a difference between the two cases regarding the allocation of power between Congress and the Supreme Court in the federal system. In its reaffirmation of Reich, the Alden majority relies on the traditional doctrine that decisions about the scope of lower federal court jurisdiction are for Congress to make, with the state courts serving as the ultimate protectors of constitutional rights in the event Congress takes away federal jurisdiction. Florida Prepaid diverges from the principle of congressional control. In the course of determining what is "appropriate" legislation within Section 5, the opinion sets forth a potentially far-reaching doctrine that may hobble efforts by Congress to assign litigation over constitutional remedies to the federal courts. In my view, the Court fails to identify valid reasons why congressional power over jurisdiction should be any narrower when acting under Section 5 than in any other context.

I. ALDEN'S REAFFIRMATION OF REICH v. COLLINS

Alden and the Florida Prepaid cases are the latest skirmishes in a long struggle between two irreconcilable constitutional values. On the one hand is the "deeply rooted historical tradition of sovereign immunity"; on the other, the principle that "where there is a right, there must be a remedy." Over a century ago the Supreme Court held in Hans v. Louisiana that the principle of sovereign immunity reflected in the Eleventh Amendment shields the states from suits for monetary relief in federal court even when the plaintiff relies on the Federal Constitution. The ruling in Hans presented a major obstacle to the development of constitutional remedies, obliging the

11. Alden, 119 S. Ct. at 2293 (Souter, J., dissenting).
12. 134 U.S. 1 (1890).
Court and Congress to find ways to vindicate constitutional rights and to deter violations while at the same time respecting state sovereign immunity. As a result, the law of constitutional remedies is understandably complex. Yet it is also, at least in its broad outlines, well-settled and largely uncontroversial. The most important case is *Ex parte Young*,\(^\text{13}\) which authorizes suits for prospective relief against state officers in spite of state sovereign immunity. *Lincoln County v. Luning*\(^\text{14}\) distinguishes suits against the state from suits against local governments, which do not share the state’s immunity. *Monroe v. Pape*\(^\text{15}\) interprets an 1871 statute, now codified as 42 U.S.C. § 1983, as authorizing a cause of action for damages or injunctive relief against officers who violate constitutional rights, though they are immune from paying damages unless the right was “clearly established” at the time of the violation.\(^\text{16}\) Since *Monroe*, the Court has held that local governments may be sued under § 1983\(^\text{17}\) and that they have no immunity,\(^\text{18}\) but that they may be sued only when their “official policy” or custom causes the violation.\(^\text{19}\)

The big gap in the coverage of § 1983 and *Ex parte Young* is any provision for suits against state governments, as distinguished from suits against their officers. Suing an officer is a satisfactory substitute when one seeks to stop a continuing or threatened violation by obtaining an injunction or a declaratory judgment. But a problem arises when the violation is partly or wholly in the past, so that a recovery of money is the only way to fully

13. 209 U.S. 123 (1908). Two important later cases should be noted: *Edelman v. Jordan*, 415 U.S. 651 (1974) (stressing that the relief must be prospective and that retrospective relief is unavailable, even if it is styled as an equitable remedy); and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (holding that even prospective injunctive relief may not be granted on state law grounds).

14. 133 U.S. 529 (1890).


vindicate one’s rights. In that event, the suit against the officer may not work, either because of the official immunity doctrine, because the officer is judgment proof, or because the Court may declare that the case is “really” against the state. In certain circumstances, notably with respect to constitutional challenges to state taxation, the Ex Parte Young and § 1983 remedies are foreclosed by judicial or statutory exceptions to the coverage of those remedies.

A. Implying a Cause of Action Directly From the Constitution

One solution to the sovereign immunity problem is for courts to recognize a cause of action implied directly from the Constitution against state governments. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics Agents, the Court ruled that, despite the absence of a statute broadly authorizing suits against federal officers on constitutional grounds, the victim of an illegal search could sue federal law enforcement officers for violation of the Fourth Amendment. Though Bivens established the crucial principle that a cause of action for damages may be implied directly from the Constitution, the holding is not sufficient by itself to support suits against states for damages. Sovereign immunity was not an obstacle to the cause of action recognized in Bivens, for the state’s immunity does not extend to officers.

A later case, McKesson Corp. v. Division of ABT, took another step in the direction of recognizing a constitutionally-based cause of action against state governments. The plaintiff sued Florida to recover illegally collected taxes and to enjoin enforcement of the tax law, in the wake of an earlier


23. Much of the Court’s opinion was devoted to showing why a common law tort suit was an inadequate substitute for a federal cause of action. See 403 U.S. at 391-95. Concurring in the judgment, Justice Harlan noted that there is precedent for such a cause of action in the long-standing availability of federal equitable relief, see id. at 400-01 (Harlan, J. concurring), that for some victims of constitutional violations “it is damages or nothing,” see id. at 410, and that “the judiciary has a particular responsibility to assure the vindication of constitutional interests,” see id. at 407, rather than leaving their enforcement solely to the legislature.

Supreme Court decision that struck down a scheme like that of Florida's on Commerce Clause grounds. The state court granted the injunction but refused to award a refund, and the Supreme Court reversed, declaring:

If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

But the Court did not address the argument that the state's sovereign immunity may block recovery, because the state courts had "accepted jurisdiction over this suit" and did not rely on sovereign immunity in denying monetary relief. Instead, the Florida Supreme Court cited "equitable considerations" in support of its refusal to award a refund. After McKesson it remained possible to argue that sovereign immunity would overcome the due process obligation recognized in that case.

Reich v. Collins seemed to put the issue to rest once and for all. In Reich, a unanimous Court reaffirmed the proposition, established by "a long line of cases," and reiterated in McKesson, "[D]ue process requires a clear and certain remedy for taxes collected in violation of federal law." The

26. 496 U.S. at 31.
27. Id. at 26.
28. Id. The Florida Supreme Court cited two "equitable considerations" in support of its ruling. One was that the tax was levied "in good faith reliance on a presumptively valid statute," which suggests that a refund obligation may "undermine the State's ability to engage in sound fiscal planning." Id. at 44. The Supreme Court found this concern insufficiently "weighty in these circumstances" to warrant the refusal of a refund, given other measures available to the state to avoid disruption. Id. at 45. Second, the state court had maintained that a refund would amount to a "windfall" to McKesson, because "the cost of the tax had likely been passed on to its customers." Id. at 46. But, the Supreme Court responded that this line of reasoning missed the point: "The tax injured petitioner not only because it left petitioner poorer . . . but also because it placed petitioner at a relative disadvantage in the marketplace vis-à-vis competitors distributing preferred local products." Id. at 48.
30. Id. at 108 (internal quotation marks and citation omitted). Ann Woolhandler maintains that, in the distant past, "[t]he requirement of a remedy . . . for taxes that violate the Federal Constitution . . . is not one that the Court historically forced on the states by way of suits against the states themselves. The baseline required remedies were typically ones that ran against the individual, not the state." Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 YALE L.J. 77, 150 (1997). Be that as it may, she
Court acknowledged that Eleventh Amendment immunity "does generally bar tax refund claims from being brought in [a federal] forum," but sharply distinguished between federal and state court. The state's Fourteenth Amendment obligation to provide a state court remedy exists, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." The taxpayer may not be forced to either pay the tax without complaint or else raise constitutional issues in defense of a criminal prosecution. The constitutional obligation is not, strictly speaking, to provide a refund action. It is to provide an effective remedy. This remedy may take the form of a pre-deprivation hearing on the validity of the tax. Alternatively, the state may penalize pre-deprivation recalcitrance and instead provide a refund action after the exaction. Georgia, however, had "held out what plainly appeared to be a 'clear and certain' postdeprivation remedy . . . and then declared, [only after the disputed taxes had been paid,] that no such remedy exists." This, the state "may not do." Because Reich and McKesson are tax cases and there are no cases like them in most other constitutional contexts, one may read them as stating a narrow principle that applies only to unconstitutional tax collection and not to other constitutional violations that produce injuries giving rise to requests for damages. But this reading ignores both the reasoning in the opinions and the context in which these tax cases arise. The Court's justification for imposing on the state courts a due process obligation to provide a remedy is not unique to tax collection. It is that "exaction of a tax constitutes a deprivation of property." That is why "the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." This reasoning applies equally to any deprivation of the rights to property and liberty protected by the Fourteenth

31. 513 U.S. at 110.
32. Id. at 111.
33. Id. at 108.
34. The Just Compensation Clause of the Fifth Amendment "dictates the remedy for interference with property rights amounting to a taking," i.e., an award of money for the loss of value. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987).
36. McKesson, 496 U.S. at 36.
37. Id.
Amendment, including all of the Bill of Rights that apply to the states through that Amendment.

The relevance of the tax context is that, on account of the states’ exceedingly strong interest in financial stability in this context, [the Court has] long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.38

Not only does the state “ha[ve] the flexibility to provide [a] remedy before the disputed taxes are paid . . . , after they are paid . . . , or both,”39 but federal remedies are also shut off. The tax injunction act explicitly forbids federal court injunctions of state taxes where a state remedy is available,40 and Supreme Court decisions interpreting the statute, or applying the principle of deference it reflects, have foreclosed other types of federal and state court relief.41 The constitutionally-implied remedy issue arises in the tax context and not elsewhere because other remedies, including § 1983 suits, are typically available for other constitutional violations, while a state court refund action, implied directly from the Due Process Clause, may be the only recourse for unconstitutionally collected state taxes.

B. The Specter of Consent

In Seminole Tribe of Florida v. Florida,42 the Supreme Court held that Congress may not abrogate state sovereign immunity in the federal courts when acting under its Article I powers. Though the issue in Seminole Tribe was the scope of congressional authority, one footnote in the opinion raised the possibility that the Court had had second thoughts about the scope of Reich. The troubling footnote is located in a section of the opinion in which the Court describes and responds to a passage in Justice Souter’s dissent, in

38. Id. at 37.
39. Reich, 513 U.S. at 108.
42. 517 U.S. 44 (1996).
which he argued for a broad congressional power to abrogate in order to assure the supremacy of federal law. Writing for the Court, Chief Justice Rehnquist pointed out that there are "other methods of ensuring the States’ compliance with federal law," including suits by the federal government and suits against state officers. He added, "[T]his Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit."

Though the Court did not cite Reich, much less explicitly call that case into question, some commentators have suggested that it may have intended to undermine the "no sovereign immunity against constitutional claims" reading of Reich. The most vigorous exponent of this view is Carlos Manuel Vazquez, who maintains that the Seminole Tribe footnote may mean that the Reich opinion does not tell the whole story of sovereign immunity against implied causes of action. In Reich itself, Georgia did not raise sovereign immunity as a defense, relying instead on the purported availability of a pre-deprivation remedy, a ploy the Court rejected as a bait-and-switch tactic. The Seminole Tribe footnote, as Vazquez views the case, nullifies the notion that states may, as a matter of constitutional right, be sued for damages in the state courts. The footnote implies that they may be sued only with their consent. If Vazquez is right, the Seminole Tribe footnote undermines the use of implied causes of action in the state courts for obtaining monetary relief against state governments.

43. See id. at 157 (Souter, J., dissenting).
44. Id. at 71 n.14.
45. Id.
46. The Court cited Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), where it first held that appeals to the Supreme Court from state judgments in suits involving the state were not barred by the Eleventh Amendment.
49. See Vazquez, supra note 47, at 1717-20. Professor Vazquez does not state the proposition as baldly as I have done. This is the necessary implication of Vazquez’s contention that, under the Seminole footnote and its treatment of Cohens, the Eleventh Amendment forbids Supreme Court review of a state judgment in such a case unless the state has consented to suit. See also Richard H. Fallon, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 62 (Supp. 1999) [hereinafter Hart and Wechsler, Supp.]. For a different perspective on the Seminole Tribe footnote, see Henry Paul Monaghan, The Sovereign Immunity "Exception", 110 HARV. L. REV. 102, 125 n.161 (1996) (rejecting the view that the Reich cause of action depends on the state’s consent).
C. Alden on Reich

Although *Seminole Tribe* cut off access to the federal courts for federal statutory causes of action against state governments, the reasoning of the opinion left open the possibility that such suits could be brought in state court. In support of its ruling in favor of the states' immunity, for example, the Court asserted, "For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment," which, of course, only protects the states from federal court suits.

Alden addressed the issue of whether Congress, acting under its Article I powers, could authorize suits in state court. In holding that the constitutional principle of state sovereign immunity barred suits under the Federal Labor Standards Act ("FLSA"), the Court had to distinguish several earlier cases that seemed to permit state court suits against state governments. One of these was *Reich*. The Court said:

In *Reich v. Collins*, we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be a clear and certain postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a clear and certain postdeprivation remedy. In this context, due process requires the State to provide the remedy it has promised. The obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts.

Whatever one thinks of *Alden*, nothing in its rejection of congressional power to subject states to suit in state court bears directly on the cause of action implied directly from the Constitution in *Reich*. *Alden* ruled that the states enjoy a substantive immunity from suit on federal statutory grounds. *Reich* held that, on account of the federal policy of channeling constitutional challenges to state taxes to the state courts, those courts must provide either a pre-deprivation or a post-deprivation remedy.

David Shapiro is bothered by the *Alden* Court's description of *Reich*. He points out, "[T]he majority states that the case stands only for the

---

50. 517 U.S. at 67.
51. 119 S. Ct. at 2259 (internal quotation marks and citations omitted).
proposition that when state law appears to provide a tax refund remedy (and only a refund remedy), the 'Constitution itself' (i.e., the Due Process Clause) requires the state to provide the remedy it has promised."52 Coupled with the troubling footnote in Seminole Tribe,53 the Alden Court's characterization of Reich raises the question of whether the Court has backed away from the Reich opinion. Thus, Professor Shapiro is concerned that Alden's reference to the bait-and-switch problem may "suggest that the state could plead sovereign immunity in its own courts if no state remedy appeared to be available and the doors of the federal courts were similarly closed."54

This worry seems to me to be misplaced. The Seminole Tribe footnote is a response to an argument that, without the option of authorizing private causes of action in the federal courts, Congress would be unable to enforce federal statutes. The Chief Justice's observation that states can be sued in state court with their consent—and the implication that they cannot be sued there otherwise—foreshadows the holding in Alden as to statutorily-based causes of action. But it does not have any necessary implications for Reich's constitutionally-based cause of action. The Court's assertion in Reich that states must provide a refund remedy for taxes collected by compulsion, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding,"55 may be unnecessary to the decision in that case, but it was backed up by a string of citations.

To the Court's critics, there may seem to be little difference between the cause of action the states were obliged to provide in Reich and the one they were allowed to deny in Alden. As they conceive of federal-state relations, the issue in both cases is whether states are accountable in the state courts under federal law. Rightly or wrongly,56 the current conservative majority takes a different view of the allocation of power in the federal system. Its members distinguish between constitutional liberties held by individuals, which they remain willing to enforce against state governments, and regulation of state governments by Congress, which they find increasingly suspect.57

52. HART AND WECHSLER, Supp., supra note 49, at 135.
53. See supra notes 41-46 and accompanying text.
55. 513 U.S. at 109-10.
56. For reasons discussed in Part III, I think the Court has made an unwise choice in deciding to protect the states against Congress.
57. See cases cited supra note 4. Note, however, that in Florida Prepaid, where both individual rights and congressional power were at issue—the question was the scope of
As for Alden’s description of Reich, the Alden Court did emphasize the impermissibility of “hold[ing] out what plainly appears to be a clear and certain postdeprivation remedy” and then “declar[ing], after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist.”58 But the premise behind striking down the bait-and-switch tactic is not “only” that the taxpayer’s reliance must be respected. It is that the state (a) has a constitutional obligation to provide a remedy for unconstitutional tax collection and (b) has a choice as to whether that remedy comes before or after the taxes are collected; but (c) must provide a remedy at some point in time. Thus, “in the context of tax-refund litigation, . . . a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a clear and certain postdeprivation remedy.”59 Reich’s holding that the state, as a matter of due process, must provide one remedy or the other remains intact.

Neither Seminole Tribe nor Alden speak to the content of the constitutional right recognized in Reich, which remains somewhat uncertain. Two aspects of this problem need to be distinguished. First, some violations of federal law by a state are constitutional violations and others are not. A state does not commit a constitutional violation every time it violates federal law and causes damage as a result.60 Thus, Maine’s failure to pay wages owed to workers under the FLSA may or may not be a “taking” and it may or may not be a deprivation of property without due process of law, depending on how the Court interprets the Fourteenth Amendment.61 The real-world impact of Alden turns on the answer to this question. If the state’s failure to pay is a Fourteenth Amendment violation, then the question of whether Congress may authorize suits to recover the wages depends on whether, in the circumstances, Congress’ authorization is within the scope of its Section 5 power. That topic is addressed in Part II. Under Reich, a remedy ought to be available in state court in any event.

Second, suppose a constitutional wrong is established, as where taxes are collected in violation of a constitutional prohibition. There may be good reasons, such as the novelty of a constitutional requirement or the

58. 119 S. Ct. at 2259 (internal quotation marks and citation omitted).
59. Id. (internal quotation marks omitted).
60. See, e.g., Florida Prepaid, 119 S. Ct. at 2209 (finding that negligent deprivations of property are not constitutional violations).
61. Cf. Hart and Wechsler, Supp., supra note 49, at 135 (suggesting that the failure to pay such wages may be a deprivation of property without due process).
availability of another means of correcting the constitutional violation, for
according the state a defense to the refund action. In this regard, keep in
mind that many constitutional wrongs committed by police officers and
other officials go unremedied every day on account of the official immunity
docline.

II. SECTION 5 SUITS IN THE FEDERAL AND STATE COURTS

Aside from the implied cause of action recognized in Reich, another way
around state sovereign immunity is provided by Section 5 of the Fourteenth
Amendment, which grants Congress the power to enforce the Amendment’s
substantive provisions “by appropriate legislation.” In Fitzpatrick v. Bitzer, the Supreme Court held that Congress may, acting under Section 5,
authorize suits by private individuals against state governments to recover
damages for violations of Fourteenth Amendment rights, even though such
suits would be “constitutionally impermissible in other contexts.” The
case concerned Title VII of the Civil Rights Act of 1964, which authorizes
suits for damages against employers who discriminate on the basis of race,
gender, and other grounds. Acting under its Section 5 power, Congress had
expanded the coverage of Title VII’s prohibitions on race and sex
discrimination by amending the statute’s coverage to include state and local
“governments, governmental agencies, [and] political subdivisions.” In
Fitzpatrick male employees of the state of Connecticut charged that the

62. Richard H. Fallon, Jr., Applying the Suspension Clause to Immigration Cases, 98
COLUM. L. REV. 1068, 1092-94 (1998) (distinguishing between the individual right to a
remedy, which may be denied if there is justification for doing so, and the need for a system
of constitutional remedies that will adequately deter violations, which is essential to
constitutional liberty). Standing in the way of such a rule is Harper v. Virginia Department of
Taxation, 509 U.S. 86 (1993), a tax refund case where the Court rejected “non-retroactivity”
of new constitutional rulings. There may be a difference, however, between the retroactivity
issue addressed in Harper and the question of what is an appropriate remedy. See HART AND
WECHSLER, supra note 16, at 853; Monaghan, supra note 47. Recall, too, that McKesson took
seriously the state court’s reasons for not awarding the refund, though it ultimately rejected
both of them. See McKesson, 496 U.S. at 44. On a different set of facts, similar arguments
may succeed.

63. U.S. CONST. amend. XIV, § 5.

64. 427 U.S. 445 (1976); see also Hutto v. Finney, 437 U.S. 678 (1978) (finding that
the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, enacted under
Congress Section 5 power, is a valid abrogation of state sovereign immunity).

65. 427 U.S. at 456.

66. See id. at 448-49 & n.2.
state's retirement plan discriminated against them. Rejected the state's sovereign immunity defense, the Supreme Court allowed the suit. The Court noted that the Fourteenth Amendment had worked a "shift in the federal-state balance [that] has been carried forward by more recent decisions of th[e] Court." It ruled that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment." In principle at least, Fitzpatrick co-exists comfortably with Hans, since Hans located the immunity in the original Constitution and Fitzpatrick ruled only that later amendments may abrogate that immunity.

This means of recovering damages from the states was severely undercut by the Court's decision three years later in Quern v. Jordan. Section 1983 provides for suit against any "person" who, acting under color of state law, violates constitutional rights. Monell v. Department of Social Services had held that municipal governments are "persons" subject to suit under § 1983. This, combined with the Section 5 ruling in Fitzpatrick, seemed to open the federal courts to suits against states for monetary relief. The Court in Quern ruled otherwise, however, on the ground that:

[section 1983] does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

Seizing on the Court's reference to the Eleventh Amendment, which by its terms only forbids suits in federal courts, the plaintiff in Will v. Michigan Department of State Police sued in state court. He argued that Quern's requirement of a clear statement should not apply in state court because the constitutional provision that justified the requirement does not apply to state court suits. Though the Court did not squarely address this

67. Id. at 447-48.
68. Id. at 448.
69. Id. at 455.
70. Id. at 456 (citation omitted).
74. 440 U.S. at 345.
76. Id.
argument, it held that states are not "persons" within the meaning of § 1983 for purposes of state court suits.

A. Section 5 Becomes Critical: Seminole Tribe and City of Boerne

In 1989, the Supreme Court in *Pennsylvania v. Union Gas Co.* held that Congress may override state sovereign immunity and subject states to suits for damages, whether it acts under its Section 5 power or some other power such as the Commerce Clause. The constitutional issue in *Union Gas* was whether a state government could be sued for damages under a federal environmental protection statute that imposed cleanup costs on polluters and named states as "persons" who may be held liable. Because the statute was enacted under Congress' Commerce Clause power and could not plausibly be defended as an exercise of Section 5 power, the Court could not rely solely on *Fitzpatrick*. Writing for a plurality of four, Justice Brennan resorted to a different theory altogether, stressing that the states had given up some of their immunity by ratifying the original Constitution. Justice Brennan reasoned:

[B]ecause the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.

---

77. Id. at 64-65.
78. Id. at 62-71.
80. Id. at 23.
81. The intent to impose liability on states was sufficiently unclear to enable four justices to dissent from it, see id. at 45-56 (White, J., dissenting), but for present purposes it is appropriate to assume that the holding on this point was correct.
82. Though the plurality makes extensive use of *Fitzpatrick* as an instance of congressional abrogation, see id. at 15-18 (plurality opinion), Justice Scalia, in dissent, points out the difference between the Section 5 power and the Commerce Clause and shows that *Fitzpatrick*’s rationale does not apply to *Union Gas*. See id. at 41-42 (Scalia, J., dissenting).
83. Id. at 19-20 (plurality opinion). The plurality was joined by Justice White, who concurred only in the judgment, "but not [Justice Brennan’s] reasoning." Id. at 45 (White, J., concurring).
Under this theory, Congress may take the immunity away whenever it acts under any of its powers, and it is unnecessary to ask whether a given statute was enacted pursuant to Section 5.

The plurality purported not to have overruled *Hans*, observing that *Hans* did not address the issue of whether Congress may abrogate the immunity. The effect of *Union Gas* was, however, as Justice Scalia noted in his dissent, to “contradict[] the rationale of *Hans*, if not its narrow holding.”

84 Little is left of state sovereign immunity as a constitutional principle if Congress may override it. After *Union Gas*, Congress enacted a number of statutes authorizing suits for damages against state governments, including bankruptcy legislation,85 the Age Discrimination in Employment Act (“ADEA”),86 and the Patent Remedy Act, which was successfully challenged in *Florida Prepaid*.88

In his dissent to *Union Gas*, Justice Scalia predicted that the champions of state liability had won only an “unstable victory.”89 He was proved right seven years later when the Court returned to the problem of state sovereign immunity in *Seminole Tribe of Florida v. Florida*,90 which overruled *Union Gas* but upheld *Fitzpatrick*. In the Indian Gaming Regulatory Act (“IGRA”), Congress, acting under its Article I power to regulate Indian commerce, had obliged the states to negotiate in good faith with Indian tribes on the regulation of Indian gambling establishments and had authorized Indian tribes to sue states who failed to negotiate in good faith.91 Striking down the statute, the Court drew a sharp distinction between Congress’ Section 5 power and its Article I powers, flatly repudiating congressional power to abrogate under Article I.92 The rationale of *Fitzpatrick*, it explained, is “wholly inapplicable to the Interstate Commerce Clause.”93

84. *Id.* at 37 (Scalia, J., dissenting).
86. See 29 U.S.C. §§ 621-34 (1994). A challenge to this legislation was recently decided by the Court. In *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), the Court ruled that the legislation exceeded Congress’ Section 5 power.
89. 491 U.S. at 45 (Scalia, J., dissenting).
92. 517 U.S. at 45.
93. *Id.* at 65.
distinction made by Justice Scalia in his *Union Gas* dissent, the Court maintained, "[T]he Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."94

For two decades, between the *Fitzpatrick* ruling in 1976 and the *Seminole Tribe* decision in 1996, the issue of how far Congress could go under Section 5 lurked in the background. Now it took center stage. It once again became necessary to delineate the scope of Congress' power under Section 5, for the validity of an abrogation of state sovereign immunity once again depended on whether the statute in question was an appropriate exercise of Section 5 power. If that power is read broadly, monetary awards will be available more often.

A year after *Seminole Tribe*, the Court began to address the scope of Congress' Section 5 power in a case that arose outside the Eleventh Amendment context. *City of Boerne v. Flores*95 was a challenge to a federal statute enacted in the wake of the Supreme Court decision in *Employment Division v. Smith*.96 The Court in *Smith* had upheld Oregon's denial of unemployment benefits to persons who used peyote as a religious sacrament, turning away a challenge based on the Free Exercise Clause. It laid down a rule that "neutral generally applicable laws" may ordinarily be applied to religious rituals without offending the Free Exercise Clause.97 Congress, purporting to act under its Section 5 power, then passed the Religious Freedom Restoration Act ("RFRA"), which forbid the government from "substantially burden[ing] the exercise of religion," even by a law of general applicability, unless it can show that the regulation is the least restrictive means of furthering a compelling governmental interest.98

In *Flores*, the Court struck down the statute insofar as it imposes requirements on the states.99 Characterizing the Section 5 power as "remedial," the Court distinguished between steps that "remedy or prevent unconstitutional actions" and those that attempt to "decree the substance of

94. Id. at 65-66.
97. See id. at 878-82.
99. Because Congress did not rely upon Section 5 in regulating the national government, a number of courts have applied it to federal agencies even after *Flores*. See, e.g., Adams v. Commissioner, 170 F.3d 173, 175 & n.1 (3d Cir. 1999).
the Fourteenth Amendment’s restrictions on the States.”

"[C]hanging what the right is," as Congress did in according religious organizations broader protection than they received under *Smith*, goes beyond the Section 5 power to "enforce, by appropriate legislation." Yet *Flores* did not lay down a blanket rule against all federal statutes aimed at preventing state practices that pass constitutional muster. The Voting Rights Act of 1965 forbids the use of literacy tests in certain states and authorizes suits against states to enforce the prohibition, even though the Court had upheld the use of such tests several years earlier. In *Flores*, the Court reaffirmed its decisions upholding the Voting Rights Act, but distinguished that statute from *RFRA*. In the Voting Rights cases, there was "evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests,” which made "[t]he new, unprecedented remedies . . . necessary given the ineffectiveness of the existing voting rights laws.” There must, however, "be a congruence between the means used and the ends to be achieved.” The prohibition contained in *RFRA* is unjustified under Section 5 because the “legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.” Even if such a problem were identified, the statute was too broadly conceived to meet the Section 5 standard of appropriate remedial legislation. As the court wrote, “*RFRA* is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”

---

100. 521 U.S. at 519-20 (citations omitted).
101. Id. at 519.
102. Id. at 517.
103. See *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959) (holding that a North Carolina constitutional requirement for all voters, irrespective of color or race, to pass a literacy test did not violate the Fourteenth Amendment).
104. 521 U.S. at 525.
105. Id.
106. Id. at 526 (citations omitted).
107. Id. at 530.
108. Id.
109. Id. at 532.
B. Limiting the Reach of Section 5

While Alden reaffirms the availability of a state forum for damage claims granted in the United States Constitution, Florida Prepaid110 narrowed the scope of Congress' Section 5 power. The issue was the validity of the Patent Remedy Act,111 which had authorized suits against state governments to obtain damages for patent infringement.112 The Court struck down the statute.113 Characterizing the Flores test as a requirement that Congress “must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct,”114 it noted that “Congress identified no pattern of patent infringement by the States,”115 that may warrant federal intervention. Moreover, even if such a pattern had been shown, this would not necessarily have justified Congress’ action, for “a State’s infringement of a patent . . . does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.”116

Accordingly, the validity of the Patent Remedy Act depended upon a showing that state remedies were inadequate. Yet, “Congress . . . said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report . . . .”117 Quoting the proportionality standard of Flores, the Court concluded, “[T]he provisions of the Patent Remedy Act are ‘so out of proportion to a supposed remedial or preventive object that

110. 119 S. Ct. 2199 (1999). In the companion case, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999), the Court held that the rights protected by the Trademark Remedy Clarification Act, which include the right to be free from false advertising and the right to be secure in one’s business interests, are not “property” covered by the Fourteenth Amendment. Thus, Congress may not protect these rights under its Section 5 power. The Court also ruled that the states do not waive their sovereign immunity by engaging in commercial activities. See College Savings, 119 S. Ct. at 2228.


112. See 119 S. Ct. at 2203.

113. See id. at 2211.

114. Id. at 2207.

115. Id.

116. Id. at 2208 (citations omitted).

117. Id. at 2209.
[they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." 118

Notice, however, that in the guise of applying Flores, the Court actually transforms and enlarges Flores' restrictions on Congress. The problem in Flores was that Congress had not merely authorized a remedy; it had defined the First Amendment right to free exercise of religion more broadly than the Supreme Court had. 119 Flores acknowledged that Congress, acting under Section 5, may prohibit state action that is constitutionally valid, but only if there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 120 Because Congress had made no showing of widespread violations of religious freedom, RFRA failed to meet the proportionality test. 121

The weakness of the Florida Prepaid opinion is not merely that the case curbed Congress' Section 5 power more severely than Flores had done, but that its normative basis is not applicable to the circumstances of Florida Prepaid, leaving the latter ruling unsupported by either precedent or policy. In justifying its nullification of RFRA, the Flores court looked to the legislative history of the Fourteenth Amendment, which demonstrated "the remedial, rather than substantive, nature of the Enforcement Clause." 122 The first draft of the Fourteenth Amendment had, in effect, granted Congress the power to define constitutional rights. But this notion was rejected for giving "Congress too much legislative power at the expense of the existing constitutional structure." 123 Subsequently, the current version, which grants remedial power to Congress and thus "maintain[s] the traditional separation of powers between Congress and the Judiciary," 124 was adopted in its place.

The traditional role of the judiciary in defining constitutional rights, as well as the history of the Fourteenth Amendment, may furnish persuasive reasons for striking down RFRA. Florida Prepaid is an altogether different kind of case, however, for the Patent Remedy Act really was remedial. Prior cases have held, and Florida Prepaid reiterated, that patents are "surely included within the 'property' of which no person may be deprived by a State without due process of law." 125 The statute merely granted a remedy

118. Id. at 2210 (quoting Flores, 521 U.S. at 532).
119. See supra notes 84-96 and accompanying text.
120. 521 U.S. at 520.
121. See id. at 532.
122. Id. at 520.
123. Id. (citations omitted).
124. Id. at 523-24.
125. 119 S. Ct. at 2208.
for deprivations of this property. Congress did not attempt to redefine constitutional rights, though it may have gone too far in allowing suits for negligent infringement.\(^\text{126}\) The possible use of this statute to remedy negligent infringements was not before the Court, as College Savings Bank alleged a deliberate infringement.\(^\text{127}\) The historical analysis and separation of powers concerns that underlie Flores thus have little, if any, weight here.

C. The Implications of Florida Prepaid

The unmistakable holding of *Florida Prepaid* is that Congress may not simply authorize suits against states for constitutional violations without first making findings that will satisfy the Court that there is a significant problem of state compliance with the constitution and an absence of effective state remedies for those violations. But the precise scope of the Court's limits on Congress' Section 5 power will remain unclear until they are tested in future cases. In particular, the Court will face the issues of just how strong a showing of state violations and just how strong a showing of inadequacy of state remedies will be necessary to meet the test of "appropriate" Section 5 legislation. It is doubtful whether such questions can ever be answered without highly subjective and intrusive inquiries of the sort the Court rejected when, in *Monroe v. Pape*,\(^\text{128}\) it held that § 1983 authorizes a cause of action, whether or not state remedies are adequate.\(^\text{129}\)

However these questions are resolved, one consequence of *Florida Prepaid* should be evident: the case makes it less likely that any given effort by Congress to provide litigants access to the federal courts for suits against states will be successful.

Given the limits placed by *Florida Prepaid* on Congress' Section 5 power, and given *Alden's* rule that sovereign immunity protects states against federal claims in their own courts, what implications do these cases, taken together, have for the power of Congress to subject states to suit in their own courts? As I understand the cases, everything depends on whether a given statute is a valid exercise of Congress' Section 5 power. Others may

\(^{126}\) See, e.g., Daniels v. Williams, 474 U.S. 327, 328 (1986) (finding that negligent deprivation of liberty is not a substantive due process violation).

\(^{127}\) See 119 S. Ct. at 2213 & n.4 (Stevens, J., dissenting).


\(^{129}\) See HART AND WECHSLER, supra note 16, at 1120. If the test of adequacy is whether state remedies are administered fairly enough to satisfy standard principles of due process, I suspect that they will generally pass the test.
have a different view. For example, Justice Stevens, writing in dissent for himself and three others in *Florida Prepaid*, observed,

> [E]ven if 28 U.S.C. § 1338 is amended or construed to permit state courts to entertain infringement actions when a State is named as a defendant, given the Court’s opinion in *Alden v. Maine...* it is by no means clear that state courts could be required to hear these cases at all.\(^{130}\)

Unless the proposed statute includes congressional findings that would satisfy the *Florida Prepaid* majority of the need for a remedy under federal law, it seems to me altogether clear that the state courts could *not* be required to hear such cases. The very holding of *Alden* is that Congress may not deprive states of their immunity from suit in the state courts when acting under its Article I powers. Since *Alden* reaffirms *Fitzpatrick*,\(^{131}\) it is equally clear that *Alden* does not stand in the way of an effort by Congress to subject states to suit in the state or federal courts for violators of the Fourteenth Amendment, assuming Congress meets the *Florida Prepaid* requirements, whatever they may be.\(^{132}\)

### III. CONGRESS, THE STATE COURTS, AND THE FEDERAL SYSTEM

*Florida Prepaid* and *Alden* both reflect the Supreme Court’s preference for the state courts as the forum for litigation seeking damages against state governments. In my view, however, the two cases have less in common than meets the eye. Underlying the holdings are two radically different conceptions of the proper allocation of power in the federal system. Both raise the issue of Congress’ role in deciding whether constitutional claims should be heard by the state or federal courts. *Florida Prepaid*, with its gloss on the requirements for “appropriate” Section 5 legislation, puts a new and potentially serious obstacle in the way of congressional efforts to allocate jurisdiction to the federal courts. Though *Alden* does not directly address the scope of congressional power over jurisdiction, its reaffirmation of *Reich*...
implicitly recognizes the paramount role of Congress in setting the scope of federal jurisdiction with the concomitant role of the state courts serving as the forum of last resort for constitutional claims. Thus, Reich's rule that a state court must afford a damages remedy, notwithstanding sovereign immunity, rests on two premises. It is justified in part by the constitutional imperative that a remedy be available at some time in some forum. But an equally essential premise for the state court cause of action recognized in Reich is that Congress may validly bar taxpayer access to the federal courts, as it has by the tax injunction act.

Because I favor a principle of strong "Congressional control over jurisdiction," I believe that this difference between Florida Prepaid and Alden is an important consideration in evaluating their respective merits. Whatever the soundness of the Court's decision in Alden to block suits seeking to enforce federal statutes, the Alden opinion deserves credit for its fidelity to Reich and the constitutionally-based cause of action recognized there. By contrast, the Section 5 ruling in Florida Prepaid is both dubious as a matter of principle and unworkable in practice. In its zeal to defend states' rights, the Court has ignored a basic principle of judicial federalism.

A. Congress' Power to Allocate Jurisdiction Between Federal and State Courts

A perennial issue in the law of the federal courts is the scope of Congress' power to control the jurisdiction of the lower federal courts. Usually, the issue arises in connection with statutory limits on federal jurisdiction over constitutional issues. Though scholars have argued for restrictions on Congress's power, the Supreme Court consistently has held that Congress may allocate jurisdiction between the federal and state courts as it sees fit, and most of the academic critics argue only that either a federal district court or the Supreme Court has jurisdiction over

“some or all of the heads of jurisdiction specified in Article III.” In a sense, the holding in Reich is simply a corollary of the power of Congress to restrict lower federal court jurisdiction. A state taxpayer cannot take his complaint to federal court on account of the Tax Injunction Act and judicial decisions that implement a shared “aversion to federal interference with state tax administration” among Congress and the Court. Because the Due Process Clause requires an effective remedial scheme for constitutional violations, the state courts must be available, either before or after the taxes are collected. Reich vindicates Henry Hart’s thesis that, on account of Congress’ broad power over federal jurisdiction, “[i]n the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”

From the perspective of vigorous enforcement of constitutional rights, it may seem perverse to treat state courts as their “primary guarantors.” For a variety of reasons, federal courts as a whole probably have more sympathy for constitutional claims, as well as more competence in adjudicating them, than do the state courts, and the disparity between federal and state courts surely makes a difference in close cases. At the same time, the structure of the federal system favors Hart’s view. Despite the Article III tenure and salary provisions, federal courts are inevitably vulnerable to encroachments of one kind or another from the other branches, such as a sustained effort over time to change their rulings by changing their composition, or the channeling of adjudication away from Article III courts and into administrative agencies or legislative courts, whose members lack tenure.

139. See supra notes 37-40 and accompanying text.
140. Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1401 (1953). The force of this principle depends on the availability and the fairness of the state forum. In the event a state court does not provide a full and fair hearing for constitutional claims, a federal court should be available. See, e.g., Allen v. McCurry, 449 U.S. 90, 101 (1980); Michael Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings, 66 N.C. L. REV. 49, 54-72, 78-91 (1987). If Tarble’s Case, 80 U.S. (13 Wall.) 397, 409-10 (1872), which seems to preclude state habeas corpus for federal prisoners, is still good law, then the federal courts must be available to federal prisoners. See Meltzer, supra note 136, at 2566-67 (questioning the continuing vitality of Tarble).
and salary protection.\textsuperscript{142} Since each state court system is answerable to a different sovereign, there is far less danger that they will all be transformed in any one direction.\textsuperscript{143} Though most state judges do not have tenure and salary protection comparable to that enjoyed by Article III judges, people can vote with their feet against abuses of power in any given state. In the long run, the most dangerous threats to constitutional liberty may come not from state courts who lack the same enthusiasm as federal courts for innovative constitutional arguments. They may come instead from demands for one or another kind of ideological purity on the federal bench.\textsuperscript{144}

\textbf{B. Florida Prepaid and the Madisonian Compromise}

\textit{Florida Prepaid} presents the mirror image of the typical case concerning congressional control over federal jurisdiction. The problem is not, as with the Tax Injunction Act, whether Congress may restrict federal jurisdiction and oblige litigants to go to the state courts. Rather, Congress attempted to broaden federal jurisdiction to include suits to recover damages from state governments for patent infringement. The Supreme Court's response was equally atypical. Rather than resting on the principle that the allocation of jurisdiction is a matter for Congress to decide, the Court struck down the Patent Remedy Act on the ground that it was not "appropriate" legislation to enforce the Fourteenth Amendment.\textsuperscript{145} In my view, this ruling deserves criticism, for it violates the "Congressional control" principle and cannot be justified by any special considerations relating to Section 5.

One rationale for judicial deference to Congress on jurisdictional matters draws on the text and history of the Constitution. The scope of the federal judiciary was an issue at the 1787 convention. Though the need for a Supreme Court was generally accepted, proponents of strong state

\begin{footnotesize}
\begin{itemize}
  \item [143] Cf. Thomas G. Krattenmaker, \textit{Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional}, 70 GEO. L.J. 297, 304-05 (1981) (noting that assigning judicial business to non-Article III federal officers threatens the separation of powers, but channeling it to the state courts does not do so).
  \item [144] A President who managed to transform the federal courts in his ideological image may, with the aid of Congress, also shift jurisdiction over some constitutional claims to the federal courts. But practical considerations, in particular the fact that many constitutional issues are raised as defenses to state enforcement actions, limit the utility of this maneuver. See Paul M. Bator, \textit{The State Courts and Federal Constitutional Litigation}, 22 WM. & MARY L. REV. 605, 608-21 (1981).
  \item [145] See \textit{Florida Prepaid}, 119 U.S. at 2206-11.
\end{itemize}
\end{footnotesize}
government resisted efforts by nationalists to create a formidable system of lower federal courts. James Madison brokered a compromise, by which the issue is left to Congress.146 Thus, Article III vests “[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”147 In Sheldon v. Sill,148 the Court reasoned that the power over whether to create lower federal courts implied the power to decide their jurisdiction, within the bounds of Article III.

Judicial deference to Congress on jurisdictional matters is not solely a matter of history. Leaving these decisions up to Congress implements a basic principle of federalism first articulated by Madison,149 championed nearly fifty years ago by Herbert Wechsler150 and elaborated across a range of issues by Jesse Choper and Laurence Tribe.151 Madison pointed out that Congress would be sensitive to state concerns since the members of Congress must answer to state electorates. For Choper and Tribe, Congress’ accountability is a good reason to leave decisions about states’ rights to Congress. Courts should spend their political capital on other matters, vindicating values that are less likely to get a respectful hearing from the majoritarian branches of government.

Determining the scope of federal jurisdiction requires that one or another branch of the national government make decisions as to the allocation of power between the federal courts and the state governments. It is unwise to leave these decisions to the federal courts, because federal judges may not take due account of the interests of the states in making them. Congress, on the other hand, is a body with both a national and a local orientation. Because Congress is made up of representatives from all over the country, it will not likely favor any particular parochial interest. At the

148. 49 U.S. (8 How.) 441 (1850).
same time, the makeup of Congress should assure that it takes account of the concerns of the states in choosing between federal and state jurisdiction. If this theory of federalism is right, the implications for Florida Prepaid are plain. In enacting the Patent Remedy Act, Congress decided to put the interests of patent holders in a federal remedy ahead of state interests in handling these matters in the state courts. The states’ constitutional objection to the legislation lacks force, simply because the states’ interests are adequately represented in Congress, where they lost a fair political fight.

In Florida Prepaid, the Court ignored these arguments in favor of congressional control, relying instead on its understanding of the constitutional limits on Congress’ Section 5 power. Section 5 authorizes only “appropriate” remedial legislation, which means that Congress “must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” Because Congress “identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations,” the legislation failed to pass muster.

A problem with the Court’s reasoning, noted earlier, is that its limits on Congress’ Section 5 power lack a strong normative foundation to counter the Madisonian argument for deference to Congress. Having reaffirmed Fitzpatrick, the Court could not invoke sovereign immunity and turned instead to its decision two years earlier in Flores. But it could not rely on the reasoning of Flores, which had stressed the limits on Congress’ power to go beyond remedial measures and impose substantive regulations—for the Patent Remedy Act was primarily remedial. Chief Justice Rehnquist’s solution was to quote the language of Flores on the need for “congruence and proportionality,” while ignoring the very different context in which Flores employed that standard.

Though the Florida Prepaid opinion does not say so, the real basis for the holding may be the current anti-federalist majority’s general policy of

152. 119 S. Ct. at 2207.
153. Id.
154. See supra notes 119-27 and accompanying text.
156. It is true that the Patent Remedy Act would allow someone to recover for negligent infringement, which evidently is not a constitutional violation. See Florida Prepaid, 119 S. Ct. at 2209-10. A fair reading of the opinion, however, is that the Court’s main concern is the absence of a showing by Congress that a federal statute was necessary to remedy deliberate violations. See also supra note 110 and accompanying text.
157. 119 S. Ct. at 2206 (quoting Flores, 521 U.S. at 520).
158. See id. at 2217-18 (Stevens, J., dissenting).
protecting states against Congress. Let us concede, for the sake of pursuing
this theme, that the argument for deference to Congress may not always be
compelling. There may be good reasons to retain some judicial protection of
states against Congress. First, some scholars advance textualist and
originalist arguments in favor of judicial protection of the states.159 Second,
there may be persuasive functional reasons for maintaining a sphere of state
autonomy.160 Third, even if Congress could once be counted on to give
adequate consideration to state interests, things have changed since 1787.
Modern communication and transportation networks have made it harder for
states to retain their identities. In contrast to earlier eras, Congress in the
past thirty years has repeatedly subjected states to increased regulation. One
important feature of the original constitution, designed to assure the
influence of the states in Congress, was that senators were elected by state
legislatures. The Seventeenth Amendment, adopted in 1913, provides for
popular election of senators, thereby diluting senators’ loyalty to the
governments of the states from which they come.161 Seminole Tribe, Alden,
and other state-protective rulings of recent years may be defensible on the
ground that the old structural safeguards no longer work.

Be that as it may, there is a fundamental difference between Florida
Prepaid and earlier anti-federalist cases. Congress’ aim in enacting the
Patent Remedy Act was not to pursue some goal of the national government
at the expense of the states, as in other recent cases where the Court had
been sensitive to the states independence from federal control,162 but to
vindicate our Fourteenth Amendment rights. “Before the Civil War . . . the
Constitution afforded individuals very limited protection against state
action.”163 Even partisans of judicial protection of the states against
Congress recognize that congressional protection of individual rights stands
on stronger ground than other kinds of regulation of the states, simply
because “the Fourteenth Amendment represented a radical shift in the

159. See, e.g., Michael B. Rappaport, Reconciling Textualism and Federalism: The
Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions, 93
NW. U. L. REV. 819 (1999); John C. Yoo, The Judicial Safeguards of Federalism, 70 S. CAL.

160. See Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism:
Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t, 96 MICH. L. REV. 813

161. See Rappaport, supra note 159, at 863-64.

Florida, 517 U.S. 44 (1996); see also cases cited supra note 4.

163. GERALD GUNThER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 420 (13th
ed. 1997).
balance between federal and state power." 164 Notwithstanding the structural argument for judicial deference to Congress in states' rights cases, it may be appropriate for the Court to protect states against congressional overreaching for the sake of some national policy like gun control or disposal of radioactive waste. It is quite another thing for the Court to strike down a statute like the Patent Remedy Act, in which Congress attempted to vindicate individual rights against encroachments by the states. Here the case for deference is compelling.

In Florida Prepaid, Justice Rehnquist stresses the lack of any showing that state remedies were inadequate. 165 This aspect of the opinion is another possible rationale for the outcome. The majority may take the view that Congress cannot justify the imposition of suits against states for damages in the federal courts unless state remedies are inadequate. Put aside the difficulty of administering a standard that requires an evaluation of state remedial systems and assume, for the sake of argument, that it can be done. The basic problem with this rationale for the outcome in Florida Prepaid is that the adequacy of state remedies is beside the point when the issue is Congress' power to allocate jurisdiction.

The origins of the Madisonian Compromise lie in the disparity between federal and state courts. Even before federal courts existed, the framers understood that they may be more sympathetic than state courts to claims based on federal law. Otherwise there would have been nothing to fight about and no need for a compromise. By treating the scope of federal jurisdiction as a matter of legislative judgment, the framers left Congress free to expand or contract the federal judicial power for the purpose of securing more or less vigorous enforcement of federal rights. 166 For example, the Tax Injunction Act was enacted because Congress thought state courts were less likely to uphold constitutional challenges to state taxes. 167 By the same token, Congress may legitimately assign patent suits against state governments to the federal court because it prefers more vigorous enforcement of patent rights, even if state remedies are constitutionally adequate. 168

164. Yoo, supra note 159, at 1405 n.10.
165. See 119 S. Ct. at 2208-09.
166. See Wells, supra note 133, at 473-74.
167. See Bator, supra note 135, at 1037.
168. See Heald & Wells, supra note 85, at 875.
IV. CONCLUSION

Alden v. Maine\textsuperscript{169} has received far more attention in the newspapers than Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,\textsuperscript{170} perhaps because its rule forbidding Congress to authorize suits against states in state court, coupled with Seminole Tribe, firmly and decisively bars the recovery of damages against state governments for violating federal statutes, no matter what the forum. Florida Prepaid merely holds that a particular exercise of Section 5 power exceeds Congress' power to enforce the Fourteenth Amendment, for reasons that are not altogether clear. It may also be relevant that the plaintiff in Florida Prepaid was a bank and the right at stake was a patent, not the sort of litigation one tends to associate with matters of high constitutional principle. Moreover, on the surface the two cases seem to reflect the same value judgments in any event, as each of them limits the power of Congress in favor of the states, in line with Seminole Tribe and the rest of the "antifederalism revival of the 1990s."\textsuperscript{171} Each reflects the current majority's preference that constitutional litigation against state governments take place in the state courts rather than in federal court.

From the standpoint of constitutional remedies, however, Alden is actually a positive development, for Seminole Tribe had called into question the principle, established in Reich, that states must provide effective remedies for constitutional violations when federal remedies are not available. Alden reaffirmed Reich, distinguishing the constitutional remedy at issue in Reich from the statutory cause of action under the FLSA the plaintiff sought to enforce in Alden. On the other hand, Florida Prepaid places new and weakly supported limits on Congress' power to remedy conceded constitutional violations by authorizing suits for damages. The opinion's lack of clarity merely highlights the potential danger. For example, the Court notes the lack of a showing that state remedies were "inadequate."\textsuperscript{172} A court bent on restricting access to federal court could turn this language into an all-purpose shield against Congress' exercise of Section 5 power.\textsuperscript{173}

\textsuperscript{169}. 119 S. Ct. 2240 (1999).
\textsuperscript{170}. 119 S. Ct. 2199 (1999).
\textsuperscript{171}. GUNTER & SULLIVAN, supra note 163, at 224.
\textsuperscript{172}. 119 S. Ct. at 2208.
\textsuperscript{173}. Some of the language in Florida Prepaid suggests that the Court's references to the adequacy of state remedies means that no constitutional violation occurs unless state remedies are inadequate. See id. ("Only where the State provides no remedy, or only
Finally, *Alden* and *Florida Prepaid*, for all their surface similarity, differ with regard to Congress' role in allocating jurisdiction between federal and state courts. *Alden*’s explanation of *Reich* depends on the premise that the scope of federal jurisdiction is up to Congress. It is largely on account of Congress’ decision to remove state tax cases from the federal courts that the state courts must hear them. *Florida Prepaid* overrides Congress’ decision to authorize a federal cause of action to enforce constitutional rights, while ignoring all the good reasons, drawn from the states’ representation in Congress, for leaving allocation issues in Congress’ hands.

...