NOTES

ABROGATING STATE SOVEREIGN IMMUNITY
IN LEGISLATIVE COURTS

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Over the last decade, the Supreme Court has greatly broadened the immunity that states enjoy from citizen suits brought for violations of federal law. With its decisions in Seminole Tribe v. Florida and Alden v. Maine, the Court has assured that states are now substantially immune from suits brought in both federal courts and the states’ own courts. A strong immunity doctrine is necessary, according to the Court, to assure that essentially political decisions remain in the politically accountable branches of government rather than in the hands of individual litigants and judges. Scholars, however, have criticized this jurisprudence as antithetical to the rule of law. This Note seeks to reconcile the Court’s accountability concerns with its critics’ rule-of-law concerns. It proposes that Congress abrogate state immunity from suits for violations of particular federal statutes in legislative courts—which are political bodies in the executive branch. In such tribunals, individuals could vindicate their federal statutory rights, subject to the approval and oversight of politically accountable officials in the executive branch.

INTRODUCTION

With its decisions in Seminole Tribe v. Florida\(^1\) and Alden v. Maine,\(^2\) the Supreme Court has tremendously broadened the immunity that states enjoy from suits brought by private individuals. In Seminole Tribe, the Court held that a state may not be sued in federal court for violations of the federal Indian Gaming Regulatory Act.\(^3\) In Alden, the Court held that a state may not be sued in its own courts for violations of the federal Fair Labor Standards Act.\(^4\) In both instances, Congress had expressly declared its intention to make the states subject to suit by private parties. Taken together, these decisions thus establish the remarkable proposition that states may violate federal statutes yet not be held accountable in any court of law.\(^5\)

State immunity from suit has been a controversial doctrine in the United States since the Founding. Indeed, the doctrine was initially repudiated by the Supreme Court in the early days of the Republic, in

3. 517 U.S. at 47.
4. 527 U.S. at 712.
5. This statement is subject to some important limitations. States that have violated federal statutes may, for instance, be subjected to suits brought on behalf of the aggrieved party by the United States itself. See infra notes 33–36 and accompanying text.
In the immediate aftermath of *Chisholm*, however, state immunity was broadened by the passage of the Eleventh Amendment, and the precise contours of the doctrine have remained in flux ever since. Over the last century, the Court has gradually expanded the reach of sovereign immunity, relying on constitutional arguments that have frequently been subject to harsh criticism. But it is only with the Court's recent decisions in *Seminole Tribe* and *Alden* that state immunity has become effectively absolute, leading scholars to challenge the Court's jurisprudence in this area as contravening the rule of law.

Chief Justice Marshall, in his aspirational dicta in *Marbury v. Madison*, asserted that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." This theme resonates throughout American constitutional jurisprudence: Where there is a right, there must be a remedy for the infringement of that right. With respect to state violations of federal statutes, however, it has become clear that the

6. 2 U.S. (2 Dall.) 419 (1793). For a discussion of *Chisholm*, see infra notes 18-21 and accompanying text.
7. See Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 Marq. L. Rev. 435, 485 (1999) (arguing that *Alden* "destroys the idea of accountability that is the essence of the rule of law"); Ellen D. Katz, *State Judges, State Officers, and Federal Commands after Seminole Tribe and Printz*, 1998 Wis. L. Rev. 1465, 1475 (arguing—before the Court's decision in *Alden*—that restricting Congress's ability to abrogate state sovereign immunity in state court "[f]in principle . . . compounds the rule of law problems created by *Seminole Tribe* by rendering states virtually unaccountable in a judicial forum, and further undermines federal supremacy by restricting Congress's ability to establish enforceable remedies for the rights it creates" (citations omitted)); see also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 53-54 (1994) (Stevens, J., concurring) ("This Court's expansive Eleventh Amendment jurisprudence is not merely misguided as a matter of constitutional law; it is also an engine of injustice . . . [that] inevitably places a lesser value on administering justice to the individual than on giving government a license to act arbitrarily.").
8. 5 U.S. (1 Cranch) 137, 163 (1803).
9. As Justice Souter noted in *Alden*:
   
   [T]here is much irony in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy.
527 U.S. 706, 811 (1999) (Souter, J., dissenting); see also, e.g., *Reich v. Collins*, 513 U.S. 106, 110 (1994) (explaining that due process requires state to provide "clear and certain" remedy for violations of federal law, notwithstanding the sovereign immunity traditionally enjoyed by states in their own courts); *Ward v. Bd. of County Comm'rs*, 253 U.S. 17, 24 (1920) (explaining that due process requires a right of action and a remedy). But as frequently as this motif sounds in our case law, it is not self-evident that the proposition is a sine qua non of just government. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733, 1778 (1991) ("Few principles of the American constitutional tradition resonate more strongly than [that] stated in *Marbury v. Madison* . . . Yet Marbury's apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained.").
Court discerns some principle more compelling than this traditional rule-of-law value.

What is this compelling principle? The Court has offered two broad rationales for its sovereign immunity jurisprudence. First, it has set out an historical justification, explaining that state immunity from private suits brought in a judicial court is a "fundamental postulate" of our constitutional order. According to the Court, at the time the Constitution was drafted and ratified, "it was well established in English law that the Crown could not be sued without consent in its own courts," and that the American people tacitly accepted this inheritance from English political theory. Second, the Court has argued that allowing the states to be sued by individuals in a court of law does not comport with the "dignity" and "respect" owed them as sovereign entities in our dual-sovereignty system of government. Although each of these grounds has elicited vehement criticism from the dissenting Justices, underlying the Court's reasoning is a coherent and compelling policy consideration: Political decisions, such as those respecting the disbursement of funds from the state treasury, must remain in the hands of the politically accountable branches of government and out of the hands of the judiciary.

This Note contends that rule-of-law values may be reconciled with the Court's interest in transparency and political accountability in the state sovereign immunity context. In particular, the Note proposes that Congress may achieve such harmonization by abrogating state sovereign immunity in non-Article III courts for state violations of federal statutory rights.

As a general matter, Congress may not abrogate state immunity from suits brought by private citizens in courts of law. Congress may, however, regulate the states as states. Congress may likewise regulate by establishing adjudicative administrative agencies—commonly referred to as "legis-

10. Alden, 527 U.S. at 729; see also Idaho v. Couer d'Alene Tribe, 521 U.S. 261, 267-68 (1997) (alluding to "tradition" and "well-established principles"); Seminole Tribe v. Florida, 517 U.S. 44, 55-56 (1996) (describing "broader principles" that the Eleventh Amendment reflects). This Note will make no attempt to evaluate the historical justifications for the doctrine laid out by the Court; such critiques have been offered by its dissenting members. See, e.g., Alden, 527 U.S. at 764-98 (Souter, J., dissenting); Seminole Tribe, 517 U.S. at 102-68 (Souter, J., dissenting).
11. Id. at 748-49; see also Couer d'Alene Tribe, 521 U.S. at 268 (recognizing the "dignity and respect afforded a State, which the immunity is designed to protect").
12. See Alden, 527 U.S. at 750 (explaining that when the "States' immunity from private suits is disregarded, the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests'" (quoting In re Ayers, 123 U.S. 443, 505 (1887))).
13. See Alden, 527 U.S. at 750.
Since these legislative tribunals are politically accountable bodies in the executive branch and not courts of law, allowing individuals to sue the states in such fora neither formally violates sovereign immunity doctrine nor functionally undermines political accountability concerns. This Note therefore argues that Congress may constitutionally allow individuals to vindicate a state’s violation of federal law in an administrative court.

Part I of this Note examines the expansive interpretation the Court has lent state sovereign immunity doctrine during the past hundred years, and also discusses the authority of Congress to abrogate a state’s immunity from suit under its Article I and Fourteenth Amendment powers. It will then focus particular attention on Justice Kennedy’s majority opinion in *Alden v. Maine*, where the Court’s accountability concerns are most explicitly articulated. Part II explores the power of Congress both to regulate the states directly and to regulate in its areas of competence through the creation of legislative courts. Part III argues that Congress may constitutionally regulate the states by making them susceptible to suit in these non-Article III courts. Such a regulatory scheme would promote rule-of-law values while demonstrating respect for the dignity of the states by ensuring that lines of political accountability for the actions taken against them remain transparent.

I. STATE SOVEREIGN IMMUNITY DOCTRINE

The evolution of state sovereign immunity doctrine has been well-rehearsed elsewhere. Section A of this Part will thus provide only a thumbnail sketch of the history of the doctrine in America, and Section B

15. A legislative court is an adjudicative body created by Congress and functioning under the aegis of the executive branch. Since it is not constituted pursuant to Article III of the Constitution, a legislative court is political, rather than judicial, in nature. The term “legislative courts” was first used in *American Insurance Co. v. Canter* in Justice Marshall’s discussion of territorial courts. 26 U.S. (1 Pet.) 511, 546 (1828) (“These Courts, then, are not constitutional Courts.... They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.”). The practical difference between a legislative and an Article III court is that only in the latter are judges granted salary protection and lifetime tenure. This Note uses the terms “Article I courts,” “non-Article III courts,” and “legislative courts” interchangeably.


will lay out the parameters of Congress's ability under the Fourteenth Amendment to abrogate state immunity from suit. Section C will focus on *Alden* and the Court's limitations on Congress's Article I abrogation power; it will argue that the compelling policy rationale behind the Court's robust sovereign immunity doctrine is that accountability must be retained in the political branches of government.

A. Interpreting Article III and the Eleventh Amendment

Whether the doctrine of state sovereign immunity comports with the ideals of a republican government has been debated from the earliest years of our nation. In the 1793 case of *Chisholm v. Georgia*, the Court was required to decide whether Georgia could be haled into federal court to defend against an action brought in assumpsit by a citizen of South Carolina. Looking to the text of Article III of the Constitution, which delineates the judicial power of the United States, the Court found only silence on the issue of sovereign immunity. As Justice Wilson noted, "[t]o the Constitution of the United States the term SOVEREIGN, is totally unknown." Absent an express grant of sovereign immunity to the states in Article III, four of the five Justices refused to read such immunity into the constitutional text, finding the doctrine to be contrary to the ideals of a republican government and antithetical to the principle of the rule of law. Only one Justice dissented, relying on a statutory analysis of the Judiciary Act of 1789 rather than on a constitutional analysis of Article III.

It has been said that the Court's decision in *Chisholm* "fell upon the country with a profound shock." The Eleventh Amendment to the Const-

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18. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454 (1793) (plurality opinion) (Wilson, J.). Each of the Justices wrote a separate opinion in the case, with Justice Iredell writing in dissent.

19. See id. at 479 (Jay, C.J.) ("The extension of the judiciary power of the United States to such controversies, appears to me to be wise, . . . because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing . . . ."); cf. Alden v. Maine, 527 U.S. 706, 802-03 (1999) (Souter, J., dissenting) (arguing that the Court's sovereign immunity doctrine is "inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own").

20. See *Chisholm*, 2 U.S. at 456 (Wilson, J.) ("If justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed?").

21. See id. at 431-34 (Iredell, J., dissenting). Determining that Congress had not explicitly spoken to the issue of sovereign immunity in the Act, Justice Iredell turned to English common law to determine whether such an action could be maintained against one of the states, and concluded that it could not. Id. at 437-38. He intimated, however, that Congress might have the power to subject states to suit at the behest of individuals. Id. at 449.

22. Charles Warren, 1 The Supreme Court in United States History 96 (rev. ed. 1932); see also Hans v. Louisiana, 134 U.S. 1, 11 (1890) (suggesting that *Chisholm* "created such a
stitution was proposed at the first meeting of Congress after the Court's decision, and was in a short time duly adopted by the states.\(^23\) The passage of the Amendment was at minimum an instruction to the Court to recognize that the states were entitled to a sphere of immunity from suits brought by private parties.\(^24\) From the text of the Amendment, however, this sphere of immunity looks rather limited. For example, the Eleventh Amendment makes it clear that states are "immune" from suits in law or equity, but no mention is made of suits in admiralty. Also, a state has immunity from suits brought by a citizen of another state, but no mention is made of immunity for suits prosecuted by a citizen of the same state. Textually, therefore, the Eleventh Amendment pretended to do no more than establish a state's immunity within a limited compass.

Nonetheless, the Court ruled in 1890 in *Hans v. Louisiana* that the Eleventh Amendment conferred immunity upon states from actions initiated by its own citizens.\(^25\) Acknowledging that the text of the Amendment was silent on this issue, the Court wrote that a literal interpretation of the Amendment would "strain the Constitution and the law to a con-

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\(^23\) The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

\(^24\) To describe the Eleventh Amendment as *confering* an immunity on the states would be problematic in at least two ways. First, the Court has stated in *Alden* that the Eleventh Amendment did not *grant* anything to the states; rather, it affirmed a principle of immunity inherent in the structure of the Constitution. See *Alden*, 527 U.S. at 713 (noting that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment"). Second, to characterize the Eleventh Amendment as a grant of *sovereign immunity* is arguably to engage in an act of reification, since the Amendment in terms does no more than set limits to the judicial power of the United States. As Professor Pfander has argued:

> [O]nce the Court begins to conceptualize the problem of state suability in terms of a free-standing principle of "sovereign immunity," rather than as a technical problem in the parsing of the language of judicial power, it unleashes a dangerous and unwieldy restriction on the federal courts' power to enforce federal-law restrictions against the states.


\(^25\) 134 U.S. at 14–15.
struction never imagined or dreamed of." The Court argued that it was "almost an absurdity on its face" to suppose that, at the adoption of the Eleventh Amendment, states were supposed to be immune from suits brought by citizens of other states, but not from suits brought by their own citizens. The Court thus refused to constrict the doctrine of state sovereign immunity to the narrow grant contained in the actual language of the Eleventh Amendment.

Having loosed the doctrine of sovereign immunity from its textual moorings, the Court proceeded in subsequent cases to expand its breadth even further. In *Ex parte New York*, the Court held that the Eleventh Amendment bars suits brought against a state in admiralty, even though the text of the Amendment refers only to suits in law or equity. The Court has also held states to be immune from suits brought under federal statute by foreign corporations and Native American tribes. And in *Principality of Monaco v. Mississippi*, the Court held that the Amendment bars suits against a state brought by a foreign country, explaining that "we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States," since "[b]ehind the words of the constitutional provisions are postulates which limit and control."

The post-*Hans* expansion of the Eleventh Amendment has not, however, been boundless. The Court has held, for example, that states are not immune from suits brought by other states, and in *United States v. Texas* the Court held that states are not immune from suits brought by the federal government. This latter constraint on the immunity of the states is particularly noteworthy, because it means that a state violation of a private citizen's federal rights may be vindicated by a suit brought on behalf of the individual by the United States. While in practice this avenue of relief is exceedingly limited, since the resources of the executive branch are inadequate to vindicate the rights of even a portion of those aggrieved, this "exception" demonstrates that the Court does not perceive state immunity to be immutable or an end in itself.

Instead, the object of the Court in establishing a robust state immunity doctrine appears to be an effort to require that essentially political decisions be made within the elected rather than the judicial branches of

26. Id. at 15.
27. Id.
28. 256 U.S. 490, 497-98 (1921).
29. Smith v. Reeves, 178 U.S. 436, 446 (1900).
33. 143 U.S. 621, 641 (1892).
34. See, e.g., Alden v. Maine, 527 U.S. 706, 810 (1999) (Souter, J., dissenting) (noting congressional finding that Secretary of Labor has inadequate resources to vindicate even a fraction of abridgments of individual rights).
government. Indeed, this is precisely the understanding under which the *Alden* Court was operating when it explained that "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."35 Were individuals allowed to bring suit against a state in either federal or state court, the irreducibly political function of managing the state treasury would fall upon the courts. By allowing the United States to bring suit on behalf of an individual against a state, however, political accountability is reconstituted. If the federal government finds an individual's interest compelling, it may shoulder the political accountability attendant upon bringing suit against a state; such a suit is constitutionally acceptable since responsibility shifts from the popularly unaccountable judicial branch to the politically accountable federal executive branch.36

B. Congress's Abrogation Powers Pursuant to the Fourteenth Amendment

Despite the Court's broad view of sovereign immunity, it has allowed Congress to abrogate state immunity, under limited circumstances, pursuant to Congress's enforcement powers under section 5 of the Fourteenth Amendment. The exact circumstances under which the Court has upheld this abrogation power lend support to the thesis that political accountability drives the Court's sovereign immunity jurisprudence, with the Court's recent curtailment of this abrogation power highlighting the pressing need for alternative methods to vindicate state violations of federal rights.

Under section 5 of the Fourteenth Amendment, Congress is given the "power to enforce, by appropriate legislation," the constitutional guarantee that no state will deprive any person of "life, liberty, or property, without due process of law," nor deny any person the "equal protec-

35. Id. at 756.

tion of the laws." The first case to test whether Congress could, through its section 5 powers, abrogate a state’s sovereign immunity for a violation of a federal law passed pursuant to the Fourteenth Amendment was Fitzpatrick v. Bitzer, a Title VII federal court action in which a Connecticut retirement plan was challenged as discriminating against male employees. Connecticut asserted its Eleventh Amendment immunity from suit, relying on Hans and its progeny. But writing for the majority, Justice Rehnquist held that the Eleventh Amendment could not bar an action brought pursuant to a statute passed under the Fourteenth Amendment. As he explained, the Court was obliged to recognize that the Fourteenth Amendment had brought about a shift in the balance of power between the states and the federal government, and that the states were therefore to be held liable under statutes passed pursuant to the Amendment. Section 5, therefore, provides Congress with a robust power to subject states to suit in the Fourteenth Amendment context.

The Court has, however, subsequently circumscribed Congress’s section 5 abrogation powers in two ways. First, it has shown itself unwilling to read Congress’s authority under the section broadly. In the 1997 case of City of Boerne v. Flores, for example, the Court held that Congress has power under section 5 to create remedies for violations of Fourteenth Amendment rights, but that it does not have the power to alter substantive rights. This holding was strengthened in 1999 in Florida Prepaid Post-

37. U.S. Const. amend. XIV. The text of section 1 of the Fourteenth Amendment states, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The full text of section 5 of the Amendment states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5.


39. Justice Rehnquist wrote:

[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.

Id. at 456 (citation omitted).

40. 521 U.S. 507, 519 (1997) ("[Congress cannot] decree the substance of the Fourteenth Amendment’s restrictions on the States. . . . It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation."). In Boerne, the Court found that Congress had overreached in passing the Religious Freedom Restoration Act, which prohibited "Government from ‘substantially burden[ing]’ a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden ‘(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.’" Id. at 515–16 (quoting the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1994)).
secondary Education Expense Board v. College Savings Bank, where the Court held that congressional action under section 5 would be constitutional only if (1) Congress had identified state conduct transgressing the Fourteenth Amendment's substantive provisions before it enacted the remedial legislation, and (2) Congress had narrowly tailored its legislation to remedy or prevent the state misconduct. The Court's cabining of Congress's abrogation powers under section 5 accords with its underlying concern for maintaining transparency and political accountability, since broad abrogation powers can only muddy the public's perception of which governmental body is responsible for the allocation of state moneys.

That political accountability is the Court's central concern may also be inferred from its second manner of constricting the section 5 abrogation powers of Congress: through the adoption of an increasingly rigorous "clear statement" rule. In Quern v. Jordan, the Court held that Congress must use clear and explicit language if it intends to "sweep away the immunity of the States"—a standard that was ratcheted up in Atascadero State Hospital v. Scanlon, where the Court required that Congress "mak[e] its intention unmistakably clear in the language of the statute." One reason to dictate such a stringent standard is to assure that the courts are certain of Congress's intent to abrogate a state's immunity, since the consequence of such abrogation is to upset "the usual constitutional balance between the States and the Federal Government." But another consequence of requiring Congress to be explicit in its intentions is to raise the political cost to Congress of subjecting the states to suit. The Court has made it clear that it will not allow the elected branches to slough off responsibility for their political choices onto the judicial branch. To the extent that the Court feels obliged to acknowledge the powers of Congress to abrogate state immunity in the Fourteenth Amendment context,

41. 527 U.S. 627, 639-46 (1999). Boerne's "congruence and proportionality" test was affirmed this term in Board of Trustees of the University of Alabama v. Garrett, where the Court held that Congress's abrogation of state sovereign immunity pursuant to the Americans with Disabilities Act of 1990 was a remedy not "congruent and proportional to the targeted violation." No. 99-1240, 2001 U.S. LEXIS 1700, at *32 (Feb. 21, 2001); see also Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) (holding Congress's abrogation of state sovereign immunity under the Age Discrimination in Employment Act was "an unwarranted response to a perhaps inconsequential problem," and thus inappropriate legislation under section 5).

42. 440 U.S. 332, 345 (1979).
44. Atascadero, 473 U.S. at 242.
45. As Professor Sunstein has explained: "Clear statement" principles are omnipresent in current law. A subset of the category of interpretive norms, they are designed to ensure an unambiguous statement from Congress before allowing certain results to be reached. One of their targets is governmental outcomes that reflect views that can be traced only to the executive branch, and not to the national legislature as well.

therefore, it will insist that Congress exercise this power in an accountable manner.\textsuperscript{46}

C. Congress's Abrogation Powers Pursuant to Article I

The Court has upheld the ability of Congress to abrogate the Eleventh Amendment immunity of the states under its Article I powers in only one case. Justice Brennan, writing for a plurality in \textit{Pennsylvania v. Union Gas Co.}, held that the Interstate Commerce Clause granted Congress the authority to abrogate state immunity, since the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages."\textsuperscript{47} The Court reasoned that ""the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," and ""[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."\textsuperscript{48}

However, \textit{Union Gas} was explicitly overruled in \textit{Seminole Tribe v. Florida} in 1996.\textsuperscript{49} Faced with an Eleventh Amendment challenge to the Indian Gaming Regulatory Act, which had been passed pursuant to Congress's Indian Commerce Clause authority, the Court ruled that Congress's attempt to abrogate state immunity through its Article I powers was unconstitutional. Embracing a conception of sovereign immunity as a fundamental tenet of constitutional law, the Court explained that the background principle of sovereign immunity cannot be abridged, even in areas where Congress is vested with complete lawmaking authority.\textsuperscript{50} Finding no principled distinction between Congress's Commerce Clause and its Indian Commerce Clause powers, the Court opted to overrule \textit{Union Gas} and establish that under none of its Article I powers was Con-

\textsuperscript{46} For an analysis contending that the Court's Eleventh Amendment jurisprudence is motivated primarily by political accountability concerns, see infra notes 55–71 and accompanying text.


\textsuperscript{48} Id. at 14 (quoting Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191–92 (1964), overruled by Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987)). The "structural protection" reasoning of \textit{Union Gas} has been upheld in the federal-state regulatory context. See infra Part II.A.


\textsuperscript{50} Id. at 72. The Court further explained that ""[b]ehind the words of the constitutional provisions [of section 2 of Article III and of the Eleventh Amendment] are postulates which limit and control."" Id. at 68 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 323 (1934)). Implicitly referring to these ""postulates which limit and control,"" Justice Stevens recently opined that ""[t]he full reach of [Seminole Tribe's] expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the present majority's perception of constitutional penumbras rather than constitutional text."" Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting).
gress authorized to abrogate state sovereign immunity. The decision in *Seminole Tribe* articulated clearly the modern Court's jurisprudential approach to state immunity: Post- *Hans* precedent and background principles of constitutional law are to be accorded substantial weight; the text of Article III and the Eleventh Amendment are to be taken as no more than guideposts to these principles; and the pre-Republic and early Republic historical accounts of the doctrine are to be de-emphasized accordingly.

The substantive rationale for these formal considerations was most forcefully articulated by the Court in *Alden v. Maine*. At issue in *Alden* was Maine's assertion that sovereign immunity protected it from suits brought by state employees alleging violations of the overtime provisions of the Fair Labor Standards Act. The Court decided not only that Congress was unauthorized to abrogate a state's immunity from suit for violation of a federal statute in federal court, but also that Congress lacked the authority to abrogate state immunity from suit in a state's own courts. With the decision in *Alden*, therefore, the Court's sovereign immunity jurisprudence would appear to have reached its substantive denouement. Absent extraordinary circumstances, such as the United States government bringing suit on an individual's behalf, states may violate federal statutes and remain immune from suit in any judicial court, federal or state.

The Court offered two justifications for this holding. First, it reaffirmed the postulate laid out in *Seminole Tribe* that sovereign immunity was a background principle of constitutional law rather than a creature of the Eleventh Amendment. As in *Seminole Tribe*, this defense of the Court's sovereign immunity jurisprudence relied on an historical account of the states' immunity that has been contested by both scholars and—in exhaustive detail—by the dissenting Justices. Second, with great rhetorical flourish the Court emphasized that sovereign immunity preserves the

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51. *Seminole Tribe*, 517 U.S. at 72; see also *Fla. Prepaid*, 527 U.S. at 636 (“Congress may not abrogate state sovereign immunity pursuant to its Article I powers.”).
52. See *Seminole Tribe*, 517 U.S. at 68-71 (“The dissent... disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events.”).
54. Id. at 712.
55. See id. at 728 (describing the Court's "settled doctrinal understanding" that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself"). It is not surprising, of course, that the Court premised its holding on the presumption that the immunity of the states from suit is a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution," id. at 713, since the Eleventh Amendment itself (as a restriction on the judicial power of the United States) has no relevance for actions brought in state court.
56. See, e.g., *Seminole Tribe*, 517 U.S. at 101-68 (Souter, J., dissenting). Justice Scalia has derided the "now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods." *Fla. Prepaid*, 527 U.S. at 688. It is beyond the scope of this Note to assess the
dignity and respect that the states as sovereign entities deserve. For instance, the Court explained that "immunity from private suits [is] central to sovereign dignity," and that "[w]hen Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system ...." This language of "esteem" and "respect" was buttressed with quotations from earlier cases in which the Court made similar gestures toward preserving the dignitary value of its sovereign immunity doctrine.

Although tempting, it would be a mistake to read the Alden Court's appeals to state dignity as empty rhetoric devoid of substance. Earlier opinions certainly did suggest, in ipse dixit fashion, that upholding a state's dignity was the overriding goal of the Court's sovereign immunity doctrine. But in Alden the Court went to great lengths to articulate the substance underlying the rhetoric of dignity—that the elected branches of government must not be subjected to the coercion of the judicial branch. Of particular concern to the Court was the idea that a state would be "subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." The harm of a private citizen "levying on its treasury" is that the essence of political decisionmaking—i.e., how state money is to be distributed—would be displaced onto an unaccountable judiciary. This concern is further evident in the Court's subsequent citation to In re Ayers, an 1887 decision in which that Court noted that "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." The Court in Ayers went on to explain that:

It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States,

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57. *Alden*, 527 U.S. at 715.
58. Id. at 758.
59. See, e.g., Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State, which the immunity is designed to protect"); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (stating that principle of sovereign immunity "accords the States the respect owed them as members of the federation").
60. Justice Souter, in his dissenting opinion in *Alden*, clearly found it difficult to take the argument from dignity seriously. See infra notes 72-74 and accompanying text.
61. See, e.g., *P.R. Aqueduct*, 506 U.S. at 146 ("While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated.").
63. In re Ayers, 123 U.S. 443, 505 (1887), quoted in *Alden*, 527 U.S. at 750.
should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. 64

This juxtaposition of dignity and judicial coercion thus suggests that the "dignitary harm" states suffer through involuntary participation in lawsuits is the displacement by an unaccountable judiciary of state political processes for control of the state treasury.

In fact, the Court in Alden was even more explicit in highlighting its concern that accountability be retained in the political branches of government. For example, Justice Kennedy explained that immunity from litigation protects "the states and the nation from unanticipated intervention in the processes of government," since the authorization of private suits would "place unwarranted strain" on the ability of the states to "govern in accordance with the will of their citizens" and to allocate scarce resources, an "interest [that] lies at the heart of the political process." 65 Distribution of moneys from the public fisc, in other words, requires political judgment for which the courts are constitutionally unsuited. 66 Moreover,

[w]hen the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government. The asserted authority would blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments, displacing "state decisions that 'go to the heart of representative government.'" 67

Justice Kennedy explained that sovereign immunity blurs the lines of political responsibility along two axes: both among the branches of government and between the state and federal governments. As such, the Alden decision fits nicely into place with the Court's other recent federalism decisions. In New York v. United States, for example, the Court struck down a congressional attempt to commandeer the states by forcing them either to regulate according to congressional requirements or else to take possession of radioactive waste. 68 The Court explained that "where the Federal government compels States to regulate, the accountability of

64. Id.

65. Alden, 527 U.S. at 750-51 (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944)).

66. "If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence . . . ." Id. at 752.


both state and federal officials is diminished,"69 since state officials will be subjected to public disapproval when the federal government directs the states to regulate, even though federal officials devised the regulatory program. Similarly, in Printz v. United States the Court explained that the commandeering of state officials, like the commandeering of state legislatures, was unacceptable since the states are "put in the position of taking the blame for [the federal regulation's] burdensomeness and for its defects."70 Alden is thus of a piece with the Court's recent federalism cases and their heightened concern for establishing clear lines of political accountability.71

In dissent, Justice Souter provided a strong historical refutation of the majority's defense of state sovereign immunity, but he did not engage vigorously with the Court's political accountability rationale for promoting a muscular sovereign immunity doctrine. Opting not to acknowledge the substantive values underlying the Court's decision, Justice Souter merely expressed outrage at the majority's use of anthropomorphic language. For instance, he argued that the Court's "assumption] that this 'dignity' is a quality easily translated from the person of the King to the participatory abstraction of a republican State" is "thoroughly anomalous" and "inimical to the republican conception."72 Moreover, he suggested that it is "symptomatic of the weakness of the structural notion proffered by the Court that it seeks to buttress the argument by relying on 'the dignity and respect afforded a State, which the immunity is de-

69. Id. at 168.
71. For scholarly commentary acknowledging the centrality of accountability concerns to the Alden decision, see, for example, Roger C. Hartley, The Alden Trilogy: Praise and Protest, 23 Harv. J.L. & Pub. Pol'y 323, 350 (2000), suggesting that "[o]ne might fairly argue that the most valid understanding of the interpretive process deployed in Alden is that a majority of the Court preferred state autonomy, fiscal predictability, and political accountability, and disapproved of individuals' ability to influence the course of government through litigation." But note that at least some scholars remain unsure about the Court's steadfastness with respect to its accountability arguments. William P. Marshall and Jason S. Cowart, for instance, in discussing the political accountability concerns manifested in Alden, suggest that the Court is reluctant "to take the accountability rationale to its logical conclusion" and that it "may not be fully committed to this theory as an explanation of state immunity doctrine." William P. Marshall & Jason S. Cowart, State Immunity, Political Accountability, and Alden v. Maine, 75 Notre Dame L. Rev. 1069, 1071 (2000); see also William P. Marshall, Understanding Alden, 31 Rutgers L.J. 803, 813-18 (2000) (making similar observations).
72. Alden, 527 U.S. at 802 (Souter, J., dissenting) (quoting majority opinion); see also id. at 803 (stating that "a constitutional structure that stint[s] on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law").
signed to protect.'”73 This focus on the majority’s “Gilded Era language” is, however, overly superficial, for it fails to acknowledge that behind the Court’s language of dignity and respect lie important substantive values.74 Nonetheless, Justice Souter’s dissent is valuable for two reasons. First, he emphasizes that the ability of the federal government to bring suit on behalf of individuals, pursuant to United States v. Texas,75 is in reality impracticable “unless Congress plans a significant expansion of the National Government’s litigating forces to provide a lawyer whenever private litigation is barred by today’s decision and Seminole Tribe.”76 Thus, the Alden majority’s exclusive focus on accountability risks leaving no channels for the vindication of individual rights. Second, Justice Souter’s dissent also calls our attention to an important point not disputed by the majority—that state sovereignty does not impede Congress from regulating the states pursuant to its Commerce Clause powers, and that the states are bound by such regulation, irrespective of their immunity from suit.77

73. Id. at 801 (quoting Idaho v. Couer D’Alene Tribe, 521 U.S. 261, 268 (1997)); see also P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc. 506 U.S. 139, 151 (1993) (Stevens, J., dissenting) (arguing that concern for state dignity is “an embarrassingly insufficient” rationale for the justification of sovereign immunity at the expense of “the fair and efficient administration of justice”); cf. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (Marshall, C.J.) (“We must ascribe the [Eleventh] amendment, then, to some other cause than the dignity of a State.”).

74. Alden, 527 U.S. at 802 (Souter, J., dissenting). In this regard, Justice O’Connor’s admonition in Kimel v. Florida Board of Regents, that the dissent’s calcified position on sovereign immunity doctrine has preempted further substantive debate, may be well taken. 528 U.S. 62, 79-80 (2000) (“Indeed, the present dissenters’ refusal to accept the validity and natural import of decisions like Hans, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution.”); cf. id. at 97 (Stevens, J., dissenting) (“I am unwilling to accept Seminole Tribe as controlling precedent.”); Alden, 527 U.S. at 761 (Souter, J., dissenting) (“On each point the Court has raised it is mistaken.”). That the majority and dissent have such entrenched positions is not surprising. As John V. Orth suggested a decade before the decision in Seminole Tribe, “[t]he search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart’s desire. And . . . the object of the search may prove equally illusory.” Orth, supra note 22, at 28.

75. 143 U.S. 621, 644-45 (1892).

76. Alden, 527 U.S. at 810 (Souter, J., dissenting).

77. Id. at 806 (Souter, J., dissenting) (noting that “the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty”). Justice Kennedy, writing for the majority in Alden, acknowledged that the states are bound by federal law under the Supremacy Clause, but found this fact to be irrelevant to the question of whether a state may thus be sued:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. . . . We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.

Id. at 754-55. For a discussion of congressional ability to regulate the states as states, see infra Part II.A.
Part II of this Note attempts to bridge the accountability concerns laid out by the *Alden* majority and the rule-of-law concerns expressed by the dissent by proposing that states may be held liable for violations of federal law by making them subject to suit in courts where accountability remains located in the political branches.

II. LEGISLATIVE COURTS AND CONGRESSIONAL REGULATION OF THE STATES

As this Part explains, Congress not only possesses the power to regulate the states as states, but also to regulate private parties through the creation of non-Article III tribunals. Within such legislative courts Congress need not assure litigants who are asserting their statutory rights all of the judicial protections required in an Article III setting.

A. Congressional Regulation of the States as States

Under current doctrine, the states possess significant immunity from lawsuits, but their immunity from regulation is much more limited. In its 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court held that the states are not immune from congressional regulation passed pursuant to either the Commerce Clause or to Congress's other Article I powers.78 *Garcia* overruled *National League of Cities v. Usery*, where the propriety of congressional regulation of the states was made to depend on a distinction between regulation of the states in their traditional governmental functions, and regulation of the states in their market-participant functions.79 This distinction was held to be "unworkable" in practice, "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."80 Finding no constitutional principle by which to draw such a line, the Court refused to rely on "*a priori* definitions of state sovereignty," and instead argued that the measure of state sovereignty lies in the very structure of our federalism rather than in "discrete limitations on the objects of federal authority."81

78. 469 U.S. 528, 548 (1985). In *Garcia*, the Court held that the Fair Labor Standards Act was constitutional as applied against the states, and specifically that the federal government could regulate the states in matters relating to the payment of overtime wages to certain employees.


80. *Garcia*, 469 U.S. at 543, 546.

81. Id. at 548, 552. The Court also noted that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." Id. at 554. As such, it was echoing the principles
Interestingly, this "structural limits" justification for the Court's refusal to constrict congressional regulation of the states has been rejected by the Court in the parallel realm of state sovereign immunity.82 The Court's current sovereignty jurisprudence thus manifests a conceptual disjunct between regulatory and judicial immunity from certain federal actions. While regulation of the states as states is permissible because state interests are protected by the federalist structure, the abrogation of the states' immunity from suit is impermissible because those same safeguards are inadequate to protect the states' sovereignty.83

laid out in Professor Wechsler's classic treatise on the structural protections of federalism. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 559 (1954) (arguing that the structure of federalism assures that state interests are adequately protected against congressional action, and that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress"); see also The Federalist No. 33, at 224 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (suggesting that "the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union"); The Federalist No. 46, at 299 (James Madison) (Isaac Kramnick ed., 1987) (suggesting that a "local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States"); Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 713 (1976) (arguing, well before Seminole Tribe, that "[t]he eleventh amendment serves as a reminder that, within the federal judicial process, there is no assurance that [claims for the states as independent sovereigns] will be appropriately regarded. Only in Congress are the states represented in a way that reasonably assures consideration of their institutional interests."). John Nowak also argued, well before Seminole Tribe, that:

[T]he Court should read the eleventh amendment as a direct limitation on its own powers, but should not interpret it as a limitation on congressional power. A congressional grant of jurisdiction allowing a suit by a citizen against a state indicates that Congress has determined that the federal policy is preeminent and that the hardship on the state is not severe. The states may adjust to the congressional enactment or, if the regulation proves onerous, they may exert their influence on Congress to have it changed.


82. As Justice Stevens explains in his dissent in Kimel v. Florida Board of Regents: The majority's view... does not bolster the Framers' plan of structural safeguards for state interests. Rather, it is fundamentally at odds with that plan. Indeed, as Justice Breyer has explained, forbidding private remedies may necessitate the enlargement of the federal bureaucracy and make it more difficult "to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers."


83. See Kimel, 528 U.S. at 78-80 (affirming that extension of Age Discrimination in Employment Act to states is valid exercise of commerce power that does not violate Tenth
ABROGATING STATE SOVEREIGN IMMUNITY

It would appear difficult to reconcile the Court's disparate reasoning patterns in these two lines of jurisprudence. One way, no doubt, is to read the Court as self-consciously balancing an arguably excessive grant of congressional power to regulate the states (as established by Garcia) with a corresponding diminution of congressional power to subject states to suit (as per Seminole Tribe and Alden).84 If this balancing of the regulatory line of jurisprudence against the sovereign immunity line is indeed what is happening, then the Court's state immunity cases must be understood as simply ends-oriented. And if the Court is truly doing no more than manipulating the doctrine of sovereign immunity in a cynical manner, then the proposal set forth herein is surely quixotic. This Note presumes, however, that these two lines of jurisprudence may indeed be reconciled in a more principled way, and it attempts to do so by focusing on the Court's emphasis in both lines of cases on process concerns—specifically, on the necessity of maintaining transparent lines of political responsibility and accountability in the sovereign immunity context.85

B. Congressional Regulation Through the Creation of Non-Article III Courts

Article III of the Constitution guarantees lifetime tenure and salary protection for judges of the Supreme Court and inferior courts of the nation.86 These provisions are meant to "protect the role of the independent judiciary within the constitutional scheme of tripartite government Amendment, but holding that Congress's attempt to abrogate state immunity from individual suit under the Act violates Eleventh Amendment); cf. EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (holding that ADEA constitutes valid exercise of Congress's power to regulate commerce). For an argument implicitly suggesting that states' immunity from suit and from regulation should be coterminous, see 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, 821 (1999), which argues that the Court should recognize that the textual source of state sovereignty is located in the use of the term "State" in the Constitution.

84. See Jay S. Bybee, The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave, 23 Harv. J.L. & Pub. Pol'y 551, 561 (2000) (suggesting that the "juxtaposition of Garcia and Alden yields a peculiar result" and that "Alden is the Rehnquist Court's revenge for Garcia—a kind of theory-of-the-second-best solution to the Court's unwillingness to overrule Garcia"); see also Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 Sup. Ct. Rev. 125, 192 ("[F]ederalism requires...the Court to craft, to construct, to make-up, limits on regulative authority, both state and federal, so as to check the growth in the commerce power, to the extent that growth has set the original balance askew."); Fruehwald, supra note 7, at 479 (critiquing such an approach on the part of the Court as unprincipled).

85. With respect to the regulatory line of cases, see, for example, New York v. United States, 505 U.S. 144, 168-69 (1992) (noting that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished," and that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision"). With respect to the sovereign immunity line of cases, see supra Part I.B-C.

86. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a
and assure impartial adjudication in federal courts." Nonetheless, Congress has long created non-Article III tribunals, where judges have no Article III protections, for the adjudication of certain rights. The driving force behind the creation of such tribunals—the boundaries of which were rarely tested in the courts before the middle of the nineteenth century—is that adjudication is both an efficient and inevitable mode of administrative regulation.

The Court has consistently upheld the constitutionality of Congress's power to create legislative tribunals, though of course it has set limits on this authority. The initial justification for the constitutionality of legislative courts, as well as the initial circumscription of Congress's authority to create such courts, was provided in 1855 in Murray's Lessee v. Hoboken Land & Improvement Co. There the Court stated that

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.
Congress may thus create non-Article III tribunals for the adjudication of "public rights"—traditionally defined as "those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."93 This definitional requirement that the federal government be a party to the case was upheld as recently as 1982 in *Northern Pipeline Construction Corp. v. Marathon Pipe Line Co.*, though only by a plurality of the Court.94

If this definition of a public right were still operative, then the constitutional reach of legislative courts would remain short, and the very idea that a state might be held accountable before such a tribunal would be unimaginable. But Justice O'Connor, who was responsible for one of the concurring votes in *Northern Pipeline*, brought forth a new definition of public rights several years later in *Thomas v. Union Carbide Agricultural Products Co.*95 Remarking that "[a]n absolute construction of Article III is not possible in this area of 'frequently arcane distinctions and confusing precedents,'"96 Justice O'Connor refused to uphold the *Northern Pipeline* Court's formalist approach to the public rights doctrine. Instead, she defended an expanded notion of "public rights" that "reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced."97 Thus, if Congress can authorize an agency to fulfill its mandate without implicating Article III, then Congress may likewise adopt the more pragmatic and efficient approach of requiring private parties to resolve disputes between themselves in an Article I tribunal.98

The standard for determining whether or not Congress has vested improper powers in a non-Article III court was laid out explicitly in *Com-claims created by the administrative state, by and against private persons*); Martin H. Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Decision, 1983 Duke L.J. 197, 208–09 [hereinafter Redish, Legislative Courts] (making similar point).

94. 458 U.S. 50, 84–85 (1982) (plurality opinion) (holding a congressional grant of power to non-Article III bankruptcy courts unconstitutional because "essential attributes of the judicial power" were not retained by Article III courts (quoting *Crowell*, 285 U.S. at 51)). Justices Rehnquist and O'Connor concurred in the result, though only on the grounds that there was a common-law rather than statutory claim at issue.
95. Justice O'Connor's approach was new to the majority, at least. Justice White, in his dissent in *Northern Pipeline*, had laid out the foundations of a test that balanced Article III values against the reasons for Congress's decision to create the legislative tribunal. See id. at 113–16 (White, J., dissenting).
97. Id. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68).
98. See id. at 593–94 ("Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.").
modity Futures Trading Commission v. Schor.99 Again adopting a pragmatic stance, the Court identified several factors to weigh in order to determine whether a legislative court was constitutionally constructed. The factors are:

the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.100

Under the Schor and Thomas balancing test, therefore, Congress has great latitude to create legislative courts in which private parties may adjudicate statutorily-created rights.

III. SOVEREIGN IMMUNITY AND LEGISLATIVE COURTS

This Note proposes that Congress may make the states subject to suits brought by individuals in non-Article III courts. This Part sketches out what such a scheme would look like, highlighting the type of mechanism that would be necessary to assure that politically accountable actors retain adequate discretion over any adjudicative proceedings within the agency. In particular, this Part recommends that Congress mandate that the head of the administrative agency sign off on any suit brought by an individual against a state before such a suit will be allowed to proceed in the agency's legislative court. Since the agency's head is answerable to the President, lines of responsibility will remain transparent, and responsibility for allowing such a proceeding to continue will be located in a politically accountable actor. While the mechanics of the proposal discussed in this Part are generally applicable to any legislative court scheme, the discussion below will use the Fair Labor Standards Act—the federal statute at issue in Alden—as its model for how the proposal would work.

A. Political Accountability Within the Administrative Agency

In Alden v. Maine the Court made clear that private citizens may not bring suit against the states under the Fair Labor Standards Act (FLSA) in either state or federal court. There is no question, however, that it is permissible for Congress to provide that the Secretary of Labor may bring suit against a state for violations of the FLSA. Indeed, the FLSA specifically authorizes such suits,101 and the majority in Alden partly relied on

100. Id. at 851 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).
101. The Act authorizes employees to sue public agencies:
Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . . An action to recover the liability prescribed . . . may
this fact in its finding that there was no constitutional infirmity in pre-
cluding state suability under the Act in either state or federal courts.102
Allowing the Secretary to make such a decision appropriately "require[s] the exercise of political responsibility for each suit prosecuted against a
State,"103 and accords with the political accountability concerns that have
been latent in the Court's jurisprudence at least since United States v. Texas. The problem, as Congress itself has recognized, is that the Secre-
tary of Labor was not originally envisioned, nor can she realistically be
expected, to devote substantial resources to sue on behalf of aggrieved
employees.104Once again the central dilemma reasserts itself: Individuals
may not bring suits against the states because the lines of political
accountability will become muddied, yet the politically responsible fed-
eral officer empowered to bring such suits does not have the practical
resources to effectuate this duty.

There is, however, a way out of this impasse. The Secretary of Labor
may base her decision to bring suits against states on the complaints filed
by individuals. Why, then, may not Congress set up an authority within
the Department of Labor to adjudicate these same complaints? Garcia ex-
plained that the federal government may regulate the states pursuant to
the FLSA, and we know from Texas and Alden that the federal govern-
ment may bring suit against a state, on behalf of an individual, for dam-
ages resulting from a violation of the Act. As discussed above, this is ac-
ceptable because the lines of political accountability run transparently
between the federal government and the people: The Secretary of Labor

be maintained against any employer (including a public agency) in any Federal
or State court of competent jurisdiction by any one or more employees for and in
behalf of himself or themselves and other employees similarly situated.
29 U.S.C. § 216(b) (1994). A "public agency" is defined to include "the government of a
State or political subdivision thereof; any agency of . . . a State, or a political subdivision of
a State." Id. § 203(x). The Secretary of Labor is authorized to bring an action on behalf of
the employees:
The Secretary may bring an action in any court of competent jurisdiction to
recover the amount of unpaid minimum wages or overtime compensation and an
equal amount as liquidated damages . . . . Any sums thus recovered by the
Secretary of Labor on behalf of an employee pursuant to this subsection shall be
held in a special deposit account and shall be paid, on order of the Secretary of
Labor, directly to the employee or employees affected.
Id. § 216(c). As noted above, the Court held in Garcia v. San Antonio Metropolitan Transit
Authority that the FLSA's comprehension of the states within its regulatory sphere is
constitutionally permitted. See supra notes 78–81 and accompanying text. And under
United States v. Texas, the United States may bring suit on behalf of an individual whose
federal statutory rights have been abridged. See supra notes 33–36 and accompanying
text.

103. Id.
104. Id. at 810 (Souter, J., dissenting) ("Congress specifically found, as long ago as
1974, 'that the enforcement capability of the Secretary of Labor is not alone sufficient to
provide redress in all or even a substantial portion of the situations where [state]
ultimately has the political responsibility for bringing suit against a state, and thus she and the President are directly accountable for the political fallout resulting from such a decision. So long, therefore, as the establishment of authority to adjudicate these same claims within the Department of Labor, via a legislative court, remains subject to the same level of political transparency, such a scheme will respect the core concerns of the Court’s majority in *Alden*.

This Note thus proposes that Congress may set up an authority within the Department of Labor to adjudicate complaints by individuals against the states for violations of the FLSA, in essence abrogating the states’ sovereign immunity in these legislative courts. There are three strands to this argument: (1) the right to overtime pay created by the FLSA is amenable, under the Court’s current public rights doctrine, to adjudication in a legislative court; (2) sovereign immunity is a concept foreign to the administrative agency context, since legislative courts are more properly understood to be regulatory bodies rather than courts of law; and (3) the political safeguards that attend the Secretary of Labor’s decision to bring suit against a state will remain in place, so long as the Secretary must predetermine whether there is a substantial basis for sending any particular action to an Administrative Law Judge (ALJ). Moreover, since the Department of Labor is already staffed with ALJs, recourse to a legislative-court regime for the disposition of FLSA claims against the states would be far less costly than requiring the Secretary of Labor to bring such suits herself on behalf of individuals. 105

B. The Amenability of FLSA Provisions to Adjudication in Legislative Courts

Under the Court’s current public rights doctrine, adjudication of rights such as those created by the overtime provisions of the FLSA are amenable to adjudication in legislative courts. Applying the *Schor* balancing test, one first notes that the right to be adjudicated here is statutory in nature. Congress has created a right (to overtime pay) that did not hitherto exist, at common law or otherwise. Since this is a statutory right, we need not be concerned that Congress has made an undue incursion into the realm of Article III courts, because the right is not one that has historically been adjudicated therein. Because the disposition of claims arising under this manufactured right could be decided by the executive

105. As Joanne Brant has argued, an individual’s “attempt to persuade the federal government to sue on their behalf and to remit any damages the government recovers” would “likely . . . screen out a significant number of viable claims, and will strain an already tight federal litigation budget, which has never contemplated that the Department of Labor would serve as the front line of FLSA enforcement.” Joanne C. Brant, The Ascent of Sovereign Immunity, 83 Iowa L. Rev. 767, 815 (1998). The Department of Labor already employs ALJs, and the bureaucratic structure for litigating claims within the agency already exists. See Ronald A. Cass, Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis, 66 B.U. L. Rev. 1, 18 (1986) (reporting that as of 1986 the Department of Labor employed sixty-six ALJs).
or legislative branches without recourse to adjudication and without implicating Article III, there is no danger that any due process right has been abridged by restricting adjudication to a legislative tribunal whose judges do not have salary protection or life tenure.

The second element of the Schor test—the concern that drove Congress to depart from the requirements of Article III—is compelling here. Not only is the Secretary of Labor incapable of providing the optimal level of protection for private parties whose rights have been abridged, but the goals of Congress in enacting the FLSA are imperiled by state noncompliance. Coupled with the typical justifications offered for delegating adjudicative power to legislative courts—administrative efficiency and expertise—this element weighs heavily in the constitutional balance.

A somewhat more complicated question arises with respect to the third Schor prong: “the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts.” A state brought before the FLSA legislative court by a private party could contend that its immunity remains intact before such a tribunal, because substantial supervision over the non-Article III tribunal by an Article III court is constitutionally required—and once Article III oversight is required, the state’s immunity from suit is implicated. At one stage in the history of the Court’s sovereign immunity jurisprudence, this argument might have been compelling. The Court’s current jurisprudence, however, re-


107. The rights to overtime pay and maximum working hours created under the FLSA fit squarely within the expanded definition of “public rights” that Justice O’Connor laid out in Thomas. See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589–94 (1985); see also supra notes 95–98 and accompanying text; cf. Martin H. Redish & Daniel J. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407, 425–26 (1995) (noting that the fraudulent-conveyance action at issue in Granfinanciera—which was there held to be a private right—“would easily fit under the Court’s definition in Thomas of ‘public right’”).

108. See supra note 104.

109. See Sward, supra note 88, at 1062.

110. Indeed, after laying out the balancing test in Schor, Justice O’Connor proceeded to address only the nature of the right at issue and the amount of Article III powers delegated to the legislative court; the concerns that drove Congress were tacitly presumed to be compelling. See Commodity Futures Trading Comm’n v. Schor, 478 U.S. 50, 81 (1982) (noting that “the functions of the adjunct must be limited in such a way that ‘the essential attributes’ of judicial power are retained in
quires only de minimis judicial oversight of the proposed legislative court.\textsuperscript{113} In \textit{Thomas}, for example, the Court found constitutional a statute that limited Article III review to matters of fraud, misconduct, or misrepresentation.\textsuperscript{114} The need for Article III oversight has thus been greatly reduced and, to the extent that sovereign immunity is understood to be a doctrine operative only in a judicial context, state sovereign immunity has been removed as a formal concern.

C. The Distinct Status of Legislative Courts

An obvious objection to allowing individuals to bring FLSA actions against states in legislative court is that such a scheme is merely an end-run around the Court's sovereign immunity doctrine.\textsuperscript{115} Sovereign im-

\textsuperscript{113} As discussed above, the Court has gone to pains to construe the reach of \textit{Northern Pipeline} narrowly and to emphasize that Article III oversight is but one factor to be weighed in the balancing test approved in \textit{Schor}. See, e.g., \textit{Thomas v. Union Carbide Agric. Prods. Co.}, 473 U.S. 568, 584 (1985) (characterizing \textit{Northern Pipeline} as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review" (emphasis added)). For a discussion of Court precedent after \textit{Northern Pipeline}, see supra notes 95-100 and accompanying text.

\textsuperscript{114} \textit{Thomas}, 473 U.S. at 592; cf. Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 632 (1984) ("[T]he whole point of the 'public rights' analysis was that no judicial involvement at all was required—executive determination alone would suffice.").

\textsuperscript{115} Cf. Evan H. Caminker, State Immunity Waivers for Suits by the United States, 98 Mich. L. Rev. 92, 128 (1999) (arguing that originalist understanding of sovereign immunity issues requires finding that qui tam actions against states are constitutional); Monaghan, Exception, supra note 17, at 125-26 n.162 (suggesting that Congress could get around state sovereign immunity problem by authorizing qui tam actions against the states, but noting that "[w]hether the Seminole Tribe majority would permit so transparent an evisceration of its holdings is unclear"); James Y. Ho, Note, State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created by the Eleventh Amendment Upon the Federal Courts, 68 Fordham L. Rev. 189, 216-24 (1999) (arguing that sovereign immunity should not apply in qui tam actions where the United States has intervened, even if the United States is not the real party in interest). This Note's proposal—to allow individual suits against the states in legislative court—is conceptually distinct from qui tam actions. The legislative court proposal offers an alternative method for congressional regulation of the states, rather than an alternative method for the federal government to defend its own economic interests by authorizing an individual to bring suit in a judicial forum in the name of the United States. In the qui tam context, the qui tam relator would need to demonstrate that his or her pressing of a claim would result in some direct benefit to the government. For a discussion of qui tam and some other "end-runs" around the Court's sovereign immunity doctrine in the context of bankruptcy law, see Kenneth N. Klee et al., State Defiance of Bankruptcy Law, 52 Vand. L. Rev. 1527, 1584-89 (1999).
munity, after all, is arguably meant to protect against exactly this type of action—a private party subjecting a state to the indignity of being haled before an adjudicatory body. Surely one could convincingly contend that moving the adjudication from an Article III or state court to a legislative court should make no constitutional difference.

As discussed above, however, there is a clear conceptual difference between legislative and judicial courts, even if the distinction between them has been a problem of a "highly theoretical nature" and "productive of much confusion and controversy." In the past, the Court has adopted a functional standard for determining whether an action before an agency is to be deemed a suit at law. But the current public rights doctrine requires a more formalist approach to this question, since the functions of judicial and legislative courts are presumed to be constitutionally discrete. Indeed, the premise of the Court's holdings in Thomas and Schor is that the difference between an administrative agency, which regulates directly, and a legislative court, which regulates through an adjudicative process, is constitutionally inconsequential. Given the doctrinal distinction between constitutional and legislative courts, the

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116. Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962); see also Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975, 988 n.10 (2d Cir. 1991) ("The task of navigating through the murky waters that surround this area of constitutional law is a difficult one.").

117. See Upshur County v. Rich, 135 U.S. 467, 477 (1890) ("The principle... is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions,... is purely administrative in its character, and cannot, in any just sense, be called a suit."). In support of the functional standard, see, for example, Redish & La Fave, supra note 107, at 433, noting that, "[w]hile administrative rulemaking obviously does not qualify as a 'suit,' it would defy all reality to suggest that administrative adjudication of a statutorily created cause of action on behalf of or against a private individual or entity does not constitute a 'suit.'"

118. See Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 916, 928 (1988) (arguing that "from the perspective of article III, [there is] no difference in constitutional principle between legislative courts and administrative agencies"); Redish, Legislative Courts, supra note 92, at 201 (noting that the Court "cannot logically distinguish the work of non-article III legislative courts from that of administrative adjudicatory bodies," since "their work cannot be functionally or theoretically distinguished"); cf. Samuels, Kramer, 930 F.2d at 988 (refusing to treat Article I tax court as a "Court of Law" for purposes of the Appointments Clause); see also Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1263 (3d Cir. 1994) (explaining that Court decisions from the era of Upshur did not adopt a "functional test").

119. As Professors Redish and La Fave explain:

[An] administrative agency-legislative court dichotomy could not be rationalized by resort to the public rights doctrine, because that doctrine draws no such distinction for purposes of Article III analysis. In its original context, that doctrine was developed for the sole purpose of distinguishing between Article III and non-Article III adjudicatory power.

Redish & La Fave, supra note 107, at 484. This appears to be the reason that Justice Scalia refused to join in Justice O'Connor's articulation of a "new" public rights doctrine. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 66 (1989) (Scalia, J., concurring) ("The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine.").
Court should hesitate to interfere with the operations of non-Article III courts, at least when these tribunals operate under the clear control of the elected branches of government.

The Court has adopted just such a formal approach in other, non-sovereign immunity, areas of the law. For example, the Court has refused to find a Seventh Amendment defect in the refusal of Congress to permit juries to be seated in non-Article III courts. As the Court explained in Granfinanciera, S.A. v. Nordberg, where a Seventh Amendment claim was brought in the context of a non-Article III bankruptcy court, "if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a non-jury factfinder." Similarly, in NLRB v. Jones & Laughlin Steel Corp., the Court held that the Seventh Amendment "does not apply where the proceeding [an adjudication under the NLRA] is not in the nature of a suit at common law." Again, given the constitutional distinction between legislative and judicial courts, these holdings cannot be surprising. It therefore follows that the non-Article III tribunal, as a creature of Congress and a tool of the President, should properly remain subject to the control of the elected branches of government, and not be answerable to doctrines like sovereign immunity that have been developed within a judicial context.

120. 492 U.S. at 53-54. The Court in Granfinanciera found, however, that a jury trial was required in the instant case since a private right was at issue. "If a claim that is legal in nature asserts a 'public right,' . . . then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity." Id. at 42 n.4. In dissent, Justice White argued for a more expansive conception of that right as falling within the public rights doctrine. Id. at 89 (White, J., dissenting).

121. 301 U.S. 1, 48 (1937); see also Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977) (explaining that where public rights are being litigated, "the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible"). But see Curtis v. Loether, 415 U.S. 189, 194 (1974) (explaining that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law").

122. See, e.g., Freytag v. Comm'r, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (arguing that Article I Tax Courts are not courts of law, since "[t]he only 'Courts of Law' referred to there are those authorized by Article III, § 1, whose judges serve during good behavior with undiminishable salary"); Amer. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) ("These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government . . . ."). Note, however, that scholars have critiqued the Court's jurisprudence in this area. See Sward, supra note 88, at 1062-89 (arguing that Seventh Amendment should be respected in legislative courts); Redish & LaFave, supra note 107, at 480-52 (same).
D. Necessity of a Filtering Mechanism

A proposal to allow states to be "sued" in legislative courts will initially appear at odds with Alden's claim that the "logic" of its sovereign immunity decisions "does not turn on the forum in which the suits were prosecuted." But if the Court's underlying rationale is to assure that accountability and responsibility remain in the political branches of government, then the location of a suit in a political forum—the legislative court—affords precisely the respect for the states' political functioning demanded by the Court. Since adjudications within an independent regulatory agency do not implicate either the state or federal judiciary, the doctrine of sovereign immunity is not violated.

Abrogating state sovereign immunity in legislative courts would afford the kind of political accountability that the Alden Court seeks and that is present when the Secretary of Labor is required to initiate a suit herself. We understand the actions of the Secretary of Labor to be subject to popular correction because the Secretary is a delegate of the President, the elected representative of the people. The President is directly accountable to the people for his actions and those of his delegates, since he is responsible under Article II for faithfully executing the laws and for "directing the action to be taken by his executive subordinates" to protect the national interest. The President maintains control over the Secre-

124. Prior to the Court's decision in Alden, judges and commentators had assumed that allowing the states to be sued in their own courts would comport with respect for the dignity of the states. See, e.g., O'Brien v. Vermont (In re O'Brien), 216 B.R. 731, 736 (Bankr. D. Vt. 1998) (characterizing as "Chicken Littles" those who believe that state violations of bankruptcy laws will not be remediable, since "[w]hen a federal statute impose[s] liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court") (quoting Hilton v. S.C. Public Rys. Comm'n, 502 U.S. 197, 207 (1991)); Ellen D. Katz, State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz, 1998 Wis. L. Rev. 1465, 1471-72 ("[T]he anti-commandeering rule shorn of its judicial exception should not be understood to shield state courts from the obligation to adjudicate federal claims when those claims are brought against state defendants."); Katrina A. Kelly, Comment, In the Aftermath of Seminole: Waiver of Sovereign Immunity Under Section 106(b) of the Bankruptcy Code, 15 Bank. Dev. J. 151, 152 (1998) (suggesting that Seminole Tribe would require bankruptcy proceedings against states to proceed in state courts, and that it would be "a viable, although somewhat undesirable, alternative"); Monaghan, Exception, supra note 17, at 122 ("In the main, the Eleventh Amendment is concerned only with forum selection: should states be sued in state or federal courts?"); James E. Pfander, An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe, 46 U.C.L.A. L. Rev. 161, 165 (1998) (arguing that Seminole Tribe Court's interpretation of Eleventh Amendment "does not absolutely bar federal cognizance but simply shifts or allocates claims against the states away from federal trial courts and into state trial courts as courts of first instance"). These scholars could not, of course, have anticipated the Court's decision in Alden and its emphasis on political accountability concerns.
125. Myers v. United States, 272 U.S. 52, 134 (1926). The President is ordinarily assumed to be politically responsible for the actions of his officers. See, e.g., id. at 132 ("The highest and most important duties which [the President's] subordinates perform
tary (and all his delegates) through his removal powers. Since Article I judges are also executive functionaries, they too are subject to the control of the President through his removal powers. To some extent, therefore, the actions of ALJs must be understood to be political in nature. The President, that is, maintains control over the legislative courts, and is ultimately responsible for their functioning.

There are, however, limits on the President’s removal power with respect to ALJs. The President cannot, for example, influence an ALJ during an adjudication. As Chief Justice Taft suggested in *Myers*:

> [T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.

The President cannot himself direct the outcome of an adjudication—a commonsensical and presumably uncontroversial restriction on his removal powers. But does this necessarily mean that the President cannot be held accountable for the judgments emanating from an administrative agency? Would a delegation of power from the Secretary of Labor to a legislative court necessarily entail the loss of political accountability in the person of the President? The short answer to these questions is that delegated power need not entail a loss of accountability.

First, the President is capable of influencing, in broad strokes, the manner and substance of the decisionmaking in the legislative court by policing its decisionmakers. Those ALJs who refuse to share the President’s interpretation of how the law is to be executed will be dismissed, and those ALJs who remain will be on notice that the retention of their positions is conditional. While such influence over administrative adjudication might appear unseemly, this kind of political intrusion on the process is an anticipated and welcome characteristic of the legislative court.

are those in which they act for him. In such cases they are exercising not their own but his discretion.”).

126. See id. at 161; cf. Edmond v. United States, 520 U.S. 651, 666 (1997) (holding that non-Article III judges on Coast Guard Court of Criminal Appeals were inferior officers of the United States and thus subject to removal by the President without any restriction); Freytag v. Comm’r, 501 U.S. 868, 912 (1991) (Scalia, J., concurring) (arguing that Article I Tax Court is not a court of law since its judges “still lack life tenure; their salaries may still be diminished; they are still removable by the President for ‘inefficiency, neglect of duty, or malfeasance in office’” (quoting 26 U.S.C. § 7443(f))).

127. See generally Morrison v. Olson, 487 U.S. 654, 691 (1988) (holding that Congress may restrict President’s removal power if the restrictions are not “of such a nature that they impede the President’s ability to perform his constitutional duty” to take care that the laws be faithfully executed).

Recall that these tribunals are political bodies, and that adjudications therein are regulatory rather than judicial in nature. Article I judges lack the salary protection and life tenure of Article III judges, precisely because we insist that these executive branch functionaries answer to the President and, ultimately, to the people. If the people are dissatisfied with the number of lawsuits that the Secretary of Labor allows to proceed against the states, or with the relative ease or difficulty of gaining relief in an administrative court, they can express their discontent at the next national election. And if the states are concerned that they will not be afforded the benefits which accrue from having a proceeding adjudicated by an Article III judge, all they need do is remove the proceeding to federal district court—where they will, perforce, have waived their claim of immunity.

Second, Congress may provide a threshold political check on whether an individual's claim against a state may proceed by requiring that the Secretary of Labor issue a certificate of probable cause before allowing the claim to proceed to adjudication. Given that the Secretary of Labor is the President's subordinate, the President will bear responsibility for the issuance of such a certificate. This screening function will ensure political accountability, for it entrenches a high-level deliberative process through the exercise of executive discretion.

E. Some Objections to the Legislative Court Proposal

It is not difficult to imagine objections to a proposal to abrogate state sovereign immunity in legislative courts. After all, as has already been noted, the *Alden* Court specifically explained that state immunity is a "background principle" of our constitutional order, and that the logic of the Court's immunity jurisprudence does not "turn on the forum" in which suit is brought. If the lesson to be gleaned from *Alden* is simply that the states are not to be sued without their consent, then any parsing of the reasoning behind the Court's decision is ultimately in vain.

To the extent that the issues raised by this Note have been addressed in analogous contexts, the courts superficially appear to have adopted this straightforward approach to the question of state suability in non-Article III courts. For example, in the wake of *Seminole Tribe* a number of states successfully claimed Eleventh Amendment immunity from federal jurisdiction in bankruptcy proceedings, even though bankruptcy courts are non-Article III tribunals, arguably beyond the Amendment's ambit.

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130. See *Mitchell v. Franchise Tax Bd.* (In re Mitchell), 209 F.3d 1111, 1114–15 (9th Cir. 2000); *NVR Homes, Inc. v. Clerks of the Circuit Courts* (In re NVR, LP), 189 F.3d 442, 448–49 (4th Cir. 1999); *In re Sacred Heart Hosp.*, 133 F.3d 237, 239 (3d Cir. 1998). But see *Samuel L. Bufford, Seminole Tribe May Not Apply to Bankruptcy Courts*, 6 Consumer Bankr. News, Apr. 10, 1997, at 3 (arguing that Eleventh Amendment does not apply to bankruptcy courts because as non-Article III courts they do not exercise the judicial power of the United States). Joanne Brant has also noted that:
Those courts that have addressed the question of state immunity in bankruptcy actions have focused on the nature of the proceeding rather than on the forum in which the adjudication was located. Thus, the question of state immunity was reduced in these cases to an analysis of whether the state had been coerced to appear before the bankruptcy court, and whether the substance of the remedy sought by the individual would require invasion of the state's treasury.\(^{131}\)

Such an approach has superficial appeal. It seems to accord with the thrust of both *Seminole Tribe* and *Alden* that individuals simply may not sue the states. The context of bankruptcy proceedings is, however, distinct in important ways from the scheme proposed in this Note. For instance, the statute creating the bankruptcy courts makes explicit that these tribunals are functionally to serve as the tools of Article III district courts,\(^{132}\) with the result that, unlike in legislative courts, the doctrine of sovereign immunity remains both functionally and formally relevant in such proceedings. More to the point for purposes of this Note, the bankruptcy court system has not been devised with an eye toward assuring that ultimate responsibility for its dispositions comes to rest on a politically accountable actor. There is no mechanism in the bankruptcy context for assuring that the President, his officers, or their delegates exercise their discretion transparently. There are no checks or safeguards to assure that the lines of political accountability remain unmuddied. To the degree such transparency and accountability truly provide the substantive rationale for the Supreme Court's state immunity jurisprudence, the argument that state immunity can be abrogated in the bankruptcy courts simply falls short. The court rulings on sovereign immunity in the bankruptcy context thus do not provide evidence that this Note's proposal to abrogate state immunity in legislative courts is misguided. Rather, the bankruptcy cases serve to highlight the importance of the key conceptual component of this proposal: the need to build political responsibility, transparency, and accountability into the structure of the administrative agency and its legislative court.

One final approach, which has not yet been presented to a court, is the radical argument that as a bankruptcy court is an Article I court, it does not exercise "federal judicial power" and is thus not restricted by the Eleventh Amendment. The implications of this argument are extraordinary. If accepted, then any Article I court—including ... the myriad federal agencies authorized to resolve disputes involving "public rights"—would be unfettered by the Eleventh Amendment.

Brant, supra note 105, at 827.

131. See, e.g., *In re NVR*, 189 F.3d at 452.

132. 28 U.S.C. § 151 (1994) ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); see also *Pitts v. Ohio Dep't of Taxation* (In Re Pitts), 241 B.R. 862, 867 n.1 (Bankr. N.D. Ohio 1999) (opining that it is "unlikely" that Judge Bufford's "argument will prevail as 28 U.S.C. § 151 provides that bankruptcy courts will function as a 'unit' of the Article III district courts").
Of course, should the Court decide that it no longer wishes to respect its Garcia holding in the FLSA context, or should it scale back the muscular public rights doctrine it has set forth in Schor and Thomas, or should it even disavow the political-accountability reasoning for its sovereign immunity decisions in Alden, then the legislative court solution might prove untenable. But given the Court's current approach to these vexing constitutional questions, this Note's proposal offers a remedy for state violations of federal rights where none existed before. It respects both the formal and functional concerns that the Court has emphasized in its sovereign immunity case law. It spares the Secretary of Labor from having to devote the Department's finite resources to litigating claims on behalf of individuals. It maintains transparent lines of political accountability between the people and the President. It respects the core of the Court's regulatory jurisprudence. And it respects the central concerns of the Court in its state sovereign immunity jurisprudence.

CONCLUSION

This Note has argued that abrogation of state sovereign immunity in non-Article III courts falls well within the borders of constitutional doctrine laid out by the Supreme Court. Given the premises that the federal government may regulate the states, that Congress may create non-Article III courts for the efficient administration of its regulatory programs, and that private rights may be adjudicated in these courts, the propriety of subjecting the states to suit in such tribunals seems clear.

The more difficult question is whether this proposal comports with the spirit of the Constitution and the nation's federalist structure. This Note has identified the Court's compelling policy justification for maintaining a robust state immunity doctrine: that political accountability must be located in the elected branches of government, and that the governmental actors responsible for placing the state treasuries at risk must be clearly discernible. In demonstrating that the legislative court, as a creature of Congress and tool of the President, provides for such accountability, this Note concludes that Congress's creation of such a court would indeed comport with the spirit of both the Constitution and our federalism. This proposal thus demonstrates that concerns for procedural fairness and federalism may be reconciled, and that, with respect to state violations of federal law, it is possible to respect both the constitutional principle of state sovereignty and the equally compelling principle of the rule of law.