SUPREME COURT OF THE UNITED STATES

Nos. 98–791 and 98–796

J. DANIEL KIMEL, JR., ET AL., PETITIONERS
98–791 *v.*
FLORIDA BOARD OF REGENTS ET AL.

UNITED STATES, PETITIONER
98–796 *v.*
FLORIDA BOARD OF REGENTS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 11, 2000]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting in part and concurring in part.

Congress' power to regulate the American economy includes the power to regulate both the public and the private sectors of the labor market. Federal rules outlawing discrimination in the workplace, like the regulation of wages and hours or health and safety standards, may be enforced against public as well as private employers. In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power. See *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 165–168 (1996) (SOUTER, J., dissenting); *EEOC* v. *Wyoming,* 460 U. S. 226, 247–248 (1983) (STEVENS, J., concurring).

The application of the ancient judge-made doctrine of

sovereign immunity in cases like these is supposedly justified as a freestanding limit on congressional authority, a limit necessary to protect States' "dignity and respect" from impairment by the National Government. The Framers did not, however, select the Judicial Branch as the constitutional guardian of those state interests. Rather, the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement. See generally Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).

It is the Framers' compromise giving each State equal representation in the Senate that provides the principal structural protection for the sovereignty of the several States. The composition of the Senate was originally determined by the legislatures of the States, which would guarantee that their interests could not be ignored by Congress.[1] The Framers also directed that the House be composed of Representatives selected by voters in the several States, the consequence of which is that "the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." *Id.*, at 546.

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[1]The Federalist No. 45, p. 291 (C. Rossiter ed. 1961 (J. Madison)) ("The State governments may be regarded as constituent and essential parts of the federal government . . . . The Senate will be elected absolutely and exclusively by the State legislatures. . . . Thus, [it] will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them").

Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant.[2] The persuasiveness of any justification for overcoming legislative inertia and taking national action, either creating new federal obligations or providing for their enforcement, must necessarily be judged in reference to state interests, as expressed in existing state laws. The precise scope of federal laws, of course, can be shaped with nuanced attention to state interests. The Congress also has the authority to grant or withhold jurisdiction in lower federal courts. The burden of being haled into a federal forum for the enforcement of federal law, thus, can be expanded or contracted as Congress deems proper, which decision, like all other legislative acts, necessarily contemplates state interests. Thus, Congress can use its broad range of flexible legislative tools to approach the delicate issue of how to balance local and national interests in the most responsive and careful manner.[3] It is

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[2]When Congress expanded the ADEA in 1974 to apply to public employers, all 50 States had some form of age discrimination law, but 24 of them did not extend their own laws to public employers. See App. to Brief for Respondents 1a–25a.

[3]Thus, the present majority's view does more than simply aggrandize the power of the Judicial Branch. It also limits Congress' options for responding with precise attention to state interests when it takes national action. The majority's view, therefore, 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." *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. ___, ___ (1999) (slip op., at 13) (dissenting opinion); see also *Printz* v. *United States*, 521 U. S 898, 976–978 (1997) (BREYER, J., dissenting).

quite evident, therefore, that the Framers did not view this Court as the ultimate guardian of the States' interest in protecting their own sovereignty from impairment by "burdensome" federal laws.[4]

Federalism concerns do make it appropriate for Congress to speak clearly when it regulates state action. But when it does so, as it has in these cases,[5] we can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account

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[4]The President also plays a role in the enactment of federal law, and the Framers likewise provided structural safeguards to protect state interests in the selection of the President. The electors who choose the President are appointed in a manner directed by the state legislatures. Art. II, §1, cl. 2. And if a majority of electors do not cast their vote for one person, then the President is chosen by the House of Representatives. "But in chusing the President" by this manner, the Constitution directs that "the Votes shall be taken *by States*, the Representatives from each State having one Vote." Art. II, §1, cl. 3 (emphasis added); see also Amdt. 12.

Moreover, the Constitution certainly protects state interests in other ways as well, as in the provisions of Articles IV, V, and VII. My concern here, however, is with the respect for state interests safeguarded by the ordinary legislative process. The balance between national and local interests reflected in other constitutional provisions may vary, see, *e.g., U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995), but insofar as Congress' legislative authority is concerned, the relevant constitutional provisions were crafted to ensure that the process itself adequately accounted for local interests.

I also recognize that the Judicial Branch sometimes plays a role in limiting the product of the legislative process. It may do so, for example, when the exercise of legislative authority runs up against some other constitutional command. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 166–167 (1996) (SOUTER, J., dissenting). But in those instances, courts are not crafting wholly judge-made doctrines unrelated to any constitutional text, nor are they doing so solely under the guise of the necessity of safeguarding state interests.

[5]Because Congress has clearly expressed its intention to subject States to suits by private parties under the ADEA, I join Part III of the Opinion of the Court.

during the deliberative process leading to the enactment of the measure. Those burdens necessarily include the cost of defending against enforcement proceedings and paying whatever penalties might be incurred for violating the statute. In my judgment, the question whether those enforcement proceedings should be conducted exclusively by federal agencies, or may be brought by private parties as well, is a matter of policy for Congress to decide. In either event, once Congress has made its policy choice, the sovereignty concerns of the several States are satisfied, and the federal interest in evenhanded enforcement of federal law, explicitly endorsed in Article VI of the Constitution, does not countenance further limitations. There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States. The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.

The Eleventh Amendment simply does not support the Court's view. As has been stated before, the Amendment only places a textual limitation on the diversity jurisdiction of the federal courts. See *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 286–289 (1985) (Brennan, J., dissenting). Because the Amendment is a part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" by an Act of Congress. *Seminole Tribe*, 517 U. S., at 93 (STEVENS, J., dissenting). Here, however, private petitioners did not invoke the federal courts' diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that

arise under federal law. Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity,[6] which the Court treats as though it were a constitutional precept. It is nevertheless clear to me that if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's "Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. That is the essence of the Court's holding in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 13–23 (1989).

I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. *Stare decisis*, furthermore, has less force in the area of constitutional law. See, *e.g.*, *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–410 (1932) (Brandeis, J., dissenting). And in this instance, it is but a hollow pretense for any State to seek refuge in *stare decisis'* protection of reliance interests. It cannot be credibly maintained that a State's ordering of its affairs with respect to potential liability under federal law requires adherence to *Seminole Tribe*, as that decision leaves open

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[6] Under the traditional view, the sovereign immunity defense was recognized only as a matter of comity when asserted in the courts of another sovereign, rather than as a limitation on the jurisdiction of that forum. See *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136 (1812) (Marshall, C. J.); *Nevada* v. *Hall*, 440 U. S. 410, 414–418 (1979).

a State's liability upon enforcement of federal law by federal agencies. Nor can a State find solace in the *stare decisis* interest of promoting "the evenhanded . . . and consistent development of legal principles." *Payne* v. *Tennessee,* 501 U. S. 808, 827 (1991). That principle is perverted when invoked to rely on sovereign immunity as a defense to deliberate violations of settled federal law. Further, *Seminole Tribe* is a case that will unquestionably have serious ramifications in future cases; indeed, it has already had such an effect, as in the Court's decision today and in the equally misguided opinion of *Alden* v. *Maine*, 527 U. S. ___ (1999). Further still, the *Seminole Tribe* decision unnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress' §5 authority. Finally, by its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law.[7] The kind of judicial activism manifested in cases like *Seminole Tribe, Alden* v. *Maine, Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. ___ (1999), and *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. ___ (1999), represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Accordingly, I respectfully dissent.

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[7] See, *e.g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S., at ___ (slip op., at 8–14) (overruling *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)); *Seminole Tribe*, 517 U. S., at 63–73 (overruling *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989)); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 127, 132–137 (1984) (STEVENS, J., dissenting) ("[T]he Court repudiates at least 28 cases, spanning well over a century of this Court's jurisprudence").