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Why the Eleventh Amendment Always Matters, Even When Transaction Costs Are Zero; a Reply to Professor Farber

Neil S. Siegel

WHY THE ELEVENTH AMENDMENT ALWAYS MATTERS, EVEN WHEN TRANSACTION COSTS ARE ZERO

A REPLY TO PROFESSOR FARBER

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INTRODUCTION

After the Supreme Court's decision in *Seminole* came down,[1] a number of commentators wrote reassuringly to their distressed colleagues (and probably themselves) to the effect that the legal community should not make too much of the Court's holding. For example, Henry Monaghan concluded that, "[i]n the end, *Seminole Tribe* simply perpetuates a questionable line of reasoning, the negative effects of which may in any event be circumvented. State sovereign immunity remains the exception, not the rule, the rhetoric of state sovereignty notwithstanding."[2] In a similar vein, Daniel Meltzer completed his assessment with the suggestion that

> there remain reasons to think that the decision in *Seminole* is not one of a mounting series of blows to the reach of national power, but rather a gesture in the direction of a diffuse conception of state sovereignty that in the end will not be gener-

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1. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding unconstitutional the Indian Gaming Regulatory Act ("IGRA") because, when acting under Article I, Congress does not possess the constitutional power to abrogate a state's immunity from suit in federal court) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).
2. Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 Harv. L. Rev. 102, 133 (1996).

> ally enforced by the Court. If that is so, the *Seminole* decision may come to be seen not only as regrettable but also as quixotic.[3]

In short, these scholars and others were inclined to view *Seminole* as a symbolic, stake-in-the-ground sort of decision that lacked significant generative power.

Looking back now, as the Court's 2000-2001 term has drawn to a close, hindsight suggests that these commentators may have seriously underestimated the extent of the conservative majority's commitment to articulating its vision of state sovereign immunity. It is now abundantly clear that the Court in *Seminole* said what it meant, and subsequent decisions have shown that *Seminole* means what it says.[4]

Nevertheless, these commentators may have been right all along, but for reasons they did not even remotely recognize. This is because it does not necessarily follow from the fact that the Court "really means it" when it comes to state sovereign immunity that what the Court has to say on the issue really mat-

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3. Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 S. Ct. Rev. 1, 65 (footnote omitted).

4. The Court's post-*Seminole* state sovereign immunity decisions are *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding that Eleventh Amendment precluded prospective relief against state officers who were interfering with plaintiff tribe's alleged property rights in submerged lands because tribe's suit was functional equivalent of quiet title action against state, which would prevent exercise of state regulatory authority over lands); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (holding provisions of Patent and Plant Variety Protection Remedy Clarification Act of 1992 abrogating states' sovereign immunity unconstitutional as beyond Congress' powers under Section 5 of Fourteenth Amendment); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999) (holding provisions of Trademark Remedy Clarification Act abrogating states' sovereign immunity unconstitutional as beyond Congress' powers under Section 5); *Alden v. Maine*, 527 U.S. 706 (1999) (extending *Seminole*'s holding to suits commenced in state courts); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that Section 5 would not sustain effort by Congress to abrogate states' sovereign immunity with regard to suits under Age Discrimination in Employment Act of 1967 ("ADEA")); and *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that Americans with Disabilities Act of 1994 ("ADA") does not constitute valid enforcement legislation under Section 5, and thus does not validly abrogate states' Eleventh Amendment immunity from suit).

Also relevant to the issue of state sovereign immunity because they address the scope of Congress' powers under Section 5 are *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding unconstitutional Religious Freedom Restoration Act of 1993 ("RFRA"), which sought to overrule the Court's interpretation of Free Exercise Clause, because Congress' power under Section 5 extends to creation of remedies, not to alteration of substantive rights); and *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress was without power under either Commerce Clause or Section 5 to enact provision of Violence Against Women Act of 1994 ("VAWA") creating federal civil remedy for victims of gender-motivated violence).

ters. Enter Daniel Farber. Shortly after *Seminole* came down, he argued in a highly enjoyable and thought-provoking piece[5] that on an economic approach to the question of state sovereign immunity, "the Eleventh Amendment doesn't matter"[6] insofar as "transaction costs don't prevent contracting around legal rules."[7] "[M]ore precisely," Farber wrote, Congress and the states "will always bargain their way to an economically efficient outcome, regardless of the legal rule."[8] This, Farber maintained, "is a straightforward consequence of the Coase Theorem."[9] Given the number of important recent Supreme Court decisions that trace their lineage to *Seminole*,[10] it is worth inquiring whether Farber is right,[11] and more importantly, determining exactly *what* he is right about. As will be demonstrated, this latter

5. Fallon, Meltzer, and Shapiro refer to Farber's essay as "a delightful, tongue-in-cheek appraisal of *Seminole* in terms of economic costs and benefits." Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *1999 Supplement to Hart and Wechsler's The Federal Courts and the Federal System* 108 (Foundation Press, 4th ed. 1996). Regardless of whether Farber intended his article to be "tongue-in-cheek" (and it is not at all obvious that he did), the important point to bear in mind within the context of this inquiry is that his analysis of the Court's engagement with the issue of state sovereign immunity broadly exemplifies what economic approaches to this constitutional question will necessarily look like. On any self-respecting economic analysis, efficiency is the only relevant value, and transaction costs broadly conceived, see note 12, are a very important obstacle to the realization of that value. This article is ultimately more concerned to engage the general economic approach to the issue of state sovereign immunity than Farber's personal views. See note 37.

6. Daniel A. Farber, *The Coase Theorem and the Eleventh Amendment*, 13 Const. Comm. 141, 142 (1996).

7. Id.

8. Id. The relevant legal rule in the context of state sovereign immunity is either congressional-abrogation-power or no-congressional-abrogation-power.

9. Id. at 141. The Coase Theorem states that when transaction costs are zero, so that there are no impediments to bargaining, an efficient allocation of resources will result regardless of the legal rule that formally governs the situation. As Farber puts the point of the theorem, "Bargaining washes away legal rules . . . ." Id. at 142. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); see also Robert D. Cooter, *The Strategic Constitution* 53 (Princeton U. Press, 2000). Note that subsequent commentators—not Coase himself—formulated Coase's conclusions as the Coase Theorem. See Robert D. Cooter, *The Cost of Coase*, 11 J. Legal Stud. 1 (1982).

10. See note 4.

11. Of course, the fact of Farber's being right as a matter of economic theory is irrelevant as a matter of constitutional reality insofar as transaction costs are non-trivial and thereby impede bargaining between Congress and the states. Farber is well aware of this; indeed, he dedicates the bulk of his analysis to examining the effects of transaction costs under alternative assumptions about Congress' and the states' relative preferences for abrogating and retaining the latter's immunity from suit, respectively. Farber, 13 Const. Comm. at 142-43 (cited in note 6). This article does not consider the effects of positive transaction costs because its purpose is to demonstrate that even under the most charitable empirical assumptions concerning the presence of transaction costs, an exclusively economic approach to the constitutional question of state sovereign immunity is of very limited value.

issue focuses attention on the constitutional crux of the matter—namely, the extent to which an economic-efficiency approach to the question of state sovereign immunity ought to influence—let alone be dispositive of—its resolution.

I. OF EFFICIENCY AND DISTRIBUTION

There is no doubt that Farber's application of Coase's assumption and conclusion to the issue of state sovereign immunity is valid as a matter of economic theory: If transaction costs are zero, so that nothing ever gets in the way of Congress and the states successfully bargaining over the latter's susceptibility to suit,[12] then it certainly does not matter from the standpoint of efficiency whether or not Congress has the power to abrogate the states' immunity. If this assumption holds up, then as those enamored of economic analysis like to say, "the law doesn't matter."

Putting aside the realism of the critical Coasian assumption regarding transaction costs,[13] what this typically imperialistic economic conclusion[14] leaves out is the *what* with respect to which the law does not matter—namely, economic efficiency.[15] It also leaves out the *what* with respect to which the law *always* matters, even when transaction costs are zero—namely, *distributive consequences*. That is, even though Congress and the states will always be able to bargain to a social welfare-maximizing outcome regardless of whether *Seminole* or *Union Gas*[16] is the law of the land insofar as transaction costs are zero, which decision is on the books makes a great deal of difference in terms of

12. Note that Coase expanded the idea of transaction costs to encompass all impediments to successful bargaining. See Cooter, *The Strategic Constitution* at 53 (cited in note 9). Costless bargaining does not necessarily imply successful bargaining because of the possibility that strategic behavior (i.e., "hard bargaining" tactics) will prevent the parties from being able to agree on how to divide the value created by the bargain (called the *cooperative surplus*, see note 20). See generally Cooter, *The Cost of Coase* (cited in note 9).

13. See note 11.

14. See note 39.

15. There are a number of conceptions of efficiency in economics. The most basic is *Pareto efficiency*. An allocation of resources is Pareto efficient or Pareto optimal if the only way to make one person better off is to make another person worse off. Thus, Pareto optimality does not allow losses. In contrast, cost-benefit efficiency identifies the efficient outcome as the one that maximizes the sum of net benefits (i.e., benefits less costs) accruing to all people affected by the allocation regardless of their distribution across those people. Thus, the cost-benefit standard allows losses insofar as the winners win more than the losers lose. This article uses the cost-benefit standard in discussing the distributional consequences of different constitutional rules of state sovereign immunity.

16. See note 1.

the relative costs that Congress and the states have to bear, and thus their relative political and economic power.

The following example demonstrates the point nicely. Suppose that in enacting particular legislation, Congress would be willing to pay $10 million to render the state of California susceptible to suit in federal court for its violations of that statute.[17] Suppose further that California is opposed to being vulnerable to such suits, and would be willing to pay $5 million for a substantive immunity.[18] The cost-benefit efficient solution in this

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17. The example that follows assumes that Congress can, consistent with the Constitution, in effect purchase waivers of Eleventh Amendment immunity from the states—for example, by using its Article I spending power to condition the states' receipt of federal funds on their waiving sovereign immunity. The precedent most on point concerning this congressional option is *South Dakota v. Dole*, 483 U.S. 203 (1987). The Court's holding that Congress may condition some percentage of federal highway funds on a recipient state's adopting a minimum drinking age is significant in light of the fact that it relied on the assumption that the Twenty-first Amendment would bar Congress from enacting a national minimum drinking age. Given that the Twenty-first Amendment limits congressional action that would otherwise fall within the commerce power, it closely resembles the Rehnquist Court's interpretation of the Eleventh Amendment in this respect. This close legal correspondence provides a strong argument in favor of the constitutionality of Congress' using its spending power to exact waivers of immunity from the states.

On the other hand, *Dole* intimated in dictum that there were limits on Congress' use of the spending power, stating that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" Id. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). The Court could seize this notion as a way of limiting aggressive congressional use of the spending power to circumvent the limits imposed by *Seminole* and its progeny.

Additionally, what in *Dole* was characterized as a condition or temptation could readily be perceived as coercion in many statutory contexts. This is significant in light of the fact that the conservative majority has repeatedly demonstrated that it is willing to revisit established constitutional doctrines in pursuit of its determination to articulate and preserve a robust doctrine of state sovereign immunity. In this regard, Fallon, Meltzer, and Shapiro ask: "Given the majority's apparent willingness to chip away at other established constitutional doctrines in order to protect its vision of untrammeled state sovereign immunity . . . , is the broad authority recognized in Dole to condition financial grants on state waiver a technique that may be narrowed or eliminated?" Fallon, Meltzer, and Shapiro, *1999 Supplement* at 111 (cited in note 5). It may not be unduly pessimistic—but rather simply realistic—to conclude that the answer to this question is a resounding "yes."

Nevertheless, the purpose of the example in the text is to illustrate the point that the law always imparts distributional consequences, even when economic efficiency can be achieved regardless of the legal rule that formally governs the situation. The extent to which Congress may constitutionally purchase waivers of immunity from the states is not under consideration here.

18. This example employs the standard economic technique of measuring a party's valuation of a state of affairs in terms of its willingness to pay to bring it about or prevent it from obtaining. While the assumption that value equals willingness to pay is ethically and empirically questionable—and indeed can be morally outrageous—when a significant percentage of a person's wealth is at stake, it is not problematic within the context of the example in the text since it concerns bargaining between two governments with only a few million dollars at stake.

case is for California to be susceptible to suit in federal court for violations of the statute, since the benefit to Congress of $10 million exceeds the cost to California of $5 million, resulting in a net social benefit of $5 million. Assuming no transaction costs, this outcome will be achieved regardless of the controlling constitutional law of state sovereign immunity: Under *Union Gas*, Congress would have the power to abrogate California's immunity without paying a cent, and under *Seminole*, Congress could pay California a sufficient amount for it to voluntarily waive its immunity—for example, $7.5 million. Either way, the efficient outcome obtains, so that as far as efficiency is concerned, "the Eleventh Amendment doesn't matter."[19]

Nevertheless, the distributive consequences associated with the alternative legal regimes under examination are far from irrelevant. Under *Union Gas*, Congress ends up with a benefit of $10 million and California incurs a cost of $5 million. Under *Seminole*, Congress obtains a net benefit of $2.5 million (a $10 million benefit from California's waiver less the purchase price of $7.5 million), and California nets $2.5 million (receipt of a $7.5 million payment less the $5 million cost of waiver). Thus, although the law does not matter from the aggregate standpoint of efficiency, it matters a whole lot to each of these competing sovereigns. Congress would much rather end up ahead $10 million than ahead only $2.5 million, and California certainly would rather gain $2.5 million than lose $5 million.[20]

Now, an obvious question comes to mind. In terms of the values that are most deeply implicated in debates over federalism in general and state sovereign immunity in particular,[21] what

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19. See Farber, 13 Const. Comm. at 142 (cited in note 6).

20. This numerical example can be formalized using cooperative bargaining theory. See Cooter, *The Strategic Constitution* at 56-57 (cited in note 9). A party's *threat value* (TV) indicates how well it can do in the absence of cooperation (i.e., successful bargaining). The *noncooperative value* of the game (NV) is the sum of the parties' threat values. The *cooperative value* of the game (CV) is the sum of the payoffs the parties receive when they cooperate by bargaining successfully. The *cooperative surplus* (CS), which is the amount of value created through cooperation, is the difference between the cooperative value and the noncooperative value of the game (i.e., CS = CV - NV).

Under *Union Gas*, $TV_{Congress} = 10$ and $TV_{California} = -5$, so that NV = 5 and CV = 0, which in turn implies that CS = -5. In essence, bargaining cannot possibly succeed here because cooperation cannot create value. This is because Congress wants to abrogate California's immunity more than California is opposed to it, and Congress has the legal authority to do so.

The situation is different under *Seminole*. $TV_{Congress} = 0$ and $TV_{California} = 0$, so that NV = 0. CV = 5, which implies that CS = 5. Here, cooperation creates value because Congress is willing to pay more for the waiver than California requires to grant it, and California has the legal right to refuse to do so. Thus, Congress can try to induce California matters more as a matter of constitutional law: Maximizing the sum of the welfares of Congress and California regardless of how that value is distributed between them (as required for cost-benefit efficiency),[22] or deciding how the costs and benefits of alternative legal and political decisions will be distributed between these competing sovereigns? About which alternative are defenders of states' rights and advocates of one national constitutional community more concerned? Certainly these questions answer themselves. Thus, Farber's assertion that "the Eleventh Amendment may well be irrelevant,"[23] like the more general Coasian claim that "the law doesn't matter," contains much more rhetorical flare than substantive bite. It is like saying that the rules of baseball "don't matter" because, assuming it is always warm and sunny on game day, the rule that informs the umpire's discretion with respect to postponing a game on account of inclement weather never comes into play. Certainly, nice weather matters to all fans and players of America's pastime. But the rules of the game primarily exist to serve more important purposes.

II. THE PLACE OF EFFICIENCY IN THE PANTHEON OF CONSTITUTIONAL VALUES

The fight within the Court over state sovereign immunity constitutes a prominent battlefield in a larger war being fought over the constitutional question of state sovereignty in general. That is, the Justices are steeped in an ideological conflict over

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to waive its immunity by paying a sufficient price.

A positive cooperative surplus usually indicates that successful bargaining is possible. It is not assured, however, because the parties still need to agree on how to divide the surplus. Bargaining theory predicts that the price of waiver will fall somewhere in the interval between \$5 million (the minimum California is willing to accept) and \$10 million (the maximum Congress is willing to pay). Nevertheless, as Cooter writes, "Economists have long struggled with the fact that self-interested rationality alone does not determine the distribution of the cooperative surplus. Social norms help close the gap. A reasonable solution to the bargaining problem often gives each player his threat value plus an equal share of the cooperative surplus." Id. at 57. Because John Nash was the first to formalize the properties of this solution, game theorists call it the *Nash bargaining solution*. See John F. Nash, Jr., *The Bargaining Problem*, 18 Econometrica 155 (1950).

In the numerical example under consideration, Cooter's simplified version of the Nash bargaining solution suggests that Congress should receive $TV_{Congress}$ + ½(CS), or 0 + ½(5) = \$2.5 million. California should receive $TV_{California}$ + ½(CS), or 0 + ½(5) = \$2.5 million. Thus Congress, should pay California \$7.5 million.

21. For a discussion of some of these values, see Part II.
22. See note 15.
23. See Farber, 13 Const. Comm. at 141 (cited in note 6).

federalism.[24] Part of what is required for a viable long-term resolution of this debate is "a functional analysis of the role of the states in the federal system."[25] Among the values in play are

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24. That the fight within the Court is really about federalism is evident from consideration of the consistency of the recent state sovereign immunity decisions, see note 4, with the Court's holdings in other major federalism cases—in particular, *United States v. Morrison*, 529 U.S. 598 (2000) (see note 4); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" local sheriffs by requiring them to perform background checks on would-be handgun purchasers in conformity with provisions of Brady Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down for first time since New Deal a federal statute regulating private conduct—possession of a gun in a school zone—as beyond Congress' power to regulate interstate commerce); and *New York v. United States*, 505 U.S. 144 (1992) (holding that federal statute requiring states to either regulate radioactive waste or take title to waste constitutes compulsion and commandeering of governmental capacity of state governments, not encouragement, and therefore is beyond Congress' regulatory power). As Vicki Jackson concludes:

> . . . *Seminole Tribe* must be regarded as part of a broader canvass on which the Court is redrawing lines of federalism. . . .
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> These recent federalism decisions [i.e., *Seminole*, *Lopez*, and *New York*] are united by the diminished (in some cases invisible) role of *Garcia v. San Antonio Metropolitan Transit Authority* [469 U.S. 528 (1985)] and its view that the interests of the states can largely be safeguarded through the structures of federalism themselves. In *New York* and *Seminole Tribe*, the record of state participation in resolving an ongoing problem at a national level through legislation to which states as such significantly contributed is clear. There can be little doubt that the "safeguards of the federal structure" were in play there, if they ever can be said to be in play. That the Court largely ignored the relevance of these safeguards suggests that the influence of *Garcia* is, at best, waning.

Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. Rev. 495, 541-42 (1997) (footnotes omitted). Decisions subsequent to *Seminole* have confirmed Jackson's assessment of the current situation. See, e.g., Morrison, 529 U.S. at 653-54 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting); see also id. at 661-64 (Breyer, J., joined by Stevens, J., dissenting).

That the fight within the Court is really about federalism and not sovereign immunity per se is also evident from the fact that neither the members of the conservative majority nor the dissenters have found it relevant to discuss at any length the sovereign immunity of the United States in their state sovereign immunity opinions. This is very telling, for if it were the Justices' diverging views on sovereign immunity that constituted the crux of the doctrinal dispute, certainly they would find it both useful and necessary to analogize or distinguish the sovereign immunity of the United States in their Eleventh Amendment opinions.

25. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 S. Ct. Rev. 341, 345. Rapaczynski's analysis focuses on the *Garcia*-context. What a functional approach to federalism questions leaves out in the context of state sovereign immunity is the great extent to which this issue is laden with symbolic meaning for people on both sides. The strong reactions that the Court's recent Eleventh Amendment decisions typically engender in members of the legal community tend to overstate and thus obfuscate how much is really at stake from a day-to-day, instrumental standpoint in this area of the law. The crux of the legal question to which these decisions speak is the susceptibility of states to suits for retrospective federal relief in actions brought by private parties, since prospective relief against state officers remains available under *Ex Parte Young*, 209 U.S. 123 (1908) (holding that federal court could enjoin state attorney general from enforcing in state court an unconstitutional state rate-setting order for railroads), general concerns about the future implications of *Seminole* and *Coeur d'Alene* on this front notwithstanding. See note 4. While it is certainly

(1) preserving liberty through tyranny prevention; (2) providing a space for participatory politics; and (3) articulating legal standards and moral/cultural values in such areas of community life as education, antidiscrimination norms, and criminal law enforcement.[26]

It is beyond the scope of this short article to theorize the trade-off among these values. Rather, what is directly relevant

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not the case that this question is of trivial significance in the constitutional scheme of things, it nevertheless is of considerably less importance than many others which the Court typically addresses, including, for example, that decided in *Lopez*, see note 24, which spoke to the scope of Congress' general power to regulate.

Perhaps the reason that the strength of lawyers', judges', and academics' sentiments about the issue of state sovereign immunity is out of proportion to its practical significance lies in the perceived symbolic significance of subjecting states to suits brought by private citizens. That is, this particular theatre of battle in the larger war being fought within the Court over federalism is laden with symbolic meaning for people who feel very strongly about this more general structural issue.

In this light, it is worth considering Ninth Circuit Judge William Fletcher's observation that *Seminole* is

> at least a partial mistake from the viewpoint of the five Justices in the majority . . . [because] an argument in favor of state sovereign immunity is powerful when a state performs its sovereign functions, especially its policing and other criminal justice functions. But this argument has little or no force when a state engages in commercial activities . . . . [R]egulation under the Commerce, Patent, and Copyright Clauses generally does not regulate a state in the performance of its sovereign functions. . . . [L]egislation passed under these clauses is virtually always directed at private actors, and brings a state within its scope only because the state engages in the same behavior as the private actors.
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> . . . If the Court really believes that the distinction [between sovereign actions and commercial actions] is unimportant, we need to rethink a number of important legal ideas. Perhaps most obvious, those Justices in the current majority who voted for *National League of Cities v. Usery* need to rethink their rationale in that case . . . , for the holding in *National League of Cities* depends on the distinction between activities of a state that involve its sovereignty and activities that do not. . . . [F]urther, if the commercial activities of the states are the activities of sovereigns, the Court needs to rethink the market participant doctrine under the dormant Commerce Clause, under which a state is allowed to favor its own residents only when it is engaged in commercial activities.

William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 Notre Dame L. Rev. 843, 853-55 (2000) (footnotes omitted). While Fletcher's analysis has much force as a practical matter, it is doubtful that the members of the conservative majority are unaware of the doctrinal tension—if not flat inconsistency—he points out, and it is even more doubtful that they will be much moved by his argument. The reason probably comes down to a significant consideration he neglects to entertain—namely, the symbolic significance of state sovereign immunity for the Justices in the majority. That is, in their minds and as they would put it, the "indignity" of "hailing" a "sovereign State" into court at the "behest" of a private citizen far exceeds any symbolic damage to a state's sovereignty that results from the Court's Commerce Clause or dormant Commerce Clause jurisprudence, the distinction between sovereign actions and commercial actions notwithstanding.

26. There is much debate over whether the states are valuable as laboratories of experimentation. Compare Rapaczynski, 1985 S. Ct. Rev. at 408-18 (cited in note 25), with the Honorable J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523, 523-26 (2001).

to the present inquiry is the idea that collectively they carry much greater constitutional weight than economic efficiency, and they are often in serious tension with it. As Rapaczynski observes:

> [W]hat seems doubtful is that governmental efficiency is among the primary functions of our constitutional division of authority between the states and the federal government. Quite to the contrary, if my analyses of the role to be played by the states in protecting the citizens from the dangers of governmental oppression and in providing a public space for participatory politics are correct, then the protection of these constitutional functions of the states requires that a certain price be paid for them in terms of a degree of governmental inefficiency.[27]

Rapaczynski's analysis addresses the first two values served by federalism identified above. Concerning whether the locus of cultural values in the areas of education, the family, antidiscrimination, and criminal law should be national or local, which accounts for the *Lopez* and *Morrison* majority's concern with traditional subjects of state regulation,[28] a consequentialist economic analysis only gets off the ground insofar as We the People[29] are prepared to choose national or local solutions exclu-

27. Id. at 413.

28. See *Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); see also *Morrison*, 529 U.S. 615-16:

> Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez*, supra, at 564 . . . . The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part. Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant.

29. The words "We the People" in the text refers to the authority of the United States Constitution as *ethos*, as an instantiation of national identity. See Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 35-38, 41-49 (Harvard U. Press, 1995) (articulating the constitutional authority of ethos). Post writes that "the *te-*

sively on the basis of aggregate consequences. Insofar as We have preferences for the national or local levels *ex ante* (i.e., antecedent to a global consequentialist analysis), economics cannot tell us anything. To put the point another way, an economic approach to federalism would decide what We should want in light of the overall costs and benefits associated with the various alternatives. The Supreme Court's participation in the perpetual process of collective identity formation, in which the practice of constitutional adjudication is most fundamentally engaged, more often first decides who We were, are, and aspire to be—and thus want for ourselves and our posterity—before determining the relevant aggregate costs and benefits.

This is as it should be. Similar to the values that underlie the other two main prongs of the American constitutional structure (i.e., the separation of powers and individual rights), those served by federalism transcend and are in some tension with the value of efficiency. There would thus be some truth to meeting the grandiose claim that "the law doesn't matter" with the dismissive response that when it comes to constitutional law, "economics doesn't matter." But this would be to overstate the point. The fact of the matter is that economics is relevant: The economists are appropriately at the table at which constitutional debate unfolds. The practice of constitutional adjudication must "take[ ] consequences seriously"[30] not only because in extreme situations, the Constitution is not a "suicide pact,"[31] but also because in the more mundane context of everyday life, one of the explicit purposes of the Constitution is to "promote the general Welfare."[32]

Nevertheless, economic analysis is of much greater potential value in the public-law context for its positive analyses than for its prescriptive arguments. For example, the contribution of Farber's piece lies in its rigorous investigation of the effects of transaction costs on political bargaining between Congress and the states,[33] especially its identification of the potentially perverse consequence that "some states will in the end be harmed

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los and shape of constitutional interpretation . . . demands . . . a continual effort to articulate the authority of our 'fundamental nature as a people.'" Id. at 36 (quoting Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. Legal Educ. 167, 169 (1987)).

30. Cooter, *The Strategic Constitution* at 3 (cited in note 9).

31. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (warning that the Court's decision may have moved far enough toward embracing civil liberties so as to have turned the Bill of Rights into a "suicide pact").

32. U.S. Const., Preamble.

33. See Farber, 13 Const. Comm. at 142-43 (cited in note 6).

by *Seminole* because political inertia will prevent them from entering into waiver bargains that actually would be in their interests."[34] By contrast, Farber's prescriptive claim that "the correctness of *Seminole*" turns "on a comparison of relative political transaction costs . . . [,] not on the history or text of the Eleventh Amendment,"[35] is worse than wrong. In sacrificing all of the other, ultimately more important constitutional values in play at the altar of economic efficiency, Farber's normative conclusion is *dangerous* because it tends to corrode the integrity of the practice of constitutional adjudication. Efficiency is only one of a number of purposes that the Constitution is intended to serve.[36] Moreover, in the pantheon of constitutional values, its pursuit is almost always of secondary—and thus nondecisive—constitutional importance.[37]

CONCLUSION: THE CONSTITUTIONAL VIRTUE OF HUMILITY

It has not been the purpose of this brief article to flesh out how the constitutional federalism values of tyranny reduction, political participation, and collective identity formation, as well as symbolic considerations,[38] play out in the context of state sovereign immunity. Rather, what has been emphasized here is the judgment that some combination of them—not the results of an efficiency analysis—ought to be dispositive of its resolution. Although economists are imperialists by nature,[39] constitutional

34. Id. at 142.

35. Id. at 143 (footnotes omitted).

36. The practice of constitutional adjudication is a messy intellectual exercise. Unlike economic analysis, constitutional law does not possess an analytical structure that focuses exclusively on maximally realizing one value. Instead, it is most fundamentally about identity and meaning—i.e., about how enactments of law come to stand for and ultimately to constitute a culture and a people. This being the case, constitutional law often will be engaged in the extremely difficult but profoundly necessary project of crudely balancing incommensurable values. What is lost in analytical rigor, theoretical parsimony, and aesthetic appeal is more than offset by the knowledge that the fundamental law is fulfilling its social function.

37. As a prominent public-law scholar in addition to being an expert on law and public choice, Farber presumably knows this. Thus, he is careful to write that, "*[a]ccording to standard law and economics reasoning*, the Eleventh Amendment may well be irrelevant." Id. at 141 (emphasis added). Similarly, he observes that, "*[f]rom a law and economics perspective*, then, the correctness of *Seminole seems* to turn on a comparison of relative political transaction costs." Id. at 143 (emphasis added). Through these qualifications, Farber appears to be conveying that he is presenting an economic approach to the question of state sovereign immunity, not necessarily his own considered view of the issue. See note 5.

38. See note 25.

39. Consider the words of George Stigler, who won the Nobel Prize in Economic

law is a field within which they would be wise to proceed with extreme caution, genuine humility, and a profound appreciation of the limits of economic analysis.

Science in 1982 for his seminal contributions to price theory, industrial organization, and the history of economic thought, his role in founding the sub-fields of the economics of information and the economics of regulation, and his pioneering research on the intersection of economics and the law. See Richard Schmalensee, *George Stigler's Contributions to Economics*, 85 Scand. J. Econ. 77 (1983). Stigler asserts that "economics is an imperial science: it has been aggressive in addressing central problems in a considerable number of neighboring social disciplines, and without any invitations . . . . [E]conomics [is] the study of all purposive human behavior." George J. Stigler, *Economics – The Imperial Science?* 86 Scand. J. Econ. 301, 311 and 302 (1984).