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## Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?

Jeffrey M. Hirsch\*

*The need to attract and keep soldiers has never been greater, yet that necessity is threatened by the Supreme Court's burgeoning state sovereign immunity jurisprudence. Congress has sought to promote military service in the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which protects soldiers from adverse employment actions based on their military status. Although USERRA is clearly intended to apply to state employers, the Court's dicta that Congress cannot abrogate state sovereign immunity under Article I of the Constitution appear to emasculate that aim. This Article, however, argues that the Court's recent holdings show that USERRA's abrogation, enacted pursuant to Congress's war powers, is an exception to the general prohibition against abrogation under Article I. The validity of war powers abrogation is supported by the historical importance of a unified national defense—well recognized during the plan of the Constitutional Convention and by the Court itself—which reveals that the states did not expect to possess immunity where the federal government exercises its war powers. This issue is important, for, as this Article details, few suitable alternatives exist for military personnel who are deprived of their USERRA rights by state employers. Indeed, unless war abrogation is upheld, or Congress acts to secure conditional waivers of state immunity, military employees in only a few states will have the level of protection deemed necessary by Congress.*

The use of noncareer military personnel for active duty assignments has become more prevalent as the United States has both reduced the number of full-time soldiers and increased its military involvement throughout the world. Indeed, to address the conflict in Iraq, as well as threats in Afghanistan, North Korea, and other parts of the world, the United States placed over 300,000 members of the Reserves and National Guard on active duty since

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September 11, 2001.<sup>1</sup> The soldiers being called up now are also facing increased time on active duty, with current predictions of two years.<sup>2</sup> Moreover, unlike soldiers in earlier conflicts,<sup>3</sup> those who eventually leave active duty and return to civilian life now face an additional hardship: the Supreme Court's burgeoning state sovereign immunity jurisprudence, which has greatly expanded the power of state employers to avoid liability under many federal employment statutes, even where Congress expressly permitted private lawsuits against states.<sup>4</sup>

At a time when the nation is increasing its use of noncareer

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<sup>1</sup> Kristen Downey, *Reservists Filing Complaints*, WASH. POST, Nov. 11, 2003, at E11 (stating that 306,000 members of the Reserves and National Guard had been called to active duty). As of November 26, 2003 the Department of Defense had 132,667 members of the Reserves or National Guard on active duty. See News Release, Dep't of Def., National Guard and Reserve Mobilized as of Nov. 26, 2003, at <http://www.defenselink.mil/releases/2003/nr20031125-0704.html> (last visited Mar. 9, 2004); see also *USERRA Legal Inquiries Up Regarding Jobs; DOL Says Possible Rise in Claims Expected*, 63 DAILY LAB. REP. (BNA), at A-12 (Apr. 2, 2003) [hereinafter *USERRA Legal Inquiries Up*] (stating that over 280,000 people have been called to active duty since September 2001); Associated Press, *Pentagon Lost Track of Reservists*, WASH. POST, Aug. 22, 2003, at A4 (stating that about 300,000 reservists had been called to active duty since September 11, 2001); Thomas E. Ricks & Vernon Loeb, *Unrivaled Military Feels Strains of Unending War*, WASH. POST, Feb. 16, 2003, at A18 (describing the strains felt by soldiers who are often required to go on back-to-back deployments, the decreasing number of active duty members of the armed forces, and the increased number of military interventions over the past decade). The Army Chief of Staff estimated before fighting began in the second Iraqi conflict that the military will need "several hundred thousand" soldiers in Iraq after the conflict ends, although the Pentagon subsequently disagreed, putting the number as 100,000. See Eric Schmitt, *Pentagon Contradicts General on Iraq Occupation Force's Size*, N.Y. TIMES, Feb. 28, 2003, at A1 (noting estimate by Gen. Erik K. Shinseki). The Pentagon's most recent estimate is that 156,000 United States soldiers will be needed in Iraq through at least 2004. See Vernon Loeb, *Pentagon Unveils Plan to Bolster Forces in Iraq*, WASH. POST, July 24, 2003, at A8. Further, the most recent Department of Defense statistics show that there are 1,236,000 members of the Reserves or National Guard, and 1,385,116 active members of the armed services. See DEP'T OF DEF., SELECTED MANPOWER STATISTICS: FISCAL YEAR 2001, at 18, 155 (noting numbers as of September 30, 2001), available at <http://www.dior.whs.mil/mmid/m01/fy01/m01fy01.pdf> (last visited Mar. 9, 2004).

<sup>2</sup> See Robert Burns, *Reserves May Get Alert on Iraq War* (Nov. 19, 2002) (estimating that from 185,000 to 285,000 reservists would be required), available at <http://www.cqservices.com/MyCQ/News/Default.asp?V=2121> (last visited Mar. 9, 2004); Vernon Loeb & Steve Vogel, *Reserve Tours Are Extended*, WASH. POST, Sept. 9, 2003, at A1 (describing order that reservists and Guard members called to active duty must serve twelve months on the ground in Iraq or nearby, and that the tours may be extended to two years).

<sup>3</sup> During the 1991 Persian Gulf conflict, over 265,000 reservists were called to active duty. See National Guard Association of the United States website, *Major National Guard Callups* (stating that 265,322 reservists were called), at <http://www.ngaus.org/newsroom/guard101-callups.asp> (last visited Mar. 9, 2004).

<sup>4</sup> See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

personnel and deploying them for longer periods of time, the Court's state immunity decisions threaten the federal government's ability to attract, and keep, such soldiers. That goal underlies the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which guarantees leaves of absence for training, provides the right to reemployment after active duty, and prohibits discrimination based on an employee's military status.<sup>5</sup> Although the need for USERRA is growing,<sup>6</sup> its ability to further the nation's military needs by protecting military employees<sup>7</sup> may be undermined if the Court permits states to avoid liability under the Act by invoking their sovereign immunity.<sup>8</sup>

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<sup>5</sup> See *infra* notes 72-74 and accompanying text (describing USERRA's statutory purposes).

<sup>6</sup> See *USERRA Legal Inquiries Up*, *supra* note 1, at A-12 (stating that USERRA complaints have increased by about thirty percent since the increase in callups after September 11, 2001—a percentage comparable to the increase after the 1991 Persian Gulf conflict); see also *Official Says DOL Receiving Fewer USERRA Complaints Than Period After 1991 Gulf War*, 221 DAILY LAB. REP. (BNA), at A-12 (Nov. 17, 2003) (stating that the Department of Labor received 1,315 USERRA complaints during fiscal year 2003, compared to 2,500 complaints in fiscal year 1991); Downey, *supra* note 1, at E11 (noting that the approximately 1,300 complaints in fiscal year 2003 was up from nine hundred complaints in 2001).

<sup>7</sup> This Article refers to military service members who are working, or seeking work, in civilian positions as "military employees."

<sup>8</sup> Recent congressional statements made on behalf of a 1998 amendment to USERRA emphasized the importance of protecting state military employees. See *infra* notes 222-23 and accompanying text (describing amendment that sought to ensure USERRA's enforcement against state employers); see also 144 CONG. REC. H1396, H1398-99 (daily ed. Mar. 24, 1998) (statement of Rep. Filner) (stating that because "members of the Reserve and National Guard are a critical component of our national defense," Congress should pass bill that restores USERRA protection to state employees after *Seminole Tribe*). For example, Rep. Evans made clear the importance of fully protecting state military employees' rights under USERRA:

Federal law must assure that the appropriate remedies are available when violations of [USERRA] threaten our Nation's ability to obtain and attract a strong military force. . . . By passing [the amendment ensuring protection for state employees] we are fulfilling our duty to provide for the common defense of our Nation . . . [and] we are fulfilling our Constitutional duty to "provide for the common Defence" of our nation. With the need to utilize the resources of the National Guard and Reserves to meet our Total Force military responsibilities, it is essential that those who volunteer to serve our country be protected by adequate safeguards of their right to obtain and retain suitable civilian employment. The United States has a strong national interest in assuring that its military readiness will not be undermined by policies and practices which can deter competent and qualified citizens from military service. . . . The ability of the United States to attract and retain the competent and qualified personnel necessary to meet our national security interests will be undermined absent a remedy [against state employers] . . . .

At present, a state military employee's ability to bring a USERRA action against a state remains an open question, as the few decisions examining that issue are in disagreement.<sup>9</sup> No court, however, has fully considered the impact of the Supreme Court's most recent state sovereign immunity decisions on USERRA's abrogation. Thus, the question remains whether USERRA, which was enacted pursuant to Congress's war powers, provides an exception to the Court's generally dim view of Article I abrogation.

This Article argues that, despite Supreme Court dicta suggesting that Congress can never abrogate state immunity under its Article I powers,<sup>10</sup> the Court's own holdings, and its most influential historical evidence, indicate that war powers abrogation is constitutional. In short, the unique nature of the federal government's war powers vis-à-vis the states—as illustrated by the colonial period, the constitutional ratification debates, and the Constitution's text—shows that the states did not believe that they possessed immunity where the federal government exercises its war powers. Because the Court has recently held that these historical beliefs are determinative,<sup>11</sup> USERRA's abrogation of state immunity under the federal war powers is valid.

Part I of this Article describes the Supreme Court's recent state sovereign immunity jurisprudence. Part II then argues that, under that jurisprudence, USERRA's war powers abrogation is constitutional. Finally, Part III explores alternate means of enforcing USERRA should its abrogation be invalidated, and it recommends congressional action to ensure full state compliance with the Act.

## I. THE SUPREME COURT'S NEW FEDERALISM JURISPRUDENCE

### A. *Seminole Tribe of Florida v. Florida*

The starting point for the Supreme Court's recent state sovereign immunity jurisprudence is the Eleventh Amendment and the Court's interpretation of it in *Seminole Tribe of Florida v. Florida*.<sup>12</sup>

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*Id.* at H1397-98 (statement of Rep. Evans).

<sup>9</sup> See *infra* notes 96-105 and accompanying text.

<sup>10</sup> See *infra* note 94 and accompanying text.

<sup>11</sup> See *infra* notes 106-21 and accompanying text.

<sup>12</sup> 517 U.S. 44 (1996) (addressing abrogation of state immunity in the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168 (1994); 25 U.S.C. §§ 2701-2721 (1994)). For a more thorough analysis of *Seminole Tribe* and Eleventh Amendment jurisprudence, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, and Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

Enacted to overrule the Court's 1793 *Chisholm v. Georgia* decision,<sup>13</sup> the Eleventh Amendment declares that "[t]he 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."<sup>14</sup>

As *Seminole Tribe* openly acknowledged, the Court has not felt bound by the literal text of the Amendment.<sup>15</sup> Rather, the Court has continued to uphold an expansive interpretation of the Eleventh Amendment that began with *Hans v. Louisiana*,<sup>16</sup> which held that the federal courts lacked jurisdiction over a suit brought against a state by one of its own citizens—even though the Amendment speaks only to suits by citizens of another state or country. Despite its general willingness to broadly construe the Eleventh Amendment, the Court had curbed its reach where Congress permitted a private right of action against nonconsenting states. In particular, the Court held in *Pennsylvania v. Union Gas Co.*<sup>17</sup> that Congress could validly abrogate state immunity pursuant to the Interstate Commerce Clause.<sup>18</sup>

Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.<sup>19</sup>

War powers abrogation provided little controversy under *Union Gas*, for Congress's authority to abrogate state immunity pursuant to its commerce and war powers was equal.<sup>20</sup> In *Seminole Tribe*, however,

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<sup>13</sup> 2 U.S. (2 Dall.) 419 (1793) (holding that federal jurisdiction existed over a suit by a South Carolina citizen seeking payment of a debt by the State of Georgia).

<sup>14</sup> U.S. CONST. amend. XI.

<sup>15</sup> See 517 U.S. at 54.

<sup>16</sup> 134 U.S. 1 (1890) (holding that a state can invoke sovereign immunity against a suit by one of its own citizens for breach of contract).

<sup>17</sup> 491 U.S. 1 (1989).

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .").

<sup>19</sup> 491 U.S. at 19-20.

<sup>20</sup> See, e.g., *Reopell v. Massachusetts*, 936 F.2d 12, 16 (1st Cir. 1991) (holding, pre-*Seminole Tribe*, that the Supreme Court's "rationale for holding that the Commerce Clause enactments abrogate the Eleventh Amendment equally supports War Power abrogation"); *Jennings v. Ill. Office of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979) (holding, pre-*Seminole Tribe*, that USERRA's abrogation was valid because "Congress was exercising legislative authority that is plenary within the terms of the

the Court overruled *Union Gas* and held that Congress's attempt to abrogate state sovereign immunity in the Indian Gaming Regulatory Act,<sup>21</sup> which was enacted under the Indian Commerce Clause,<sup>22</sup> violated the Eleventh Amendment.

Writing for the Court in *Seminole Tribe*, Chief Justice Rehnquist directly addressed the central issue underlying Congress's power to abrogate: whether the Eleventh Amendment grants states constitutional immunity or merely common-law protection susceptible to congressional abrogation. According to the Court, the immunity is constitutional and "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is in an area . . . that is under the exclusive control of the Federal Government."<sup>23</sup>

Despite the significance of its holding that states' sovereign immunity was constitutional in nature, *Seminole Tribe* did not preclude all congressional attempts to abrogate. Rather, the Court explicitly reemphasized the validity of *Fitzpatrick v. Bitzer*,<sup>24</sup> another decision authored by then-Justice Rehnquist, in which the Court held that Congress could abrogate state immunity pursuant to the Fourteenth Amendment.<sup>25</sup>

In upholding *Fitzpatrick*, the Court distinguished congressional attempts to abrogate under the Fourteenth Amendment versus the Commerce Clauses. The Court first noted that, unlike the Commerce Clauses, Section 1<sup>26</sup> of the Fourteenth Amendment expressly prohibited certain state actions, and Section 5<sup>27</sup> gave Congress the power to enforce Section 1; thus, the Amendment

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Constitutional (war powers) grant") (internal quotation marks omitted).

<sup>21</sup> 18 U.S.C. §§ 1166-1168 (1994); 25 U.S.C. §§ 2701-2721 (1994).

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . .").

<sup>23</sup> *Seminole Tribe*, 517 U.S. at 72; *accord* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002). For criticism of *Seminole Tribe's* holding that state sovereign immunity is constitutionally required, see, for example, *Seminole Tribe*, 517 U.S. at 82-83 (Souter, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259-90 (1985) (Brennan, J., dissenting); and Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 507-08 (1997).

<sup>24</sup> 427 U.S. 445 (1976) (upholding abrogation under Title VII of the Civil Rights Act of 1964).

<sup>25</sup> U.S. CONST. amend. XIV.

<sup>26</sup> U.S. CONST. amend. XIV, § 1 (stating, in part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

<sup>27</sup> U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

expanded federal power at the “expense of state autonomy.”<sup>28</sup> Then, the Court stressed that the Fourteenth Amendment’s expansion of congressional power vis-à-vis the states occurred after the Eleventh Amendment’s ratification:

*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.<sup>29</sup>

Although this chronological distinction is less than satisfying,<sup>30</sup> *Seminole Tribe* made clear that the Indian Gaming Regulatory Act’s abrogation violated the Eleventh Amendment because Congress acted under the earlier-ratified Indian Commerce Clause.<sup>31</sup> The Court concluded that, under its chronological analysis, “[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization [under Article I] of suits by private parties against unconsenting States.”<sup>32</sup>

Finally, on a more practical note, the Court in *Seminole Tribe* established a two-step analysis for determining whether Congress validly abrogated state sovereign immunity. The first step is to assess whether Congress “unequivocally expresse[d] its intent to abrogate the immunity.”<sup>33</sup> Then, if the intent to abrogate is clear, the next step is to examine “whether Congress has acted ‘pursuant to a valid exercise of power.’”<sup>34</sup> In short, if Congress clearly granted a private right of action against nonconsenting states, did it have the power to do so?

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<sup>28</sup> *Seminole Tribe*, 517 U.S. at 59.

<sup>29</sup> *Id.* at 65-66.

<sup>30</sup> See Ann Althouse, *The Alden Trilogy: Still Searching for a New Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 644 & n.62 (2000) (“It is difficult to see why the subsequent enactment of the Eleventh Amendment undercuts evidence from the ratification period.”); Meltzer, *supra* note 12, at 21-23.

<sup>31</sup> *Seminole Tribe*, 517 U.S. at 65-66.

<sup>32</sup> *Id.* at 72.

<sup>33</sup> *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

<sup>34</sup> *Id.* (quoting *Green*, 474 U.S. at 68); see also *id.* at 59 (“Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?”).



B. *Weighing State Sovereign Immunity Against Congressional Abrogation*

Following *Seminole Tribe*, the Court has addressed congressional abrogation of state sovereign immunity under several employment statutes,<sup>35</sup> principally ones enacted pursuant to the Fourteenth Amendment. Although USERRA was enacted under Congress's Article I war powers rather than the Fourteenth Amendment,<sup>36</sup> the Court's analyses in those cases display an explicit balancing of interests that are relevant to the validity of war powers abrogation. In particular, USERRA's importance to the nation's military needs may provide a rare situation for the Court to tip the balance away from state sovereign immunity concerns and toward Congress's goals in abrogating that immunity.

It must first be noted that the curtailment of Congress's abrogation power coincided with new restrictions on its ability to enact legislation under the Fourteenth Amendment. In *City of Boerne v. Flores*,<sup>37</sup> the Court held that Congress's power to enforce the Fourteenth Amendment is only remedial and cannot alter the scope of constitutional rights; defining those rights is the role of courts alone.<sup>38</sup> The key holding in *Boerne* was that the determination

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<sup>35</sup> See Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (holding that individuals can sue state employers for monetary damages under Family and Medical Leave Act); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that individuals cannot sue state employers for monetary damages under the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (same, under the Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706 (1999) (same, under the Fair Labor Standards Act). Although the Supreme Court has yet to address abrogation in other employment statutes, there is a substantial body of law from other courts that has done so. For example, most post-*Seminole Tribe* courts have upheld abrogation under the Equal Pay Act of 1963, 29 U.S.C. §§ 203(e)(2)(C), 206(d) (2000). See, e.g., Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999), *vacated and remanded by* 528 U.S. 1111 (2000) (citing *Kimel*), *on remand*, 107 F. Supp. 2d 158 (S.D.N.Y. 2000) (holding abrogation to be valid); Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998); Timmer v. Mich. Dep't of Commerce, 104 F.3d 833, 837 (6th Cir. 1997).

<sup>36</sup> See *infra* note 102.

<sup>37</sup> 521 U.S. 507 (1997). In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that neutral, generally applicable laws do not have to show a compelling government interest to apply to religious practices. Congress sought to reverse *Smith's* interpretation of the First Amendment by enacting the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). *Boerne* held that RFRA was unconstitutional. *Boerne*, 521 U.S. 507.

<sup>38</sup> 521 U.S. at 519; see also Althouse, *supra* note 30, at 674; Christopher L.

whether Congress exceeded its remedial power turns on the “proportionality or congruence between the means adopted and the legitimate end to be achieved.”<sup>39</sup>

*Boerne’s* impact on state sovereign immunity abrogation was not necessarily apparent at the time, for the Court also emphasized that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ [Fourteenth Amendment] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>40</sup> The Court, however, subsequently embarked on an explicit balancing of Congress’s Fourteenth Amendment power against the states’ sovereign immunity interests and, despite *Boerne’s* deferential language, the states’ immunity concerns have generally prevailed.

In its examinations of various employment statutes, the Court has reemphasized the validity of Congress’s power to abrogate state immunity under Title VII of the Civil Rights Act of 1964<sup>41</sup> and cursorily rejected abrogation under the Fair Labor Standards Act (“FLSA”).<sup>42</sup> The Court’s more comprehensive employment decisions

Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 86-87.

<sup>39</sup> 521 U.S. at 533; see Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109 (discussing, in part, the relationship between the Court’s Fourteenth Amendment limits and state sovereign immunity).

<sup>40</sup> *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). At least one commentator did note the potential negative impact on federal employment statutes. See Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. & EMP. POL’Y J. 175 (1998) (predicting that *Boerne* would eliminate most federal employment protections for state employees).

<sup>41</sup> 42 U.S.C. §§ 2000e to 2000e-17 (1994); see *Seminole Tribe*, 517 U.S. at 59, 65-66 (reemphasizing the validity of *Fitzpatrick*, which upheld Congress’s power to abrogate state immunity under Title VII’s prohibition against intentional race discrimination); *Ussery v. Louisiana*, 150 F.3d 431, 434-35 (5th Cir. 1998) (rejecting argument that Title VII’s abrogation of state immunity was not clear and reaffirming the relevancy of *Fitzpatrick* after *Seminole Tribe*). Doubts could be raised, however, about whether Title VII’s abrogation is valid where it prohibits disparate impact discrimination. See Eisgruber & Sager, *supra* note 38, at 90-91 (arguing that *Boerne* permits Congress to authorize private disparate impact race discrimination claims against states).

<sup>42</sup> 29 U.S.C. §§ 201-219 (1994); see *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress could not allow individuals to pursue a FLSA claim for money damages against a nonconsenting state in state court). Congress’s struggle to apply the FLSA to the states provides a good illustration of the difficulties caused by the Court’s changing sovereign immunity jurisprudence. After the Court held in 1973 that the FLSA did not clearly state an intent to abrogate state immunity, see *Employees v. Mo. Pub. Health Dep’t*, 411 U.S. 279, 285 (1973), Congress amended the Act to make its intent to abrogate clear, see 29 U.S.C. § 203(d) (1974). In 1976, however, the Court

initially involved statutes prohibiting discrimination based on age and disability. In those two cases, the Court acknowledged Congress's explicit attempt to provide national protection for employees—including those who work for state employers—but concluded that Congress's power to achieve its goals was overwhelmed by state sovereign immunity interests. That emphasis on state immunity interests was finally curbed, however, by the Court's subsequent decision upholding private rights of action against state employers to enforce federal family medical leave requirements.

In *Kimel v. Florida Board of Regents*,<sup>43</sup> the Court held that Congress's abrogation of state immunity under the Age Discrimination in Employment Act ("ADEA")<sup>44</sup> was unconstitutional. *Kimel* was notable for its explicit balancing of state immunity interests against individual rights, as the Court focused its criticism on Congress's failure to show that state employers, rather than employers in general, were engaging in a pattern of unconstitutional age discrimination.<sup>45</sup>

The central issue in *Kimel* was whether the ADEA's abrogation was a "congruent and proportional" exercise of Congress's

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held that Congress could not extend the FLSA to state employees in "areas of traditional governmental functions." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976). In 1985, the Court reversed course and held that the FLSA covered all state employees. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>43</sup> 528 U.S. 62 (2000).

<sup>44</sup> 29 U.S.C. §§ 621-634 (1994). Congress passed the ADEA in 1967, and it originally applied only to private employers. *See id.* § 630(b) (1970) (excluding as an "employer" the "United States . . . or a State or political subdivision thereof"). The Fair Labor Standards Amendments of 1974 amended the ADEA's definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." *Id.* § 630(b) (1994); *see also id.* § 626(b) (incorporating *id.* § 216(b), which permits an individual to bring a civil action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction"); *id.* § 203(x) (defining "public agency" as "the government of a State or political subdivision thereof . . . [and] any agency of . . . a State, or political subdivision of a State").

<sup>45</sup> The Court never addressed why Congress would have provided such evidence, given that it had no reason to believe that such findings were necessary at the time. More importantly, the Court failed to acknowledge that its retroactive application of *Seminole Tribe* may ignore evidence of state discrimination that existed, but that Congress was never compelled to seek out or present. *See* Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming a Coordinate Branch*, 4 GREEN BAG 2D 351, 355 (2001) (noting that congressional findings for the ADA may have found more state violations if Congress knew of their subsequent significance). However, in reformulating USERRA's application to state employers, Congress did note that after *Seminole Tribe*, several federal courts had held that USERRA's abrogation was invalid. *See, e.g.*, 144 CONG. REC. H1398, H1398 (Mar. 24, 1998) (statement of Rep. Evans).

Fourteenth Amendment power.<sup>46</sup> In spite of the obvious congressional intent to apply the statute to state employers, the Court held that “the substantive requirements that the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.”<sup>47</sup>

Underlying that conclusion was the Court’s holding that the type of class being protected directly affects the “congruence and proportionality” of a statute’s application to state employers.<sup>48</sup> The ADEA suffered under that analysis, for age bias is entitled only to rational basis review, rather than the strict or heightened scrutiny of other classifications.<sup>49</sup> Accordingly, because the ADEA prohibited age-based classifications that were likely rationally related to a legitimate state interest, its abrogation of state immunity was “so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent,

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<sup>46</sup> *Kimel*, 528 U.S. at 83.

<sup>47</sup> *Id.* *But see id.* at 93, 96 (Stevens, J., dissenting) (“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. . . . [O]nce Congress has made its policy choice, the sovereignty concerns of the several States are satisfied . . .”).

<sup>48</sup> *See id.* at 83; *see also* *Kazmier v. Widmann*, 225 F.3d 519, 524 (5th Cir. 2000). *But see id.* at 535-41 (Dennis, J., dissenting) (arguing that *Kimel* and *Boerne* did not substantively change Congress’s enforcement power under the Fourteenth Amendment where a suspect or quasi-suspect class is at issue—there need only be a rational basis for Congress’s action).

<sup>49</sup> *See Kimel*, 528 U.S. at 83 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)). Under rational basis review, a state may discriminate based on age without violating the Fourteenth Amendment if the classification is rationally related to a legitimate state interest—that is, states may “draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it is ‘probably not true’ that those reasons are valid in the majority of cases.” *Id.* The relevance of this reasoning is not immediately apparent, for the ADEA allows similar discrimination under its bona fide occupational quality defense. *See* 29 U.S.C. § 623(f)(1) (2000). The Court, however, held that the bona fide occupational defense is different from rational basis review because the former requires a showing of “reasonable necessity” and shifts the burden to the state. *See Kimel*, 528 U.S. at 86-87. The Court also noted that rational basis review allows states to use age as a proxy for other policies, while the ADEA does not. *See id.* (citing 29 U.S.C. § 623(f)(1)). Yet, it is puzzling why the Court weighed states’ immunity interests against *general* age-based policies, rather than *individual* claims of unconstitutional age discrimination. Such an analysis suggests that Congress could find a pattern of age discrimination against individuals by states, but is powerless to address that pattern as long as the discrimination occurs under policies that have a rational basis as applied to the majority of, but not all, older workers.

unconstitutional behavior.”<sup>50</sup>

The Court acknowledged that Congress’s enforcement power under the Fourteenth Amendment is not limited to remedying constitutional violations,<sup>51</sup> and therefore examined “whether the ADEA is in fact just an appropriate [prophylactic] remedy or, instead, merely an attempt to substantively redefine the States’ legal obligation with respect to age discrimination.”<sup>52</sup> Noting the legislative history’s failure to cite evidence of a pattern of state age discrimination—even though Congress extended the ADEA to state employers in 1979, well before it had any reason to believe that such evidence was necessary—the Court held “that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.”<sup>53</sup> Given the lack of such a pattern, Congress’s abrogation of state immunity was not congruent and proportional to the ADEA’s “broad prophylactic legislation,” and therefore violated the Eleventh Amendment.<sup>54</sup>

*Kimel* aptly demonstrated that in a balance between deference to Congress and state sovereign immunity, the latter is paramount. The prominence of state immunity vis-à-vis congressional prerogatives was

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<sup>50</sup> *Kimel*, 528 U.S. at 82-83 (quoting *Boerne*, 521 U.S. at 532).

<sup>51</sup> *Id.* at 88 (“Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.”).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 91. Although it noted Congress’s ability to provide a broad remedy against possible constitutional violations, the Court repeatedly invoked the dearth of evidence indicating a pattern of constitutional violations. *See, e.g., id.* (“Congress’ failure to uncover any significant pattern of unconstitutional discrimination . . . confirms that [it] had no reason to believe that broad prophylactic legislation was necessary.”). That requirement ignores both Congress’s ability to address injuries that do not violate the constitution and the very meaning of “prophylactic.” It appears difficult to prove that prophylactic legislation is necessary if the only means to do so is through evidence that the targeted problem was already widespread. *But see Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1983 (2003) (holding that prophylactic abrogation in the FMLA was valid because earlier attempts to remedy gender-based discrimination had failed). Moreover, by requiring proof of a pattern of constitutional violations by the states, particularly after a statute’s enactment, the Court drastically increased its willingness to challenge Congress’s factfinding and legislative prerogatives. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 380 (2001) (Breyer, J., dissenting) (“In reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate.”). Indeed, whether courts are suited to identify and remedy discrimination that occurs throughout various parts of the country is debatable. *See id.* at 380-85 (Breyer, J., dissenting) (arguing that courts are ill-suited to make such findings).

<sup>54</sup> *Kimel*, 528 U.S. at 91.

further illustrated in *Board of Trustees of the University of Alabama v. Garrett*,<sup>55</sup> where the Court struck down Congress's abrogation of state immunity in the Americans with Disabilities Act ("ADA").<sup>56</sup>

As in *Kimel*, the rational basis review used for disability discrimination grounded the Court's holding.<sup>57</sup> Although the Court acknowledged that prohibiting employment discrimination against the disabled was generally a valid purpose under the Fourteenth Amendment, it held that Congress again failed to show that individuals needed protection against a pattern of unconstitutional discrimination by states.<sup>58</sup> Thus, according to the Court, permitting individuals to sue states under the ADA was not congruent and proportional to the injuries being targeted and, therefore, was invalid.<sup>59</sup>

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<sup>55</sup> 531 U.S. 356 (2001).

<sup>56</sup> 42 U.S.C. §§ 12101-12213 (2000). Congress's intent to abrogate state immunity was undeniable; the ADA mandates that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court . . ." *Id.* § 12202; *see also Garrett*, 531 U.S. at 364. Moreover, the ADA provides a clear statement of Congress's belief that it was enacted pursuant to the Fourteenth Amendment, for the Act declares that its purpose is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment, . . . [and] to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4); *see Garrett*, 531 U.S. at 364 n.3.

<sup>57</sup> *See Garrett*, 531 U.S. at 367 (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)). *Garrett* defined rational basis review as requiring a plaintiff to show that there exists no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)); *see also id.* at 387-88 (Souter, J., dissenting) ("[I]t is difficult to understand why the Court, which applies minimum rational-basis review to statutes that *burden* people with disabilities, subjects to far stricter scrutiny a statute that seeks to *help* those same individuals.") (internal quotation marks and citation omitted); Amar & Estreicher, *supra* note 45, at 354-56 (criticizing *Garrett* for looking only to *state*, rather than municipal and county, discrimination in *employment*).

<sup>58</sup> *See Garrett*, 531 U.S. at 368. It is striking that, in finding no pattern of discrimination, the Court dismissed a wealth of congressional findings on disability discrimination because, with few exceptions, they did not involve states engaging in such discrimination. *See id.* at 366-67. *But see id.* at 378-79 (Souter, J., dissenting) ("The powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that larger society. . . . [Moreover, t]here are roughly 300 examples of discrimination by state governments themselves in the legislative record.").

<sup>59</sup> *See id.* at 374 ("Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here . . . ."); *id.* at 367-68 ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such

In *Nevada Department of Human Resources v. Hibbs*,<sup>60</sup> the Court confirmed the emphasis that *Kimel* and *Garrett* appeared to place on the identity of a protected class. In *Hibbs*, the Court held that Congress validly abrogated state immunity in the Family and Medical Leave Act (“FMLA”).<sup>61</sup> As the Court recognized, the FMLA “aims to protect the right to be free from gender-based discrimination in the workplace.”<sup>62</sup> Yet, unlike age and disability,<sup>63</sup> gender-based classifications are reviewed under a heightened scrutiny standard.<sup>64</sup> That difference was vital to the Court’s holding.

As it had done in *Kimel* and *Garrett*, the Court reviewed the evidence of state discrimination that Congress relied on to abrogate state immunity—this time evidence of discriminatory family medical leave policies. Although the FMLA evidence was not substantially different than that of the ADEA and ADA,<sup>65</sup> the Court found that “States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.”<sup>66</sup> The Court made clear why it held that abrogation

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individuals are rational. They could quite hard headedly—and perhaps hardheartedly—hold to job qualification requirements which do not make allowance for the disabled.”). The Court also emphasized that the ADA’s protections extended beyond the bounds of the Fourteenth Amendment by requiring “reasonable accommodation” of disabled workers and by proscribing actions that “disparately impact” those workers. *Id.* at 372-73.

<sup>60</sup> 123 S. Ct. 1972 (2003).

<sup>61</sup> 29 U.S.C. §§ 2601-2654 (2000). Congress clearly intended for the FMLA to abrogate state immunity, as it permits private rights of action for money damages “against any employer (including a public agency) in any Federal or State court of competent jurisdiction.” *Id.* § 2617(a)(2). Although *Hibbs*, at a minimum, validated the FMLA’s abrogation with regard to family leave requirements, some courts have held that it left open the question whether the FMLA’s abrogation for personal leave was valid. See, e.g., *Brockman v. Wyo. Dep’t of Family Servs.*, 342 F.3d 1159, 1164 (10th Cir. 2003) (distinguishing *Hibbs*, and holding that the FMLA’s abrogation of state immunity for personal leave was unconstitutional).

<sup>62</sup> *Hibbs*, 123 S. Ct. at 1978.

<sup>63</sup> See *supra* notes 43-59 and accompanying text.

<sup>64</sup> *Hibbs*, 123 S. Ct. at 1978 (citing *Craig v. Boren*, 429 U.S. 190, 197-99 (1976)). The Court defined heightened scrutiny as requiring a classification to “‘serve important governmental objectives,’ and ‘the discriminatory means employed [must be] substantially related to the achievement of those objectives.’” *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

<sup>65</sup> See Vikram David Amar, *The New “New Federalism,”* 6 GREEN BAG 2D 349, 351-53 (2003) (noting similarities of evidence relied upon to pass the ADA and FMLA).

<sup>66</sup> *Hibbs*, 123 S. Ct. at 1981. The Court relied on studies showing that private employers provide more maternity than paternity leave, that leave policies in the public and private sectors are similar, and that few of the states providing extended maternity leave gave similar paternity leave; it also relied on testimony that public and private sector leave policies are discriminatory and that most states provided no

under the FMLA was valid but concluded that abrogation under the ADEA and ADA was not: “Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.”<sup>67</sup> Congress’s attempt to remedy this pattern in the FMLA, therefore, was congruent and proportional to the problem it targeted.<sup>68</sup>

*Garrett, Kimel, and Hibbs* illustrate the Court’s insistence on a statute-specific justification for Congress’s abrogation of state immunity.<sup>69</sup> That case-by-case review takes on particular significance with regard to USERRA’s abrogation. Because the federal government’s war powers will no doubt garner more respect from the Court than the ADEA and ADA—particularly when the nation is engaged in war—USERRA may provide a rare instance where the Court finds the need to abrogate more compelling than state immunity.

## II. STATE SOVEREIGN IMMUNITY V. USERRA’S WAR POWERS ABROGATION

### A. *USERRA Background*

The United States has sought to protect the employment rights of noncareer military personnel since World War II.<sup>70</sup> In its latest

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family medical leave. *See id.* at 1979-80. *But see id.* at 1985 (Scalia, J., dissenting) (arguing that to allow enforcement against a state, there must be a finding that the particular state had a pattern of unconstitutional discrimination); *id.* at 1987-91 (Kennedy, J., dissenting) (criticizing the evidence relied upon by the majority as not showing a pattern of unconstitutional discrimination by the states).

<sup>67</sup> *Id.* at 1982. The Court further noted that “[u]nlike the statutes in *City of Boerne, Kimel, and Garrett*, which applied broadly to every aspect of state employers’ operations, the FMLA is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.” *Id.* at 1983.

<sup>68</sup> *See id.* at 1982.

<sup>69</sup> *See* Susan Bandes, *Treaties, Sovereign Immunity, and the “Plan of the Convention,”* 42 VA. J. INT’L L. 743, 745 (2002) (arguing that in “determining the scope of the abrogation power, it is essential to identify the authority under which Congress acted in order to know whether its attempt to subject the states to damage remedies is constitutional”). *But see* Carlos Manuel Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 726 n.69 (2002) [hereinafter Vazquez, *Treaties*] (disagreeing with Bandes, and arguing that Congress’s power to abrogate does not depend on the authority under which it acted).

<sup>70</sup> *See* Lt. Col. H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56-57 (1999) (noting that original act, 50 U.S.C. app. § 308 (1946), *repealed by* Selective Service Act of 1948, ch. 624, 62 Stat. 625 (1948), was intended to prepare for the possibility of war and to enable



form, USERRA, formerly known as the Veterans' Reemployment Rights Act ("VRRRA"),<sup>71</sup> is intended "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service."<sup>72</sup> The goal of "minimiz[ing] the disruption to the lives of persons performing service in the uniformed services . . . [is furthered] by providing for the prompt reemployment of such persons upon their completion of such service,"<sup>73</sup> and by "prohibit[ing] discrimination against persons because of their service."<sup>74</sup>

USERRA provides reemployment rights to "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services."<sup>75</sup> After such service, a military employee is entitled to be "promptly reemployed in the position of employment in which the person would have been employed" absent the interruption, or in the position the person left if not qualified for the "elevated" position.<sup>76</sup> Moreover, for up to one year after reemployment,<sup>77</sup> the military employee can be terminated only for "just cause."<sup>78</sup> The military employee is also entitled to the same employment benefits as an employee on nonmilitary furlough or

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service members to return to civilian jobs, and that subsequent amendments were enacted to support the Cold War and the Vietnam conflict).

<sup>71</sup> USERRA replaced VRRRA, 38 U.S.C. §§ 2021-2027, on October 13, 1994. USERRA was enacted to "clarify, simplify, and where necessary, strengthen the existing veterans' employment and re-employment rights provisions" of the former VRRRA. H.R. REP. NO. 103-65, at 19 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451.

<sup>72</sup> 38 U.S.C. § 4301(a)(1) (2000); *see also* *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559-60 (1981); *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 613 (1st Cir. 1996).

<sup>73</sup> 38 U.S.C. § 4311(a)(2).

<sup>74</sup> *Id.* § 4301(a)(3); Eve I. Klein & Maria Cilenti, *When Duty Calls: What Obligations Do Employers Have to Employees Who Are Called to Military Service?*, 73 N.Y. ST. B. J. 10, 10 (2001); Manson, *supra* note 70, at 58 (noting need for reserve forces following decrease in active duty service following end of Cold War).

<sup>75</sup> 38 U.S.C. § 4312(a). "Service in the uniformed services" covers "performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority." *Id.* § 4303(13) (including "active duty," "active duty for training," "initial active duty for training," "inactive duty training," and "full-time National Guard duty"). "Uniformed Service" includes service in the United States Armed Forces, Army National Guard, Air National Guard, commissioned corps of the Public Health Service, and any positions designated by the President during war or emergency. *See id.* § 4303(16).

<sup>76</sup> *Id.* § 4313(a)(1)(A).

<sup>77</sup> The period of protection is one year if the military service was for over 180 days; the period is 180 days if the service was between 30 and 180 days. *See id.* § 4316(c).

<sup>78</sup> *See id.* § 4316(c).

leave,<sup>79</sup> including health insurance coverage for up to eighteen months.<sup>80</sup> Exceptions exist where an employer proves that reemployment would be unreasonable or cause undue hardship to the employer, the position was temporary, or there was legally sufficient cause to terminate the employee before the military leave.<sup>81</sup>

USERRA also forbids discrimination by prohibiting an employer from denying “initial employment, reemployment, retention in employment, promotion, or any benefit of employment”<sup>82</sup> if a person’s “membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer’s action, unless the employer can prove that the action would have been taken in the absence of such . . . service.”<sup>83</sup> To prove discrimination under USERRA, a plaintiff must show that military service was a “substantial or motivating factor” in an adverse action.<sup>84</sup>

It is well established that courts will liberally construe USERRA in favor of the military employee.<sup>85</sup> Where a violation is found, the Act’s remedies include equitable relief, make-whole compensation, liquidated damages, attorneys’ fees, and costs.<sup>86</sup> In short, USERRA provides substantial employment rights for those employees that have served, or will have to serve, in the United States military. The extent to which state military employees enjoy those rights is uncertain, however. Although Congress has made clear its intent that USERRA applies to state employers,<sup>87</sup> the Supreme Court’s state sovereign

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<sup>79</sup> See *id.* §§ 4311, 4316(b)(1); Klein & Cilenti, *supra* note 74, at 11. Those benefits include contributions to pension plans and calculation of service for such plans as if the military employee was not on military leave. See 38 U.S.C. § 4318.

<sup>80</sup> See 38 U.S.C. § 4317(a)(1)(A). However, after 31 days of leave, the employee may be required to pay up to 102% of the premiums. See *id.* § 4317(a)(2).

<sup>81</sup> See *id.* § 4312 (setting forth procedures that the military employee must follow to qualify for reemployment rights); Klein & Cilenti, *supra* note 74, at 11.

<sup>82</sup> 38 U.S.C. § 4311(a).

<sup>83</sup> The employer is also prohibited from taking adverse action in retaliation against individuals’ attempts to enforce their rights under USERRA. See *id.* § 4311(c)(1).

<sup>84</sup> See *Gummo v. Vill. of Depew, N.Y.*, 75 F.3d 98, 106 (2d Cir. 1996); Klein & Cilenti, *supra* note 74, at 14, 20 (noting that the “motivating factor” standard is generally interpreted as mirroring the burden-shifting standard used in National Labor Relations Board cases, such as *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394-95 (approving NLRB’s standard as expressed in *Wright Line*, 251 N.L.R.B. 1083 (1980))).

<sup>85</sup> See *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 675 (7th Cir. 1998).

<sup>86</sup> See 38 U.S.C. § 4323(d), (e), (h).

<sup>87</sup> See *id.* § 4303(4)(A)(iii) (defining “employer” to include a state); § 4323(b) (permitting actions against state employers); § 4323(c)(2)(B)(7) (“Any person

immunity jurisprudence threatens to significantly undermine state military employees' ability to exercise their rights under the Act.

*B. War Powers Abrogation After Seminole Tribe*

As discussed,<sup>88</sup> the Court has taken an increasingly skeptical view of congressional attempts to abrogate state sovereign immunity. In striking down such efforts, the Court has balanced what it views as the extraordinary importance of state sovereign immunity against the lesser need to abrogate that immunity in a particular statute.<sup>89</sup> Abrogation under USERRA, however, presents a unique situation.

As argued below, Congress's abrogation of state immunity pursuant to its war powers is constitutionally valid, despite the Court's general disapproval of Article I abrogation. That conclusion follows from the Court's recent emphasis on states' expectations when they ratified the Constitution. The Founders' intent that the nation exercise its war powers with a single voice, which was advanced by granting exclusive war powers to the federal government and expressly limiting states' powers, indicates that the plan of the Constitution was not to allow states to thwart congressional war powers enactments through claims of sovereign immunity.

As noted, *Seminole Tribe* created a two-part test for analyzing the validity of a statute's abrogation.<sup>90</sup> USERRA clearly satisfies the first requirement—whether Congress unequivocally expressed its intent to abrogate state immunity<sup>91</sup>—for the Act explicitly permits private suits against states.<sup>92</sup> The second requirement—whether that abrogation is

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[employed by a State or political subdivision] shall not be denied . . . retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.”).

<sup>88</sup> See *supra* notes 12-68 and accompanying text.

<sup>89</sup> See *supra* note 69.

<sup>90</sup> See *supra* notes 33-34 and accompanying text.

<sup>91</sup> See *supra* note 33 and accompanying text.

<sup>92</sup> See *supra* note 87; see also *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 531 (W.D. Mich. 1997). *But cf.* *Forster v. SAIF Corp.*, 23 F. Supp. 2d 1196, 1197 (D. Or. 1998) (assuming, because of plaintiff's concession, that Congress did not abrogate state immunity under USERRA). Moreover, consistent with Supreme Court precedent refusing to extend Eleventh Amendment immunity to municipalities and counties, USERRA also permits federal suits against political subdivisions of a state. See 38 U.S.C. § 4323(b)(1) (2000) (granting federal jurisdiction over suits against a “private employer,” which “includes a political division of a State”); *Miller v. City of Indianapolis*, No. IP-99-1735-CMS, 2001 WL 406346, at \*5 (S.D. Ind. Apr. 13, 2001), *aff'd*, 281 F.3d 648 (7th Cir. 2002). Finally, as discussed *infra* notes 221-44 and accompanying text, it is unclear whether USERRA currently abrogates state immunity in federal court. The following discussion, however, still applies to USERRA's clear abrogation of state immunity in state courts, and to war powers

valid—is in much greater dispute. Indeed, that question has created a split between the two federal circuit courts that have addressed USERRA’s application to state employers.<sup>93</sup>

Much responsibility for those conflicting views may be placed on Supreme Court dicta suggesting that Congress cannot abrogate state immunity pursuant to *any* of its Article I powers. A typical example states that Congress cannot “under Article I expand the scope of federal courts’ jurisdiction under Article III.”<sup>94</sup> The Court, however, has never addressed whether war powers abrogation is an exception

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abrogation generally.

<sup>93</sup> See *infra* notes 96-105 and accompanying text.

<sup>94</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 65 (1996); see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 761 (2002) (holding that states are immune from federal administrative adjudication of a complaint filed against the state by a private party because “it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, see *Seminole Tribe*, 517 U.S. at 72, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply”); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (“Congress may not, of course, base its abrogation of the States’ Eleventh Amendment immunity upon the powers enumerated in Article I.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78 (2000) (“In *Seminole Tribe*, we held that Congress lacks the power under Article I to abrogate the States’ sovereign immunity.”); *Alden v. Maine*, 527 U.S. 706, 754 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999). Most lower courts subsequently addressing Article I abrogation have relied on such dicta as a basis for finding war powers abrogation invalid. See *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 288 (5th Cir. 2000) (citing *Florida Prepaid* in rejecting argument that Congress’s war powers justified the Indian Non-Intercourse Act’s abrogation of state immunity); *Palmatier v. Mich. Dep’t of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (“Applying the lessons of *Seminole Tribe*, it necessarily follows that Congress, acting under Article I, could not effectively abrogate the states’ Eleventh Amendment immunity in USERRA.”); *Larkins v. Dep’t of Mental Health & Mental Retardation*, 806 So. 2d 358, 362-63 (Ala. 2001) (holding that “*Alden* forecloses, on constitutional grounds, resort to Article I as the basis for subjecting the State of Alabama to suit [under USERRA] in a state court on a remedy based on Congress’s assertion of its powers with respect to military preparedness”). As explained below, however, those cases are undermined by the Court’s subsequent holding in *Alden*, despite *Alden*’s restatement of that dictum. See *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 755, 761-62 (6th Cir.), *cert. granted*, 124 S. Ct. 45 (2003) (rejecting dicta in holding that Bankruptcy Act abrogation was valid, although noting that five other circuits disagreed: *Nelson v. La Crosse County Dist. Attorney*, 301 F.3d 820, 832-34 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111, 1120-21 (9th Cir. 2000); *Sacred Heart Hosp. v. Pennsylvania*, 133 F.3d 237, 242-43 (3d Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co.*, 123 F.3d 241, 243-45 (5th Cir.), *amended by* 130 F.3d 1138, 1138-39 (5th Cir. 1997); *Schlossberg v. Maryland*, 119 F.3d 1140, 1145-46 (4th Cir. 1997)). Indeed, the Court’s most recent restatement of this rule referred only to Congress’s Article I *commerce* power. See *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) (“Congress may not abrogate the States’ sovereign immunity pursuant to its Article I power over commerce.”).

to its general prohibition against Article I abrogation.<sup>95</sup>

The First Circuit, in *Diaz-Gandia v. Dapena-Thompson*,<sup>96</sup> expressly refused to apply that dictum to USERRA and concluded that its abrogation of state immunity was valid.<sup>97</sup> The court held that *Seminole Tribe* did not overrule an earlier First Circuit case that upheld war powers abrogation, *Reopell v. Massachusetts*,<sup>98</sup> because *Seminole Tribe* addressed only Congress's Interstate Commerce Clause power and "does not control the War Powers analysis."<sup>99</sup> The court's reliance on *Reopell* is not entirely persuasive, for the basis of that decision was that the Supreme Court's "rationale for holding that the Commerce Clause enactments abrogate the Eleventh Amendment equally supports War Power abrogation."<sup>100</sup> *Seminole Tribe*, of course, later held that Congress could not abrogate pursuant to the Commerce Clause, thereby undermining *Reopell*'s equation of Congress's commerce and war powers. Yet, as explained in the next section, the Supreme Court's subsequent decision in *Alden* supports the First Circuit's reluctance to hold that *Seminole Tribe* effectively foreclosed war powers abrogation.

In *Velasquez v. Frapwell*,<sup>101</sup> Chief Judge Posner, writing for the Seventh Circuit, more thoroughly examined USERRA's abrogation under *Seminole Tribe* and concluded that it was unconstitutional. The central holding in *Velasquez* was that Congress's war powers, like its powers under the Commerce Clause and the rest of Article I, predates the Eleventh Amendment's reestablishment of states' immunity against private suits.<sup>102</sup> Thus, only power granted to Congress after the Eleventh Amendment's ratification may be

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<sup>95</sup> See also Bandes, *supra* note 69, at 746 (arguing that this dictum should not be taken literally because, in part, sovereign immunity may be overridden through conditional waivers of state immunity obtained under Congress's Spending Clause power) (citing William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 853 (2000)).

<sup>96</sup> 90 F.3d 609 (1st Cir. 1996).

<sup>97</sup> *Id.* at 616 & n.9.

<sup>98</sup> 936 F.2d 12 (1st Cir. 1991) (holding that a state is liable for prejudgment interest under the VRRRA).

<sup>99</sup> *Diaz-Gandia*, 90 F.3d at 616 n.9 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

<sup>100</sup> *Reopell*, 936 F.2d at 16 (citing *Union Gas*, 491 U.S. 1).

<sup>101</sup> 160 F.3d 389 (7th Cir. 1998).

<sup>102</sup> See 160 F.3d at 392; accord *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997). The court also rejected the plaintiff's argument that USERRA's abrogation was based on Section 5 of the Fourteenth Amendment—concluding that the "only constitutional basis of USERRA is . . . the war power"—and refused to consider whether due process abrogation was applicable. *Velasquez*, 160 F.3d at 391-92.

sufficient to abrogate state immunity.<sup>103</sup>

Although that chronological distinction is not particularly convincing,<sup>104</sup> it has support under *Seminole Tribe*, where the Court distinguished its approval of Fourteenth Amendment abrogation, stating that “the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.”<sup>105</sup> The *Velasquez* court’s reliance on that statement was soon undermined, however, for the Court shortly thereafter abandoned its emphasis on chronology.

### C. *Alden v. Maine: A Historical Basis for State Immunity*

Prior to *Seminole Tribe*, few courts were concerned with an employee’s ability to pursue a federal lawsuit against a state employer in state court because such an option had generally been considered available.<sup>106</sup> In *Alden v. Maine*,<sup>107</sup> the Supreme Court eliminated that option.

The plaintiffs in *Alden* had filed a FLSA suit in federal court against their employer, the State of Maine.<sup>108</sup> After the Supreme Court subsequently decided *Seminole Tribe*, the district court dismissed the *Alden* suit.<sup>109</sup> The plaintiffs then filed their claims in state court, which were dismissed based on the state’s argument that it had immunity against private suits in its own courts.<sup>110</sup>

In rejecting the validity of Congress’s clear abrogation of state immunity in the FLSA, the Court, in an opinion better left for others to criticize,<sup>111</sup> held that “the powers delegated to Congress under

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<sup>103</sup> See *id.* at 391.

<sup>104</sup> See *supra* note 30.

<sup>105</sup> 517 U.S. at 65-66.

<sup>106</sup> See, e.g., *Velasquez*, 160 F.3d at 394; *Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th Cir. 1996).

<sup>107</sup> 527 U.S. 706 (1999).

<sup>108</sup> See *id.* at 711-12.

<sup>109</sup> See *id.* at 712.

<sup>110</sup> See *id.*

<sup>111</sup> See, e.g., *id.* at 760 (Souter, J., dissenting); Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court’s Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77, 141-48 (2001) (arguing that the Founders’ intent under the Constitution was to permit Congress to authorize federal court jurisdiction over most private suits against states); see also John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-1914 (1983) (arguing that the historical evidence shows that the states never thought they

Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts.”<sup>112</sup> The Court emphasized that state sovereign immunity is not derived from the Eleventh Amendment; rather, it “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”<sup>113</sup> The Eleventh Amendment merely confirmed that immunity.<sup>114</sup>

Accordingly, states will possess immunity in a given area unless there is “compelling evidence’ that the states were required to surrender [their immunity] to Congress pursuant to the constitutional design.”<sup>115</sup> The *Alden* Court concluded that neither the Supremacy Clause,<sup>116</sup> nor Congress’s “specific Article I powers,” provided compelling evidence that the constitutional design permitted Congress to require a state to entertain a case against it in its own courts.<sup>117</sup> The Court found that such evidence was also lacking in the “history, practice, precedent, and the structure of the Constitution,”<sup>118</sup> and concluded that “the States retain immunity from private suits in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.”<sup>119</sup>

Although the Court’s sweeping statement that Congress cannot abrogate under Article I is an obstacle to war powers abrogation,

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possessed sovereignty against private suits during either the colonial period or the constitutional ratification); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1425-30 (1975) (concluding that the Constitution intended for Congress to have the power to provide federal court jurisdiction in most suits against a state by citizens of another state).

<sup>112</sup> *Alden*, 527 U.S. at 712.

<sup>113</sup> *Id.* at 713.

<sup>114</sup> *See id.* at 713, 728-29.

<sup>115</sup> *Id.* at 731 (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 781 (1991)); *see also Seminole Tribe*, 517 U.S. at 68 (“There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.”) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (internal quotation marks omitted)).

<sup>116</sup> “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI.

<sup>117</sup> *See Alden*, 527 U.S. at 731-34.

<sup>118</sup> *Id.* at 741, 754; *see also Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 753-54 (2002) (looking to original understanding of Constitution and early congressional practice).

<sup>119</sup> *See Alden*, 527 U.S. at 741, 754.

*Alden* actually justifies the validity of USERRA's application to state employers. By shifting the analysis away from *Seminole Tribe's* reliance on chronology and toward states' historical immunity, *Alden* implicitly recognized that the history of the federal government's war powers may constitute an exception to the general prohibition against Article I abrogation.<sup>120</sup> In short, even if the plan of the Constitutional Convention did not intend for Congress to abrogate state immunity under all of its Article I powers, it is inconceivable that the Constitution—given its primary goal of establishing a central power over the new nation's external relations, particularly its military abilities<sup>121</sup>—was intended to permit states to thwart the new federal war powers by invoking sovereign immunity.

#### D. War Powers Abrogation After *Alden*

*Alden's* move away from a chronological analysis, and toward an emphasis on the history of the Constitution, provides an important basis for holding that USERRA's war powers abrogation is valid. To be sure, it is far from clear whether the current Court would hold that USERRA is an exception to its dicta prohibiting all Article I abrogation. Yet, the extraordinary difference between Congress's war powers<sup>122</sup> and most of its other Article I powers suggests that, under the plan of the Constitution, the states did not retain immunity—if they ever had it—where the federal government acts to further the nation's military efforts.

The Court has relied on often confusing evidence from English common law, the Constitutional Convention, and the state ratifying conventions to hold that Congress lacks the general power under

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<sup>120</sup> See Althouse, *supra* note 30, at 644 n.62 (raising the possibility that *Alden* changes the basis for *Velasquez*); Major Hehr & Major Wallace, *The Supreme Court "Outfoxes" the Ninth Circuit*, 1999 ARMY LAW. 47, 53 n.97 (1999) (suggesting that Congress's war power abrogation in USERRA may provide an exception to *Seminole Tribe*); *cf.* Hood v. Tenn. Student Assistance Corp., 319 F.3d 755, 762-67 (6th Cir.), *cert. granted*, 124 S. Ct. 45 (2003) (holding that abrogation under the Bankruptcy Act was valid because the grant of power to Congress to make "uniform" laws in bankruptcy represented a design in the plan of the Constitution to allow abrogation where Congress exercises that power); Bandes, *supra* note 69, at 747-48 (arguing that abrogation under Congress's treaty power may be valid after *Alden*). *But see* Vazquez, *Treaties*, *supra* note 69, at 726 (suggesting that war powers abrogation is invalid).

<sup>121</sup> See *infra* note 140 and accompanying text.

<sup>122</sup> As noted below, the federal government's foreign powers in general may constitute an exception. See *infra* notes 131-37 and accompanying text. Those foreign powers may be part of what the Court referred to in *Alden*, where it held that the limits on federal supervision of the states do not apply "to matters [that] the Constitution specifically authorized or delegated to the United States." *Alden*, 527 U.S. at 754 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938)).



Article I to abrogate state immunity.<sup>123</sup> Rather than reexamine that history, this Article accepts the Court's historical interpretation and argues that its own holdings, including its principal historical reference, support the validity of war powers abrogation.

As oft-quoted by the Court, Alexander Hamilton stated in *The Federalist No. 81* that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the [s]tates . . . .”<sup>124</sup> The very next sentence, although consistently absent from the Court's majority opinions, declares that “[t]he circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here.”<sup>125</sup> That discussion is found in *The Federalist No. 32*, where Hamilton stated:

[A]s the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*.<sup>126</sup>

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<sup>123</sup> See, e.g., *Alden*, 527 U.S. at 714-57; *Seminole Tribe*, 517 U.S. at 68-71.

<sup>124</sup> THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *quoted in* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 752 (2002); *Alden*, 527 U.S. at 716-17; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634 (1999); *Seminole Tribe*, 517 U.S. at 54, 70 n.13; *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); *see also Alden*, 527 U.S. at 773 & n.13 (Souter, J., dissenting) (arguing that Hamilton was stating the unique view that state immunity derived from natural, rather than common, law, and that he was referring only to immunity “with respect to diversity cases applying state contract law”). Justice Souter's dissent in *Alden* also noted the state ratification conventions' disparate views on state immunity to argue that the majority's historical analysis is not as certain as it claims. *See Alden*, 527 U.S. at 775-81, 792 (Souter, J., dissenting).

<sup>125</sup> THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see Seminole Tribe*, 517 U.S. at 145-46 (Souter, J., dissenting) (noting “difficulties that accrue to the majority from reliance on The Federalist No. 81”).

<sup>126</sup> THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Hood v. Tenn. Student Assistance Corp., 319 F.3d 755, 766 (6th Cir.), *cert. granted*, 124 S. Ct. 45 (2003) (holding that bankruptcy abrogation falls under Hamilton's “alienation” examples).

The federal government's war powers satisfy all three of Hamilton's "alienations." First, the federal government's war powers are exclusive under two views: that the states never possessed such powers; or that the states allocated, through the Articles of Confederation and the Constitution, whatever colonial-era war powers they may have possessed to the federal government.<sup>127</sup> Indeed, Hamilton's own belief was that the federal government's war powers "ought to exist without limitation."<sup>128</sup> Second, the text of the Constitution explicitly grants war powers authority to the federal government, while prohibiting state power in the same area.<sup>129</sup> Third, it is difficult to imagine any federal authority to which a similar

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<sup>127</sup> See *infra* notes 131-56 and accompanying text; see also ARTICLES OF CONFEDERATION art. 6 ("No state shall engage in any war" without federal consent except for an invasion or emergency Indian attack.); *id.* art. 9 ("Congress possesses the sole and exclusive right and power of determining on peace and war."); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1714 (1997) (stating that in "traditional foreign relations contexts, federal exclusivity is effectively assured by Article I, Section 10 and by extant federal enactments"); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1228-29 (1999) ("[A]gainst the landscape of foreign relations as they were conducted at the time of the Founding, the allocation [of foreign power in the Constitution] seems decisively to have established a principle of federal exclusivity."); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 182 (1996) (noting, in discussion of separation of federal war powers, then-Congressman and eventually Chief Justice Marshall's statement that the President was "the sole organ of the nation in its external relations") (quoting 10 ANNALS OF CONG. 613 (1800)); *id.* at 236-37 ("The drafters of the Articles vested all war powers in the Continental Congress."). See generally Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 16-18 (1973) (describing theory that states vested foreign affairs authority to the federal government in the Constitutional Convention). But see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 280 (2002) ("[T]he Rehnquist Court's increasingly restrictive approach to national authority in the domestic sphere raises interesting questions regarding the extent to which the Court will continue to authorize expansive national authority over foreign relations.").

<sup>128</sup> THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Yoo, *supra* note 127, at 272 (quoting antifederalists' concession during ratification debate that the federal government had exclusive power of "all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs, peace and war," and James Madison's statement in THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961): "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and infinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . .").

<sup>129</sup> See *infra* notes 146-56 and accompanying text; see also Goldsmith, *supra* note 127, at 1619-20 (emphasizing that the foreign power provisions of the Constitution "give the federal political branches comprehensive power to conduct foreign relations without interference of limitation by the states").

authority granted to individual states would be more “contradictory and repugnant.” Thus, as the Seventh Circuit held in a pre-*Seminole Tribe* case, Congress’s abrogation of state immunity in USERRA was “an exercise of power delegated to it ‘in the plan of the convention,’ which includes the power to make the states amenable to damage actions in federal courts.”<sup>130</sup>

The argument that the Constitution expressly granted the federal government exclusive authority over war powers is bolstered by well-established Supreme Court precedent holding that the states, even prior to the Articles of Confederation or Constitution, never possessed such powers. In *United States v. Curtiss-Wright Export Corp.*,<sup>131</sup> for example, the Court explicitly held that the states never possessed authority to engage in foreign relations, including acts of war.

*Curtiss-Wright* involved convictions under a presidential proclamation and congressional joint resolution prohibiting arms sales to Bolivia.<sup>132</sup> One of the defendants’ arguments was that the joint resolution invalidly delegated congressional powers to the President by allowing him to decide whether to make arms sales illegal.<sup>133</sup>

The Court rejected that defense. Assuming that the resolution would normally constitute an invalid delegation of lawmaking authority, the Court asked whether an exception was warranted because the resolution involved a unique class of government conduct—one that is “entirely external to the United States, and falling within the category of foreign affairs.”<sup>134</sup> In addressing that question, the Court made clear that the federal government’s foreign powers<sup>135</sup> were fundamentally different from its domestic powers vis-à-vis the states:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought

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<sup>130</sup> *Jennings v. Ill. Office of Educ.*, 589 F.2d 935, 942 (7th Cir. 1979).

<sup>131</sup> 299 U.S. 304 (1936).

<sup>132</sup> *Id.* at 311.

<sup>133</sup> *Id.* at 314.

<sup>134</sup> *Id.* at 315.

<sup>135</sup> *Id.* at 318 (noting foreign powers, including the “powers to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties”).

desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had is self evident. *And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.*<sup>136</sup>

The Court's conclusion that states never possessed war powers is significant. Although states may have generally retained their sovereign immunity under the Constitution—even against express federal abrogation—it is implausible that they expected to have immunity where the federal government exercises powers that the states never possessed.<sup>137</sup>

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<sup>136</sup> *Id.* at 315-16 (emphasis added and internal citation omitted); see also Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1203 n.275 (2000) (citing articles, and noting Rufus King's statement at the Constitutional Convention that "[t]he states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties") (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 323 (Max Farrand ed., 1937) (Madison's notes)). The basis for *Curtiss-Wright's* holding was that the federal foreign affairs powers were "extra-constitutional" because the source of those powers was Great Britain, whose sovereignty passed to the Union as a whole, not to the individual states. See *Curtiss-Wright*, 299 U.S. at 316, 318 (noting that, even if not mentioned in the Constitution, the foreign powers "would have vested in the federal government as necessary concomitants of nationality").

<sup>137</sup> The Court has emphasized federal exclusivity in other foreign powers cases, particularly in holding that conflicting state actions were preempted by the federal government's exclusive power in that area. See *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2378 (2003) (holding that state requirement that insurance companies disclose information about Holocaust-era policies was preempted by a federal executive order because the state law "compromises the President's very capacity to speak for the Nation with one voice in dealing with other governments"); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2002) (invalidating state restrictions on trade with Burma because the "state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the [related] federal Act to find it preempted"); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (invalidating state law limiting nonresident alien claims to estate property because it "is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *United States v. Pink*, 315 U.S. 203, 233 (1942) (holding that state law must yield to decree negotiated by federal government and foreign country because "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (holding that state alien registration act was invalid because "[n]o state can add to or take from the force and effect of [a] treaty . . . for [t]he Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the [s]tate . . . does not exist.") (internal citation omitted); *Missouri*

To be sure, as the *Velasquez* court noted, there is legitimate doubt about the Court's holding that states never possessed war powers.<sup>138</sup> Even if the Court overruled *Curtiss-Wright*, however, and found that the colonial state governments had some military authority, the Constitution's exclusive delegation of war powers to the federal government supports the "alienation" of state immunity where those powers are exercised.<sup>139</sup>

It appears beyond dispute that, in ratifying the Constitution, the

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v. Holland, 252 U.S. 416, 434 (1920) (holding that federal migratory bird treaty did not interfere with state's Tenth Amendment rights because, although "the great body of private relations usually fall within the control of the State, . . . a treaty may override its power"); *Chae Chan Ping v. United States*, 130 U.S. 581, 629 (1889) (declining jurisdiction over act that prohibited certain aliens from entering the country because, in part, the federal political branches are "invested with power over all foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state government"). See generally G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

<sup>138</sup> See *Velasquez*, 160 F.3d at 392-93 (citing *Curtiss-Wright*, 299 U.S. at 316-18; Goldsmith, *supra* note 127, at 1660 & n.184 (noting differing views on whether the states ever possessed foreign relations powers); Lofgren, *supra* note 127, at 32); see also Yoo, *supra* note 127, at 224-35 (discussing the war powers of pre-Articles of Confederation state legislatures and governors). Moreover, scholars have questioned whether the need to exclude states from foreign affairs is still wise in the post-Cold War era. See, e.g., Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109 (1999). Finally, the Court's reliance on the federal government's "extra-constitutional" source of foreign powers has been criticized as well. See, e.g., *Velasquez*, 160 F.3d at 392-93 (citing articles); Lofgren, *supra* note 127, at 32 (describing as "shockingly inaccurate" the Court's holding that the federal government's foreign affairs powers came from an extra-constitutional source); Swaine, *supra* note 136, at 1129-30 & n.1 (citing articles).

<sup>139</sup> *Velasquez* noted also that even if it were true that the states' sovereign powers never included war powers, it does not follow that "they surrendered any part of their sovereign immunity from a suit seeking money from the state treasury. That immunity is an independent attribute of sovereignty rather than an incident of the war power or of any other governmental power that a state might or might not have. The subject matter of the suit to which the defense of sovereign immunity is interposed is thus irrelevant." *Velasquez*, 160 F.3d at 393 (internal citations omitted). Although *Velasquez*'s stress on states' general immunity from private suits, as opposed to the subject matter of a given suit, is understandable given that *Alden*, *Kimel*, *Garrett*, and *Hibbs* had yet to be decided, see *supra* note 69 and accompanying text, its statement proves far too much. Taken literally, *Velasquez* would dispense with Fourteenth Amendment abrogation as well, for nowhere in the Fourteenth Amendment is there an indication that states were surrendering their immunity. See Nowak, *supra* note 111, at 1458 ("There is no discussion in the debates of the ability of federal courts to entertain damage actions against state governments under the [F]ourteenth [A]mendment without congressional authorization."). Rather, as the Supreme Court has held, by limiting state actions and giving Congress enforcement power, the states implicitly surrendered their immunity under the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

states transferred whatever war powers they may have possessed to the federal government. As one commentator has noted, “[o]ne of the primary and least controversial purposes of the Constitutional Convention was to strengthen the foreign relations powers of the federal government vis-à-vis the states.”<sup>140</sup> Yet, that intent is not dispositive; under current law, the federal government’s exclusive authority in an area does not, by itself, permit abrogation of states’ immunity.<sup>141</sup>

The transfer of war powers was remarkable, however, as the Constitution explicitly granted powers to the federal government, while barring state action absent express federal approval. Thus, the Constitution not only delegated exclusive war powers authority to the federal government, but also, in the words of Hamilton, “prohibited the states from exercising the like authority.”<sup>142</sup> Indeed, the war powers’ “alienation” of state immunity was confirmed by a relatively contemporary Supreme Court holding in 1824, when Chief Justice Marshall wrote that “[t]he powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States.”<sup>143</sup> In short, by carving out state authority and delegating it to the federal government, the

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<sup>140</sup> Goldsmith, *supra* note 127, at 1643; *see also Alden*, 527 U.S. at 777 n.16 (Souter, J., dissenting) (“[O]ne of the main reasons a Constitutional Convention was necessary at all was that under the Articles of Confederation Congress lacked the effective capacity to bind the States.”); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND THE OLIVE BRANCH? 64-65 (1981) (arguing, with respect to allocation of power between the President and Congress, that the Framers intended “Congress . . . to control most American decisions about war and peace,” but recognized the need for a “single command” while at war); Lofgren, *supra* note 127, at 16-17 (noting John Jay’s statement that the states had vested Congress with war powers “by express delegation of power”) (citing 31 JOURNALS OF THE CONTINENTAL CONGRESS 797-98 (1934) (Oct. 13, 1786)).

<sup>141</sup> *See Seminole Tribe*, 517 U.S. at 72.

<sup>142</sup> *See supra* note 126 and accompanying text; *see also Peel v. Fla. Dep’t of Transp.*, 600 F.2d 1070, 1081 (5th Cir. 1979) (holding, pre-*Seminole Tribe*, that USERRA’s abrogation was valid because “[t]he war power of the federal government is its supreme power. When it is in action it is transcendent”) (quoting *St. Johns River Shipbuilding Co. v. Adams*, 164 F.2d 1012, 1015 (5th Cir. 1947)); *Jennings v. Ill. Office of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979) (holding, pre-*Seminole Tribe*, that USERRA’s abrogation was valid because “Congress was ‘exercising legislative authority that is plenary within the terms of the Constitutional (war powers) grant’”) (quoting *Fitzpatrick*, 427 U.S. at 456).

<sup>143</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382 (1821) (holding that the Court had jurisdiction over the state in an appeal from a state law conviction, where defendant used a federal act as a defense). Obviously, the present Court has not followed *Cohens* in its interpretation of the Eleventh Amendment. *See Seminole Tribe*, 517 U.S. at 96 (Stevens, J., dissenting) (noting that *Cohens* held that the Eleventh Amendment’s intent was to limit federal jurisdiction over private suits seeking payment of state debts).

Constitution fundamentally changed the balance of state and federal war powers, echoing the change that would later occur under the Fourteenth Amendment.<sup>144</sup> By its terms, therefore, the Constitution reveals that with regard to war powers, “there [was] a surrender . . . of immunity in the plan of the convention.”<sup>145</sup>

The text of the Constitution plainly grants broad federal control over military affairs. Under Article II, the President is “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>146</sup> Moreover, Congress has the power under Article I to “provide for the common Defence,”<sup>147</sup> to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”<sup>148</sup> to “raise and support Armies,”<sup>149</sup> to “provide and maintain a Navy,”<sup>150</sup> to “make Rules for the Government and Regulation of the land and naval Forces,”<sup>151</sup> to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>152</sup> and to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline

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<sup>144</sup> See *Jennings*, 589 F.2d at 938, 941-42; see also *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 755, 765 (6th Cir.), cert. granted, 124 S. Ct. 45 (2003) (recognizing, but ultimately rejecting, the theoretical plausibility of the argument that “in ceding some sovereignty with the Bankruptcy Clause, the states ceded their legislative powers but not their immunity from suit”). Indeed, the Supreme Court has long rejected attempts by states to hinder federal exercise of war powers by, for example, refusing to permit state militia members from participating in federal military exercises. See, e.g., *Perpich v. Dep’t of Def.*, 496 U.S. 334, 351 (1990) (rejecting State of Minnesota’s attempt to prevent state National Guard members from participating in federal military training in Honduras because the militia clauses “recognize[] the supremacy of federal power in the area of military affairs” and “several constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government”); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (holding that state militia member could not refuse federal military service in the War of 1812).

<sup>145</sup> *Alden*, 527 U.S. at 717 (quoting THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>146</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>147</sup> *Id.*, art. I, § 8, cl. 1.

<sup>148</sup> *Id.*, art. I, § 8, cl. 11.

<sup>149</sup> *Id.*, art. I, § 8, cl. 12.

<sup>150</sup> *Id.*, art. I, § 8, cl. 13.

<sup>151</sup> *Id.*, art. I, § 8, cl. 14.

<sup>152</sup> U.S. CONST. art. I, § 8, cl. 15.

prescribed by Congress.”<sup>153</sup> As noted, Article I provides not only positive federal war powers, but also expressly limits<sup>154</sup> the states’ war powers: they are unable to “grant Letters of Marque and Reprisal,”<sup>155</sup> and “[n]o State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”<sup>156</sup>

Those war powers are striking in their expansive grant of power to the federal government and their express limitations on state power, which can generally be exercised only with Congress’s approval. Indeed, that subordination of state power, although lacking an explicit enforcement clause, mirrors the Fourteenth Amendment’s allocation of authority between the federal and state governments.

In *Alden*, the Court reemphasized the validity of Fourteenth Amendment abrogation in terms that apply equally well to federal war powers, while also invoking Hamilton’s alienations: “By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment ‘fundamentally altered the balance of state and federal power . . . .’”<sup>157</sup> Accordingly, like the

<sup>153</sup> *Id.*, art. I, § 8, cl. 16.

<sup>154</sup> See Spiro, *supra* note 127, at 1228 (“The constitutional architecture itself evinces a norm of federal exclusivity in foreign affairs, on the one hand granting expansive foreign relations power to the federal government, on the other denying them to the states.”); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1176 (1999) (“What the Constitution gives to the [federal] political branches, it explicitly takes from the states.”).

<sup>155</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>156</sup> *Id.*, art. I, § 10, cl. 3; see also W. Taylor Reveley III, *War Powers*, 83 COLUM. L. REV. 2117, 2121 (1983) (reviewing EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER (1982)) (stating that section 10, clause 3 “suggests that the Framers expected the states to bear the major burden of defense against sudden attack until Congress could act”).

<sup>157</sup> *Alden*, 527 U.S. at 756 (quoting *Seminole Tribe*, 517 U.S. at 59); see also *Jennings*, 589 F.2d at 938, 941-42 (equating, in pre-*Seminole Tribe* case, USERRA’s war power abrogation to abrogation pursuant to the Fourteenth Amendment); cf. *McVey Trucking, Inc. v. Sec’y of St. of Ill.*, 812 F.2d 311, 320-21 (7th Cir. 1987) (holding, pre-*Seminole Tribe*, that Congress may abrogate state immunity under its bankruptcy powers, and rejecting theory that *Fitzpatrick* tied Fourteenth Amendment abrogation to explicit limits on state power because Congress’s “plenary” power necessarily limits state authority). *Fitzpatrick*, however, also noted that the Fourteenth Amendment “[i]mpressed upon [the states] . . . duties with respect to their treatment of private individuals.” *Fitzpatrick*, 427 U.S. at 453. Although the war powers lack that nexus to private individuals, *Fitzpatrick* also recognized that “every addition of power to the general government involves a corresponding diminution of governmental powers of the States. It is carved out of them.” *Fitzpatrick*, 427 U.S. at 455 (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1880)). So too did the Constitution transfer whatever



federal government's exercise of its war powers, "[w]hen Congress enacts appropriate legislation to enforce [the Fourteenth Amendment], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution."<sup>158</sup>

The Constitution's exclusive grant of war powers to the federal government, at the expense of state authority, also reflects the enormous importance of having a unified military policy. As Hamilton recognized, to sufficiently exercise its war powers, the federal government must be able to prevent recalcitrant states from thwarting federal action through invocations of sovereign immunity.<sup>159</sup> The Supreme Court, in another opinion by Chief Justice Marshall, affirmed the understanding that state war powers would be "contradictory and repugnant" to the exclusive federal war powers by holding that, under the Constitution, "the powers of sovereignty are

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war powers the states possessed to the federal government. *See* Yoo, *supra* note 127, at 254-56.

<sup>158</sup> *Alden*, 527 U.S. at 756 (internal citations omitted); *see also* *Case v. Bowles*, 327 U.S. 92, 102 (1946) (permitting Office of Price Administration to enjoin state timber sale because to hold otherwise would make "the Constitutional grant of the power to make war . . . inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment"); Goldsmith, *supra* note 127, at 1645 (arguing that the Constitution "ensured state compliance with the political branches' foreign relations enactments. But they left the determination of when the national foreign relations interest would be best served by the exclusion of state power largely to the discretion of the federal political branches"); Major Richard M. Lattimer, Jr., *Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities*, 150 MIL. L. REV. 79, 132-33 (1995) (arguing for negative war powers theory to prevent state regulation of military activities).

<sup>159</sup> *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (holding that Congress could impose minimum wage and overtime restrictions on states because they do not retain sovereign authority where the Constitution "divested them of their original powers and transferred those powers to the Federal Government," and specifically noting the Article I, section 8 powers of Congress, and Article I, section 10 restrictions on state power); *Case*, 327 U.S. at 102 ("To construe the Constitution as preventing [the federal government from regulating state land sales pursuant to its war powers] would be to read it as a self-defeating charter. . . . [T]he Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government.") (internal quotation marks omitted); *Cantwell v. County of San Mateo*, 631 F.2d 631, 636 (9th Cir. 1980) (holding that Congress did not violate the Tenth Amendment where VRRRA conflicted with state statutes because the war powers are distinguishable from the commerce powers); *Jennings*, 589 F.2d at 938 ("[T]he power given to Congress to prosecute war 'is not destroyed or impaired by any provision of the Constitution or by any one of the amendments.'") (quoting *Lichter v. United States*, 334 U.S. 742, 781 (1948)); Goldsmith, *supra* note 127, at 1670 ("[T]he functional case for a self-executing prohibition [through federal common law] on subnational foreign relations activity is strongest under [the] traditional concept[]" of foreign relations, such as military issues).

divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”<sup>160</sup>

Although the current Court, for the most part, has moved away from Marshall’s view of sovereignty, the importance of federal war powers should prove an exception. The Court’s recent state abrogation holdings have centered on a concern that a “*general* federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.”<sup>161</sup> That concern, however, should not prevent the Court from acknowledging that the Founders and ratifying states did not contemplate the ability of states to undermine a uniform national defense and war policy by invoking sovereign immunity; the Constitution is not a “suicide pact.”<sup>162</sup>

Despite its minor infringement on states’ freedom to allocate resources, USERRA’s abrogation is not a disproportionate attempt to address a trivial objective. Rather, it narrowly targets state actions that directly impede the nation’s growing need to recruit and retain soldiers. A low-level state manager, for example, may decide that compliance with USERRA, particularly where significant numbers of employees are called away for unforeseeable periods of time,<sup>163</sup> is too costly. Absent abrogation, that individual’s narrow self-interest can ignore the broader concerns of the nation as a whole—even when

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<sup>160</sup> *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819), *quoted in Alden*, 527 U.S. at 800 (Souter, J., dissenting); *see also Alden*, 527 U.S. at 754 (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.”) (emphasis added) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938)).

<sup>161</sup> *Alden*, 527 U.S. at 750-51 (emphasis added).

<sup>162</sup> *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (invalidating statute that divested citizenship of person who left country to avoid the draft, while recognizing that the “powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact”); *see also Case*, 327 U.S. at 102; *Schell v. Ohio State Highway Patrol*, No. C-2-80-641, 1981 WL 2289, at \*2-\*3 (S.D. Ohio June 1, 1981) (holding, in pre-*Seminole Tribe* case, that the state employer had no Eleventh Amendment immunity from VRRRA suit because “the responsibility of the national government to raise and support the military places the national government in a special position vis-à-vis the states,” therefore, “[d]ifferent policy considerations are raised by the Commerce and the War Powers Clauses . . . [and] our system of federalism requires greater deference to federal interests where the War Powers are involved”).

<sup>163</sup> *See supra* notes 1-2 and accompanying text.

those concerns involve areas as serious as military action.<sup>164</sup> It is in such instances where the need for federal action is paramount and should trump individual states' sovereignty interests.<sup>165</sup>

In sum, although the Court's explicit balancing of interests has consistently favored state immunity concerns over private enforcement of federal rights, Congress's enactment of USERRA represents the apex of federal authority. Accordingly, that statute's war powers abrogation provides the best case for the Court to recognize a limited exception to its general disapproval of Article I abrogation.

To be sure, when reviewing its statements that Congress cannot abrogate state immunity pursuant to Article I, the Court could hold that it meant what it said.<sup>166</sup> Indeed, one fears, especially with regard to state sovereign immunity,<sup>167</sup> that by merely repeating the Article I dicta enough, the Court will turn it into unassailable law.<sup>168</sup> Such a

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<sup>164</sup> See, e.g., *Wriggelsworth v. Brumbaugh*, 129 F. Supp. 2d 1106, 1112 (W.D. Mich. 2001) (holding that state statute and pension plan at issue were preempted by 38 U.S.C. § 4302 (2000), which provides uniform set of rights by expressly preempting any state law, collective-bargaining agreement, or certain other plans that limit USERRA's protections); Meyler, *supra* note 111, at 104 (arguing that Congress, pursuant to War Powers and the Necessary and Proper clauses of the Constitution, should be able to require state employers to maintain hypothetical draftees' employment seniority).

<sup>165</sup> See Althouse, *supra* note 30, at 644 n.62 ("There is little, if any, recognizable normative value to the states' ability to produce diverse [war powers] solutions tailored to local needs and preferences, as there is with the commerce power."); Goldsmith, *supra* note 127, at 1677 (stating that traditional foreign relations matters, like military affairs, differ from nontraditional foreign relations matters in that federal-state concurrent authority over the latter is "much less likely to undermine the United States' ability to participate in international affairs, and much less likely to harm the national foreign relations interest"); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495-1500 (1987) (discussing states' check on the federal government's military power through their ability to train militias under Congress's prescriptions).

<sup>166</sup> See *supra* note 94 and accompanying text.

<sup>167</sup> See, e.g., *Seminole Tribe*, 517 U.S. at 54 (refusing to follow literal text of Eleventh Amendment because of its past holdings in, for example, *Hans v. Louisiana*, 134 U.S. 1 (1890), which held, in spite of the text of the amendment, that Eleventh Amendment prohibits federal jurisdiction over a private suit against a citizen's own nonconsenting state).

<sup>168</sup> The Court may be reversing course, however, as evidenced by its recent decision in *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). See *supra* notes 60-68 and accompanying text. In restating *Seminole Tribe's* abrogation rule, the Court in *Hibbs* moved away from its practice of declaring that Congress cannot abrogate under any of its Article I powers, see *supra* note 94, to the subtly—although perhaps significantly—different statement that "Congress may not abrogate the States' sovereign immunity pursuant to its Article I power *over commerce*." 123 S. Ct. at 1977 (emphasis added). Although it is too soon to tell whether that change portends a meaningful distinction, *Hibbs* supports the view that the Court will

holding, however, would require a shift away from *Fitzpatrick* and *Alden*, as well as an explanation why, under the plan of the Constitution, states expected to possess immunity against the federal government's exercise of its extraordinarily broad war powers. The Court is unlikely to put itself in that quandary, for even where it has expanded state immunity, it has been careful not to encroach upon the federal government's war powers. For example, although the Court held in *National League of Cities v. Usery*<sup>169</sup> that Congress could not apply the FLSA to "core" state activities, it specifically noted that it was not overruling the holding of *Case v. Bowles*<sup>170</sup>—that Congress could enjoin state sales of timber under federal wartime price rules—because "[n]othing we say in [*Usery*] addresses the scope of Congress' authority under its war power."<sup>171</sup>

One could argue, as did the Seventh Circuit in *Velasquez*,<sup>172</sup> that striking down USERRA's abrogation would have little impact because relief against state employers is available under *Ex parte Young*<sup>173</sup> suits, and in actions pursued by the federal government.<sup>174</sup> As discussed

recognize that its previous statements regarding Article I abrogation were too broad.

<sup>169</sup> *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>170</sup> *Case v. Bowles*, 327 U.S. 92, 102 (1946).

<sup>171</sup> *Usery*, 426 U.S. at 854 n.18; *accord* *Cantwell v. County of San Mateo*, 631 F.2d 631, 636 (9th Cir. 1980) (stating that USERRA's abrogation did not violate states' Tenth Amendment powers); *Peel v. Fla. Dep't of Transp.*, 600 F.2d 1070, 1083-84 (5th Cir. 1979) (same). Also, a question asked during oral argument by Chief Justice Rehnquist in 1996 may indicate his openness to the idea that congressional authority over the states is greater during war than peace. *See* *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress's attempt to make state officers carry out federal handgun purchase law violated the Tenth Amendment), Transcript of Oral Argument, 1996 WL 706933, at \*39-\*40 (Rehnquist, C.J., responding to Solicitor General's argument that Congress had the power to make states assist in World War I effort by stating that "you would say there is some difference between wartime and peacetime as to congressional authority").

<sup>172</sup> *See Velasquez*, 160 F.3d at 394.

<sup>173</sup> *See infra* notes 184-90 and accompanying text.

<sup>174</sup> *See* *West Virginia v. United States*, 479 U.S. 305, 311 n.4 (1987). *Velasquez* also noted private parties' ability to file an USERRA claim in state court—an alternative subsequently eliminated by *Alden*. Moreover, in arguing that the need for war powers abrogation was not grave, the *Velasquez* court stated that because National Guards generally act as a state militia, the states have a substantial interest in protecting them. *See Velasquez*, 160 F.3d at 394. It is not clear, however, that individual judgments whether to protect a military employee's job, or whether to invoke sovereign immunity, will take into account the general benefit of the National Guard. Indeed, that states have been not infrequently sued for such violations belies the value that they place on such protections. *Cf. Vazquez, Treaties, supra* note 69, at 741 & n.112 (noting that the Founders believed that "states could not be trusted to comply with their federal obligations without compulsion") (citing *THE FEDERALIST* No. 15, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

below, however, those alternatives, as well as actions under state law, do not sufficiently protect USERRA's goals.

### III. ALTERNATIVES TO ENSURING STATE COMPLIANCE WITH USERRA

One of the many points of contention between the majority and dissent in *Seminole Tribe* was the degree to which alternate means of enforcing federal rights would exist after the decision.<sup>175</sup> That disagreement continued to play out in the Court's subsequent holdings, where it repeatedly limited federal statutes' application to the states.<sup>176</sup> According to the majority, the remaining enforcement alternatives sufficiently protected federal rights, thereby allowing it to conclude that the "principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States."<sup>177</sup>

The efficacy of alternate means to enforce USERRA is important, therefore, for those alternatives may be an implicit, if not explicit, factor in the Court's examination of war powers abrogation. The Court will have to acknowledge that the need for a unified, national war policy is directly related to the ability of military employees to exercise their rights under USERRA; thus, it is likely to question whether sufficient alternative remedies exist should war powers abrogation be invalidated. As shown below, the answer to that inquiry is that there are few, if any, suitable alternatives. In particular, it appears that the equitable federal remedy generally available for most other statutes is not permitted under USERRA, and the alternatives that do exist fail adequately to protect the important policy needs underlying USERRA.

#### A. *Exceptions to State Sovereign Immunity*

##### 1. Federal Suit Against a State Employer

Even where a private individual is not permitted to sue a state for damages, it is well settled that states have no immunity against an action brought on the individual's behalf by the federal

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<sup>175</sup> See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 77 n.1 (1996) (Stevens, J., dissenting) (arguing that exclusively federal schemes such as copyright and bankruptcy will lack any remedy under the majority decision); *id.* at 72 n.16 (responding to Justice Stevens by noting alternative remedies, including *Ex parte Young* actions).

<sup>176</sup> See *supra* notes 35-59 and accompanying text.

<sup>177</sup> *Alden*, 527 U.S. at 757.

government.<sup>178</sup> USERRA explicitly allows for such an option, as individuals may ask the United States Secretary of Labor to seek enforcement against the state.<sup>179</sup>

This option provides little more than false hope, however. Although the federal government may become involved in particularly significant cases,<sup>180</sup> it lacks the resources to represent the vast majority of employees seeking to enforce their federal employment rights against a state employer, especially when war both strains the federal budget and increases the number of soldiers being called to active duty.<sup>181</sup> USERRA's statutory scheme, moreover, reflects Congress's decision to encourage private enforcement of the Act.<sup>182</sup> Accordingly, relying solely on potential federal enforcement not only undermines USERRA's intent, but provides little hope for most military employees seeking monetary damages from a

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<sup>178</sup> See *id.* at 755-76; *West Virginia v. United States*, 479 U.S. 305, 312 n.4 ("States retain no sovereign immunity as against the Federal Government."); *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003) (reversing district court's grant of the state's motion seeking dismissal under the Eleventh Amendment of ADA suit brought by federal government); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) (noting that 29 U.S.C. § 216 allows the Labor Department to bring FLSA suits on behalf of individuals).

<sup>179</sup> See 38 U.S.C. §§ 4322(a)(2)(B), 4323, 4326 (2000); Klein & Cilenti, *supra* note 74, at 17. The Attorney General, however, must approve such suits. See 38 U.S.C. §§ 4322, 4323.

<sup>180</sup> For example, after the Supreme Court, citing *Seminole Tribe*, vacated a Ninth Circuit decision allowing a class action ADEA suit against the California Public Employees Retirement System, the EEOC intervened and ultimately secured a \$250 million settlement. See Joyce E. Cutler, *Nation's Largest Pension Plan to Pay \$250 Million to Settle Age Bias Charges*, 21 DAILY LAB. REP. (BNA), at A-9 to A-10 (Jan. 31, 2003); see also *Cal. Pub. Employees' Ret. Sys. v. Arnett*, 528 U.S. 1111 (2000), *vacating* 179 F.3d 690 (9th Cir. 1999), *remanded to* No. 95-03022 CRB (N.D. Cal. Jan. 29, 2003) (approving settlement).

<sup>181</sup> See *Alden*, 527 U.S. at 810 (Souter, J., dissenting) ("[U]nless 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*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy."); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 704 (1999) (Breyer, J., dissenting) ("Congress . . . might create a federal damages-collecting 'enforcement' bureaucracy charged with responsibilities that Congress would prefer to place in the hands of States or private citizens."); BRIAN LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 211 n.1 (1997) (discussing the limited resources of the Justice Department's Office of Civil Rights, and noting that "[m]ost federal law enforcement is given limited resources, perhaps because Congress sees underenforcement as less repugnant than overenforcement"); Dana Milbank, *Spending Request Envisions Long War*, WASH. POST, Mar. 25, 2003, at A1 (describing White House request for \$74.7 billion for first six months of Iraqi conflict).

<sup>182</sup> See 38 U.S.C. § 4323.

nonconsenting state employer.<sup>183</sup>

## 2. *Ex parte Young* Action

A further limited exception to a state's claim of sovereign immunity is a private *Ex parte Young*<sup>184</sup> action against a state official in federal court. *Ex parte Young* essentially created a legal fiction: that a suit brought against a state officer is not considered a suit against the state that is susceptible to a sovereign immunity defense.<sup>185</sup> However, *Ex parte Young* actions are limited to prospective relief, thereby barring money damages for successful plaintiffs.<sup>186</sup> Although courts frequently rely on *Ex parte Young* relief to argue that abrogation is unnecessary to protect employees' federal rights,<sup>187</sup> it is unclear to what extent that claim is true.

The prohibition against monetary relief is more than an inconvenience for state military employees. Lawsuits are expensive, especially for an individual who is unemployed. Although a state employer may be wary of a large class of plaintiffs, which is better able to spread the costs of an *Ex parte Young* suit, many individuals will have great difficulty affording litigation that will not achieve monetary damages. Thus, states will often be able to violate USERRA without facing this type of suit.

Moreover, even where an employee has the resources to sue, a state defendant is likely to delay resolution as long as possible. The only potential harm from an *Ex parte Young* suit, aside from litigation costs and the rare negative publicity, is an order to stop breaking the

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<sup>183</sup> Further, as Justice Souter stated in his *Garrett* dissent, "the greater the obstacle the Eleventh Amendment poses to the creation by Congress of the kind of remedy at issue here—the decentralized remedy of private damage actions—the more Congress, seeking to cure important national problems . . . will have to rely on more uniform remedies, such as federal standards and court injunctions, which are sometimes draconian and typically more intrusive." *Garrett*, 531 U.S. at 388 (Souter, J., dissenting) (internal citations omitted). *But see* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645 (1999) ("The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.").

<sup>184</sup> 209 U.S. 123 (1908).

<sup>185</sup> *See id.* at 159-60; *see also* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (noting fiction); Jackson, *supra* note 23, at 511.

<sup>186</sup> *See* *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (approving *Ex parte Young* relief for USERRA claim).

<sup>187</sup> *See, e.g., Alden*, 527 U.S. at 757; *Seminole Tribe*, 517 U.S. at 71 n.14; *Velasquez*, 160 F.3d at 394.

law in the future. State defendants, therefore, have little incentive to settle even strong claims for *Ex parte Young* relief under USERRA.<sup>188</sup>

In sum, a state employer has little reason not to disregard USERRA where, at worst, it will generally only have to reinstate or hire an employee. That incentive, combined with the prohibitive costs of a lawsuit, leaves state military employees with little more than an empty promise of equitable relief.<sup>189</sup> With its limited effect, *Ex parte Young* fails to stem the damage that state sovereign immunity claims inflict upon USERRA's goal of promoting military service.

Further, as discussed below,<sup>190</sup> even the limited relief available under *Ex parte Young* may no longer be available under a 1998 amendment to USERRA, which appears to have eliminated federal jurisdiction over all suits against state employers. Thus, if war powers abrogation is invalidated, state military employees will be barred from pursuing any private USERRA claim against their employer.

### 3. State Military Employment Statutes

State legislation is one alternative that may provide USERRA-like rights to some state military employees. Not surprisingly, there are significant disparities among the states,<sup>191</sup> which undermine USERRA's attempt to provide a consistent level of protection for military employees.<sup>192</sup> More important, even among the states that have enacted statutes similar to USERRA, most are of no help to state military employees because they fail to permit private rights of action for monetary damages against the state.

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<sup>188</sup> *But see Velasquez*, 160 F.3d at 394 (arguing that states have incentives to protect their own state militia and Reserve members).

<sup>189</sup> *See Coll. Sav. Bank*, 527 U.S. at 704 (Breyer, J., dissenting) ("*Ex parte Young* . . . is still available, though effective only where damages remedies are not important."); Jackson, *supra* note 23. Another potential problem with *Ex parte Young* relief is that *Seminole Tribe* further eroded the already limited nature of such actions by holding that they are not available "[w]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. Because USERRA does not appear to contain any remedial provisions detailed enough to proscribe *Ex parte Young* relief, *Seminole Tribe's* holding in this area should not be a concern. *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997) (refusing to permit *Ex parte Young* action in the "special circumstance[]" where the claim, for title to state submerged lands, would be as intrusive to state sovereignty as a claim for monetary damages).

<sup>190</sup> *See infra* notes 222-29 and accompanying text.

<sup>191</sup> *See infra* notes 193-99 and accompanying text.

<sup>192</sup> *See Von Allmen v. Conn. Teachers Ret. Bd.*, 613 F.2d 356, 360 (2d Cir. 1979) ("It is clear from the legislative history [of the 1974 amendments extending VRRRA to the states] that Congress intended the amendments to produce uniformity from state to state . . .") (citing S. REP. No. 93-907, at 110 (1974)).



All states have some type of reemployment or leave of absence guarantees for state military employees called to active duty,<sup>193</sup> although the level of protection can vary dramatically.<sup>194</sup> It is

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<sup>193</sup> See ALA. CODE § 31-2-13 (1998) (*but see* *White v. Assoc. Indus. of Ala., Inc.*, 373 So. 2d 616 (Ala. 1979) (holding statute unconstitutional against private employers)); ALASKA STAT. § 39.20.350 (Michie 2002); ARIZ. REV. STAT. § 26-168(C) (2000 & Supp. 2003); ARK. CODE ANN. §§ 21-4-203, 21-4-212(b)(1), (d), (f)(1) (Michie 1996 & Supp. 2003); CAL. MIL. & VET. CODE §§ 395 to 395.03, 395.05, 395.1, 395.3, 395.4 (West 1988 & Supp. 2004); COLO. REV. STAT. §§ 24-50-301, 24-50-302, 28-3-601 to 28-3-608 (2001 & Supp. 2003); CONN. GEN. STAT. §§ 5-248, 5-255, 27-33 (1998 & Supp. 2003); DEL. CODE ANN. tit. 29, § 5105 (2003); FLA. STAT. ANN. §§ 115.01 to 115.15, 295.09 (West 2002 & Supp. 2004); GA. CODE ANN. § 38-2-279 (1995 & Supp. 2003); HAW. REV. STAT. § 79-20 (1993) (repealed July 1, 2002, by 2000 Haw. Sess. Laws, Act 253, § 132) (retaining the rights granted in the statute if comparable rights are not provided in collective-bargaining agreement or executive order); IDAHO CODE § 46-407 (Michie 2003); ILL. COMP. STAT. ANN. §§ 325/1, 330/5 (West 1993); IND. CODE § 10-2-4-3 (2003); IOWA CODE § 29A.28 (2001 & Supp. 2003); KAN. STAT. ANN. § 48-517 (Supp. 2002); KY. REV. STAT. ANN. §§ 61.373, 61.377, 61.394 (Michie 1993 & Supp. 2003); LA. REV. STAT. ANN. § 29:38 (West 1989 & Supp. 2004); ME. REV. STAT. ANN. tit. 37-B, § 342(5)(B) (West 2001 & Supp. 2003) (amended by 2000 Me. Legis. Serv. 662) (including members of the federal reserves); MD. CODE ANN., STATE PERS. & PENS. §§ 2-701 to 2-707 (1997); MASS. GEN. LAWS ch. 33, § 59 (1999) (providing leaves of absence, but no reemployment rights for public employees); MICH. COMP. LAWS §§ 35.352, 35.354 (2001); MINN. STAT. §§ 192.26, 192.261 (1992 & Supp. 2004); MISS. CODE ANN. §§ 33-1-19, 33-1-21 (2000); MO. REV. STAT. §§ 36.370, 41.942, 105.270 (2001 & Supp. 2004); MONT. CODE ANN. §§ 10-1-604, 10-2-221, 10-2-225 (2003); NEB. REV. STAT. §§ 55-160 (providing pay for up to 120 hours), 55-161 (1998); NEV. REV. STAT. §§ 281.145, 284.359 (2002 & Supp. 2003); N.H. REV. STAT. ANN. §§ 112:8, 112:9 (1990); N.J. STAT. ANN. §§ 38:23-1, 38:23-3, 38:23-4 (West 2002); N.M. STAT. ANN. §§ 20-4-7, 28-15-1, 28-15-2 (Michie 1978); N.Y. MIL. LAW §§ 242, 243 (McKinney 1990 & Supp. 2004) (providing up to 30 days paid, with escalator clause); N.C. GEN. STAT. §§ 127A-116, 127A-202, 127A-202.1, 127A-203 (2001); N.C. ADMIN. CODE tit. 25, r.1E.0802 (2003); N.D. CENT. CODE §§ 37-01-25, 37-01-25.1 (1987); OHIO REV. CODE ANN. §§ 124.29, 5903.01, 5903.02 (West 2003); OHIO ADMIN. CODE § 123:1-34-04 (2003); OKLA. STAT. tit. 44, §§ 208.1, 209 (1996 & Supp. 2004); OR. REV. STAT. §§ 399.230, 408.240, 408.290 (2001); 51 PA. CONS. STAT. §§ 4102, 7304 (1976 & Supp. 2003); R.I. GEN. LAWS § 36-5-2 (1997); S.C. CODE ANN. §§ 8-7-20, 8-7-80, 8-7-90, 25-1-2250 (Law. Co-op. 1976 & Supp. 2003); S.D. CODIFIED LAWS §§ 3-6-19, 3-6-22, 3-6-24 (Michie 1994); TENN. CODE ANN. §§ 8-33-102, 8-33-104, 8-33-109 (2002 & Supp. 2003); TEX. GOV'T CODE ANN. §§ 431.005, 613.001 to 613.006, 661.904 (Vernon 1998 & Supp. 2004); UTAH CODE ANN. §§ 39-3-1, 39-3-2 (1998 & Supp. 2003); VT. STAT. ANN. tit. 3, § 263 (2003); VA. CODE ANN. §§ 2.2-2901, 2.2-2903.1, 44-93, 44-93.1, 44-204 (Michie 2001 & Supp. 2003); WASH. REV. CODE § 38.40.060 (2003); W. VA. CODE §§ 6-11-1, 15-1F-1 (2003); WIS. STAT. §§ 21.80, 230.32, 230.35(3)(a), 230.82 (2003); WYO. STAT. ANN. §§ 19-11-103, 19-11-106 to 19-11-108, 19-11-111 (Michie 2003).

<sup>194</sup> For example, states differ in providing an "elevator" clause like USERRA. See *supra* note 76 and accompanying text; *compare, e.g.*, ALA. CODE § 31-2-13 (providing elevator clause); LA. REV. STAT. ANN. § 29:38 (same); MONT. CODE ANN. §§ 10-1-604, 10-2-221, 10-2-225 (same); OHIO REV. CODE ANN. §§ 124.29, 5903.01, 5903.02 (same); UTAH CODE ANN. § 39-3-1 (same); VT. STAT. ANN. tit. 3, § 263 (same), *with* ALASKA STAT. § 39.20.350 (lacking elevator clause); COLO. REV. STAT. §§ 24-50-301, 24-50-302, 28-3-601 to 28-3-608 (same); N.M. STAT. ANN. § 28-15-2 (same); N.D. CENT. CODE §§ 37-01-25, 37-01-25.1 (same). Similarly, states differ wildly in how much paid leave

questionable whether those protections are meaningful, however, because few states appear to allow private enforcement with monetary damages against the state employer.<sup>195</sup> For most state military

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they provide, if any. *See, e.g.*, ALA. CODE § 31-2-13 (providing up to 168 hours paid); ARIZ. REV. STAT. § 26-168(C) (providing 30 days); ARK. CODE ANN. § 21-4-212 (providing 30 days); CAL. MIL. & VET. CODE §§ 395.01, 395.1, 395.3, 395.4 (providing 180 days); COLO. REV. STAT. §§ 24-50-301, 24-50-302, 28-3-601 to 28-3-608 (providing no paid leave); FLA. STAT. ANN. §§ 115.01 to 115.15, 295.09 (providing 30 days); GA. CODE ANN. § 38-2-279 (providing 30 days); HAW. REV. STAT. § 79-20 (providing 15 days); IND. CODE § 10-2-4-3 (providing 15 days); IOWA CODE § 29a.28 (providing 30 days); MASS. GEN. LAWS ch. 33, § 59 (providing 17 days); MO. REV. STAT. § 105.270 (providing 120 hours); MONT. CODE ANN. § 10-1-604 (providing 15 days); NEB. REV. STAT. § 55-160 (providing 120 hours); NEV. REV. STAT. § 281.145 (providing 15 days); N.H. REV. STAT. ANN. § 112:9 (providing 15 days); N.J. STAT. ANN. §§ 38:23-1, 38:23-3, 38:23-4 (providing 90 days for federal service, unlimited for state service); N.M. STAT. ANN. § 20-4-7 (providing 30 days); N.Y. MIL. LAW §§ 242, 243 (providing 30 days); OHIO ADMIN. CODE § 123:1-34-04 (providing 22 days); OR. REV. STAT. § 408.290 (providing 15 days); 51 PA. CONS. STAT. § 4102 (providing 15 days); S.C. CODE ANN. § 8-7-90 (providing 15 days); S.D. CODIFIED LAWS §§ 3-6-19, 3-6-22 (stating that pay is at employer's discretion); TENN. CODE ANN. § 8-33-109 (providing 15 days); UTAH CODE ANN. § 39-3-2 (providing 15 days); VA. CODE ANN. § 44-93.1 (stating that employer may supplement pay); WASH. REV. CODE § 38.40.060 (providing 15 days); W. VA. CODE § 15-1F-1 (providing 30 days); WIS. STAT. § 230.35(3)(a) (providing 30 days); WYO. STAT. ANN. § 19-11-111 (providing 15 days). *See generally* Samuel W. Asbury, Comment, *A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 GONZ. L. REV. 67 (1994) (discussing state paid leave statutes, although without looking to state immunity). Other differences include provisions providing a period of time after which a returning employee can be terminated only for just cause, or penalties against violators of military employees' rights. *See, e.g.*, ARIZ. REV. STAT. § 26-168 (stating that violation is a misdemeanor); FLA. STAT. ANN. § 115.15 (stating that violation is removal from office); ME. REV. STAT. ANN. tit. 37-B, § 342(5)(B) (stating that violation is a misdemeanor); MISS. CODE ANN. § 33-1-21 (providing 1 year cause); MONT. CODE ANN. §§ 10-2-221, 10-2-225 (providing up to 15 days paid, 1 year cause clause, and escalator clause); TENN. CODE ANN. § 8-33-104 (providing 1 year cause); TEX. GOV'T CODE ANN. § 613.004 (providing 1 year cause); UTAH CODE ANN. § 39-3-1 (providing 1 year cause); WIS. STAT. § 21.80 (providing 180 days cause).

<sup>195</sup> Compare COLO. REV. STAT. § 28-3-611 (allowing suit for damages against "any employer" that violates part of statute that protects public and private employees); DEL. CODE ANN. tit. 20, § 905 (allowing suit for damages against "any employer" that violates relevant statutes); FLA. STAT. ANN. § 295.14 (allowing suit for damages available before court or state commission); IDAHO CODE § 46-407(d) (allowing suit for damages in violation of section that applies to any employer other than the federal government); LA. REV. STAT. ANN. §§ 29:38(D), 29:38.3; MICH. COMP. LAWS § 35.355; MONT. CODE ANN. § 10-1-226 (allowing state or private enforcement); N.M. STAT. ANN. § 28-15-3; OKLA. STAT. tit. 44, § 208.1 (adopting USERRA, including its provision for private enforcement against state, 38 U.S.C. § 4323); TENN. CODE ANN. § 8-33-107; UTAH CODE ANN. § 39-3-1(5); VA. CODE ANN. § 44-93.5; WYO. STAT. ANN. § 19-11-121), *with* NEB. REV. STAT. § 55-161 (adopting much of USERRA, but not its private right of enforcement provision, 38 U.S.C. § 4323); TEX. GOV'T CODE ANN. §§ 431.006 (providing monetary damages only for private employees), 613.021 to 613.023 (providing only equitable relief for public employees); S.D. CODIFIED LAWS § 3-6-25 (providing only private enforcement to obtain equitable relief). Some of

employees, therefore, the right to a leave of absence or reemployment is no better than equitable *Ex parte Young* relief obtained under USERRA.<sup>196</sup>

Moreover, only thirteen states<sup>197</sup> prohibit military-based

these states, and others, also provide for state enforcement of leave and employment rights, with varying remedies, against state employers. *See, e.g.*, KAN. STAT. ANN. § 48-517(d), (f) (stating that state can prosecute on individual's behalf); MICH. COMP. LAWS § 35.355 (stating that state enforcement preferred, but permits private enforcement); MISS. CODE ANN. § 33-1-21(b) (stating that district attorney can enforce leave of absence protection); MONT. CODE ANN. § 10-1-226 (allowing state or private enforcement); N.M. STAT. ANN. § 28-15-3 (allowing state or private enforcement for damages); N.C. GEN. STAT. §§ 127A-202.1 (allowing state enforcement), 127A-203 (allowing monetary award for reemployment for state guard members); OHIO REV. CODE ANN. § 124.29 (providing state administrative enforcement scheme); OR. REV. STAT. § 399.235 (providing state administrative enforcement scheme); TENN. CODE ANN. § 8-33-106 (stating that it can be enforced by Commissioner of Personnel, in addition to private suit); WIS. STAT. § 21.80(7) (allowing state to enforce with damages).

<sup>196</sup> *See supra* notes 184-90 and accompanying text. Moreover, even where a private right of action is provided, it may not be helpful without also providing attorney fees. *See Asbury, supra* note 194, at 92 (arguing that states should permit attorney fees for military employees' suits to obtain guaranteed paid leave because the damages involved will often not otherwise make a lawsuit economically feasible).

<sup>197</sup> *See* CAL. MIL. & VET. CODE § 394(b); ME. REV. STAT. ANN. tit. 37-B, § 342(5) (amended by Me. Legis. Serv. 662 (2000)) (including members of the federal reserves); MO. REV. STAT. § 105.270; NEB. REV. STAT. § 55-161 (adopting USERRA); NEV. REV. STAT. § 412.606 (prohibiting discrimination against state guard); N.H. REV. STAT. ANN. § 110-B:65 (prohibiting discrimination against guard members); N.J. STAT. ANN. §§ 10:5-5, 10:5-12; N.C. GEN. STAT. § 127B-12; OKLA. STAT. tit. 44, § 208.1 (adopting USERRA "as state law," which includes state employers); 51 PA. CONS. STAT. §§ 7301-7309; UTAH CODE ANN. § 39-3-1 (preventing only discrimination against employees who return to work after military service); WIS. STAT. §§ 111.32, 111.321, 111.322; WYO. STAT. ANN. §§ 19-11-103, 19-11-104. New York does prohibit prejudice against an employee because of an absence required by military service; however, that protection is best described as a reemployment right. *See* N.Y. MIL. LAW § 242 (protecting against "prejudice[], by reason of [a military duty] absence, with reference to continuance in office or employment, reappointment to office, reemployment, reinstatement, transfer or promotion"); *Kitsakos v. Brown*, 848 F. Supp. 459, 462 (S.D.N.Y. 1994) (stating that N.Y. MIL. LAW § 243 applies "only where employment would not have been terminated by any intervening cause apart from absence due to military duty"); *Hogan v. N.Y. State Office of Mental Health*, 496 N.Y.S.2d 299 (App. Div. 1985) (holding that refusal to hire or discrimination not actionable under Section 242 unless related to specific absence).

Seventeen other states have antidiscrimination laws, but do not explicitly apply them to state employers. *See* ARIZ. REV. STAT. § 26-167; COLO. REV. STAT. § 28-3-506; CONN. GEN. STAT. § 52-571; 20 ILL. COMP. STAT. ANN. § 1805/100, 705 § 505/8, 745 § 5/1; IOWA CODE § 29A.43 (providing no definition of "employer," but held to include municipal employees in *Bewley v. Villisca*, 200 N.W.2d 904 (Iowa 1980)); KAN. STAT. ANN. §§ 44-1126, 44-1002 (defining "person" as not including state); LA. REV. STAT. ANN. § 29:38.1 (failing to include state employer, as reemployment does); MASS. GEN. LAWS ch. 33 § 13; MICH. COMP. LAWS § 192.34; MISS. CODE ANN. § 33-1-15; MONT. CODE ANN. §§ 10-1-603, 10-1-615 (stating that violation is a misdemeanor);

discrimination against state employees.<sup>198</sup> As with leave and reemployment statutes, those state anti-discrimination provisions are undermined by the failure of most states to provide for private enforcement with monetary damages against the state employer.<sup>199</sup>

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N.M. STAT. ANN. § 20-4-6 (stating that willful violation is a misdemeanor); R.I. GEN. LAWS §§ 36-11-2, 36-11-6; TENN. CODE ANN. § 58-1-604; VT. STAT. ANN. tit. 3, § 491; VA. CODE ANN. § 44-93.4 (failing to mention state employee, like leave reemployment statutes do); WASH. REV. CODE §§ 38.40.040, 38.40.050.

<sup>198</sup> States may obviously differ in what they recognize as a valid waiver of immunity against a private suit, but it is assumed that state courts will not find such a waiver unless clearly expressed by the legislature. *See, e.g.,* *Amantia v. Cantwell*, 213 A.2d 251, 254 (N.J. Super. Ct. App. Div. 1965) (holding that plaintiff was entitled to monetary remedy for violation of paid leave statute, but that it could not mandate payment because permitting monetary remedies against the state is exclusively within the legislature's discretion). Thus, it is also assumed that a statute providing rights to a military employee will be applicable against a state employer only if there exists an "express waiver," as is required for federal jurisdiction over such suits. *Alden*, 527 U.S. at 724 ("The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary."). *See generally* Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1102-05 (2002) (discussing enforcement of state disability laws against state actors). Indeed, waivers under state legislation may apply to a federal USERRA suit as well, for at least one state has held that a legislature's enactment of a statute allowing private money damages against the state also constitutes a waiver of sovereign immunity under a federal statute that provides the same rights. *See Williamson v. Dep't of Human Res.*, 572 S.E.2d 678, 681 (Ga. Ct. App. 2002) (holding that waiver of immunity under state statute prohibiting disability discrimination constituted waiver under the ADA).

<sup>199</sup> *Compare* N.H. REV. STAT. ANN § 110-B:65 (providing specifically for money damages against the state); N.J. STAT. ANN. §§ 10:5-13, 10:5-38 (providing state or private enforcement of damage suit); UTAH CODE ANN. § 39-3-1 (providing private right to enforce only for discrimination against *returning* employees); WYO. STAT. ANN. § 19-11-121, *with* NEB. REV. STAT. §§ 55-161, 55-161.01 (adopting USERRA's protections for public employees, but only the Commissioner of Labor can enforce statute and obtain monetary damages; does not adopt USERRA's private right of enforcement provision, 38 U.S.C. § 4323); N.C. GEN. STAT. §§ 127A-203, 127B-12 (allowing private suit for damages only for reemployment claims); 51 PA. CONS. STAT. §§ 7301-7309, 42 PA. CONS. STAT. §§ 8521-8522 (lacking a waiver of sovereign immunity); WIS. STAT. §§ 111.375, 111.39 (only state may seek backpay).

Many states make violations of antidiscrimination laws a crime. *See* CAL. MIL. & VET. CODE § 394(g); IOWA CODE ANN. § 29a.43 (failing to clearly prohibit discrimination in hire); ME. REV. STAT. ANN. 37-B § 342(5); MO. REV. STAT. § 105.270 (stating that violation is a misdemeanor; no prohibition against refusal to hire); NEB. REV. STAT. § 55-165 (stating that violation is a misdemeanor); NEV. REV. STAT. § 412.606 (same); N.H. REV. STAT. ANN. § 110-B:65; N.C. GEN. STAT. § 127B-13 (same). However, making discrimination a crime does little, if anything, for state military employees, as it is unlikely that a state attorney general or local prosecutor has the power, or will, to charge a state agency with a crime. *See* Colker & Milani, *supra* note 198, at 1104 (discussing Alabama law).

Accordingly, state military employees in the vast majority of states can enforce their rights only at a potentially significant financial burden.<sup>200</sup> Additional problems arise from the perception that state courts are more hostile than federal courts to claims against their own state,<sup>201</sup> and that state litigation may involve more substantial delays.<sup>202</sup>

Further, the significant number of states that provide the right to a leave of absence and reemployment, but fail to prohibit discrimination with regard to hiring, creates a perverse incentive for a state employer. A manager will be faced with potentially severe problems associated with hiring a military employee, including increased leave time and serious health problems that may result from active duty.<sup>203</sup> Many managers, therefore, may simply avoid taking on such burdens by refusing to hire members of the Reserves or National Guard. In the vast majority of states, those employers can easily discriminate against such applicants, fearing only the potential of future equitable relief.<sup>204</sup>

Although a few states provide their employees with rights as expansive as USERRA, the majority do not. Military employees of most states, therefore, are no better off than they would be merely seeking *Ex parte Young* relief. Accordingly, state legislation does not provide an adequate safety net for Congress's attempt to encourage military service should the Supreme Court invalidate USERRA's abrogation of state immunity.<sup>205</sup>

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<sup>200</sup> See *supra* notes 186-89 and accompanying text.

<sup>201</sup> See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-31 (1977) (arguing that state courts are generally less open to plaintiffs seeking to exercise their rights); Kathryn S. Piscitelli, *Seminole Tribe of Florida v. Florida: Can State Employees Still Sue in Federal Court?*, 43 LAB. L.J. 213, 216 (1996) (predicting that "state courts will probably be less generous than federal courts in awarding damages against a state").

<sup>202</sup> See, e.g., Hehr & Wallace, *supra* note 120, at 55 n.115 (noting disadvantages of suing in state courts); John A. Martin & Nancy C. Maron, *Courts, Delay, and Interorganizational Networks: Managing an Essential Tension*, 14 JUST. SYS. J. 268 (1991) (addressing delays in state litigation).

<sup>203</sup> See *supra* notes 1-2 and accompanying text; see also David Brown, *U.S. Acts to Avert Gulf War Malady; Military Readies Military Tracking System and Better Sensors*, WASH. POST, Jan. 21, 2003, at A1 (noting that approximately 160,000 soldiers may have suffered "lingering physical symptoms" after the 1991 Gulf War).

<sup>204</sup> Although some states make discrimination a crime, none appears to permit prosecution of state officials. See *supra* note 199.

<sup>205</sup> The lack of protection for military employees in most states also raises the possibility of a more attenuated alternative—due process abrogation. Under this theory, Congress may abrogate state immunity pursuant to its due process power under the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59 (holding that Congress can abrogate pursuant to a valid exercise of its Fourteenth Amendment

#### 4. State Waiver of Sovereign Immunity

Finally, the Supreme Court has “long recognized that a State’s sovereign immunity is ‘a personal privilege which it may waive at pleasure.’”<sup>206</sup> To create such a waiver, a state must have voluntarily submitted to federal jurisdiction, or made a “clear declaration” that it intends to submit to such jurisdiction.<sup>207</sup>

In *College Savings Bank*,<sup>208</sup> however, the Court limited the ability of courts to find a waiver. The previous rule was that implicit or constructive waivers—for example, a court finding a waiver of state immunity based on a state’s operation of an interstate railroad<sup>209</sup>—were permissible. The Court in *College Savings Bank* changed course

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power); Vazquez, *supra* note 12, at 1745-63 (describing “abrogation reductio”); *see also* Jackson, *supra* note 23, at 507-10 & nn.53-58; Meltzer, *supra* note 12, at 49-50 & nn.230-32. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the Court recognized the possibility of due process abrogation, but placed great doubts on Congress’s ability to satisfy the balance between due process protections and state immunity. *Florida Prepaid* involved a patent infringement suit brought against the State of Florida. *See id.* at 630-32. In the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a) (2000), Congress abrogated state immunity against patent suits pursuant to its Fourteenth Amendment due process power. *See Florida Prepaid*, 527 U.S. at 637. The Court expressly acknowledged that due process abrogation could be valid, *see id.* at 642; however, it held that the abrogation was not congruent and proportional to Congress’s Fourteenth Amendment power because there was no evidence of a pattern of state due process violations, such as patent violations, without providing some means of redress. *Id.* at 644-46 (noting also that a due process violation must be intentional or reckless).

Assuming that USERRA’s protections can be considered a grant of property rights to military employees—which is unlikely given that Congress never cited its due process, or any Fourteenth Amendment power with reference to the Act, *see supra* note 102—*Florida Prepaid* raises several interesting issues. For example, Congress has protected military employees since 1940, *see supra* note 70, and until *Seminole Tribe*, states would have considered themselves liable to individual suits. Given that a pattern of state violations without due process protection would obviously be lacking, would the Court require a period where states take advantage of their immunity by violating USERRA rights without due process before holding that Congress can validly abrogate state immunity to protect those same rights? Moreover, although some state laws would protect the hypothetical USERRA property rights, others would not. *See supra* notes 189-99 and accompanying text. Would the Court hold that USERRA’s abrogation was valid with regard to some states, but not others? Its analysis in other cases suggests that it would not make such a targeted ruling, but one could question why a statute’s abrogation would be void even though it was valid in some circumstances. *See generally* Carlos Manuel Vazquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000).

<sup>206</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

<sup>207</sup> *Id.*

<sup>208</sup> 527 U.S. at 680.

<sup>209</sup> *Id.*

and held that “a State’s express waiver of sovereign immunity [must] be unequivocal.”<sup>210</sup> Thus, if war powers abrogation is unconstitutional, a state must explicitly waive its immunity for a private USERRA suit for monetary damages to be available.

An aggrieved employee will have few means, save perhaps public opinion, to force a state to waive its immunity.<sup>211</sup> Yet, Congress possesses an easy method of obtaining state waivers. As it has done in other areas,<sup>212</sup> Congress may require states to expressly waive their immunity against USERRA suits in exchange for related federal money, such as National Guard funding.<sup>213</sup> Indeed, the Court has recently reemphasized Congress’s ability to obtain such conditional waivers.<sup>214</sup>

Given its recent attempts to amend USERRA,<sup>215</sup> this route provides Congress with a simple and relatively quick means of reestablishing national protections for military employees.<sup>216</sup> It must proceed carefully, however. Although tying waivers of immunity to the acceptance of funds is generally permissible, Congress’s “bribe” cannot be so coercive as to threaten states’ ability to engage in lawful activities if they choose not to accept the conditional funds.<sup>217</sup>

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<sup>210</sup> See *Parden v. Terminal Ry. of Ala. State Docks Dep’t*, 377 U.S. 184, 192 (1964).

<sup>211</sup> See Helen Irvin, *A Few States Respond to Garrett Decision, Consider Waiving Immunity to ADA Lawsuits*, 119 DAILY LAB. REP. (BNA), at C-1 (June 21, 2001) (noting state bills to waive sovereign immunity against disability discrimination suits).

<sup>212</sup> See *infra* note 214.

<sup>213</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress can tie funding to adoption of minimum drinking age laws); Hehr & Wallace, *supra* note 120, at 57-58; see also Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793, 823-27 (1998) (discussing general restrictions on conditional waivers); Vazquez, *supra* note 12, at 1707. See generally Albert J. Rosenthal, *Conditional Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

<sup>214</sup> See *Alden*, 527 U.S. at 755 (citing *Dole*, 483 U.S. 203); *Coll. Sav. Bank*, 527 U.S. at 686. See generally Rebecca E. Zeitlow, *Federalism’s Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 172-82 (2002).

<sup>215</sup> See *infra* notes 222-29 and accompanying text. As noted below, Congress’s most recent amendment may have inadvertently eliminated federal jurisdiction even where a state has consented to suit. See *infra* notes 221-44 and accompanying text. Any legislation seeking to obtain conditional waivers, therefore, should also make clear that the federal courts have jurisdiction over private suits against state employers.

<sup>216</sup> See, e.g., Intellectual Property Protection Restoration Act of 2001, S. 1611, 107th Cong. (2001) (bill permitting states to obtain money damages for violations of their own patents only if they waive sovereign immunity for suits against state violations of private patents).

<sup>217</sup> See *Coll. Sav. Bank*, 527 U.S. at 686; Althouse, *supra* note 30, at 664-65 (“[T]he financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.”) (internal quotation marks omitted) (citing *Coll. Sav. Bank*, 527 U.S. at 686); Daniel J. Meltzer, *Overcoming Immunity: The Case of*

Congress cannot impose waiver on states; rather, a state must voluntarily waive its immunity.<sup>218</sup>

Notwithstanding this limitation, it should be easy for Congress to avoid an overly coercive waiver. The federal government already provides a significant amount of money to encourage state employment of military employees,<sup>219</sup> and linking a USERRA waiver of immunity to such funds would be valid.<sup>220</sup> Despite its simplicity, this conditional waiver could prove invaluable to state military employees who would otherwise face discrimination or the loss of their jobs without monetary relief.

*B. USERRA's Amendment and Its Impact on the State Sovereign Immunity Exceptions*

One additional complication for state military employees could prove quite significant. Congress, in a surprisingly quick response<sup>221</sup> to *Seminole Tribe*, attempted to ensure that USERRA would continue to cover state employers. In the Veterans Programs Enhancement Act of 1998 ("Amendment"),<sup>222</sup> Congress amended USERRA to

*Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1373-79 (2001) (discussing possible limits of conditional spending waivers, as expressed in *South Dakota v. Dole*, 483 U.S. 203 (1987)). *But see* Kinports, *supra* note 213, at 827 (arguing that this limitation refers only to the amount of money, not the "string" attached). An extreme example would be a condition that states waive their immunity under USERRA to receive federal protection in case of an invasion.

<sup>218</sup> *See Coll. Sav. Bank*, 527 U.S. at 704 (Breyer, J., dissenting) ("[P]erhaps Congress will be able to achieve the results it seeks . . . by embodying the necessary state 'waivers' in federal funding programs—in which case, the Court's decisions simply impose upon Congress the burden of rewriting legislation, for no apparent reason."). Moreover, conditional waivers could be more difficult in the few states that cannot waive their immunity absent a constitutional amendment. *See infra* notes 238-42 and accompanying text; *see also* John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. MARSHALL L. REV. 1, 29-32 (2001) (discussing requirement that state waiver of immunity comply with state law); Meltzer, *supra* note 217, at 1331, 1386 n.186 (2001) ("It may be that in a small number of states waiver can be effected only through constitutional amendment.") (citing *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1304, 1322-25 (M.D. Ala. 1998) (holding that, in spite of rule that the legislature cannot waive immunity, waiver may occur through accepting "bribery" funds by the federal government); *Univ. of W. Va. Bd. of Trs. v. Graf*, 516 S.E.2d 741, 745 (W. Va. 1998) (holding, in case not addressing conditional waiver, that under the state constitution, the legislature lacks power to waive state sovereign immunity)).

<sup>219</sup> *See, e.g.*, Jobs for Veterans Act, Pub. L. No. 107-288, 116 Stat. 2033 (2002) (increasing funding to states to find employment for veterans).

<sup>220</sup> *See infra* note 242.

<sup>221</sup> *See* 144 CONG. REC. H1396, H1398 (daily ed. Mar. 24, 1998) (statement of Rep. Filner) (noting that, "after the problem was identified, we came up with the consensus rather quickly to solve it for the men and women in our armed forces").

<sup>222</sup> Pub. L. No. 105-368, § 211, 112 Stat. 3315, 3329-31 (1998).



declare that federal courts “shall have jurisdiction” over an action brought against a state by the federal government, and that “[i]n the case of an action against a state (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.”<sup>223</sup>

The Amendment relied, in part, on the principle that, under the Supremacy Clause, state courts must enforce federal law. As discussed, however, *Alden* soon eliminated that doctrine, making Congress’s attempt to provide a state forum for USERRA actions futile.<sup>224</sup> In perhaps a greater affront, that attempt may have even further limited military employees’ ability to pursue USERRA claims by also eliminating all federal jurisdiction over private suits against a state employer—including those brought under *Ex parte Young* or against a state that has waived its immunity.

That inadvertent harm is illustrated by the subsequent history of the Seventh Circuit’s *Velasquez* decision,<sup>225</sup> which issued one day after the Amendment was enacted.<sup>226</sup> After the court became aware of the enactment, it vacated its original decision, which held that Congress lacked the power to abrogate state immunity under USERRA, and examined the Amendment’s effect on the plaintiff’s USERRA action. Chief Judge Posner, writing again for the court, dismissed the action for lack of jurisdiction because the Amendment mandated that private USERRA claims against state employers can be heard *only* in state courts.<sup>227</sup>

*Velasquez*’s interpretation of the Amendment may appear puzzling at first. The language of the Amendment itself is ambiguous, for it declares only that a military employee *may* sue in state court, not that a claim *must* be brought in such a forum.<sup>228</sup> Congress’s grant of jurisdiction over suits brought by the federal government on an individual’s behalf was much stronger, stating that federal courts “shall” have jurisdiction over such actions.<sup>229</sup> The use of “may,” therefore, could indicate that Congress was merely

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<sup>223</sup> 38 U.S.C. § 4323(b) (2000). This change was to apply to all pending actions. *See id.* § 4323(a); *Larkins v. Dep’t of Mental Health*, No. Civ. A. 97-W-1536-N, 1999 WL 33100500, at \*2 (M.D. Ala. Feb. 3, 1999).

<sup>224</sup> *See supra* notes 106-19 and accompanying text.

<sup>225</sup> *See supra* notes 101-03 and accompanying text.

<sup>226</sup> The Amendment became effective the same day. *See* 38 U.S.C. § 4323(a).

<sup>227</sup> *See Velasquez v. Frapwell*, 165 F.3d 593, 593 (7th Cir. 1999) (*Velasquez II*); *see also Larkins*, 1999 WL 33100500, at \*2 (relying on *Velasquez II* to hold that the Amendment deprived federal jurisdiction over claims against states).

<sup>228</sup> *See* 38 U.S.C. § 4323(b)(2).

<sup>229</sup> *See id.* § 4323(b)(1).

providing another jurisdictional option—particularly when examined under the rule that USERRA is to be construed liberally in favor of military employees.<sup>230</sup>

The contrary interpretation is not without support, however. First, the language at issue is in a subsection entitled “Jurisdiction,” which addresses three types of actions: (1) a suit brought against a state or private employer by the federal government, over which the federal courts “shall have jurisdiction”; (2) a private suit against a state employer, which “may be brought” in state court; and (3) a private action against a private employer, over which the federal courts “shall have jurisdiction.”<sup>231</sup> The subsection appears to be comprehensive, except for suits against the federal government,<sup>232</sup> and provides no evidence that it intended private actions against states to be heard anywhere except in state court. Indeed, the statement that such a suit “may” be brought in state court can be explained by the constraint that such suits are permissible only “in accordance with the laws of the State.”<sup>233</sup> The failure to declare that states “shall” have jurisdiction over such claims may simply be a recognition that Congress has limited authority to dictate state courts’ jurisdiction.

Second, the Amendment’s limited legislative history suggests that Congress’s answer to *Seminole Tribe* was only to permit the federal government to pursue suits on behalf of individuals in federal court and to allow private suits against state employers in state court. Representative Evans provided a typical explanation of the Amendment, stating that it “would substitute the United States for an individual . . . where the Attorney General believes that a State has not complied with USERRA. . . . Individuals not represented by the Attorney General would be able to bring enforcement actions in State court.”<sup>234</sup> There is little in the legislative history to suggest that

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<sup>230</sup> See *supra* note 85; see also *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (discussing VERRA). However, it is also true that statutes granting jurisdiction, especially where state sovereign immunity is implicated, should be construed narrowly. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (“The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.”).

<sup>231</sup> 38 U.S.C. § 4323(b)(1), (2), (3).

<sup>232</sup> See *id.* §§ 4324, 4325.

<sup>233</sup> *Id.* § 4323(b)(3).

<sup>234</sup> 144 CONG. REC. H1396, H1398 (daily ed. Mar. 24, 1998) (statement of Rep. Evans); see also *id.* at H1397-98 (statement of Rep. Evans) (stating that the Amendment provides “the federal government with a means of enforcing service members’ employment and re-employment rights in federal court,” which “assures that the federal government’s interest in protecting . . . military personnel can be

Congress sought to provide federal *and* state jurisdiction over private claims against states.<sup>235</sup> Such an intent, even ignoring *Alden's* subsequent bar to state court suits, is troubling. It means that Congress, in an amendment seeking to expand USERRA rights, also restricted those rights by eliminating both *Ex parte Young* relief<sup>236</sup> and federal jurisdiction where a state waives its immunity.

Nevertheless, if the Seventh Circuit's interpretation is accepted, a state military employee will have to rely solely on state law or federal prosecution of USERRA, unless war powers abrogation is accepted.<sup>237</sup> The consequence of that outcome is amply illustrated by *Larkins v. Department of Mental Health & Mental Retardation*, in which a USERRA claim was dismissed from federal court based on the state employer's sovereign immunity.<sup>238</sup> After the plaintiff refiled his claim in state court, the Supreme Court of Alabama held that Congress lacked the power to abrogate under USERRA, but that the Act's grant of jurisdiction to state courts was arguably constitutional under *Alden* because jurisdiction existed only "in accordance with the laws of the State."<sup>239</sup> However, the court then examined whether Alabama law permitted USERRA suits against the state, and concluded that it did not.<sup>240</sup> Under Alabama's constitution, the state "shall never be made a defendant in any court of law or equity."<sup>241</sup> That immunity cannot

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fully exercised in those cases where the employer is a State government"); 144 CONG. REC. S12,918, S12,934 (daily ed. Oct. 21, 1998) (statement of Sen. Rockefeller) (stating that the Amendment "would substitute the United States for an individual veteran as the plaintiff in cases where the Attorney General believes that a State has not complied with USERRA. This restores the ability of veterans who are employed by a state agency to seek redress for violations of their reemployment rights").

<sup>235</sup> *But see* 144 CONG. REC. H10,389, H10,391 (daily ed. Oct. 10, 1998) (statement of Rep. Evans) ("For more than 50 years, Federal law has provided protection for members of the uniformed services . . . [including] the right to bring an action against a state or private employer *in federal court*. . . . This bill restores the protections and remedies for state employees that existed prior to the *Seminole Tribe* decision . . .") (emphasis added).

<sup>236</sup> One could argue that *Ex parte Young* relief is still available, because an action against a state official is not one against the state. However, as noted, section 4323's grant of jurisdiction covers only private suits against a "State (as an employer)" or a "private employer." An *Ex parte Young* action is clearly not one against a private employer, so it either constitutes a suit against a state, or something else entirely, in which case the statute provides no jurisdiction.

<sup>237</sup> *See Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So. 2d 358, 361-63 (Ala. 2001) (*Larkins II*) (holding that under *Alden*, the state is not liable for USERRA claim in state court); Hehr & Wallace, *supra* note 120, at 55.

<sup>238</sup> *See Larkins v. Dep't of Mental Health*, No. Civ. A. 97-W-1536-N, 1999 WL 33100500, at \*2 (M.D. Ala. Feb. 3, 1999) (*Larkins I*).

<sup>239</sup> 38 U.S.C. § 4323(b)(2) (2000); *Larkins II*, 806 So. 2d at 363.

<sup>240</sup> *See Larkins II*, 806 So. 2d at 363.

<sup>241</sup> ALA. CONST. art. I, § 14; *Larkins II*, 806 So. 2d at 363. Indeed, under *Alden*, all

be waived by “the Legislature or by any other state authority,” and state courts lack jurisdiction over any action that is contrary to the state’s immunity.<sup>242</sup> Accordingly, Alabama could not be held liable under USERRA unless it amended its constitution to allow such claims.

The potential elimination of federal jurisdiction—and, as *Larkins* and *Alden* demonstrate, probably state jurisdiction as well—underscores the need for Congress to amend USERRA to ensure a forum for claims against all state employers.<sup>243</sup> One irony is that the statute in its present form could help state military employees bring USERRA suits in state court. In *Alden*, as it has elsewhere, the Supreme Court relied in part on the availability of *Ex parte Young* relief in holding that Congress could not abrogate the state’s immunity in its own courts.<sup>244</sup> The elimination of that alternative may provide an additional ground for concluding that USERRA’s abrogation constitutes an exception to the general prohibition against abrogation under Article I.

#### CONCLUSION

The Supreme Court’s burgeoning state sovereign immunity jurisprudence has significantly affected state employees, who have lost the ability to pursue private claims for damages against their nonconsenting state employers in a variety of federal employment statutes. Although the interests of those employees, and the nation, in ensuring state compliance are significant, they may pale in comparison to the national concerns embodied in USERRA. The need to encourage participation in the armed forces is always important, yet rarely is it so vital as when the nation is consumed with military needs both abroad and at home.<sup>245</sup> That concern is not a mere matter of public policy, for it also directly implicates the Court’s

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states have such immunity unless expressly waived.

<sup>242</sup> *Larkins II*, 806 So. 2d at 363 (citing *Ala. State Docks Terminal Ry. v. Lyles*, 797 So. 2d 432, 434-35 (Ala. 2001); *Druid City Hosp. Bd. v. Epperson*, 378 So. 2d 696 (Ala. 1979)).

<sup>243</sup> See *infra* note 246.

<sup>244</sup> See *supra* note 187.

<sup>245</sup> See Vernon Loeb & Thomas E. Ricks, *For Army, Fears of Postwar Strife*, WASH. POST, Mar. 11, 2003, at A1 (noting that the Army had fallen short of its reserve recruiting goals in January and February 2003 because of increasingly long deployments); see also Eric Schmitt, *Soft Economy Aids Army Recruiting Effort*, N.Y. TIMES, Sept. 22, 2003, at A1 (stating that the weak economy allowed all of the armed services to meet their recruiting goals for fiscal year 2003, but that military officials expected difficulties in the future because of the Iraq conflict—particularly for enrollment in the National Guard and Reserves).

abrogation analysis.

The Court's explicit balancing of interests has generally weighed in favor of state immunity over congressional attempts to abrogate that immunity. War powers abrogation, however, may represent a stopping point. The desire for uniform, national war powers was a critical goal of the Constitutional Convention. War powers, therefore, not only provides an important policy consideration for the Court, but also constitutes a limited area in which the states did not expect to retain immunity where the federal government acted.

That conclusion holds even in the face of the Court's broad dicta stating that Congress can never abrogate state immunity under Article I. The Court has never addressed abrogation under Congress's war powers; thus, its dicta fail to acknowledge the exceptional nature of those powers. The understanding of the Founders, the Court's holdings with regard to states' war powers, and the Constitution's extraordinary grant of power to the federal government vis-à-vis the states, all provide compelling evidence, even under the Court's sovereign immunity jurisprudence, that war powers abrogation is valid.

Should the Court strike down USERRA's war powers abrogation, however, state military employees have few options that adequately protect the rights underlying the Act. The Court's own exceptions—claims brought by the federal government or those seeking only *Ex parte Young* relief—are inadequate, and the vast majority of states do not permit private suits for monetary damages in their own legislation. Congress does have one relatively simple option: it can require states to waive their immunity against USERRA claims in exchange for related federal funding. Such legislation, which could also amend USERRA to make clear that federal courts have jurisdiction over suits brought by state employees, would fully protect the goals of USERRA by once again bringing state employers under its reach.<sup>246</sup> By doing so, Congress could circumvent the threat to

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<sup>246</sup> Following informal distributions of an earlier version of this Article, several Democratic senators introduced a bill that, among numerous other changes, would amend USERRA as this Article recommends. *See* Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. (2d Sess. 2004) (permitting, for example, private rights of action under Title VI and IX of the Civil Rights Act of 1964, allowing punitive damages under the ADA, and creating a conditional waiver of state immunity under FLSA, ADA, ADEA, Title VI, and Title IX). The Fairness Act would grant federal jurisdiction over private USERRA claims brought against states and would condition receipt of federal funds on states' waiver of sovereign immunity against USERRA claims. *See id.* § 201(b)(2) ("In the case of an action against a State (as an employer) by a person, the action may be brought in a district court of the United States or State court of competent

USERRA raised by the Court's sovereign immunity jurisprudence and reassert its judgment that the nation's military readiness requires that all soldiers—even those who work, or seek to work, for state employers—be able to serve in the military without impairing their civilian employment opportunities.

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jurisdiction."); *id.* § 201(b)(3) ("A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under this chapter for the rights or benefits authorized the employee by this chapter.").