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# Manning v. Mining and Minerals Division: Sovereign Immunity as a Bar against Claims for Damages Brought under the U.S. Constitution

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# *MANNING V. MINING AND MINERALS DIVISION*: SOVEREIGN IMMUNITY AS A BAR AGAINST CLAIMS FOR DAMAGES BROUGHT UNDER THE U.S. CONSTITUTION

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## I. INTRODUCTION

Over the past two decades, the U.S. Supreme Court has strengthened and expanded the doctrine of state sovereign immunity.[1] In particular, the Court held in *Alden v. Maine*[2] that the Constitution protects States from suits for damages brought by private parties in state courts and that Congress cannot abrogate that immunity pursuant to its power to regulate interstate commerce.[3] In *Manning v. Mining & Minerals Division*,[4] the New Mexico Supreme Court dealt with the question of whether, in light of *Alden*, sovereign immunity barred claims against the State that arose under the Takings Clause[5] and the Contracts Clause[6] of the U.S. Constitution. In *Manning*, a landowner claimed that mining regulations had effected a taking,[7] and had also impaired the landowner's contractual obligations.[8] The landowner sought compensatory damages.[9] The court held that sovereign immunity precluded the claim for damages brought under the Contracts Clause, but not the claim for damages brought under the Takings Clause.[10]

This Note examines the New Mexico Supreme Court's reasoning in *Manning* and its implications for future claims brought against the State under the U.S. Constitution. Part II of this Note reviews the history of sovereign immunity and the current sovereign immunity doctrine. After a brief statement of the case in Part III of this Note, Part IV explains and analyzes the reasoning of the court in reaching its results. The court used two independent bases for its holding that the Takings Clause abrogates sovereign immunity—it found abrogation based upon the unique nature

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1. *E.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate a State's sovereign immunity pursuant to its commerce powers); City of Boerne v. Flores, 521 U.S. 507 (1997) (imposing limits upon when Congress may abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment); Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress may not abrogate a State's immunity from suit in state court pursuant to its commerce powers); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (holding that sovereign immunity extends to administrative proceedings in which a State is a party).

2. 527 U.S. 706.

3. *See id.* at 726–27, 754. The power to regulate interstate commerce is a power granted exclusively to Congress by the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 3.

4. 2006-NMSC-027, 144 P.3d 87, *cert. denied*, 127 S. Ct. 663 (2006).

5. U.S. CONST. amend. V.

6. U.S. CONST. art. I, § 10.

7. *See infra* notes 62–63.

8. *See infra* notes 64–65.

9. *See infra* note 66.

10. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 1, 144 P.3d 87, 88.

of the Takings Clause,[11] and it analogized to a string of due process cases involving tax refunds.[12] The court barred the Contracts Clause claim by rejecting a broad exception to sovereign immunity for claims based upon the Constitution itself.[13] Finally, Part V examines the implications of the court's holding. This Note argues that the court in *Manning*, by blocking Contracts Clause claims and abrogating sovereign immunity for Takings Clause claims, made it very difficult for claimants to seek monetary damages based upon constitutional violations other than the Takings Clause.[14] This difficulty arises because the attributes of the Takings Clause are not shared by other constitutional provisions,[15] and because the due process/tax refund theory is unlikely to be applicable in many situations outside the tax or takings contexts.[16] Finally, this Note suggests that, although the current political climate regarding takings makes such a move unlikely,[17] the court's language leaves the door open for the State to alter the procedures that litigants must follow in order to recover monetary damages in light of a taking.[18]

## II. BACKGROUND

The immunity that States enjoy from suit under the U.S. Constitution has long been the subject of debate.[19] While the history of that debate is not the subject of this Note, some background is necessary to explain the current legal doctrine.

Article III of the U.S. Constitution allows for federal jurisdiction over controversies between States and citizens of another State.[20] At the time of the ratification of the Constitution, the amenability of States to suit as *defendants* at the hands of private individuals was debated; some framers believed Article III subjected States to suits from individuals,[21] while others, including Alexander

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11. *See infra* Part IV.A.2.
12. *See infra* Part IV.A.3.
13. *See infra* Part IV.B.
14. *See infra* Part V.
15. *Infra* Part V.
16. *Infra* Part V.
17. *See infra* notes 281–283 and accompanying text.
18. *See infra* notes 160–163 and accompanying text.
19. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.10.2, at 187–93 (3d ed. 2006) (outlining the competing theories of the meaning of the Eleventh Amendment).
20. The text of Article III, Section 2, clause 1 states, in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and...to Controversies...between a State and Citizens of another State...and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Thus, the text of this clause seems to allow for suits between citizens of one State and the government of another State, and between a State and foreign individuals. This clause also seems to grant federal jurisdiction to hear all suits arising under the Constitution and Federal law, without any restrictions on whom the parties to those suits may be.
21. Three framers who believed that Article III allowed for individuals to bring States into federal court were Patrick Henry, Edmund Randolph, and James Wilson. During the Virginia ratification debates, Patrick Henry expressed his belief that the plain text of Article III provided for individual suits against States: "What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (2d ed. 1861) (remarks of Patrick Henry) [hereinafter ELLIOT'S DEBATES].

Later in that debate, Edmund Randolph expressed a similar view: "I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*." 3 ELLIOT'S DEBATES, *supra*, at 573 (remarks of Edmund Randolph).

Hamilton, James Madison, and John Marshall, believed that States could bring suits as plaintiffs but could not be made to answer as defendants in suits with private citizens.[22] In *Chisholm v. Georgia*,[23] the U.S. Supreme Court was faced with a suit brought by an out-of-state plaintiff against the State of Georgia.[24] The Supreme Court ruled 4 to 1 that the plaintiff could bring the suit under Article III.[25] This decision was followed quickly by the drafting and ratification of the Eleventh Amendment,[26] which expressly forbids out-of-state plaintiffs from suing States in federal court,[27] thus overturning *Chisholm*.[28] A century later, in *Hans v. Louisiana*, the Supreme Court broadened the scope of the Eleventh Amendment to bar a federal claim against a State brought by a citizen of that State.[29] The Court in *Hans* acknowledged that the plain text of the Eleventh Amendment did not bar the suit, but rejected the alternative, that a State could be sued by one of its *own* citizens, as

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During the Pennsylvania ratification debates, James Wilson expressed approval of the fact that individuals and States would be on equal footing: "Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing." 2 ELLIOT'S DEBATES, *supra*, at 491 (remarks of James Wilson).

22. In the *Federalist No. 81*, Hamilton denied that Article III would cause States to be sued as defendants.

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union....[T]here is no colour to pretend that the state governments would, by the adoption of that [Constitution], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

THE FEDERALIST NO. 81, 417, 422–23 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

James Madison argued in the Virginia ratification debates, contrary to the assertions of Patrick Henry and Edmund Randolph, *supra* note 21, that Article III only allowed States to sue individuals, but not vice versa:

> Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

3 ELLIOT'S DEBATES, *supra* note 21, at 533 (remarks of James Madison). Later, in the Virginia debates, John Marshall echoed Madison's view:

> I hope that no gentleman will think that a state will be called at the bar of the federal court....It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.

3 ELLIOT'S DEBATES, *supra* note 21, at 555 (remarks of John Marshall).

23. 2 U.S. (2 Dall.) 419 (1793).

24. *Id.*

25. *Id.*

26. The decision in *Chisholm v. Georgia* was announced in 1793, and the Eleventh Amendment was endorsed by both Houses of Congress within two months of that decision. Alden v. Maine, 527 U.S. 706, 721 (1999). The draft was proposed to the legislatures of the States, and the requisite number of States ratified the Amendment by February 7, 1795. Explanatory notes to U.S. CONST. amend. XI, *in* U.S.C.S. Constitution, Amendment XI, at 872 (2001).

27. The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. While this amendment forecloses federal jurisdiction over suits brought by citizens of one State against the government of a different State, it is silent on the possibility of suits between citizens and States arising under federal law or the Constitution and on the topic of state court jurisdiction. For a lengthy opinion on the original intent of the founders on the topic of sovereign immunity, including the intent of the drafters of the Eleventh Amendment, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 100–68 (1996) (Souter, J., dissenting). *But see id.* at 67–70 (majority opinion authored by Justice Rehnquist critiquing Justice Souter's historical analysis). The majority in *Alden* analyzed the same historical issue and arrived at the opposite conclusion. Alden v. Maine, 527 U.S. 706, 713–43 (1999).

28. CHEMERINSKY, *supra* note 19, § 2.10.1, at 186–87.

29. Hans v. Louisiana, 134 U.S. 1 (1890).

an "absurdity on its face."[30] In *Hans*, the Supreme Court interpreted the ratification of the Eleventh Amendment as an indication of the Founders' intent that States be protected against suits brought by private individuals generally, not simply that they be protected against diversity suits.[31]

Taken literally, the sovereign immunity bar to private suits against States outlined in *Hans* would immunize States entirely from private enforcement of federal rights.[32] This consequence was mitigated soon after with the Supreme Court's decision in *Ex Parte Young*,[33] where the Court stated that a plaintiff could sue a government actor to enjoin unconstitutional activity.[34] The "*Ex Parte Young* doctrine" allows plaintiffs to sue individual state officials to prevent the ongoing enforcement of unlawful or unconstitutional laws.[35] Individuals may seek declaratory or injunctive relief, but may not seek monetary damages.[36] The doctrine is premised upon the notion that when a public official performs an unlawful or unconstitutional act, the official is no longer acting on behalf of the public and is therefore stripped of immunity.[37] This "fiction"[38] retains its vitality because of its utility in ensuring that governments do not run afoul of the Constitution.[39]

In addition to limitations imposed by the "*Ex Parte Young*" fiction, the reach of sovereign immunity has been limited in several other respects. The doctrine only protects state agencies and entities that can properly be considered the "State" itself;[40] it does not protect political subdivisions of a state.[41] Also, under certain

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30. *Id.* at 15.

31. *Id.*

32. CHEMERINSKY, *supra* note 19, § 2.10.4.1, at 204; *see also* Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("[*Ex Parte Young*] has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.").

33. 209 U.S. 123 (1908).

34. *Id.* at 155–56.

35. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-25, at 535 (3d ed. 2000).

36. *Id.*

37. *Ex Parte Young*, 209 U.S. at 159–60.

38. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 n.25 (1984).

39. *Id.* at 105. In recent years the Supreme Court has narrowed the *Ex Parte Young* doctrine. It has done so by creating exceptions where the doctrine is inapplicable: (1) when prospective injunctive relief would impinge upon a State's sovereign interests, Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 283 (1997), and (2) when a federal statute has its own comprehensive and exclusive enforcement mechanism. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996). In *Seminole Tribe* the Court also characterized the doctrine as "narrow." *Id.* at 76.

40. *See* CHEMERINSKY, *supra* note 19, § 2.10.3, at 197–200. It is sometimes difficult to predict whether courts will treat entities as arms of the state for sovereign immunity purposes. *Id.* Chemerinsky cites four factors that courts use in making that determination:

> 1) Will a judgment against the entity be satisfied with funds in the state treasury?
> 2) Does the state government exert significant control over the entity's decisions and actions?
> 3) Does the state executive branch or legislature appoint the entity's policymakers?
> 4) Does the state law characterize the entity as a state agency rather than as a subdivision?

*Id.* § 2.10.3, at 199 (citing John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447, 461 (1986)).

41. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.11, at 52 (7th ed. 2004). The term "political subdivisions" includes municipal corporations, *id.*; counties, Lincoln County v. Luning, 133 U.S. 529, 530 (1890); and school boards, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281 (1977).

To add to the confusion of who constitutes the "State," suits filed under 42 U.S.C. § 1983 (2000) (the federal statute allowing for a private cause of action for violations of constitutional rights) must be brought against a "person":

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

circumstances, a party can bring an "officer suit" to recover directly from a government officer if that officer has harmed the party.[42]

States may also waive sovereign immunity.[43] Additionally, Congress may abrogate state sovereign immunity pursuant to its power to enforce civil rights under Section 5 of the Fourteenth Amendment.[44] Thus, sovereign immunity is not a strict jurisdictional bar to suit against a State; it is more precisely characterized as a bar to private suits[45] against a State for monetary damages.

In the past two decades, state sovereign immunity has been expanded by the U.S. Supreme Court. In 1996, the Court held in *Seminole Tribe of Florida v. Florida* that Congress cannot validly abrogate a State's sovereign immunity from private suits for damages while exercising its powers to regulate commerce.[46] In 1999, the Court decided *Alden v. Maine*, which extended the constitutional protection of state sovereign immunity to state courts.[47] The Supreme Court in *Alden* held that Congress, pursuant to its power to regulate interstate commerce, could not abrogate a State's sovereign immunity in its own courts by creating a federal cause of action against a State.[48] The Court explicitly stated that it was not enforcing the text of the

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laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000) (emphasis added). This statute cannot be used to bring suits against a State because the State is not a "person" under the meaning of the statute. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). However, municipal corporations and other local government bodies are "persons" and can be sued under the statute. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

42. CHEMERINSKY, *supra* note 19, § 2.10.4.2, at 205. As a general matter, state indemnification of officer suits does not serve to waive sovereign immunity. *Id.* Even though sovereign immunity poses no bar to recovery, officers may be able to raise other immunity defenses. *Id.* § 2.10.4.2, at 206. Individuals performing judicial, legislative, or prosecutorial functions may be entitled to absolute immunity from suit. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6.2, at 516 (4th ed. 2003). Most other government officials are entitled to qualified immunity against suits for damages, *id.* § 8.6.3, at 528–29, which generally means immunity for acts that do not violate clearly established law of which a reasonable person would have known. *Id.* § 8.6.3, at 531 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

43. NOWAK & ROTUNDA, *supra* note 41, § 2.11, at 56. In New Mexico, the State has waived sovereign immunity for certain torts committed by government officials through the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (2006). The State covers the liability of government officials sued under the Act. *Id.* § 41-4-4(B) (2001).

44. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). There are significant limits to the scope of Congress's ability to abrogate state sovereign immunity. Not only must the abrogation be clear and unequivocal, Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991), but Section 5 only affords Congress the power to "enforce" the rights of the Fourteenth Amendment by "appropriate" legislation, City of Boerne v. Flores, 521 U.S. 507, 519 (1997), which means that the congressional remedy must be congruent and proportional to the alleged violation of constitutional rights. *Boerne*, 521 U.S. at 533. Finally, Congress may have to show findings of such violations in order to prove congruence and proportionality. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88–91 (2000).

45. Article III permits, and the Supreme Court hears, suits between States. U.S. CONST. art. III, § 2; NOWAK & ROTUNDA, *supra* note 41, § 2.11, at 51. Additionally, the federal government can sue a State for a violation of federal law. *Id.* § 2.11, at 51. It may do so even when the purpose of the federal suit is to protect private individuals. *Id.*

46. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996). More precisely, the Court held that Congress could not override the sovereign immunity of States when exercising its plenary power to regulate Indian commerce. *Id.* However, since the power of Congress to regulate Indian commerce is more expansive than its powers to regulate interstate commerce, the holding implies that Congress is also unable to abrogate sovereign immunity by exercising its interstate commerce powers. *Id.* at 62–63.

47. Alden v. Maine, 527 U.S. 706 (1999).

48. *Id.* The federal act in question was the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1988).

Eleventh Amendment;[49] rather, a State's immunity from suit in its own courts was considered a "fundamental attribute of...sovereignty"[50] at the time of the founding,[51] and that the U.S. Constitution structurally protects the sovereignty of the States.[52] The Court acknowledged that this sovereignty is not complete,[53] and that the States surrendered some of it in the plan of the convention.[54] However, the States had not surrendered their sovereign immunity when it came to causes of action created by Congress.[55]

*Alden* caused a stir among Supreme Court commentators,[56] who had previously assumed that constitutional sovereign immunity only protected States from suit in federal court.[57] However, because the case only dealt directly with the power of Congress to abrogate sovereign immunity pursuant to its interstate commerce power, it did not directly address the scope and structure of state sovereign immunity in the context of claims brought under the Constitution itself.[58] That question—the applicability of sovereign immunity to cases for damages arising directly under the Constitution—was the issue before the New Mexico Supreme Court in *Manning v. Mining & Minerals Division.*

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49. *Alden*, 527 U.S. at 712–13. Because constitutional sovereign immunity from suit in state court does not come from the Eleventh Amendment, I refrain from using the term "Eleventh Amendment immunity" in this Note. Instead, I simply use the term "sovereign immunity." This use of "sovereign immunity" raises the issue of potential ambiguity with common-law sovereign immunity, which has been abolished in New Mexico. *See* Cockrell v. Bd. of Regents of N.M. State Univ., 2002-NMSC-009, ¶ 12, 45 P.3d 876, 882 (discussing Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975)). Because common-law sovereign immunity has been abolished, however, I feel that it is somewhat unnecessary for the purposes of this Note to distinguish between the two by name.

50. *Alden*, 527 U.S. at 713.

51. *Id.* at 715.

52. *Id.* at 714–15.

53. *Id.* at 715 ("[States] retain the dignity, though not the full authority, of sovereignty.").

54. *Id.* at 730–31.

55. *Id.* at 754.

56. Much of the scholarly reaction to *Alden* has been hostile. *E.g.*, Daan Braveman, *Enforcement of Federal Rights Against States:* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611, 613 (2000) (arguing that *Alden* has jeopardized the enforcement of civil rights against States, thereby disrupting federalism's balance between state and federal interests); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1203 (2001) (arguing that the "entire body of law" governing sovereign immunity is wrong and should be abolished); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) (arguing that recent sovereign immunity jurisprudence is "compelled neither by history nor logic"); 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, 78 (2001) (challenging the validity of the historical evidence used to justify recent sovereign immunity decisions).

Not all scholarly commentary has been negative. *See, e.g.*, Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001) (arguing that a robust sovereign immunity doctrine is consistent with the original intent of the founders).

57. *See, e.g.*, PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 880, 887–90 (3d ed. 1994) (discussing various interpretations of the Eleventh Amendment as restrictions on the federal judicial power).

58. *Alden* did address the validity of *Hans v. Louisiana*, 134 U.S. 1 (1890), which was a case brought directly under the Contracts Clause. *See infra* notes 258–259. *Alden* also briefly addressed the validity of *Reich v. Collins*, 513 U.S. 106 (1994), which was a claim for damages brought under the Due Process Clause. *See infra* note 210 and accompanying text. Therefore, *Alden* was not entirely silent on the topic of claims brought under the Constitution itself.

## III. STATEMENT OF THE CASE

In 2006, the New Mexico Supreme Court heard an appeal from the Mannings, a family owning mining and milling properties in southwestern New Mexico.[59] The family sued the State,[60] claiming two constitutional violations.[61] First, they claimed that mining regulations put into place while their milling operation was dormant effectively prevented them from putting the mine to any economically profitable use,[62] resulting in a "regulatory taking" in violation of the Takings Clause of the U.S. Constitution.[63] The family also claimed that these regulations, which prevented them from operating the mining and milling sites, had therefore prevented them from meeting existing contractual obligations,[64] thus violating the Contracts Clause.[65] They sought $6.5 million in compensatory damages.[66]

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59. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 2, 144 P.3d 87, 88.

60. *Id.* ¶ 4, 144 P.3d at 88. More precisely, they sued the state agencies responsible for the enforcement of mining laws and regulations: the Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department, and the Environment Department. *Id.* ¶¶ 3–4, 144 P.3d at 88. There was no issue about whether the agencies were "arms of the state" for sovereign immunity purposes. For the sake of simplicity, I will refer to these parties collectively as "the State" in this Note.

61. *Id.* ¶¶ 2, 4, 144 P.3d at 88.

62. *Id.* ¶ 4, 144 P.3d at 88. Specifically, the Mannings complained that they could not operate the mining and milling site because they had not met the bonding and reclamation requirements set out in the Mining Act and its regulations. The Mannings claimed that the proper value of the required bond was impossible to determine without the mine actually being in operation. Thus, according to the Mannings, the mine was effectively permanently barred from opening. *Id.*

63. The Takings Clause of the Fifth Amendment of the U.S. Constitution prohibits the taking of property for public use without just compensation. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

There are several different types of takings that can occur. The simplest is a taking by reason of seizure or physical invasion of property. Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 425 (1982). Takings can also occur as a result of conditions imposed upon property by regulatory acts of the State. NOWAK & ROTUNDA, *supra* note 41, § 11.12, at 509; Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). A regulatory taking may involve a partial deprivation of the use of property. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). It may also involve the complete deprivation of all economically beneficial use of property, and thus constitute a total regulatory taking. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). Finally, if property is seized or impaired temporarily, such act may constitute a temporary taking. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318–19 (1987). In such cases, the property owner is entitled to compensation for the partial loss of the property. *Id.*

64. *Manning*, 2006-NMSC-027, ¶ 2, 144 P.3d at 88. According to the Mannings, they "had well-established contractual rights and obligations with third parties to explore and develop mineral reserves adjacent to and necessary for" the mining operation. Plaintiffs/Petitioners Brief-In-Chief at 6, Manning v. Mining & Minerals Div., 2006-NMSC-027, 144 P.3d 87 (No. 28,500). The Mannings further claimed that the Mining Act and its regulations impaired the implementation of these contracts. *Id.*

65. Unlike the Takings Clause, the Contracts Clause was explicitly written as a check upon the States: "No State shall...pass any...law impairing the obligation of contracts." U.S. CONST. art. I, § 10. Courts use a very deferential standard to evaluate claims arising under the Contracts Clause: in order for a State to violate the Contracts Clause with respect to a private contract, the state action must substantially impair the contract, and such action must lack a reasonable relationship with a "significant and legitimate public purpose." Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 411–13 (1983). State action impairing contracts to which a State is a party, however, will receive a more skeptical review. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25–26 (1977).

66. *Manning*, 2006-NMSC-027, ¶ 4, 144 P.3d at 88. The *Manning* opinion is unclear regarding the apportionment of that amount between the Takings Clause claim and the Contracts Clause claim.

Under the Takings Clause, individuals are entitled to "just compensation" for their losses. U.S. CONST. amend. V. Just compensation is measured as the amount lost by the private property owner, not the amount gained by the government. Brown v. Legal Found. of Wash., 538 U.S. 216, 235–36 (2003). With a regulatory taking, that amount should be the value of the property interest impaired by the regulation. *See Dolan*, 512 U.S. at 396 (Stevens, J., dissenting) (stating that the dollar value of the property interest in that case was not disclosed in the record, but

At the trial court level, the State moved for summary judgment based upon both ripeness and sovereign immunity, and the trial court granted summary judgment on ripeness grounds.[67] The Mannings appealed, and the New Mexico Court of Appeals affirmed the grant of summary judgment, but on sovereign immunity grounds, not ripeness.[68] The Mannings then petitioned the New Mexico Supreme Court for certiorari to reverse the sovereign immunity issue, and certiorari was granted.[69]

## IV. RATIONALE/ANALYSIS

The New Mexico Supreme Court in *Manning* examined the Takings and Contracts Clause claims in turn, addressing whether they were barred by sovereign immunity. With respect to the Takings Clause claim, the court employed arguments that prior U.S. Supreme Court precedent supported the notion that sovereign immunity did not bar takings claims.[70] While some of the court's reasoning involved interpreting Supreme Court silence on the topic, which is problematic in a field of changing law,[71] the court did find support from dicta in prior takings opinions.[72]

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that it would be "the dollar value of petitioner Florence Dolan's interest in excluding the public" from the property segment in question).

The request for monetary damages for a Contracts Clause claim is somewhat unusual. Because the clause only prohibits the impairment of contractual obligations, U.S. CONST. art. I, § 10, most recent Supreme Court Contracts Clause cases have involved requests for injunctive relief. *See, e.g.*, *Energy Reserves Group*, 459 U.S. at 408–09 (request for declaratory judgment regarding contractual rights); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239–40 (1978) (suit for declaratory and injunctive relief); *U.S. Trust Co.*, 431 U.S. at 25–26 (suit for declaratory relief); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 418 (1934) (petition for stay pursuant to statute).

67. *Manning*, 2006-NMSC-027, ¶ 5, 144 P.3d at 88–89. For the dissent's argument that the case was not ripe, see *infra* note 69.

68. *Manning*, 2006-NMSC-027, ¶ 5, 144 P.3d at 89.

69. *Id.* Justices Minzner and Maes dissented from the opinion on the grounds that the case was not ripe. *Id.* ¶ 53, 144 P.3d at 99 (Minzner, Maes, J.J., dissenting). The dissent relied upon prudential considerations for deciding the case on ripeness grounds: "The majority...has followed the Court of Appeals...into what appears to be a thicket of constitutional jurisprudence. I prefer to stay on a safer path and leave the task of cutting through the mass of federalism, takings, and sovereign immunity holdings for another day, and another court." *Id.*

The dissent made the point that ripeness furnishes a much cleaner method of settling the case than trying to sort out conflicting and contradictory constitutional doctrines. *Id.* ¶¶ 53–54, 144 P.3d at 99. The dissent went on to argue that the case was not ripe because the Mannings' mining operations were hampered by an injunction issued by a federal judge in a separate proceeding, meaning that in the absence of the complained-of state regulations, they still would not be able to mine the property. *Id.* ¶ 55, 144 P.3d at 99. More seriously, the Mannings had failed to complete the State's permit application process, making their claims of a total deprivation of economic use speculative. *Id.*

The majority may have sidestepped the ripeness issue because *Alden* and the resurgence of state sovereign immunity created an important open question of constitutional law, a question that demanded the court's attention. One of the articulated grounds for granting certiorari is when "the decision of the court of appeals...involves a significant question of law under the Constitution of New Mexico or the United States." NMSA 1978, § 34-5-14(B)(3) (1972). Additionally, if the ripeness issue were resolved and the Mannings were able to continue with their litigation, the sovereign immunity issue might well come up in a future stage of the proceedings. Thus, avoiding the sovereign immunity question would only serve to delay resolution of the issue and perpetuate uncertainties for the parties involved in the lawsuit. *Cf.* Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 143–45 (1974) (holding that the case was ripe because uncertainty regarding the constitutionality of the legislative scheme might have impacted decisions made by interested parties, and further factual development would not have assisted the Court in answering the legal question involved).

70. *See infra* Part IV.A.1.a.

71. *See infra* Part IV.A.1.b.

72. *See infra* Part IV.A.1.b.

The *Manning* court went beyond these statements and grounded its holding in arguments that the unique text and purpose of the Takings Clause required the court to abrogate sovereign immunity.[73] In particular, the court found that the Takings Clause is self-executing (and therefore needs no statutory enactment to be operative)[74] and that its purpose would be subverted if sovereign immunity could act as a bar to takings suits.[75] These arguments, however, necessarily only apply in the context of takings claims, and so serve to limit the reach of the holding.[76] The opinion gives the State considerable leeway in altering the procedures used in adjudicating takings claims.[77]

The court also used the Due Process Clause to abrogate sovereign immunity in the takings context by analogizing to a line of cases involving tax refunds.[78] The Due Process Clause supplied a separate, independent basis for abrogating sovereign immunity.[79]

Finally, the court rejected the Contracts Clause claim on the grounds that it lacked the textual remedy of the Takings Clause.[80] The court found significant *Alden*'s favorable treatment of *Hans v. Louisiana*[81] and in so doing rejected the idea, raised earlier in the *Manning* opinion, that *Alden* should be read only to block causes of action created by Congress.[82]

### *A. Takings Clause Claims*

#### 1. Prior U.S. Supreme Court (Non) Treatment of the Issue

##### a. The Court's Reasoning

The *Manning* court drew support from U.S. Supreme Court precedent in two ways. First, it noted that the U.S. Supreme Court had failed to indicate concern with sovereign immunity in its recent treatment of takings cases against States.[83] Second, the *Manning* court found language from other Supreme Court precedent suggesting that sovereign immunity might not apply in the takings context.[84]

The *Manning* court first demonstrated that the current claim was similar, in terms of the identity of the defendant, to recent "regulatory takings" cases that the U.S. Supreme Court had decided on their merits.[85] The court identified *Lucas v. South Carolina Coastal Council*,[86] *Palazzolo v. Rhode Island*,[87] and *Tahoe-Sierra*

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73. *See infra* Part IV.A.2.a.
74. *See infra* Part IV.A.2.a.
75. *See infra* Part IV.A.2.a.
76. *See infra* Part IV.A.2.b.
77. *See infra* Part IV.A.2.b.
78. *See infra* Part IV.A.3.a.
79. *See infra* Part IV.A.3.b.
80. *See infra* Part IV.B.1.
81. *See infra* Part IV.B.1.
82. *See infra* Part IV.B.2.
83. *See* Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 12, 144 P.3d 87, 90.
84. *Id.* ¶¶ 16–17, 144 P.3d at 90–91.
85. *Id.* ¶¶ 13–16, 18, 144 P.3d at 90–91.
86. 505 U.S. 1003 (1992). In *Lucas*, a landowner alleged a taking after a state agency, enforcing a statute

*Preservation Council, Inc. v. Tahoe Regional Planning Agency*[88] as examples of cases between individuals and state agencies, and noted that sovereign immunity never arose as an issue in any of them.[89] If sovereign immunity had been a valid bar to a takings suit, the court reasoned, then surely it would have come up in at least one of these cases.[90]

The court also noted that the U.S. Supreme Court has hinted that sovereign immunity may be inapplicable in the takings context.[91] The *Manning* court cited a much-scrutinized footnote in *First English Evangelical Lutheran Church v. County of Los Angeles* that suggests the inapplicability of sovereign immunity principles to takings claims.[92] The Manning court also discussed a later statement in a different case that pointedly left open the issue of sovereign immunity and takings.[93]

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designed to protect against coastal erosion, prevented him from building a house on his beachfront property. *Id.* at 1007–09. The Court remanded the case with the instruction to find a complete regulatory taking unless the State could show that Lucas would have been liable for nuisance or violation of some other common law tort had he constructed the house. *Id.* at 1031.

87. 533 U.S. 606 (2001). In *Palazzolo*, the petitioner formed a corporation and bought three parcels of land for development purposes that consisted, in part, of salt marshes. *Id.* at 613. The corporation was unable to secure approval to develop the land. *Id.* at 613–14. Subsequently, the State enacted regulations protecting coastal wetlands. *Id.* at 614. After the enactment of the regulations, the corporation's charter was revoked for failure to pay taxes and title to the land passed to the petitioner. *Id.* The petitioner attempted to develop the land again and was denied in part because his plans would conflict with the wetlands regulations now in effect. *Id.* at 614–15. The petitioner then sued for a regulatory taking, and the U.S. Supreme Court held that his suit was ripe notwithstanding the fact that he had not personally owned the property at the time the regulations were enacted. *Id.* at 630.

88. 535 U.S. 302 (2002). In *Tahoe-Sierra*, a regional planning agency created by compact between the States of California and Nevada imposed two moratoria on development at Lake Tahoe while the agency studied the impact of development and created an environmentally sound growth strategy. *Id.* at 306. A corporation representing 2,000 landowners claimed that the moratoria constituted a regulatory taking. *Id.* at 312. Applying a balancing test, the Court found that the moratoria, under those circumstances, did not constitute a taking. *Id.* at 320.

89. *Manning*, 2006-NMSC-027, ¶¶ 16, 18, 144 P.3d at 90–91. In *Palazzolo*, a brief amicus curiae did suggest a sovereign immunity defense, but the Court did not address that argument in its opinion. Brief for the Board of County Commissioners of the County of La Plata, Colo., et al. as Amicus Curiae Supporting the Respondents State of Rhode Island, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047), 2001 WL 15620, at 20–21; Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 496 (2006).

90. *See Manning*, 2006-NMSC-027, ¶ 12, 144 P.3d at 90.

91. *See id.* ¶ 17, 144 P.3d at 91.

92. *Id.* (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987)). In *First English*, the U.S. Supreme Court considered the question of whether a State could prevent the recovery of monetary damages in temporary regulatory takings for the time period prior to the determination that a taking had occurred. *First English*, 482 U.S. at 306–07. The Court held that it could not. *Id.* at 319. In a footnote, the Court seemed to dismiss the notion that sovereign immunity had any relevance to that question, insisting instead that the remedy for a taking was just compensation, as provided in the Constitution itself:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

*Id.* at 316 n.9 (citations omitted).

It should be emphasized, however, that the applicability of sovereign immunity to the Takings Clause was not even the question the footnote sought to answer—the Court assumed that the church could sue, and the only question was whether they could recover monetary damages. *See* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1072–77 (2001). For a partial list of commentators who have interpreted the footnote, see *infra* note 106.

93. *Manning*, 2006-NMSC-027, ¶ 17 n.3, 144 P.3d at 91 n.3 (citing City of Monterey v. Del Monte Dunes

Thus, the court reasoned, both the U.S. Supreme Court's continued acceptance of takings suits against state agencies and its dicta on the topic suggested that sovereign immunity is inapplicable in takings cases,[94] recent sovereign immunity cases (*Alden* in particular) notwithstanding.[95]

### b. Analysis

The danger with using the absence of Supreme Court comment on an issue is that one might ignore differences in procedural posture that can determine whether sovereign immunity applies.[96] An important factor in assessing the applicability of sovereign immunity is whether the State has agreed to waive its sovereign immunity defense (either by not raising the defense in litigation or by having a statutory waiver/mechanism for bringing takings claims). If a State has waived its sovereign immunity defense, then the fact that the case is heard on its merits is hardly support for a lack of sovereign immunity.[97] Unfortunately, the opinions in these cases do not give enough detail about their procedural posture and do not provide enough detail about the then-existing state statutes governing takings claims to conclusively determine whether, in fact, sovereign immunity would have even been at issue. Nonetheless, the complete lack of discussion of the issue of sovereign immunity in those cases might furnish some support for the idea that it does not survive in takings cases.

A related problem is that sovereign immunity doctrine has recently undergone considerable change[98] and attorneys would not have thought to raise constitutional sovereign immunity defenses in state court prior to *Alden*.[99] Before *Alden*, the U.S.

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at Monterey, Ltd., 526 U.S. 687, 714 (1999)). *Del Monte Dunes* involved the right to a jury trial in inverse condemnation proceedings brought pursuant to 42 U.S.C. § 1983. *Del Monte Dunes*, 526 U.S. at 694. Discussing the rationales used to justify the lack of a jury trial in *direct* condemnation proceedings, a plurality dismissed the "sovereign immunity rationale," or the rationale that a government could institute proceedings without a jury because it could refuse consent to a trial in the first place, as inapplicable to cases involving municipalities that lacked sovereign immunity. *Id.* at 714. The Court's language also suggested that this "sovereign immunity rationale" was inappropriate in takings cases: "*Even if* the sovereign immunity rationale retains its vitality in cases where this Amendment is applicable, *cf. First English*, 482 U.S. at 316, n.9...." *Id.* (emphasis added).

94. *Manning*, 2006-NMSC-027, ¶¶ 12, 16, 144 P.3d at 90.

95. *Id.* ¶ 32, 144 P.3d at 94.

96. The contours of sovereign immunity are outlined in Part II, *supra*.

97. In its answer brief in *Manning*, the State highlighted this procedural issue by distinguishing the procedural posture of prior U.S. Supreme Court takings cases. Answer Brief of Defendants/Respondents at 27 n.18, *Manning*, 2006-NMSC-027, 144 P.3d 87 (No. 28,500). In particular, the State argued that *Palazzolo v. Rhode Island* is inapposite because the claim was brought as an inverse condemnation action under state law. *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 615 (2001)). The actual opinion in *Palazzolo* does say that the plaintiffs brought an "inverse condemnation" action in that case, but does not explicitly say that they followed a state statute or procedure in doing so. *Palazzolo*, 533 U.S. at 615. The term "inverse condemnation" typically encompasses all suits brought by private parties alleging compensation for takings when condemnation proceedings have not yet been implemented, not simply those pursuant to a statutory scheme. *See* United States v. Clarke, 445 U.S. 253, 257 (1980).

The State's attempts to distinguish *Lucas* and *Tahoe-Sierra*, the other two Supreme Court cases cited by the *Manning* court for their silence on sovereign immunity, are less persuasive. The State simply argues that the cases do not address sovereign immunity. Answer Brief of Defendants/Respondents, *supra*, at 27 n.18. Of course, this would seem to lend support to the court's position that sovereign immunity has always been assumed to be inapplicable in takings cases. *Manning*, 2006-NMSC-027, ¶ 16, 144 P.3d at 90.

98. For a description of the evolution of sovereign immunity doctrine, see *supra* Part II.

99. The *Alden* majority explicitly recognized this drawback to using prior cases as evidence of implicit

Supreme Court had only enforced sovereign immunity in federal court.[100] Thus, *Lucas*, which was decided prior to *Alden*,[101] probably has limited value in predicting the current applicability of sovereign immunity.

However, the same drawback arguably does not apply to the use of prior explicit Supreme Court statements on the subject. The court in *Manning* identified the two significant statements made by the Supreme Court in the past two decades: the footnote in *First English* that arguments grounded in sovereign immunity might not be applicable in the takings context[102] and the later statement in *Del Monte Dunes* that the applicability of sovereign immunity to takings cases was still an open question.[103]

The *First English* footnote was purely dictum,[104] since the defendant in that case was not even the "State" for sovereign immunity purposes and the ability to sue was not in question.[105] Nonetheless, some commentators interpreted this dictum as a sign that the Takings Clause abrogated sovereign immunity.[106] Of course, the later statement in *Del Monte Dunes* made clear that the issue was open,[107] but even that statement was made in the context of rejecting a sovereign immunity rationale for denying a jury trial in inverse condemnation proceedings.[108] Thus, these statements do seem to carry some significance in terms of the Supreme Court's thinking on the applicability of sovereign immunity to takings claims.

These cases were decided before *Alden v. Maine*, and thus their predictive power might be weakened because of the expansion of sovereign immunity heralded by *Alden*.[109] However, *Del Monte Dunes* was decided one month before *Alden*,[110] so it

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acknowledgement by the Court of a lack of sovereign immunity in state courts. Alden v. Maine, 527 U.S. 706, 737 (1999). This argument may undercut the *Alden* Court's claim that it was applying a principle of constitutional jurisprudence that had been assumed for a long time. *Id.* at 746–48.

On a related note, the U.S. Supreme Court has been explicit in certain recent cases about the fact that it is creating "new law" and that new doctrines should not always be applied retroactively. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1733–35 (1991) (stating that the Supreme Court has limited the retroactive effect of its rulings in certain areas, including criminal procedure, habeas corpus proceedings, qualified immunity, and the Dormant Commerce Clause). While the precise issue of retroactivity has little bearing on this case (or on takings in general), the fact that the Supreme Court is willing to suspend the retroactive application of its holdings indicates that using silence in precedent may have its drawbacks.

100. *See supra* notes 56–57 and accompanying text.

101. *Lucas* was decided in 1992. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). *Alden* was decided in 1999. *Alden*, 527 U.S. 706.

102. *Manning*, 2006-NMSC-027, ¶ 17, 144 P.3d at 91 (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987)).

103. *Id.* ¶ 17 n.3, 155 P.2d at 91 n.3 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 713–14 (1999)).

104. *See supra* note 92.

105. *See supra* note 92.

106. *See, e.g.*, TRIBE, *supra* note 35, § 3-23, at 484; Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 205 (1996); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 115 n.454 (1988); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 981 (2000).

107. *Del Monte Dunes*, 526 U.S. at 713–14.

108. *Id.*

109. *See supra* notes 56–57 and accompanying text.

110. *Alden* was decided June 23, 1999, while *Del Monte Dunes* was decided May 24, 1999. Alden v. Maine, 527 U.S. 706 (1999); *Del Monte Dunes*, 526 U.S. 687.

is somewhat unrealistic to believe that the Court was completely unaware of the implications of *Alden* when it wrote *Del Monte Dunes*.

It is more likely that the dicta in *First English* and *Del Monte Dunes* do provide some insight into the Supreme Court's view of the interplay between the Takings Clause and sovereign immunity. In this light, the N.M. court gave the statements an appropriate degree of weight. While the court did not follow the lead of certain commentators who decided that the statement in *First English* settled the question,[111] it used the statements as appropriate indicators of the Supreme Court's views on the subject.

2. Unique Nature of the Takings Clause

a. The Court's Reasoning

The *Manning* court argued that the text of the Fifth Amendment mandates a remedy of just compensation,[112] and that the purpose of the Takings Clause within the constitutional scheme would be subverted if private takings claims for damages against the State were blocked by sovereign immunity.[113]

The court opened this structural argument by asserting that the Takings Clause is "[a]n essential element of individual liberty"[114] whose purpose is "to ensure the protection of private property from an overreaching government."[115] Significantly, the *Manning* court continued, the Founders chose a specific remedy for takings violations: just compensation.[116]

The court noted that the State, through statutes, allows for compensation when property is taken under the power of eminent domain.[117] The State attempted to argue that eminent domain represented a limited consent to suit on the part of the State that left sovereign immunity intact for other types of takings,[118] but the court rejected the idea that the State could avoid having to pay any compensation unless the State consented to suit.[119] Since New Mexico has only consented to suit in the case of eminent domain,[120] and not in the case of regulatory takings, the court concluded that requiring the State to consent to suit would essentially eliminate any recovery for regulatory takings.[121] This, the court continued, was contrary to the spirit of the Takings Clause, which sought to compensate all landowners for all types of takings.[122]

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111. *See supra* note 106.
112. *See infra* notes 116, 133–134 and accompanying text.
113. *See infra* notes 114–122 and accompanying text.
114. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 10, 144 P.3d 87, 89.
115. *Id.* ¶ 10, 144 P.3d at 89–90 (citations omitted).
116. *Id.* ¶ 10, 144 P.3d at 90.
117. *Id.* ¶ 19, 144 P.3d at 91.
118. *Id.* ¶ 20, 144 P.3d at 91.
119. *Id.* ¶ 21, 144 P.3d at 91–92.
120. *Id.*
121. *Id.* ¶ 22, 144 P.3d at 92. As explained above, a landowner could enjoin the enforcement of an onerous regulation under *Ex Parte Young*. *See supra* notes 33–39 and accompanying text. Such a course of action would, however, leave the landowner uncompensated for the period during which the land was taken. *See infra* notes 144–148.
122. *See Manning*, 2006-NMSC-027, ¶ 22, 144 P.3d at 92.

In discussing the eminent domain argument, the court also stated a proposition that may have a significant impact on future takings lawsuits. While arguing that a statute is not necessary for someone to bring an inverse condemnation claim, the court stated, "We are not suggesting that the legislature cannot prescribe terms and conditions that govern recovery under the Takings Clause, such as Section 42A-1-29. When a statutory framework provides for recovery, individuals must abide by it."[123]

The court subsequently dealt with the related issue of whether the Takings Clause was self-executing.[124] The State argued by analogy to the statute enabling takings claims against the federal government and claimed that a similar statute was necessary to make the Takings Clause operative against the state government.[125] In responding to this argument, the court assumed that the State was arguing that analogous *congressional* action would be necessary to make the Takings Clause operative against the State.[126] The court easily concluded that no other court requires congressional action to make the Takings Clause operative against the States,[127] and it also concluded that the text and purpose of the Takings Clause would not be served by requiring an operative statute.[128]

If the Takings Clause were not self-executing, the court reasoned, takings victims would have to rely upon discretionary government action (i.e., statutory consent to suit) in order to protect themselves against "abusive governmental power,"[129] thus undermining the principle underlying takings doctrine[130] protection from an "over-reaching government."[131]

Furthermore, the fact that the Constitution explicitly mentions the remedy for a taking led the court to conclude that the Takings Clause was self-executing.[132] The Takings Clause is nearly unique in having a specific remedy mandated by the Constitution,[133] and that uniqueness, argued the court, indicates that the framers intended for the remedy to apply to all takings claims.[134] Allowing legislatures to

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123. *Id.* ¶ 21, 144 P.3d at 91.

124. *Black's Law Dictionary* defines "self-executing" as "effective immediately without the need of any type of implementing action." BLACK'S LAW DICTIONARY 1391 (8th ed. 2004).

125. *Manning*, 2006-NMSC-027, ¶ 41, 144 P.3d at 96.

126. *Id.* ¶ 43, 144 P.3d at 96–97. This was not exactly the State's position. In its brief, the State argued that analogous legislation by the New Mexico Legislature would suffice to abrogate sovereign immunity: "[T]he *Tucker Act*...waived the federal government sovereign immunity....By analogy, a similar waiver must be enacted by the New Mexico Legislature in order to abrogate the State's immunity." Answer Brief of Defendants/Respondents, *supra* note 97, at 24.

However, the court's characterization of the State's argument was ultimately of little import, because the court's reasoning—that the Takings Clause should not require further government action to be operative—would apply to state legislative action as well as congressional action. *Manning*, 2006-NMSC-027, ¶ 43, 144 P.3d at 96–97.

127. *Manning*, 2006-NMSC-027, ¶ 43, 144 P.3d at 96–97.

128. *Id.*

129. *Id.* ¶ 43, 144 P.3d at 97.

130. *Id.*

131. *Id.* ¶ 10, 144 P.3d at 90.

132. *Id.* ¶¶ 46–47, 144 P.3d at 97–98.

133. *Id.* (citing RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 796–97 (5th ed. 2003)). In particular, the only other constitutional provision that mandates a remedy is the Habeas Corpus Clause. *Id.* ¶ 46, 144 P.3d at 97.

134. *Id.* ¶¶ 46–47, 144 P.3d at 97–98.

block the remedy by requiring enabling legislation would be inconsistent with this original intent.[135]

The court also emphasized the unique nature of the Takings Clause in refuting one of the State's claims, namely that the incorporation of the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment does not serve to abrogate state sovereign immunity for individual suits[136] because such abrogation can only result from congressional action pursuant to Section 5 of the Fourteenth Amendment.[137] The *Manning* court responded to the State's argument by characterizing Section 5 as a provision allowing Congress to act *when necessary* to enforce the civil rights protected by the Fourteenth Amendment.[138] Such a provision is necessary, the court stated, because the substantive protections of the Fourteenth Amendment, including the Equal Protection Clause and the Due Process Clause, lack remedies of their own.[139] However, when the constitutional provision in question does have its own remedy, that provision is self-executing[140] and amounts to a constitutional abrogation of state sovereign immunity.[141]

In summary, the court characterized the Takings Clause as a check upon state power and found that a sovereign immunity bar to takings claims would directly contravene the purpose of the Clause. The court found significant the fact that the Constitution expressly provides for the remedy of just compensation. Further, the court decided that the text of the Constitution makes the Takings Clause self-executing and that the constitutional requirement of just compensation for *all* takings mandated that property owners should be able to sue for all types of takings, not just for those to which the State has consented to suit.

### b. Analysis

In finding that the Takings Clause abrogates sovereign immunity by its own power, the *Manning* court arrived at the same conclusion as every other court to have considered the issue,[142] as well as at least one commentator.[143] The court's textual and structural arguments about the Takings Clause counteracted a serious problem identified by the *Manning* court that arises with the imposition of sovereign immunity: certain classes of takings might essentially be denied any meaningful remedy.[144] While the court may have overstated the impact of sovereign immunity upon the ability of citizens to counteract takings (for instance, a property owner might be able to obtain injunctive relief that would prevent the unconstitutional

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135. *Id.*

136. *See supra* note 44.

137. *See supra* note 44.

138. *Manning*, 2006-NMSC-027, ¶ 45, 144 P.3d at 97.

139. *Id.* Of course, as the tax refund cases, *infra* notes 191–192 and accompanying text, illustrate, the Due Process Clause alone can still abrogate sovereign immunity and dictate a specific monetary remedy in the absence of a remedy outlined in the Constitution.

140. *Manning*, 2006-NMSC-027, ¶ 46, 144 P.3d at 98.

141. *Id.* ¶ 51, 144 P.3d at 98.

142. DLX, Inc. v. Kentucky, 381 F.3d 511 (2004); Boise Cascade Corp. v. State *ex rel.* Or. State Bd. of Forestry, 991 P.2d 563 (Or. Ct. App. 1999); SDDS, Inc. v. South Dakota, 650 N.W.2d 1 (S.D. 2002).

143. Berger, *supra* note 89, at 592–93.

144. *See id.* at 525–26.

taking of property without compensation),[145] there are still situations where sovereign immunity would effectively block any meaningful remedy. For example, in the context of temporary takings where the taking has ceased and the property owner demands compensation for the time period when the taking occurred, monetary damages are the only remedy that will compensate the loss.[146] Of course, property owners might be able to sue individual government officers for monetary damages.[147] However, this remedy is not as reliable as a suit against the State,[148] and in cases such as this, where the complained-of act is a state law, it may be difficult to identify an individual officer to sue. Furthermore, the U.S. Supreme Court emphasized in *First English* that the remedy for *all* takings is just compensation,[149] thus rendering problematic any result allowing for compensation for certain classes of takings and not for others.[150] The New Mexico Supreme Court in *Manning* also found, in response to arguments from the State that statutory consent to suit was necessary to make the Takings Clause operative, that the Takings Clause is self-executing.[151] The purpose of the Takings Clause—to check government—would be stymied if it required government action to become operative.[152]

The court in *Manning* also relied upon the intent of the framers to provide property owners with robust protection, including the guarantee of a specific constitutional remedy.[153] This argument is strong in terms of distinguishing the Takings Clause from the rest of the Constitution, which is relevant for avoiding *Hans v. Louisiana*.[154] There is, however, a counterargument. At the time of the founding, individuals could not sue governments directly for a taking.[155] Instead, they could sue individual governmental officers for trespass, and if the governmental officers attempted to raise the defense that they were authorized by statute to commit the invasion, the property owner would have been able to invalidate that defense if the statute failed to provide for just compensation.[156] Thus, the framers could not have intended that, notwithstanding sovereign immunity, citizens would be able to sue governments directly for just compensation.[157]

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145. *Id.* at 526. This would occur through the use of the *Ex Parte Young* doctrine. *See supra* notes 33–39.

146. *See* Berger, *supra* note 89, at 526–27.

147. *See supra* note 42 and accompanying text.

148. Some of the drawbacks to this remedy include individual immunities to suit such as qualified immunity and official immunity. *See supra* note 42.

149. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987).

150. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 21, 144 P.3d 87, 91–92.

151. *Id.* ¶ 43, 144 P.3d at 97.

152. *Id.*

153. *See supra* notes 132–135 and accompanying text.

154. *Hans v. Louisiana* blocked a claim from being brought under the Contracts Clause. For a discussion of the holding of *Hans*, see *supra* notes 29–31 and accompanying text. For an examination of how *Alden* affirmed the holding and reasoning of *Hans*, see *infra* notes 258–259.

155. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 60 (1999).

According to Professor Brauneis, there were some exceptions to the general rule that States could not be sued. *See id.* at 69–70. Some States had early versions of eminent domain statutes under which plaintiffs could recover for takings; these statutes would preclude officer suits. *Id.*

156. *Id.* at 67–68.

157. Hill, *supra* note 56, at 497.

Of course, such a counterargument could be used to invalidate all "inverse condemnation" suits for takings.[158] Yet, it is difficult to imagine the purpose of such a blanket prohibition. The officer suit prevalent at the time of the founding would be a less secure and less reliable alternative method of securing just compensation.[159] The interest protected by the Fifth Amendment is the right to own private property, and just compensation remains the only remedy for an invasion of that interest. Simply because inverse condemnation suits are a more effective manner of protecting that interest than were the causes of action available at the time of the founding does not mean that they should be unprotected by the Constitution.

The *Manning* court's statement regarding the ability of the State to outline the procedures to be followed in takings situations allows the State significant control over the procedures that claimants must use in order to bring takings claims.[160] The State could create a special statutory procedure for all takings claims and might allow for administrative resolution of claims,[161] as long as the parties are afforded meaningful judicial review.[162] These procedures could have a significant impact on the amount and likelihood of recovery in takings cases.[163]

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158. Brauneis outlines the evolution of the takings claim from its early roots as an officer suit into a direct action for damages by the end of the nineteenth century. *See* Brauneis, *supra* note 155, at 109–15. Thus, courts have interpreted the Takings Clause as creating a cause of action for damages for over a century.

159. *See* Seamon, *supra* note 92, at 1083–84 (describing officer suits as alternatives to inverse condemnation suits but noting their shortcomings). Additionally, Brauneis points out that the indirect officer suit method of enforcement, which he calls the "justification-stripping" model because it strips executive officers of the justification to take property, was considered a "second-best" remedy that only existed because individuals were unable to sue the State at common law. Brauneis, *supra* note 155, at 107. This point does not fully dispose of the originalist argument that the Fifth Amendment was not intended to abrogate state sovereign immunity, but it does suggest that direct suits against States are consistent with the purpose behind the Takings Clause.

160. States can control the initial procedure to be used by takings claimants. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985). If claimants attempt to bring claims in federal court without having exhausted state takings procedures, those claims will be dismissed on ripeness grounds. *Id.* Thus, for federal purposes, a taking has not even ripened until a State has failed, through its takings procedures, to compensate the property owner. *Id.* This suggests that nothing prevents States from imposing their own procedures for the initial determination of whether a taking has occurred.

Incidentally, the ripeness requirement outlined in *Williamson* might have the effect of totally shutting a party out of federal court—a party may be forced by *Williamson* to pursue a state claim, and if the party loses on that claim, then the party is precluded from re-litigating the claim in federal court. Berger, *supra* note 89, at 502–03. This conundrum is known as the "Williamson trap." *Id.* at 502.

161. An administrative procedure for handling takings claims would not violate separation of powers. The constitutional doctrine of separation of powers is protected by Article III, Section 1 of the New Mexico Constitution, which provides: "[N]o person or collection of persons charged with the exercise of powers properly belonging to one [branch of government], shall exercise any powers properly belonging to either of the others...." N.M. CONST. art. III, § 1. This provision does not prevent the resolution of legal claims through administrative proceedings as long as adequate judicial review is afforded. *See* Wylie Corp. v. Mowrer, 104 N.M. 751, 753, 726 P.2d 1381, 1383 (1986) (upholding the constitutionality of the workmen's compensation administration, which administratively adjudicates claims prior to judicial review); *cf.* Bd. of Educ. v. Harrell, 118 N.M. 470, 483–84, 882 P.2d 511, 524–25 (1994) (finding no separation of powers violation with statutorily compelled arbitration by analogizing to compelled administrative adjudications).

162. *Harrell*, 118 N.M. at 484, 882 P.2d at 525. Adequate judicial review is required by the Due Process Clause, *id.* at 485, 882 P.2d at 526, and thus it is examined through the procedural due process analysis outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Harrell*, 118 N.M. at 486, 882 P.2d at 527. In the context of the review of compulsory arbitration proceedings, due process requires de novo judicial review of questions of law and substantial evidence review of findings of fact. *Id. Harrell* also asserts, as dictum, that the constitutional standards governing the review of administrative determinations are the same as those governing the review of compulsory arbitration. *Id.* at 485, 882 P.2d at 526.

163. In *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, Justice Souter elliptically suggested that one procedural change—the right to a trial by jury—might affect the likelihood of recovery due to jury sympathy. 526

One possible limit on the ability of the State to alter the procedure allowable for takings cases is the right to a trial by jury in the New Mexico Constitution[164] "as it has heretofore existed"[165] at the time of ratification of the Constitution.[166] No right to a jury trial exists in formal eminent domain proceedings,[167] but whether the right exists for inverse condemnation actions arising directly under the U.S. Constitution is an open question, both under federal[168] and state[169] law. A full exploration of the topic is outside the scope of this Note, but if the right exists, it would constrain the ability of the State to radically alter the procedures under which inverse condemnation proceedings may be brought.

To conclude, the *Manning* court found that, because of the textual guarantee of just compensation for all takings,[170] and because the purpose of the Takings Clause is to check government power,[171] claimants can sue the State for a taking even in the absence of an enabling statute or consent on the part of the State. The court also suggested, however, that the State has wide latitude in controlling the procedures that takings claimants must follow.[172]

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U.S. 687, 743–44 (1999) (Souter, J., dissenting). Justice Souter made the suggestion in critiquing the Court's holding allowing a jury trial in inverse condemnation proceedings brought pursuant to 42 U.S.C. § 1983. *Id.* at 743. Responding to the plurality's position that a jury trial is required in inverse condemnation proceedings in part because plaintiffs have more elements to prove (because most eminent domain proceedings are only about damages, but inverse condemnation proceedings often include the question of whether a taking has occurred), Souter dismissed that point as irrelevant, except for possible jury sympathies: "Some plaintiffs' cases are easy and some are difficult, but the difficult ones are no different in front of a jury (*except on the assumption that juries are more apt to give David the advantage against Goliath, which I do not believe is the plurality's point*)." *Id.* at 743–44 (emphasis added). Of course, the bias of a jury (as opposed to that of a different factfinder) should not be a relevant consideration in determining whether the Constitution requires a jury trial, but Souter's dissent indicates that this consideration may be present.

164. N.M. CONST. art. II, § 12.

165. *Id.*

166. Lisanti v. Alamo Title Ins., 2002-NMSC-032, ¶ 10, 55 P.3d 962, 965.

167. Santa Fe S. Ry. v. Baucis LLC, 1998-NMCA-002, ¶ 5, 952 P.2d 31, 32.

168. The Seventh Amendment to the U.S. Constitution, the federal provision protecting the right to a trial by jury, has not been incorporated against the States and thus the States are under no obligation to follow it in their own courts. Bd. of Educ. v. Harrell, 118 N.M. 470, 481, 882 P.2d 511, 522 (1994) (citing Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916)). Federal law on the topic is relevant, however, because New Mexico's courts find federal law persuasive in interpreting New Mexico's constitutional right to trial by jury. *Id.* at 481, 882 P.2d at 522.

*Del Monte Dunes* dealt with the right to a trial by jury in an inverse condemnation proceeding brought pursuant to 42 U.S.C. § 1983. 526 U.S. at 707–08. While the Court held that such a right did exist, only a plurality held that it existed because the underlying action was one for inverse condemnation. *Id.* at 715. The fifth vote, Justice Scalia, found a right to trial by jury based upon 42 U.S.C. § 1983 alone (without consideration of the underlying substantive nature of the claim). *Id.* at 723 (Scalia, J., concurring). Importantly, two members of the plurality, Chief Justice Rehnquist and Justice O'Connor, are no longer on the Court. Therefore, it seems safe to conclude that the position taken by the *Del Monte Dunes* plurality is not the unqualified position of the Court on the issue of whether a jury trial is required for inverse condemnation claims.

169. No New Mexico case has decided the question of whether a non-statutory inverse condemnation claim must be put to a jury.

170. *See supra* notes 132–135 and accompanying text.

171. *See supra* notes 114–122 and accompanying text.

172. *See supra* notes 160–163 and accompanying text.

3. Due Process/Tax Refund Analogy

a. The Court's Reasoning

The *Manning* court found, independent of the structural need for the Takings Clause to abrogate sovereign immunity, that the Due Process Clause also required abrogation.[173] The court raised the point, acknowledged in *Alden*,[174] that the deprivation of a "clear and certain" remedy by a State can be a violation of due process.[175] In so doing, the court analogized the facts of the case at bar to *Reich v. Collins*, a case where an individual successfully sued a State for a tax refund under the Due Process Clause.[176] In *Reich*, the State of Georgia had a tax refund statute that appeared to allow taxpayers to go to court and challenge illegally collected taxes.[177] In its discussion of *Reich*, the U.S. Supreme Court in *Alden* characterized this as a remedy that had been "promised" by the State.[178]

The *Manning* court likened the takings situation to the remedy that had been "promised" in *Reich*.[179] The court noted that the remedy of just compensation is found in the Constitution, and it concluded that this remedy became a "promised" state remedy when the Fifth Amendment was incorporated against the States through the Fourteenth Amendment.[180]

The *Manning* court found that the similarity between *Reich* and takings cases was "striking."[181] Like the State in *Reich*, the State of New Mexico was obligated to provide the "promised" remedy of monetary compensation "or risk violating the due process clause."[182] The State of New Mexico could not claim sovereign immunity (as the State in *Reich* had attempted)[183] because doing so would deprive the Mannings of their promised remedy and would constitute a violation of due process.[184]

b. Analysis

The court's extensive analogy to *Reich v. Collins* follows similar analogies used by the U.S. Court of Appeals for the Sixth Circuit in *DLX, Inc. v. Kentucky*[185] and the Oregon Court of Appeals in *Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*.[186] However, the New Mexico Supreme Court went further than those courts and used the Due Process Clause as a vehicle to pierce sovereign

173. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 31, 144 P.3d 87, 94.
174. Alden v. Maine, 527 U.S. 706, 740 (1999).
175. *Manning*, 2006-NMSC-027, ¶¶ 29–31, 144 P.3d at 94.
176. *Id.* (citing Reich v. Collins, 513 U.S. 106 (1994)).
177. *Reich*, 513 U.S. at 108.
178. *Alden*, 527 U.S. at 740.
179. *Manning*, 2006-NMSC-027, ¶ 28, 144 P.3d at 94.
180. *See id.* ¶ 28, 144 P.3d at 93–94.
181. *Id.* ¶ 31, 144 P.3d at 94.
182. *Id.*
183. Reich v. Collins, 513 U.S. 106, 109–10 (1994).
184. *See Manning*, 2006-NMSC-027, ¶ 31, 144 P.3d at 94. The *Manning* court noted that one commentator had argued in favor of using the Due Process Clause to abrogate sovereign immunity in state courts for takings claims. *Id.* ¶ 29, 144 P.3d at 94 (citing Seamon, *supra* note 92, at 1110–15).
185. 381 F.3d 511, 528 (2004).
186. 991 P.2d 563 (1999).

immunity. While the Sixth Circuit[187] and the Oregon Court of Appeals[188] analogized the cases before them to the due process tax refund cases, they did not find that due process requires that a State answer takings claims in state court. The *Manning* court, unlike the Sixth Circuit and the Oregon Court of Appeals, appears to have found a violation of the Due Process Clause.[189] In so doing, the court introduced a different theoretical basis for its holding that sovereign immunity is inapplicable to takings claims.

The due process theory,[190] as applied to takings claims, relies upon an analogy to cases involving the refund of illegally collected taxes.[191] In these tax refund cases, the U.S. Supreme Court has found that States have an obligation under the Due Process Clause to provide meaningful pre- or post-deprivation relief to taxpayers who wish to challenge the legality of their taxes.[192]

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187. In *DLX*, the Sixth Circuit analogized to the due process tax refund cases but did not appear to find a due process obligation for the State to provide a remedy: "[W]here the Constitution requires a particular remedy, such as through the Due Process Clause for the tax monies at issue in *Reich*, or through the Takings Clause as indicated in *First English*, the State is required to provide that remedy in its own courts, notwithstanding sovereign immunity." *DLX*, 381 F.3d at 528. In the Sixth Circuit's view, the remedy of just compensation must be provided by a State, and that mandate applies to state courts as well as state agencies. *See id.*

188. *Boise Cascade*, 991 P.2d at 567. The Oregon court's language was somewhat vague, and some language could be interpreted as finding a due process violation:

> Although *Reich* has little direct bearing on the issue before us, as it did not involve any issues of sovereign immunity, the Court's description of *Reich* in *Alden* strongly suggests that States may be required to provide promised remedies in State court proceedings by force of the Due Process Clause alone.

*Id.* However, the court's actual holding rested upon the Takings Clause:

> [W]e conclude that the Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state....[B]ecause of the "self-executing" nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution.

*Id.* at 568–69.

189. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 31, 144 P.3d 87, 94.

190. As discussed above, the *Manning* court noted that Professor Seamon, in his article *The Asymmetry of State Sovereign Immunity*, *supra* note 92, fully articulated the theory that the Due Process Clause requires the abrogation of sovereign immunity in takings cases brought in state court. *See supra* note 184. Professor Seamon's article provides much of the basis for the theoretical underpinnings of the due process abrogation theory.

191. *E.g.*, Carpenter v. Shaw, 280 U.S. 363, 369 (1930); Mont. Nat'l Bank of Billings v. Yellowstone County of Mont., 276 U.S. 499, 504–05 (1928); Ward v. Bd. of County Comm'rs of Love County, 253 U.S. 17, 24 (1920); Atchison, Topeka, & Santa Fe Ry. v. O'Conner, 223 U.S. 280, 285 (1912). In many of these cases, taxpayers challenged the legality of various state taxes. Once the taxes were declared illegal, the taxpayers (who had paid the taxes under threat of penalty) were unable to obtain refunds in state court. In *O'Conner*, the earliest of this line of tax cases, the U.S. Supreme Court held that taxpayers were entitled to a "clear and certain remedy," 223 U.S. at 285, and in *Ward*, the Court held that the failure to refund taxes paid under compulsion was a violation of the Due Process Clause of the Fourteenth Amendment. *Ward*, 253 U.S. at 24.

192. *See* McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 51–52 (1990). While federal taxes can be unlawful, *see, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (requiring apportionment for direct taxes levied by the federal government), tax refund cases involving state taxes often arise as a result of the Dormant Commerce Clause, which imposes significant limits upon the abilities of States to impede interstate commerce. *See* Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977) (holding that state taxation schemes, in order to comply with the Commerce Clause, must be applied to acts with a substantial nexus to the taxing State, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to services provided by the State). Because state taxes can easily impede interstate commerce, state taxes face a serious constitutional hurdle that federal taxes do not.

The Equal Protection Clause also protects against discriminatory taxation to some degree, and at least one early tax refund case involved equal protection violations. *See* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 245 (1931). The modern standard for judging the constitutionality of economic regulations under the

Pre-deprivation relief might be satisfied by the ability to challenge a tax scheme without paying the taxes first.[193] If a State imposes a penalty on non-payment, then a taxpayer would be entitled to post-deprivation relief,[194] which would include the ability to obtain a refund for the taxes already paid.[195] States are *not* obligated to provide both pre- and post-deprivation relief,[196] and they are given latitude in crafting their own remedial schemes.[197] "Clear and certain" non-judicial remedial schemes might be acceptable as well.[198] Importantly, the U.S. Supreme Court has not fully explained the aspect of the problem that is most important for our purposes: when States might be required to provide relief *in their courts*. The furthest the Court has gone in terms of mandating judicial remedies is to require a State to abide by a statute guaranteeing a judicial remedy.[199]

In *Reich v. Collins*, the most recent U.S. Supreme Court tax refund due process case (and the case explicitly mentioned by the *Manning* court), taxpayers sued the State of Georgia after the State refused to refund illegal taxes.[200] The taxpayers had paid the taxes in reliance upon a state statute allowing them to challenge the taxes in court;[201] unfortunately for those taxpayers, once they brought their challenges, the State refused to hear them on sovereign immunity grounds.[202] The Supreme Court held that the remedy for the illegal taxation must be "clear and certain,"[203] and, in this instance, that remedy must be the statutorily promised reimbursement of those taxes.[204] When States deny such promised remedies, sovereign immunity is inapplicable.[205]

The analogy used in *Manning* is that a taking of property is akin to the collection of a tax.[206] If the tax is illegal, then a taxpayer should have some way of getting his or her money back.[207] In the case of a taking, an individual must have an opportunity to obtain just compensation, especially since it is mandated by the Constitution.[208] Failure to provide either constitutes a deprivation of property without due process of law.[209]

One of the strengths of the due process theory is that the U.S. Supreme Court showed its approval of the theory in its decision in *Alden*, when the Court affirmed

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Equal Protection Clause, however, is lenient rational basis review. *See* Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (upholding California's property taxation scheme against an equal protection challenge, stating that the Court's rational basis review is "especially deferential in the context of classifications made by complex tax laws.").

193. *McKesson*, 496 U.S. at 36–37.
194. *Id.* at 38–39.
195. *Id.*
196. *See id.* at 36–37.
197. *Id.*
198. Reich v. Collins, 513 U.S. 106, 110–11 (1994).
199. *Id.* at 111.
200. *Id.* at 108–09.
201. *Id.*
202. *Id.* at 109.
203. *Id.* at 111.
204. *Id.*
205. *Id.* at 109–10.
206. *See* Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶ 31, 144 P.3d 87, 94.
207. *Id.*
208. *Id.*
209. *Id.*; Seamon, *supra* note 92, at 1102.

the holding in *Reich*.[210] One of the argument's principal weaknesses, though, is that the Supreme Court has never applied the theory outside of the tax refund context, and some significant differences exist between tax refunds and takings. Importantly, *Reich* was about a State's promise to provide a certain remedy.[211] When the State failed to provide the promised remedy, it violated due process.[212] In the takings context, however, it is difficult to justify the notion that the States ever "promised" anything with regard to the Takings Clause. When the Clause was ratified, it was to be applied against the federal government.[213] Even though the Takings Clause is now applicable against the States by way of the Fourteenth Amendment, it is again difficult to justify the idea that in ratifying the Fourteenth Amendment the States promised that they would provide just compensation to takings victims.[214]

This is not to say that the tax refund cases are wholly irrelevant in the takings context. While *Reich* is not completely analogous because it involved a remedy promised by the State of Georgia, other due process tax refund cases might be more applicable. In *Ward v. Board of County Commissioners of Love County*,[215] for example, there was no mention of a remedy "promised" by the State, but the Court held that the State was required to provide the specific remedy of a refund under the Due Process Clause.[216] Preventing the taxpayer from seeking a refund would have left the taxpayer with no method of recovering the property that the State had illegally taken from him.[217] This scenario seems more analogous to the takings situation, where denying a claimant the right to seek monetary damages would prevent the claimant from recovering for the unconstitutional deprivation of property without just compensation. In both cases, only a monetary remedy is appropriate to correct the constitutional violation.[218]

In conclusion, while the *Manning* court may have stretched a bit to find a direct analogy to *Reich* in terms of arguing that the State "promised" the remedy of just compensation to landowners, the due process tax refund cases still support the abrogation of sovereign immunity, because those cases illustrate that the State is required to provide a remedy for the deprivation of property that arises from the failure to provide just compensation.

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210. Alden v. Maine, 527 U.S. 706, 740 (1999).

211. *See* Reich v. Collins, 513 U.S. 106, 111 (1994) ("But what a State may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *mid-course*—to 'bait and switch,' as some have described it.").

212. *Id.*

213. NOWAK & ROTUNDA, *supra* note 41, § 11.12, at 509. In an early takings case, the U.S. Supreme Court held that the Bill of Rights only applied against the federal government. Barron v. City of Baltimore, 32 U.S. 243, 250–51 (1833).

214. *See* Berger, *supra* note 89, at 563 (arguing that the idea of automatic abrogation of sovereign immunity based upon the passage of the Fourteenth Amendment is "extreme").

215. 253 U.S. 17 (1920).

216. *Id.* at 24.

217. *See id.*

218. Seamon, *supra* note 92, at 1111.

### *A. Contracts Clause Claim*

Having concluded that the Mannings' takings claim was not barred by sovereign immunity, the court then reached the opposite conclusion with respect to the Mannings' claim under the Contracts Clause.[219]

#### 1. Court's Reasoning

Early in the opinion, the court suggested that *Alden v. Maine* should not be interpreted as a bar to claims against States that arise under the Constitution itself[220] because it is a case primarily dealing with the balance of power between Congress and the States.[221] While the court made these arguments when dealing with the Takings Clause,[222] the arguments were perfectly applicable to the Contracts Clause claim because that claim also arose directly under the Constitution.

The court noted that *Alden* and the two New Mexico cases that have applied *Alden*, *Cockrell v. Board of Regents of New Mexico State University*[223] and *Gill v. Public Employees Retirement Board*,[224] dealt with the abrogation of state sovereign immunity by Congress pursuant to its Article I powers.[225] At least part of the justification for such protection for States was a concern for federalism and the protection of state sovereignty from the reach of Congress.[226] By contrast, the court noted that "the balance of power shifts when 'the obligation arises from the Constitution itself.'"[227] The court quoted further from *Alden*, stating that the right of sovereign immunity can be "'altered by the plan of the Convention or certain constitutional Amendments.'"[228] When the Constitution is the source of the cause of action, the problem of Congress treading upon the rights of States does not exist.[229]

Although the argument that *Alden* only blocks claims brought pursuant to federal statutes would logically apply to both the Takings Clause claim and the Contracts Clause claim, the court only explicitly used the argument to support its holding in the takings context.[230] Its treatment of the Contracts Clause claim was very different.[231]

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219. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶¶ 48–50, 144 P.3d 87, 98.
220. *Id.* ¶ 26, 144 P.3d at 93.
221. *Id.*
222. *See id.*
223. 2002-NMSC-009, ¶ 1, 45 P.3d 876, 878.
224. 2004-NMSC-016, ¶¶ 7–8, 90 P.3d 491, 495.
225. *Manning*, 2006-NMSC-027, ¶ 24, 113 P.3d at 92 (discussing the holdings of *Cockrell* and *Gill*).
226. *Id.*
227. *Id.* ¶ 27, 144 P.3d at 93 (quoting Alden v. Maine, 527 U.S. 706, 740 (1999)). The use of the language "balance of power" implies the balancing of different interests in deciding whether sovereign immunity bars a claim, most notably an interest in maintaining the sovereignty of the States and an interest in enforcing constitutional rights. While this is certainly a plausible way of viewing the problem, *see* Berger, *supra* note 89, at 597–600 (discussing the weighing of different constitutional values as a legitimate way of resolving the clash between irreconcilable doctrines), the *Manning* court opted not to engage in an in-depth balancing of the different interests involved.
228. *Manning*, 2006-NMSC-027, ¶ 27, 144 P.2d at 93 (quoting *Alden*, 527 U.S. at 713).
229. *Id.* ¶¶ 26–27, 144 P.3d at 93.
230. *Id.* ¶ 28, 144 P.3d at 93.
231. *See id.* ¶¶ 48–50, 144 P.3d at 98.

The court's Contracts Clause analysis tracked *Alden*'s discussion of *Hans v. Louisiana*.[232] The cause of action in *Hans* was one for damages under the Contracts Clause,[233] and the *Hans* Court found that sovereign immunity barred such claims.[234] The U.S. Supreme Court in *Alden* made it clear that *Hans* was still good law, and the New Mexico Supreme Court concluded that *Alden*'s affirmation of *Hans* meant that claims for damages under the Contracts Clause were unavailable due to sovereign immunity.[235] The *Manning* court justified the differing results between the Takings Clause and the Contracts Clause by emphasizing the guarantee of a remedy (just compensation) in the Takings Clause that is absent from the Contracts Clause.[236]

2. Analysis

In framing *Alden* as a case about the proper boundaries of power between Congress and the States, the *Manning* court implied that the scope of the Supreme Court's holding in *Alden* did not extend to suits arising under the Constitution itself, since those suits did not implicate federalism concerns between Congress and the States.[237] However, the court was only willing to apply this rationale to the Takings Clause claim, despite its apparent applicability to the Contracts Clause claim. The failure of the Contracts Clause claim indicates that the court did not fully accept the argument that *Alden* was exclusively limited to causes of action created by Congress. Therefore, this argument is not likely to assist future litigants in getting around sovereign immunity.

The court's characterization of sovereign immunity doctrine as one aspect of the Supreme Court's federalism jurisprudence is certainly valid.[238] Many of the recent sovereign immunity cases have been about the ability of Congress to subject States to suit without their consent.[239] Protecting the States from Congress is one argument in favor of sovereign immunity,[240] and to the extent that it is inapplicable when claims arise under the Constitution itself, that is one less reason for extending sovereign immunity.[241] *Alden* itself distinguished *Reich v. Collins*,[242] a due process tax refund case, stating that the claim in that case arose under the "Constitution

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232. *Id.* ¶ 49, 144 P.3d at 98. For a brief discussion of *Hans* in relation to current sovereign immunity doctrine, see *supra* notes 29–31 and accompanying text.

233. Hans v. Louisiana, 134 U.S. 1, 10 (1890).

234. *See id.* at 15.

235. *Manning*, 2006-NMSC-027, ¶ 49, 144 P.3d at 98.

236. *Id.* ¶ 50, 144 P.3d at 98.

237. *Id.*

238. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 18–30 (2001) (discussing sovereign immunity developments as part of the Rehnquist Court's "federalism revolution").

239. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate a State's sovereign immunity pursuant to its commerce powers); Alden v. Maine, 527 U.S. 706 (1999) (holding that sovereign immunity protects States from congressionally created causes of action in state court); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that Congress did not validly abrogate sovereign immunity with the Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding no abrogation of sovereign immunity under the Religious Freedom Restoration Act).

240. *See* Berger, *supra* note 89, at 567.

241. *Id.*

242. *Alden*, 527 U.S. at 740. For a fuller discussion of the implications of *Alden*'s affirmance of *Reich*, see Part IV.A.3.b.

itself."[243] Thus, it seems fair for the *Manning* court to use that same distinction with regard to other claims brought under the Constitution, and it did so with the takings claim.[244]

Conceptually, it makes sense to distinguish between claims brought pursuant to acts of Congress and those brought pursuant to the Constitution itself. One of the functions of the Constitution is to protect individual rights against encroachments by governments.[245] Individual rights are nugatory, however, unless they are enforceable—otherwise, governments have no incentive to respect them.[246] Citizens ought to be able to bring suits in order to adequately protect themselves from violations of their constitutional rights.[247] This deeply rooted concept is embodied in the maxim, cited by Justice Marshall in *Marbury v. Madison*[248] and attributed to William Blackstone,[249] that for every right, there is a remedy.[250]

Furthermore, individual rights are arguably the highest constitutional value in our constitutional system.[251] Other values, such as protecting state sovereignty, enforcing the separation of powers, and protecting the independence of the judiciary are only subordinate values designed primarily to protect individual rights.[252] Sovereign immunity simply protects the integrity and dignity of the States.[253] Using

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243. *Alden*, 527 U.S. at 740.

244. Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶¶ 24–27, 144 P.3d 87, 92–93.

245. *Cf.* Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803) ("The question of whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.").

246. *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961).

247. *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

248. 5 U.S. (1 Cranch) at 162–63.

249. *Id.* at 163.

250. *Id.* Of course, this seemingly simple phrase does not answer the next question, which is *what* remedy is provided. People do not have an unqualified right to select any remedy whenever they have suffered an injury. Fallon & Meltzer, *supra* note 99, at 1787. Some remedies may not be available for some violations. *Id.*

251. Berger, *supra* note 89, at 601. For an argument about why individual rights should be valued more highly than structural legal rules, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 204–05 (1978):

> If we want our laws and our legal institutions to provide the ground rules within which [divisive] issues will be contested then these ground rules must not be the conqueror's law....[The law] must state, in its greatest part, the majority's view of the common good. The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected....
>
> The Government will not re-establish respect for law without giving the law some claim to respect. It cannot do that if it neglects the one feature that distinguishes law from ordered brutality. If the Government does not take rights seriously, then it does not take law seriously either.

Thus, Dworkin argues that rights must be respected because they are the only way for minorities within a political system to accept as legitimate the decisions of the majority; hence they are the only way to ensure that *all* members of society respect the rule of law.

252. As Justice O'Connor explained in *New York v. United States*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also* Berger, *supra* note 89, at 549.

253. *See* Alden v. Maine, 527 U.S. 706, 714–15 (1999).

sovereign immunity to block the enforcement of individual constitutional rights would mean promoting a subordinate value, federalism, at the expense of a more fundamental value, the protection of individual rights.[254]

Finally, in the context of suits based upon the Constitution, arguments about protecting the public fisc fail to fully persuade.[255] States must already answer suits for injunctive relief under the *Ex Parte Young* doctrine, and such suits can be more costly than suits for monetary damages.[256] Even if public finances are threatened by suits based upon the Constitution, then at least the cost of unconstitutional state action is borne by the State as a whole, as opposed to private victims.[257]

However, as the *Manning* court recognized with regard to the Contracts Clause claim, *Alden* was not exclusively about the reach of Congress, and it did not exactly signal that the courthouse doors should be thrown open to all claims based upon the Constitution itself. *Alden* reaffirmed the holding[258] and reasoning[259] of *Hans v. Louisiana*, which barred a claim brought pursuant to the Contracts Clause.[260] Furthermore, much of *Alden*'s historical reasoning regarding the intent of the framers on the issue of sovereign immunity had little or nothing to do with Congress.[261]

The result in *Manning*, given *Alden*'s unequivocal approval of *Hans*, is likely a faithful interpretation of how the U.S. Supreme Court would decide the issue. *Hans* was not, however, strictly controlling precedent (because it dealt with a case in federal court, not state court) and *Alden* left the door open to some constitutional claims overcoming sovereign immunity through its approval of *Reich* and its lack of an ironclad rule on the abrogative effect of all federal substantive law.[262]

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254. Berger, *supra* note 89, at 601.

255. *Id.* at 548; William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069, 1082–83 (2000).

256. Berger, *supra* note 89, at 548.

257. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment...was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

258. *See Alden*, 527 U.S. at 732 (arguing that federal law cannot automatically abrogate sovereign immunity in every instance due to *Hans*); *id.* at 754 (stating that *Hans* is precedent for the proposition that suits against nonconsenting States are not properly heard in the courts).

259. *See id.* at 716, 720, 723–25 (adopting *Hans*' interpretation of the original understanding of sovereign immunity and the Eleventh Amendment); *id.* at 727 (citing *Hans* for the argument that the Constitution should not be construed in such a way as to lead to an anomalous result); *id.* at 729 (citing *Hans* for the argument that the Eleventh Amendment merely confirms a presupposition about state sovereign immunity); *id.* at 746 (noting that *Hans* assumed the applicability of sovereign immunity in state court when it found a sovereign immunity bar in federal court).

260. Hans v. Louisiana, 134 U.S. 1, 10 (1890).

261. *See Alden*, 527 U.S. at 715–16 (asserting that state sovereign immunity was established at the time of the ratification of the Constitution); *id.* at 716–19 (surveying the debates surrounding ratification and concluding that the original understanding was that States could not be sued under Article III without their consent); *id.* at 720–27 (explaining the reaction to *Chisholm v. Georgia* and the swift passage of the Eleventh Amendment as evidence that the majority of the Founders believed that the sovereign immunity of the States was intact); *id.* at 741–43 (arguing that the silence of the Founders on the topic of sovereign immunity in state courts is evidence that they never contemplated that such immunity was in doubt).

262. *See id.* at 732 ("We reject any contention that substantive federal law by its own force *necessarily* overrides the sovereign immunity of the States.") (emphasis added). The use of the word "necessarily" might imply that some substantive federal law might override sovereign immunity of its own force. *See* Berger, *supra* note 89, at 535 (stating that the word "necessarily" gives the Court some "wiggle room" to carve out exceptions to the general rule).

The *Manning* court could have ruled that all claims based upon the Constitution, including Contracts Clause claims, may proceed in state court, unimpeded by sovereign immunity. In the end, however, the court chose to abide by a reading of *Hans* that precludes such a holding.[263] The one aspect of this choice that the court failed to fully acknowledge is that it should not have attempted to limit *Alden* with regard to the takings issue. If *Hans* is still good law, then its reasoning should carry over to other claims brought under the Constitution, including takings claims. While there are other, independent reasons why the Takings Clause should abrogate sovereign immunity,[264] the limited scope of *Alden* should not have been used as an argument for such a result.[265]

Of course, individuals who have suffered from a Contracts Clause violation could still seek non-monetary relief through one of the well-established routes around sovereign immunity, such as prospective injunctive relief by way of the *Ex Parte Young* doctrine. Indeed, many Contracts Clause claims proceed in just such a manner.[266]

## V. IMPLICATIONS

The holding of the New Mexico Supreme Court in *Manning* provides some guidance for future litigants seeking monetary damages against the State for constitutional violations. Obviously, claimants will be able to seek monetary damages for Takings Clause claims,[267] and not for Contracts Clause claims.[268] Because of the reasoning used to arrive at these results, it may prove difficult for claimants to seek monetary damages for violations of other constitutional provisions.

The most significant hurdle that *Manning* places before future claimants is that it applies *Alden*-type sovereign immunity to a claim based upon the Constitution itself—namely, the Contracts Clause.[269] This establishes that the scope of *Alden*, at least in New Mexico, is not limited to causes of action created by Congress pursuant to its Article I powers.[270] Any future litigants seeking monetary damages for claims brought directly under the Constitution will have to find a way around *Alden*.

Furthermore, the twin rationales in *Manning* supporting the result that takings suits are not barred by sovereign immunity—abrogation based upon the unique

263. *See* Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶¶ 49–50, 144 P.3d 87, 98.

264. *See* Part IV.A.

265. The court's explanation for the different results was that the Takings Clause contained a remedy for monetary damages, whereas the Contracts Clause contained no such remedy. *Manning*, 2006-NMSC-027, ¶ 50, 144 P.3d at 98. While it is impossible to quibble with such a distinction, the textual differences between the two clauses do not make *Alden* more applicable to one rather than the other. Instead, the court might have explained that *Alden* has something to say about all claims brought under the Constitution, but that the textual guarantee of just compensation allowed the Takings Clause to surmount *Alden*'s sovereign immunity hurdle.

266. *See, e.g.*, *supra* note 66 (listing U.S. Supreme Court Contracts Clause cases where plaintiff sought injunctive relief).

267. *See supra* Part IV.A.

268. *See supra* Part IV.B.

269. *See supra* Part IV.B.

270. *See supra* Part IV.B.

nature of the Takings Clause[271] and abrogation based upon the Due Process Clause[272] —are unlikely to transfer easily to other claims brought under the Constitution.

The *Manning* court found that the Takings Clause has unique attributes[273] that require the abrogation of sovereign immunity and also dismissed the Contracts Clause claim partly on the grounds that it lacks the textual guarantee of a remedy.[274] This reasoning will be difficult to employ in the context of other constitutional claims. Because no other constitutional rights besides the Habeas Corpus Clause have an explicit remedy,[275] claimants will be unable to analogize to that aspect of the Takings Clause. They may be able to argue that other constitutional rights have a similar purpose as the Takings Clause (i.e., the need to check abusive government power),[276] but to complete the analogy they might still need to show that the recovery of monetary damages is necessary to effectuate that purpose.[277]

By not only basing its takings holding upon the unique character of the Fifth Amendment, but also finding a violation of due process, the court may have kept the door open for other plaintiffs to bring constitutional claims based upon a "promised remedy" of compensation. However, those plaintiffs will face the significant hurdle of proving that a remedy for a constitutional violation has been promised by the State of New Mexico, or that monetary relief is the only sufficient remedy for the injury. It is difficult to envision where such cases might arise outside of the takings or tax refund context. Therefore, this alternate route around sovereign immunity will likely be of little assistance to future plaintiffs.[278]

The court's holding in *Manning* has also given the State the opportunity to dictate the procedures to be followed in order to recover for takings.[279] Whether the State accepts the court's offer remains to be seen, but such procedures might have a significant impact on the ability of takings claimants to bring their cases, especially if the constitutional right to a trial by jury does not exist in inverse condemnation cases (which is an open question).[280] In the final analysis, however, the likelihood of such a drastic change to how the State handles takings is probably slim. First, the eminent domain statutes already allow for a trial by jury.[281] Second, the right to a trial by jury has *expanded* in recent decades to allow for juries to hear more issues

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271. *See supra* Part IV.A.2.
272. *See supra* Part IV.A.3.
273. *See supra* Part IV.A.2.
274. *See supra* note 236 and accompanying text.
275. *See supra* note 133.
276. *See supra* note 129 and accompanying text.
277. *See supra* notes 115–122 and accompanying text.
278. One possible scenario might be in the context of contracts with the State. When parties contract with the State, especially for money, they are essentially being "promised" something akin to the promised remedy from *Reich*. *See supra* notes 200–205 and accompanying text. However, the State has already waived sovereign immunity for actions based upon written contracts. NMSA 1978, § 37-1-23 (1976) (waiving sovereign immunity for contract actions against the State based upon written contracts only). A due process argument could be made that the State should have to answer for promises made in oral contracts as well. The counterargument to this position is that the Due Process Clause should not be used to constitutionalize every contract action involving the State.
279. *See supra* notes 160–163 and accompanying text.
280. *See supra* notes 168–169.
281. NMSA 1978, § 42A-1-21(A) (1981); Santa Fe S. Ry. v. Baucis LLC, 1998-NMCA-002, ¶ 5, 952 P.2d 31, 32.

in eminent domain cases.[282] Thus, even though the State may have the power to alter the procedure used in takings cases, there may not be any political willpower to do so.[283]

Finally, the court's treatment of the Contracts Clause claim also answers a question about the scope of *Alden* in New Mexico. While language elsewhere in the opinion suggests that *Alden* is limited to the specific question of whether Congress can use its Article I powers to abrogate sovereign immunity, the *Manning* court's holding that *Alden* bars a state court Contracts Clause claim makes *Alden* a far more potent precedent, presumptively barring all claims against the State, constitutional or otherwise, unless they fall within an express exception to sovereign immunity. Although this holding is likely a faithful interpretation of *Alden*, it essentially forecloses future arguments by parties attempting to limit the scope of *Alden* to claims created under Congress's Article I powers.

## VI. CONCLUSION

In *Manning*, the New Mexico Supreme Court was faced with whether state sovereign immunity, as explained in *Alden v. Maine*, covered claims brought under the Takings Clause and the Contracts Clause. In holding that *Alden* blocked the Contracts Clause claim, the court expanded the scope of *Alden* to include claims brought under the Constitution itself. Additionally, because the court found that the Takings Clause abrogates sovereign immunity based upon its unique attributes, particularly the existence of a textually guaranteed remedy, future litigants will face challenges in surmounting sovereign immunity with constitutionally based claims for monetary damages. The court did provide an independent rationale for an abrogation of sovereign immunity based upon the Due Process Clause, but the theory employed by the court has heretofore only been employed in tax refund cases and is unlikely to have wide application. In dicta, *Manning* also suggests that the State has broad discretion when structuring the procedures employed in bringing takings claims, although drastic changes to takings procedures may be politically unlikely in the near future.

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282. *Santa Fe S. Ry.*, 1998-NMCA-002, ¶¶ 8–10, 952 P.2d at 33–34 (holding that a 1981 statute expanded the role of the jury in eminent domain situations to decide all issues, whereas the prior statute only permitted the jury to decide compensation).

283. After the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), there was a fear that the opinion invited governments to condemn low-cost property only to transfer it to other private individuals who would pay more taxes. *E.g.*, *Kelo*, *id.* at 501 (O'Connor, J., dissenting). In response to the *Kelo* decision, the New Mexico State Legislature has passed legislation restricting the ability of local governments to condemn property for economic development purposes. H.B. 393, 48th Leg., Reg. Sess. (N.M. 2007).