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## The Alden Trilogy: Praise and Protest

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# THE ALDEN TRILOGY: PRAISE AND PROTEST

ROGER C. HARTLEY\*

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## I. INTRODUCTION

The 1998 Supreme Court Term was relatively unremarkable<sup>1</sup> until a final day blitz in which the Court announced the *Alden Trilogy*, named for *Alden v. Maine*,<sup>2</sup> the lead case in a trio of federalism cases. Decided by identical 5-4 votes, these cases immunize state governments from citizen damage suits alleging a violation of federal rights. *Alden v. Maine* shields states from such private damage actions brought in state court.<sup>3</sup> *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank (College Savings Bank I)*, provides states immunity from patent infringement suits brought in federal court.<sup>4</sup> Similarly, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board (College Savings Bank II)* insulates states from private damage actions brought in federal court alleging unfair competition under the federal trademark law.<sup>5</sup>

This "Tuesday Trilogy"<sup>6</sup> declared portions of three federal statutes unconstitutional,<sup>7</sup> overturned one thirty-five-year-old decision of the Court,<sup>8</sup> reversed the outcome in another,<sup>9</sup> and

1. The Court closed on the earliest end-of-term date in thirty years. See Linda Greenhouse, *High Court Used Term to Favor States' Rights*, COM. APPEAL, Memphis, June 28, 1999, at A2. It adjudicated 75 signed decisions, half the number typically decided in the 1980s. See Susanna Sherry, *Some Targets Were Larger Than Others*, WASH. POST, July 4, 1999, at B4. The Court avoided deciding any of the hot-button issues that comprise the so-called "culture war" of the late Twentieth Century—race, religion, gay rights, abortion, right to die, etc. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42-43 (1991) (describing recent societal disputes as a "culture war").

2. 119 S. Ct. 2240 (1999).

3. *Id.* (dismissing private damage action brought by state employees in state court alleging violations of the overtime provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994) [hereinafter FLSA]).

4. 119 S. Ct. 2199 (1999) [hereinafter *College Sav. Bank I*].

5. 119 S. Ct. 2219 (1999) [hereinafter *College Sav. Bank II*].

6. The phrase originally was coined by Susanna Sherry. See Sherry, *supra* note 1 (taking advantage of an alliteration made possible by the coincidence that the three cases were all decided on Tuesday, June 23, 1999).

7. *College Sav. Bank I*, 119 S. Ct. 2199, overturned two sections of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a) (1994). *College Sav. Bank II*, 119 S. Ct. 2219, struck down portions of the Trademark Remedy Clarification Act (TRCA), Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified at 15 U.S.C. § 1122 (1994) and amendments to 15 U.S.C. §§ 1114, 1125, 1127 (1994)). *Alden*, 119 S. Ct. 2240, struck down § 216 of the FLSA, 29 U.S.C. § 216 (1994) (creating federal jurisdiction to hear damage actions against the state in state court).

8. See *College Sav. Bank II*, 119 S. Ct. at 2222 (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)).

9. See *Alden*, 119 S. Ct. at 2257-58 (1999) (reversing the outcome in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991)); see also discussion *infra*

precipitated a forty-five-minute "scene of extraordinary drama"<sup>10</sup> at the Court the morning the cases were announced from the bench. Each Justice who wrote a majority opinion read excerpts from it, as did the authors of the various dissenting opinions. Several Justices digressed from text during their oral presentations.<sup>11</sup> As one account put it, the exchange was "[n]ot exactly a street brawl episode of 'The Jerry Springer Show,' but this was about as close to high drama as it gets in the distinguished, white-columned building that most Americans equate with the essence of justice."<sup>12</sup> Another report observed that "[t]he rhetorical volleys . . . held the audience of tourists and government lawyers spellbound."<sup>13</sup> The opinions' strident<sup>14</sup> and sometimes sarcastic<sup>15</sup> language revealed a deep

notes 84-88.

10. Linda Greenhouse, *Court's Votes Favor States; Justices Deliver Blow Against Federalism*, L.A. DAILY NEWS, June 24, 1999, at 2, available in 1999 WL 7027061.

11. For example, from the bench, Justice Stevens characterized the majority's vision of sovereign immunity as a "mindless dragon that indiscriminately chews gaping holes in federal statutes," an approach that returns the country to that "brief period of confusion and crisis when our new nation was governed by the Articles of Confederation." *Id.* Justice Souter added that the Court has created "a very peculiar state of affairs" for those wanting to enforce their legal rights against a state government. Richard Carelli, *Divided Court Boosts States' Power: Justices Split 5-4; Blow Seen for Rights of Individuals, Firms*, BOSTON GLOBE, June 24, 1999, at A3.

12. Warren Richey, *How Court Keeps Its Squeaky Clean Image*, CHRISTIAN SCI. MONITOR, June 30, 1999, at 2. The intensity of disagreement in the *Alden Trilogy* decisions contrasts sharply with the Court's normal posture as a "beacon of dignity and civility." *Id.* (citing BARBARA PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT'S IMAGE IN THE AMERICAN MIND* (1999)).

13. Greenhouse, *supra* note 10. As another observer put it, "[t]he three cases were a bit convoluted, but announcing them together created a sense of drama and momentousness." Editorial, *Putting the Brakes on Federal Controls*, ORANGE COUNTY REG., June 29, 1999, at B6.

14. One reader read in them a "bitterly divided Supreme Court." *The Supreme Court: Activism in Different Robes*, ECONOMIST, July 3, 1999, at 22. For example, Justice Souter wrote what has been characterized as a "blistering 58-page dissent" in *Alden*, Richey, *supra* note 12, in response to a "passionately voiced" 51-page majority opinion by Justice Kennedy, *Civil Move on States' Rights*, CHRISTIAN SCI. MONITOR, July 6, 1999, at 8. Justice Souter concluded that "[i]t would be hard to imagine anything more inimical to the republican conception which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own." *Alden*, 119 S. Ct. at 2289 (Souter, J., dissenting).

In a wonderful historical twist, Justice Souter, addressing a group of high school civics teachers two days before the announcement of the *Alden Trilogy*, urged them to remind their students that although the members of the Court may at times disagree, they all genuinely respect one another. See Richey, *supra* note 12. One wonders if Justice Souter were engaging in preemptive damage control.

15. See *College Sav. Bank II*, 119 S. Ct. at 2232 (opinion of Scalia, J.) ("Justice Breyer reiterates (but only in outline form, thankfully) the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a

division within the Court as the two sides attempted to describe their irreconcilable understanding of the founding generation's intent regarding state sovereign immunity.

The general media appraisal of the *Alden Trilogy* has emphasized two themes: the interpretive process used by the Court and the political power redistribution the *Trilogy* achieved. Opponents, primarily, cite process. They lament the absence of textual support in the majority's opinion<sup>16</sup> or criticize the majority's historical understanding.<sup>17</sup> Regarding the *Trilogy's* redistribution of political power between the federal and state governments, the *Trilogy* has received strong praise from those who delight in the states' new-found

degree of repetitive detail that has despoiled our northern woods."); *id.* (arguing that the dissenters have adopted an approach to stare decisis that is "perverse" and "backwards—unless, of course, one wishes to use it as a weapon rather than a guide, in which case any old approach will do"); *Alden*, 119 S. Ct. at 2289 (Souter, J., dissenting) (concluding that the majority is "[a]pparently beguiled by Gilded Era language describing private suits against States as 'neither becoming nor convenient'" (citing the majority opinion, *id.* at 2263 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887))).

16. See, e.g., Erwin Chemerinsky, *Perspective on Justice: High Court Wrongly Lets States Off Hook*, L.A. TIMES, June 25, 1999, at B7 ("There is no provision [in the Constitution] that limits the ability to sue a state in state court or that prevents a state from being sued in federal court by its own citizens. The high court simply invented a new right for state governments."); ECONOMIST, *supra* note 14, at 22 ("In the absence of even a textual hint in the constitution, the court discerned from the constitutional 'ether' that states are immune from individual lawsuits." (quoting Professor Laurence Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School)); Anthony Lewis, Editorial, *Overreaching Justices Reshape American Government*, GREENSBORO NEWS & REC., July 2, 1999, at A15, available in 1999 WL 6951723 ("[The] majority changed the structure of American government [and] did so without a word of support in the text of the Constitution."); cf. Gary Rosen, *Triangulating the Constitution*, 108 COMMENTARY, July 1, 1999, at 59, 64 ("[C]ontroversies over the Constitution since the New Deal have hinged far less on the document's words than on the fierce contest between rival schools of interpretation.").

17. See, e.g., ECONOMIST, *supra* note 14, at 23 (describing the majority's historical argument as "'strained, even silly'" because "[t]he concept of states' sovereignty . . . was almost useless for Americans from 1776. They decided that sovereignty lay with the American people, not with any particular government entity" (quoting Jack Rakove, Historian at Stanford University and author of *Original Meanings*)); *Id.* at 23 (characterizing the Court's opinion in *Alden* as "a long excursion into historical reconstruction"); Editorial, *Court Ruling Wrongly Strips Citizen Remedy*, NEWS TRIB. (Tacoma), June 27, 1999, at B6.

The majority relied on . . . sovereign immunity [doctrine] taken from the American Colonial past. It has its roots in England and prevented vassals from suing their lords. The doctrine—an obsolete, pro-royalty relic—has been carried over to mean that citizens can't sue states, no matter how egregious or negligent state's conduct may be, even if Congress grants citizens the power to sue.

*Id.*

freedom from federal control that these cases seem to provide.<sup>18</sup> Others object to what they perceive as an untoward judicial activism manifested in these cases,<sup>19</sup> particularly what opponents conclude is an arrogant disregard for Congress and the majority rule foundations of our constitutional system.<sup>20</sup>

In this Article, I discuss the *Trilogy's* interpretive process and its redistribution of political power, but do not linger on either. This Article is written in praise of the *Alden Trilogy*, but praise coupled with protest. I make three essential points. First, the *Trilogy* deserves praise as a pragmatic masterpiece. Through it,

18. See, e.g., Michael S. Greve, *Federalism Is More Than States' Rights*, WALL ST. J., July 1, 1999, at A22.

A social-issues federalism would permit state and local experimentation with variegated arrangements. This would diffuse national, all-or-nothing conflicts and, at the margin, allow citizens to sort themselves into the jurisdictions most to their liking. Such a real, competitive federalism presupposes firm, judicially enforceable limits on Congress. Only when Congress is barred from imposing one-size-fits-all solutions will the states have to compete for their citizens' business, talents, assets, and affections.

*Id.*; Martin Morris Wooster, *Let 50 Flowers Bloom*, AM. ENTER., July 1, 1999, at 85 (reviewing MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* (1999))

[S]ix decades after federalism fell victim to the nationalist ambitions of the New Deal, it may yet be possible to establish decentralized competitive political institutions. . . . [R]eturning power to the states might defuse some of today's most potent culture wars by offering both sides the opportunity to achieve their goals in some places. . . . Freed from Washington's red tape, the states can be flexible, creative, and innovative, which means they can do a better job of many governmental functions than Washington can. 'An integrated national economy . . . needs a muscular federal government about as much as an increasingly complex global economy needs a United Nations with teeth.'

*Id.* (quoting MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 150 (1999)).

19. The majority has been characterized as a "determined band of conservative justices" possessing a "zeal to tilt the balance of political power away from Washington towards the states [who have] embarked on a venture as detached from any constitutional moorings as was the liberal Warren Court of the 1960s in its most activist mood." *ECONOMIST*, *supra* note 14, at 2; see also Chemerinsky, *supra* note 16 ("[T]he decisions are the height of conservative judicial activism . . ."); David G. Savage, *Conservatives Rule Supreme: Justices Moving Ahead via the Past*, SUN-SENTINEL (Ft. Lauderdale), June 28, 1999, at 1A, available in 1999 WL 20267598 ("This is the first time in more than 60 years where we see an aggressive conservative activism. . . . They have shown themselves willing to overturn decisions made by the democratic process, and they are prepared to do it without any basis in the text of the Constitution." (quoting Louis M. Seidman, Professor of Law at Georgetown University)).

20. See Richey, *supra* note 12 ("I think this [C]ourt is masquerading as a [C]ourt that is doing what the people want, but it is not a democratic court. It is overruling the people in many respects . . . [and is] at least as radical as the Warren Court." (quoting Stephen Gottlieb, Professor of Law at Albany Law School)).

the Court shrewdly avoided a constitutional quagmire that easily could have created a federalism crisis.

Second, I argue that the *Alden Trilogy* is an exemplar of misdirection. Here I render reluctant praise, like that given to an opposing baseball team's dramatic double-play. Though one dislikes the outcome, one cannot deny the skill just witnessed. In this regard, I show that through its deft deployment of state sovereign immunity doctrine, the Supreme Court has enhanced its own power as well as that of the federal Executive Branch—to the detriment of Congress's lawmaking power. Moreover, although the *Trilogy* focuses on Congress's remedial authority, it thwarts Congress's substantive lawmaking capacity.

Third, I show that the *Trilogy* has a dark side. Today, no individual can bring a damage action in *any* court against an unconsenting state to enforce federal statutory rights enacted pursuant to Congress's Article I powers.<sup>21</sup> This situation creates a profoundly disquieting enforcement gap that threatens to undermine the rule of law values in our constitutional scheme, particularly the principle that for every right there ought to be a remedy.

To situate this Article's praise and protest of the *Alden Trilogy* doctrinally, I begin with an abridged summary of the federalism developments of the past several decades, developments that preordained the confrontation that resulted in the *Trilogy*. Next, I describe the holdings of each *Trilogy* case, including the interpretive frameworks adopted, and identify unresolved issues generated by these holdings. I then turn to my principal undertaking: consideration of 1) how the *Trilogy* pragmatically avoided a constitutional crisis; 2) how the three cases masterfully invite attention in one direction while moving the law in another; and 3) how these cases raise rule of law concerns by creating a disjunction between Congress's substantive and remedial authority.

## II. THE NEW FEDERALISM—A CREATURE OF THE 1990S

Even though the story has been reported widely, it is worth pausing to review the major developments that led to the

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21. The Court treats statutes validly enacted wholly or in part pursuant to Congress's power under Section 5 of the Fourteenth Amendment. See discussion *infra* notes 63, 139-55 and accompanying text.

decisions in the *Alden Trilogy*. In 1971, in *Younger v. Harris*,<sup>22</sup> the Burger Court reinvigorated the states' rights values in the Constitution when it denied a request to enjoin a pending state court criminal proceeding, notwithstanding the federal plaintiffs' allegation that the underlying state criminal statute was facially unconstitutional. Justice Black, writing for the majority in *Younger*, rejected the unarticulated assumption of these requests for injunctive relief: that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively. That assumption, he argued, is disrespectful of the states and disruptive of "Our Federalism," described as the conviction that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."<sup>23</sup>

By 1976, the Court's composition had changed sufficiently to apply this new federalism in a most dramatic way. Overruling precedent,<sup>24</sup> the Court decided *National League of Cities v. Usery*,<sup>25</sup> holding that Congress lacked authority to impose the requirements of the Fair Labor Standards Act (FLSA)<sup>26</sup> on state and local governments. As Justice Powell later explained this development, "federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the states and the federal government, a balance designed to protect our fundamental liberties."<sup>27</sup> The *National League of Cities* doctrine developed into a complex weighing of the respective interests of the states and the federal government.<sup>28</sup> The Court balanced the cost of exempting states

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22. 401 U.S. 37 (1971).

23. *Id.* at 44.

24. See *Maryland v. Wirtz*, 392 U.S. 183 (1968).

25. 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

26. 29 U.S.C. §§ 201-219 (1994).

27. *San Antonio Metro. Transit Auth. v. Garcia*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

28. At its most developed stage, the *National League of Cities* doctrine immunized the states from commerce power-based legislation when four conditions were satisfied. First, the federal statute at issue must regulate "the 'States as States.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 287 (1981) (quoting *National League of Cities*, 426 U.S. at 854). Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 845) (alteration in original). Third, state compliance with the federal obligation must "directly impair [the states'] ability 'to structure integral operations in areas of traditional governmental functions.'" *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 852). Finally, the relation of state and federal interests must not be such



from the reach of federal law<sup>29</sup> against the injury done to the states if forced to comply with federal enactments.<sup>30</sup> A key consideration became whether "the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"<sup>31</sup>

In *San Antonio Metropolitan Transit Authority v. Garcia*,<sup>32</sup> decided in 1985, the Court again changed course, reversing *National League of Cities*. A 5-4 majority concluded that *National League of Cities* and its progeny were unsound in principle and unworkable in practice. The majority reasoned that the "safeguards inherent in the structure of the federal system" adequately protect states' interests.<sup>33</sup> Writing for the dissent in *Garcia*, Justice Powell rejected the proposition that federal political officials, invoking the commerce power, could be trusted to be the arbiters of the structural limitations on their authority.<sup>34</sup> Justice Kennedy subsequently sounded that same

that "the nature of the federal interest . . . justifies state submission." *Id.* at 288 n.29 (1981) (citing *National League of Cities*, 426 U.S. at 852-53).

29. A central inquiry with respect to the federal interest was whether exempting states from federal regulation would undermine the goals of the federal program. See *Hodel*, 452 U.S. at 282 (holding national surface mining standards are necessary to insure competition among states). Also considered was how closely the challenged action implicates the central concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the states. See *EEOC v. Wyoming*, 460 U.S. 226, 244-45 (1983) (Stevens, J., concurring); *FERC v. Mississippi*, 456 U.S. 742, 757 (1982) ("[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy. . . ."); *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 688 (1982) ("Congress long ago concluded that federal regulation of railroad labor services is necessary to prevent disruptions in vital rail service essential to the national economy.").

30. See *National League of Cities*, 426 U.S. at 846-51.

31. *Transportation Union*, 455 U.S. at 684 (1982) (quoting *National League of Cities*, 426 U.S. at 852).

32. 469 U.S. 528 (1985).

33. *Id.* at 552; see also *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *Garcia*, 469 U.S. at 550-51 (arguing that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress," and that this goal was furthered by vesting the states "with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections" and "more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State.").

34. See *Garcia*, 469 U.S. at 567 (Powell, J., dissenting); see also *Katzenbach v. Morgan*, 384 U.S. 641, 668, 671 (1966) (Harlan, J., dissenting) (warning against undue reliance on the structural protections inherent in the federal system, noting that deference to Congress's work is warranted when "legislative facts" are built on "empirical foundations" and are the product of a legislative process

battle cry, most notably in his concurring opinion in *United States v. Lopez*.<sup>35</sup> The national political process, he argued, inherently is unreliable as a source of protection of the states' sovereignty interest.<sup>36</sup> In a short dissent in *Garcia*, Justice Rehnquist protested that the majority had rejected a salutary principle "that will, I am confident, in time again command the support of a majority of this Court."<sup>37</sup>

Chief Justice Rehnquist's prediction has begun to come to fruition. *Garcia* has not been reversed explicitly, but the years subsequent to *Garcia* have witnessed increased reliance on a federalist interpretive framework in the Court's decisions. Richard Fallon's exquisite treatment of the subject explains that under the regime of this framework, "states emerge as sovereign entities against which federal courts should exercise only limited powers, and state courts, which are presumed as fair and competent as federal courts, stand as the ultimate guarantors of constitutional rights."<sup>38</sup> This effort to reorient constitutional law has manifested itself widely<sup>39</sup> but no more

punctuated by serious and earnest reflection and consideration of the evidence, but is not warranted when congressional conclusions amount to unsupported "ipse dixit").

35. 514 U.S. 549, 568-83 (1995) (Kennedy, J., concurring). In *Lopez*, the Court found constitutional limits on Congress's Commerce Clause power to protect the regulatory prerogatives of state and local governments, noting *inter alia* that Congress had failed to make any findings that the regulated activity (the presence of handguns near schools) has an adverse effect on interstate commerce. See *id.* at 562-63 & n.4.

36. See *id.* at 577-78 (Kennedy, J., concurring). Noting that federalism presents the Court with the most difficult cases of constitutional structure, Justice Kennedy reasoned that, although the political branches have a "sworn obligation" to uphold the "constitutional design," the "absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role." *Id.* at 549 (Kennedy, J., concurring); see also *INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power. . ."); Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 500 n.22 (1997) (speculating that recent federalism cases "may be informed by a mistrust of the institutional capacity for self-restraint of the political branches (and of the lower federal courts)").

37. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting).

38. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1143-44 (1988). Fallon points out, however, that post-1970s federal courts law also is marked by decisions that rely on what he calls a "Nationalist" set of preconceptions and preferences. See *id.* at 1148. He argues that this Federalist-Nationalist duality is not new but "exhibits itself most powerfully in the modern era in . . . the seminal Federalist case of *Younger v. Harris*, 401 U.S. 37 (1971), and the . . . Nationalist decision in *Mitchum v. Foster*, 407 U.S. 225 (1972)." *Id.* at 1168-69.

39. See *id.* at 1172-87 (discussing the penetration of the federalist interpretive

profoundly than in the law of state judicial immunity.

Literally read, the Eleventh Amendment<sup>40</sup> strips federal courts of Article III diversity jurisdiction when a state is a defendant.<sup>41</sup> It does not speak to federal question jurisdiction. For at least one hundred years, however, the Court has held that states' protections against federal jurisdiction is much broader than the mere text of the Eleventh Amendment. Since *Hans v. Louisiana*,<sup>42</sup> the Court has "reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial review power of the United States.'"<sup>43</sup> Accordingly, the Eleventh Amendment bars federal courts from hearing, among other things, cases against a state brought by one of its own citizens asserting a federal right.<sup>44</sup>

framework in the law regulating res judicata and collateral estoppel as well as habeas corpus); see also *Printz v. United States*, 521 U.S. 98 (1997) (holding that Congress may not "commandeer" local officials to help administer federal statutes regulating handguns); *New York v. United States*, 505 U.S. 144, 161 (1992) (holding the take-title provision of a federal regulatory program amounted to a congressional attempt to "commandeer[r] the legislative processes of the States" because it forced the state to either pass legislation or take title to nuclear waste (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))). The Court has contained this partial return to *National League of Cities* by repeated assurances that Congress retains authority to regulate the states as part of a program that affects states and private parties alike. See *New York*, 505 U.S. at 160.

40. U.S. CONST. amend. XI ("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.").

41. The Eleventh Amendment reversed *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that the Supreme Court had original jurisdiction to hear a diversity action brought against a state based on a state law cause of action. See *id.* at 425-27. The Amendment's literal scope also could eliminate federal judicial power to hear federal question suits brought by a diverse plaintiff. See discussion *infra* note 48.

42. 134 U.S. 1 (1890).

43. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans*, 134 U.S. at 15).

44. See *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." (quoting *Edelman v. Jordan*, 515 U.S. 651, 662-63 (1974))). Other applications sever the Eleventh Amendment from its text by interpreting it to protect states from suit in federal court. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (when sued by an Indian Tribe); *Ex parte New York*, 256 U.S. 490 (1921) (in admiralty suits); *Monaco v. Mississippi*, 292 U.S. 313 (1934) (suits brought by foreign states).

Conversely, the Eleventh Amendment is construed not to bar certain suits. See *Kansas v. Colorado*, 206 U.S. 46 (1907) (suits against states brought by other states); *United States v. Mississippi*, 380 U.S. 128 (1965) (suits brought by the

A minority on the Court mounted a determined, but ultimately unsuccessful, campaign during a short period in the mid-1980s to return the Eleventh Amendment more closely to its textual groundings.<sup>45</sup> This effort coincided with an extensive body of legal scholarship concluding that *Hans* had been decided incorrectly.<sup>46</sup> The arguments opposing *Hans* metamorphosed several times, eventually emerging as three approaches:<sup>47</sup> the literal,<sup>48</sup> the diversity,<sup>49</sup> and the abrogation

United States); *United States v. Texas*, 143 U.S. 621 (1892) (same); *Nevada v. Hall*, 440 U.S. 410 (1979) (private actions brought in state court of another state on a state law cause of action).

The Eleventh Amendment does not apply to damage actions in federal courts against state officers sued in their individual capacities. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); see also discussion *infra* notes 306-97 and accompanying text. In addition, the Eleventh Amendment does not apply to suits seeking injunctions against state officers in federal court. See *Ex parte Young*, 209 U.S. 123 (1908) see also discussion *infra* notes 273-305 and accompanying text.

45. See discussion *infra* note 50 and accompanying text.

46. See Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1693-1703, 1722-25 (1997) (discussing the literature advancing competing interpretations of the Eleventh Amendment); cf. *id.* at 1722-23 (arguing that “[t]he doctrinal payoff for [diversity theorists’] historical scholarship has been small,” and that their claims have been limited to demonstrating that the Eleventh Amendment “was not intended to withdraw ‘arising under’ jurisdiction over suits against the states” but was “indeterminate” with respect to whether “the Framers of Article III intended to extend the federal judicial power to suits against the states based on federal law in the first place”).

47. See James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1273, 1274 n.16 (1998).

48. As its name suggests, the literal model accepts that Congress may not create federal diversity jurisdiction for suits against states nor provide for “arising under” jurisdiction against a state in suits brought by a diverse party. See *id.* at 1273 n.15 (citing proponents); see also Vázquez, *supra* note 46, at 1698 (explaining that under this view, “the Amendment would apply to suits ‘arising under’ federal law, but only if the suit was brought by a citizen of a different state or of a foreign state”). Accordingly, “[u]nder the literalist account, only in-state plaintiffs may invoke federal question jurisdiction in suits against the state.” Pfander, *supra* note 47, at 1273 n.15. At one point, this view was championed by Justice Brennan, who subsequently abandoned it. See *Employees of Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting). Justice Brennan abandoned this in favor of the abrogation view of the Eleventh Amendment. See discussion *infra* note 50.

49. Unlike the literal model, the diversity model acknowledges that states have a constitutional sovereign immunity from all diversity jurisdiction suits brought in federal court but not otherwise. See Vázquez, *supra* note 46, at 1696-97 & n.62 (citing authority). Thus, Congress creates no constitutional breach in providing for federal question jurisdiction for suits brought against a state, even if brought by a diverse plaintiff. See Pfander *supra* note 47, at 1273 n.15; see also John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 48 n.9 (1998) (citing the leading diversity theorists and concluding that they represent the “dominant academic position”); *id.* at 48 nn.10-11 (citing “rebuttals and contributions from other perspectives”).

models.<sup>50</sup>

Opposition to *Hans* never gained majority support at the Court.<sup>51</sup> However, in *Pennsylvania v. Union Gas Co.*<sup>52</sup> a majority held that Congress possesses authority to abrogate state sovereign immunity from suit in federal court through exercise of the Commerce Power.<sup>53</sup> To the extent this abrogation power is extended to other Article I powers, states would be subject to private damage suit in federal court on federal claims virtually whenever Congress so determined. This would effectively end the *Hans* era.<sup>54</sup> In 1996, the Court overruled *Union Gas* in

50. See Vázquez, *supra* note 46, at 1696-98. The abrogation model has two branches that need to be differentiated and clarified. The first, and less solicitous to states' sovereign immunity rights, argues that the Eleventh Amendment merely confirms that Article III does not abrogate state sovereign immunity but the Amendment does not bar Congress from abrogating it. Extended to its broadest application, this view would seem to permit Congress to provide for diversity jurisdiction in federal court notwithstanding the language of the Eleventh Amendment. On this view, the state sovereign immunity that survived the ratification of the Constitution is a common law immunity. See Vázquez, *supra* note 46, at 1696 & n.58 (citing proponents of this view). The second branch, a close variant but more protective of states' interests, holds that Congress may not create federal diversity jurisdiction for suits against states but otherwise states enjoy a common law sovereign immunity that acts as a constitutional default, an immunity Congress may abrogate. See *id.* at 1697-98. By the mid-1980s, four members of the Court had adopted this variant of the abrogation model. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 261-63, 301 (1985) (Brennan, J., dissenting). Professor Vázquez argues that "it seems awkward to call it an 'immunity' at all if Congress has the power to withdraw it. Such an 'immunity' would operate merely as a presumption that generally applicable [federal] laws have not been made applicable to the states." Vázquez, *supra* note 46, at 1697-98.

51. In *Welch v. Texas Dep't of Pub. Transp.*, 483 U.S. 468 (1987), the Court was evenly split. Justice Scalia concurred without agreeing or disagreeing with the Brennan view. See *id.* at 495-96 (Scalia, J., concurring in part and concurring in judgment). Subsequently, Justice Scalia rejected this view and voted to uphold *Hans* in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part).

52. 491 U.S. 1 (1989).

53. In the Eleventh Amendment cases of the mid-1980s discussed above, the Brennan bloc acquired a fifth vote from Justice White who agreed that the Commerce Clause so empowered Congress, but Justice White was unwilling to join Justice Brennan's lead opinion in *Union Gas*, making that a plurality opinion. See *Union Gas*, 491 U.S. at 45 (White, J., concurring in judgment in part and dissenting in part).

54. See *id.* at 36 (Scalia, J., dissenting) ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all."). For an argument that the combination of *Union Gas* and the clear statement rule of *Scanlon*, 473 U.S. 234, represents a "subconstitutional judicial compromise" that preserves Congress's abrogation authority but makes immunity the default and requires Congress to consider the federalism implications directly, see Daniel J. Cloherty, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1307-08 (1994).

*Seminole Tribe v. Florida*.<sup>55</sup> In *Seminole Tribe*, the Court held that state sovereign immunity from suit in federal court is a constitutional, not common law, immunity, which is beyond the reach of Congress's abrogation authority through exercise of its Article I powers.<sup>56</sup>

*Seminole Tribe* thus created a gap between Congress's substantive and remedial authority.<sup>57</sup> The search to preserve state accountability to federal law in the face of the remedial limits *Seminole Tribe* imposes soon concentrated on seven alternatives: (1) consent;<sup>58</sup> (2) suit against units of local government;<sup>59</sup> (3) suit by the federal government;<sup>60</sup> (4) prospective relief;<sup>61</sup> (5) damage actions against state officers;<sup>62</sup>

55. 517 U.S. 44 (1996). *Seminole Tribe* not only affirmed *Hans* but extended it. In *Hans*, 134 U.S. 1, the plaintiff invoked general federal question jurisdiction to raise a constitutional challenge to the repudiation of certain state bonds. Congressional abrogation of state sovereign immunity, the issue in *Seminole Tribe*, was not at issue in *Hans*.

56. 517 U.S. at 72-73. The litigation in *Seminole Tribe* arose out of a dispute under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994), 18 U.S.C. §§ 1166-1168 (1994), enacted pursuant to the Indian Commerce Power, but its holding applies to all of Congress's legislative powers. See *Seminole Tribe*, 517 U.S. at 72-73.

57. *Garcia* had held that the Tenth Amendment imposes no substantive limitation on Congress's regulatory authority under the Commerce Clause to regulate states as states. See discussion *supra* notes 32-33 and accompanying text. But see the discussion about subsequent limits placed on Congress's substantive authority, *supra* note 39. The Court's Eleventh Amendment cases, especially *Seminole Tribe*, deny Congress the authority to provide for private damage remedies against the states in federal court to enforce the very rights and duties *Garcia* entrusts Congress to create.

58. Sovereign immunity bars suit in federal court only in the absence of consent. See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding that a state may consent to jurisdiction, and thereby waive immunity, by "express language" or by "overwhelming implication[]"). The federal government may encourage consent by conditioning the grant of a federal gratuity on states consenting to suit, but this option has limits. See discussion *infra* note 237.

59. The Eleventh Amendment applies to the states but not to its local political subdivisions. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984) ("[T]he Eleventh Amendment does not apply to 'counties and similar municipal corporations.'" (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977))); discussion *infra* notes 238-52 and accompanying text.

60. Sovereign immunity does not bar suits in federal court by the United States to enforce federal rights against the states. See *United States v. Mississippi*, 380 U.S. 128, 136-38 (1965) (holding state sovereign immunity does not apply to suits against the states in federal court brought by the federal government or its agencies); *United States v. Texas*, 143 U.S. 621, 643-46 (1892) (same); discussion *infra* notes 253-58 and accompanying text.

61. Sovereign immunity does not bar private party action in federal court against state officers in their official capacity to obtain prospective relief from continuing violations of a federal statute. See *Edelman*, 415 U.S. at 664; *Chavez v.*

(6) enforcement of Section 5-based legislation;<sup>63</sup> (7) suit in state court;<sup>64</sup>

The *Alden Trilogy* addressed the last two alternatives: suits against a state in state court to enforce federal rights and abrogation of state sovereign immunity from suit in federal court through Congress's exercise of power under Section 5 of the Fourteenth Amendment. The *Alden Trilogy* is important because it eliminated the first and substantially restricted the second.<sup>65</sup>

### III. THE ALDEN TRILOGY: THE HOLDINGS, INTERPRETIVE FRAMEWORKS, AND UNRESOLVED QUESTIONS

#### A. *Alden v. Maine: A State's Sovereign Immunity in Its Own Courts*

Until quite recently, federal courts scholars did not concentrate on the question of Congress's power to require state courts to hear federal claims against state governments.<sup>66</sup> Before *Seminole Tribe* in 1996, it seemed Congress could abrogate state sovereign immunity in federal court through exercise of its Article I powers, so there seemed no pressing need to consider state courts as alternative forums.<sup>67</sup> Secondly,

Arte Publico Press, 157 F.3d 282, 291 (5th Cir. 1998) (finding that, even if copyright claim cannot be brought against a state in federal court because Congress lacks Section 5 authority to enact the copyright laws, "[t]he *Ex parte Young* doctrine [209 U.S. 123 (1908)] permits suits for prospective injunctive relief."); *Armstrong v. Wilson*, 942 F. Supp. 1252, 1263-64 (N.D. Cal. 1996) (granting prospective relief against state official sued in official capacity for violating the ADA); discussion *infra* notes 273-305 and accompanying text.

62. Sovereign immunity does not bar private party damage actions in federal court against state officers sued in their individual capacities. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); discussion *infra* notes 306-97 and accompanying text.

63. Congress retains authority to abrogate state sovereign immunity from suit in federal court pursuant to its power under Section 5 of the Fourteenth Amendment to enforce the provisions of that amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). However, there are restraints on Congress's use of this authority. See *Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("[T]here must be a congruence between the means used and the ends to be achieved."); discussion *infra* notes 143-50 and accompanying text.

64. An open question remained after *Seminole Tribe* whether state sovereign immunity bars private damage suits against a state in its own courts to enforce federal rights. See discussion *infra* notes 65-138 and accompanying text.

65. See *infra* notes 223-397 and accompanying text for a discussion of the remaining alternatives.

66. See *Vázquez*, *supra* note 46, at 1695 n.56 (demonstrating that revisionist scholars devoted little attention to whether state sovereign immunity is immunity from suit in federal court only or immunity from damage liability in state and federal court).

67. See discussion *supra* notes 52-54 and accompanying text.

there seemed to be little reason to explore the availability of state courts to enforce federal rights because federal courts seemed preferable.<sup>68</sup> Accordingly, few scholars paid heed to the tantalizing dicta in several Supreme Court decisions, pre-dating *Alden*, suggesting that a state could not be sued in its own courts to enforce federal rights without its consent.<sup>69</sup>

In 1997, Professor Carlos Manuel Vázquez published an important article that brought the question to the forefront of academic inquiry.<sup>70</sup> He carefully traced the Court's Eleventh Amendment jurisprudence and concluded that the Supreme Court seemed poised to interpret state sovereign immunity as immunity from nonconsensual suit on federal causes of action not only in federal court, but also in a state's own court.<sup>71</sup> Vázquez's argument relied, in part, on dicta in *Seminole Tribe*<sup>72</sup>

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68. From the Constitution's earliest days, the constitutional parity of state and federal courts has been a delicate topic. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816), expressed concern over regional bias when it decided that in diversity cases "the constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct, or control, the regular administration of justice." Today, judicial independence dominates the debate, with the federal judiciary having the obvious structural advantage because of the Article III guarantees of tenure and security from salary reduction. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). The literature is heavily weighted towards finding federal courts institutionally superior as adjudicators of federal law. See, e.g., Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 116 (1998); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977); cf. James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 197 & n.148 (noting that federal courts may be preferred over state courts to adjudicate federal questions because the Supreme Court is the only federal court competent to review error in state courts and the Supreme Court "cannot secure the effective enforcement of federal law in all cases first litigated in the state court"). But see Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 635-37 (1981); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233 (1999) (finding parity using empirical analysis in state and lower federal courts' interpretations of Supreme Court precedent in Takings Clause cases).

69. See discussion *infra* notes 70-75 and accompanying text.

70. See Vázquez, *supra* note 46.

71. See *id.* at 1702-20; see also Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 153-54 (1997) (suggesting Congress lacks constitutional authority to compel states to adjudicate federal claims against the state in state court).

72. See Vázquez, *supra* note 46, at 1717 ("In summing up its holding overruling *Union Gas*, the Court in *Seminole Tribe* stated that "[e]ven when the Constitution



and in *Hess v. Port Authority Trans-Hudson Corp.*<sup>73</sup> His view ran contrary to conventional wisdom,<sup>74</sup> and the conclusions in his article were disputed.<sup>75</sup>

It is understandable that one might entertain serious reservations about accepting that state judicial immunity entails immunity from liability in private damage actions on federal claims in either federal or state court.<sup>76</sup> First, the language of the Eleventh Amendment refers only to federal judicial authority and the Court often has made plain that the Eleventh Amendment only applies to federal courts.<sup>77</sup> Moreover, lower federal courts had assumed that even when federal courts are not available to hear certain federal claims against a state, plaintiff may seek redress in state court.<sup>78</sup> In

vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states.” (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 71 (1996)) (alteration in Vázquez)); *id.* at 1702-03 (“The [*Seminole Tribe*] majority stated that the Supreme Court may exercise appellate jurisdiction over suits arising in the state courts ‘where a State has consented to suit.’” (quoting *Seminole Tribe*, 517 U.S. at 71 n.14)); *id.* at 1717-20 (discussing the indications in *Seminole Tribe* of “a shift towards a conception of the Eleventh Amendment as an immunity from liability.”).

73. 513 U.S. 30, 39 (1994) (noting that the effect of shielding states from suit in federal court is to “leav[e the] parties with claims against a State . . . if the State permits, in the State’s own tribunals”); *see also* Vázquez, *supra* note 46, at 1702 n.93 and accompanying text.

74. *See* Vázquez, *supra* note 46, at 1688 n.28, 1689 n.34 (citing literature taking both positions).

75. *See* Jackson, *supra* note 36, at 544 n.176.

While I agree [with Vázquez] that some language in *Seminole Tribe* and other opinions suggest that states may have some sovereign immunity in their own courts, and that these in turn could be read as consistent with an ‘immunity from liability’ understanding, I disagree that the Court does . . . understand the Eleventh Amendment in these terms.

*Id.* at 503-05 & nn.39-41 (same).

76. Discussing a state court’s duty to hear federal claims against a state somewhat puts the cart before the horse, for the initial question always is whether a state court may hear a particular federal claim. In most cases, concurrent federal and state court jurisdiction over federal claims is the constitutional default. *See* *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 478 (1981) (affirming the “deeply-rooted presumption in favor of concurrent state court jurisdiction” to hear federal questions). The presumption of concurrent federal and state court jurisdiction to hear federal questions can be rebutted only “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” *Id.*; *accord* *Tafflin v. Levitt*, 493 U.S. 455 (1990) (concurrent jurisdiction of state courts to hear civil RICO claims); *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820 (1990) (same with regard to Title VII of the 1964 Civil Rights Act).

77. *See* *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 204-05 (1991) (citing *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989)).

78. *See* *Chavez v. Arte Publico Press*, 157 F.3d 282, 291 (5th Cir. 1998) (finding that, even if copyright suits against the states cannot be brought in federal court

addition, many state courts agreed that they must hear federal claims against state government,<sup>79</sup> although others disagreed.<sup>80</sup> Finally, one might be forgiven for insisting that immunizing states from private damage claims in any court when federal law provides for such a damage remedy poses the troubling rule of law concern that Congress is being permitted to create federal rights that are illusory.<sup>81</sup>

Supreme Court precedent did not provide reliable guidance regarding whether state sovereign immunity included immunity from suit in its own courts on federal claims. The precise issue had never been litigated in the Court, but two cases seemed apposite: *Hilton v. South Carolina Public Railways*

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because Congress lacks Section 5 power to enact the copyright laws and noting in dicta that the Eleventh Amendment only shields states from being sued in federal court); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) (holding that an FLSA action for damages against the state may not be brought in federal court, but suggesting in dicta that "the employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law"); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) ("[S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law."); see also *Coolbaugh v. Louisiana*, 136 F.3d 430, 441 (5th Cir. 1998) (Smith, J., dissenting) (concluding that a finding that Congress lacks Section 5 authority to enact the ADA would not "eviscerate the basic protections the ADA gives disabled individuals against discriminatory state action [because] the plaintiff could still sue a state in state court to enforce the obligations the state owes the disabled under the ADA").

79. See, e.g., *Ahern v. New York*, 244 A.D.2d 7, 11 (N.Y. App. Div. 1998) ("In *Seminole Tribe v. Florida* . . . , the United States Supreme Court merely held that the 11th Amendment prevents a private party from suing a State in Federal court, not that Federal statutes do not apply equally to both non-State and State defendants" because the sovereign immunity principle animating the Eleventh Amendment is not "immunity from suit in any forum." (quoting *Bartlett v. Bowen*, 816 F.2d 695, 610 (D.C. Cir. 1987))). Other states have taken the same position. See *Whittington v. State*, 966 P.2d 188 (N.M. Ct. App. 1998), *vacated*, 119 S. Ct. 2388 (1999); *Bunch v. Robinson*, 712 A.2d 585 (Md. Ct. Sp. App. 1998); *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998), *vacated*, 119 S. Ct. 2387 (1999); *Ribitzki v. School Bd. of Highlands County*, 710 So. 2d 226 (Fla. Dist. Ct. App. 1998); *Clover Bottom Hosp. & Sch. v. Townsend*, 513 S.W.2d 505 (Tenn. 1974).

80. See, e.g., *Allen v. Fauver*, 742 A.2d 594 (N.J. Super. Ct. App. Div. 1999); *Keller v. Dailey*, 706 N.E.2d 28 (Ohio Ct. App. 1997); *Alden v. State*, 715 A.2d 172, 174 (Me. 1998), *aff'd*, 119 S. Ct. 2240 (1999) (dismissing claim under the overtime provisions of the FLSA); *Jackson v. State*, 544 A.2d 291, 298 (Me. 1988), *cert. denied* 491 U.S. 904 (1989) (dismissing claim under the federal Rehabilitation Act); *Board of Comm'rs. v. Splendour Shipping & Enters.*, 255 So. 2d 869 (La. Ct. App. 1972); see also *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422, 426 (Mass. 1991) ("Although the Supreme Court has never addressed the question whether States may claim immunity in their own courts when the Eleventh Amendment bars suit in Federal Court, we think that, absent congressional command to the contrary, they may.") (emphasis added).

81. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1489 (1987).

*Commission*<sup>82</sup> and *Howlett v. Rose*.<sup>83</sup> A close review shows that neither is controlling or particularly compelling.

In *Hilton*, the Court reversed a state court's refusal to provide a forum to adjudicate a damage claim brought against a state-operated railway pursuant to the Federal Employers' Liability Act (FELA).<sup>84</sup> The Supreme Court had previously held that federal courts were not required to provide a forum for FELA actions, because Congress had not adequately manifested an intent to provide a federal court forum for FELA actions.<sup>85</sup> The South Carolina supreme court extended this precedent to state courts. The Supreme Court in *Hilton* concluded that the question before it was "a pure question of statutory construction."<sup>86</sup> The Court held Congress did intend such causes of action, notwithstanding the asymmetrical result such a conclusion creates.<sup>87</sup> *Hilton* did not address a state's constitutional duty to provide a forum.<sup>88</sup>

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82. 502 U.S. 197 (1991).

83. 496 U.S. 356 (1990).

84. 45 U.S.C. §§ 51-60 (1994).

85. See *Welsh v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

86. *Hilton*, 502 U.S. at 205.

87. See *id.* at 206. In large part, *stare decisis* dictated the conclusion in *Hilton*. In *Parden v. Terminal Railway*, 377 U.S. 184 (1964), the Court found that Congress had intended to provide FELA rights for employees of state-owned railways. As a consequence, many states drafted workers' compensation laws on that understanding of the FELA. See *id.* at 202-03. The Court acknowledged that to reinterpret the FELA would "avoid[] the federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute." *Id.* at 206. But, to change the interpretation of the FELA now "would strip all FELA . . . protection from workers employed by the States," *id.* at 203, and thwart "just expectations," *id.* at 206.

88. In *Hilton*, the Court stated that "when . . . a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." *Id.* at 207. Whether "enforceable" was intended to mean "may be enforced" or "must be enforced" was left for another day. Perhaps more importantly, *Hilton* did not entail requiring a state to defend in state court a suit that the Eleventh Amendment barred from being brought in federal court. The reason is that when *Hilton* was decided, just two years after *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), Congress was thought to possess power through the Commerce Clause to abrogate state sovereign immunity in federal court. See discussion *supra* notes 52-54 and accompanying text. Accordingly, when *Hilton* was decided, the FELA could not be enforced against the states in federal court because Congress had failed adequately to manifest an intent to so provide, not because Congress lacked abrogation authority.

Recent cases have reversed the outcome in *Hilton*. Today, due to the holding in *Seminole Tribe*, Congress may not grant a federal court jurisdiction to hear a private FELA damage action against a state. Nor may Congress provide for such a suit against an unconsenting state in state court, due to the holding in *Alden*.

*Howlett* speaks to a general constitutional duty of state courts to adjudicate federal claims<sup>89</sup> but, like *Hilton*, is wide of the mark. In *Howlett*, the plaintiff brought a § 1983<sup>90</sup> action in state court against a school board. The state court dismissed the action. The state court explained that § 1983 suits brought in federal court can be maintained only against “persons,” and that a government entity that has sovereign immunity from suit in federal court is not a “person” within the meaning of § 1983. The court acknowledged that determination of whether a government entity has sovereign immunity from suit in federal court is a question of federal law. However, the state court held that when § 1983 suits are brought in state court, the relevant inquiry is whether the state has waived its sovereign immunity to suit under § 1983 as a matter of state common law. Because the state court held that Florida had not so waived its sovereign immunity, the court determined that it had no need to reach the issue of whether school boards are “persons” under § 1983.<sup>91</sup>

The Supreme Court reversed. Writing for the Court, Justice Stevens stated that the issue was “whether a state law defense of ‘sovereign immunity’ is available to a school board *otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.*”<sup>92</sup> The majority opinion explained that because municipalities, counties, and school districts do not enjoy Eleventh Amendment immunity when sued in federal court, they are “persons” subject to suit under § 1983.<sup>93</sup> Thus the *Howlett* suit could have been brought in federal court. Therefore, “[t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities [subject to suit in federal court] should be held liable for their constitutional violations [in state court], that disagreement cannot override the dictates of federal law.”<sup>94</sup>

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89. See *Howlett v. Rose*, 496 U.S. 356, 366-67 (1990).

90. 42 U.S.C. § 1983 (1994).

91. See *Howlett v. Rose*, 537 So. 2d 706, 708 (Fla. Dist. Ct. App. 1989).

92. *Id.* at 359 (emphasis added).

93. See *id.* at 376 (“[M]unicipal corporations and similar governmental entities are ‘persons’ . . . .”); see also *Monell v. New York Dep’t of Soc. Servs.*, 436 U.S. 658, 663 (1978).

94. *Howlett*, 496 U.S. at 378 (“Congress surely did not intend to assign to state

The Court also rejected Florida's alternative argument that Congress cannot require state courts to hear cases that the state law of sovereign immunity excludes from their jurisdiction. Because the Supremacy Clause makes federal law the law in each of the states, and because state courts are bound by the Constitution and laws of the United States made to conform to the Constitution, state courts have a responsibility to enforce federal law "in the absence of a valid excuse."<sup>95</sup> Discrimination against federal law is not a valid excuse.<sup>96</sup> The key is whether state courts enforce the "same types of claims" arising under state law<sup>97</sup> because it also is clear that state courts may enforce "a neutral state rule regarding the administration of the courts."<sup>98</sup> The Court found that Florida courts may not refuse to hear § 1983 claims against a school board because Florida courts are courts of general jurisdiction with authority to hear private damage claims and enter judgment against school boards under a wide variety of state causes of action, including matters of the type presented in § 1983 litigation.<sup>99</sup>

*Howlett* thus addressed a state's duty to open its courts to federal claims that also could be brought in federal court. The case was silent regarding the state's duty to open its courts to claims that constitutionally may not be brought in federal

courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (quoting *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)).

95. *Id.* at 369; *accord* *Testa v. Katt*, 330 U.S. 386 (1947); *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876).

96. *See Howlett*, 496 U.S. at 371-81; *see also* *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934) ("[T]he federal Constitution prohibits state courts of general jurisdiction from refusing [to hear a case] solely because the suit is brought under a federal law."). As the Court explained in *McKnett*, the refusal to hear the FELA action constituted discrimination "against rights arising under federal laws" in violation of the Supremacy Clause because the state court had "general jurisdiction of the class of actions to which [the action] here brought belongs." *Id.* at 232-34; *accord* *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 58 (1912) (holding that a state may not discriminate against federal law when state courts have jurisdiction "appropriate for the occasion").

97. *See Testa*, 330 U.S. at 394 (1947).

98. *Howlett*, 496 U.S. at 372 (1990). As the Court in *Howlett* explained,

The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."

*Id.* (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

99. *See id.* at 378-81.

court. That was the issue litigated in *Alden v. Maine*.

In *Alden*, a group of state probation officers filed an FLSA overtime claim against the State in state court after a federal court had dismissed the identical claim following the Supreme Court's decision in *Seminole Tribe*.<sup>100</sup> The Maine Supreme Judicial Court affirmed the state trial court's dismissal of the action.<sup>101</sup> The United States Supreme Court affirmed, holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court."<sup>102</sup> Writing for the majority, Justice Kennedy argued that the concept of Eleventh Amendment sovereign immunity is "something of a misnomer" because "sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."<sup>103</sup> It derives instead from the history and structure of the Constitution.

With respect to history, the majority concluded that the Constitution's intent, as confirmed by the Tenth Amendment, is that the states are to play a vital governing role through their status as sovereign entities<sup>104</sup> and are to be accorded the "dignity and essential attributes inhering in [sovereign] status."<sup>105</sup> Justice Kennedy then argued that prior to the

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100. After *Seminole Tribe*, the lower federal courts uniformly rejected federal jurisdiction to hear FLSA minimum wage and overtime claims against the state. See *Varner v. Illinois State Univ.*, 150 F.3d 706, 712 n.5 (7th Cir. 1998) ("[A]ll of the circuits to have addressed the issue following *Seminole Tribe* have held that the minimum wage and overtime provisions of the FLSA do not validly abrogate the States' Eleventh Amendment immunity."). But see *id.* at 717 ("Congress validly abrogated the [states'] Eleventh Amendment immunity from suit under the Equal Pay Act."); *Ussery v. Louisiana*, 150 F.3d 431 (5th Cir. 1998) (holding same); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997) (holding same).

101. See *Alden v. State*, 715 A.2d 172, 174 (Me. 1998), *aff'd*, 119 S. Ct. 2240 (1999).

[S]overeign immunity . . . protect[s] the State from suit by private parties in its own courts without its consent, even when the cause of action derives from federal law . . . [because] [i]f Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against the same claims.

*Id.*

102. *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999).

103. *Id.*

104. See *id.* at 2247 (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.15 (1996)).

105. *Id.* (concluding that states are to be sheltered from "'the concept of a central government that would act upon and through [them]' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people'" (quoting *Printz v. United States*, 521 U.S. 898, 919-20 (1997))).

Constitution's ratification, immunity from suit was considered a fundamental aspect of sovereignty,<sup>106</sup> and the Constitution was intended to preserve such state sovereign immunity from suit. This immunity, the majority concluded, is evidenced from the ratification debates,<sup>107</sup> the reaction to *Chisholm v. Georgia*,<sup>108</sup> the Eleventh Amendment's ratification debates,<sup>109</sup> and the Court's own precedent.<sup>110</sup>

The majority opinion took refuge in the Framers' silence on the issue of constitutionalizing a state's immunity from suit in its own court, concluding that:

[s]ilence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity [from suit in their own courts]. . . . [Silence] suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.<sup>111</sup>

106. See *Alden*, 119 S. Ct. at 2247 ("[T]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."). The opinion relied for this proposition on English common law, as understood from previous Supreme Court decisions and commentators such as Blackstone. See *id.* at 2248.

107. See *id.* at 2248 ("The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." (citing Hamilton, Madison, and Marshall)). In addition, the records of the state ratifying conventions were read as demonstrating that "the Constitution [was] drafted to preserve the States' immunity from private suits." *Id.* at 2249 (citing ratification debates in Rhode Island and New York).

108. 2 U.S. (2 Dall.) 419 (1793). The Court cited a call by the Massachusetts legislature to its representatives in Congress to remove from the Constitution any basis for "a decision, that, a State is compellable to answer in any suit by an individual or individuals in any Court of the United Sates." *Alden*, 119 S. Ct. at 2250 (quoting DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 196 (1997)).

109. See *Alden*, 119 S. Ct. at 2251-52 ("The text and history of the Eleventh Amendment . . . suggest that Congress acted not to change but to restore the original constitutional design . . . . The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits [both in federal and state court].").

110. See *id.* at 2253-54.

111. *Id.* at 2260. The Court added,

To read [the history of the ratification of the Constitution and its Eleventh Amendment] as permitting the inference that the Constitution stripped the States of immunity in their own courts and allowed Congress to subject them to suit there would turn on its head the concern of the founding generation—that Article II might be used to circumvent state-court immunity. In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the federal government a power to subject nonconsenting States to private suits in these fora.

In addition, the Court found neither the Supremacy Clause<sup>112</sup> nor the Necessary and Proper Clause<sup>113</sup> an impediment to its conclusions. The Court dismissed the former as circular,<sup>114</sup> and considered the latter trumped by the implicit principles of sovereign immunity built into the Constitution.<sup>115</sup>

The Kennedy majority opinion also drew support from the Constitution's structure. The opinion reasoned that finding congressional power to abrogate a state's sovereign immunity from suit in its own courts imposes an indignity on the States and an anomaly in the law. As the Court stated,

Private suits against nonconsenting States . . . present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," . . . regardless of the forum. [A] state . . . must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private

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*Id.* at 2261.

112. U.S. CONST. art. VI, cl. 2 ("This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

113. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").

114. "[T]he Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design." *Alden*, 119 S. Ct. at 2255 (quoting U.S. CONST. art. VI, cl. 2) (citing *Printz v. United States*, 521 U.S. 898, 924 (1997)). The Supremacy Clause thus leaves to be decided the issue of which acts of Congress are in accord with constitutional limits. *See id.* at 2255.

115. The majority, quoting *Printz*, 521 U.S. at 923-24 (1997), held

When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereign immunity reflected in the various constitutional provisions . . . it is not a "La[w] . . . proper for carrying into Execution the Commerce Clause" and is thus, in the words of the *Federalist*, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."

*Id.* at 2256 (quoting *Printz*, 521 U.S. at 923-24 (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (ellipses and alterations in *Printz*))).

For an alternate view, see Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 93 (1998), stating that Congress has constitutional authority to require states to adjudicate federal claims

to ensure preservation of the primacy and dominance of the federal level of authority within the federal structure . . . . No supreme law could exist if state courts could refuse to enforce valid federal law. Otherwise, the supreme law would be the law that state courts decide to enforce.

*Id.*



citizens to levy on its treasury . . . .<sup>116</sup>

This single observation introduces the four main structural themes that animate the *Alden* decision.<sup>117</sup>

The first is autonomy. State autonomy suffers when states must answer for breaches of federal law in federal court, the majority reasoned, but not so much as when states lose immunity in their own courts. This is because a state's own courts have "always been understood to be within the sole control of the sovereign itself."<sup>118</sup> The Court added that permitting the federal government to force states to hear federal damage claims against the state in the state's own courts would place the federal government in a position to "press a State's own courts into federal service to coerce the other branches of the State [and ultimately] to turn the State against itself . . . ."<sup>119</sup>

The second theme is fiscal stability. Being placed in the "disfavored status of a debtor," the majority opinion argues, could "threaten [the] financial integrity [of the States]."<sup>120</sup> This was true at the founding, and

[e]ven today an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that . . . would pose a severe and notorious danger to the States and their resources.<sup>121</sup>

116. *Alden*, 119 S. Ct. at 2264 (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)).

117. Commentators view federalism as advancing many different values. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2201 (1998) (discussing political accountability as an important federalism value); Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 124-25 (1996) (discussing the "executive discretion" rationale for sovereign immunity); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1060-74 (1995) (arguing that federalism advances the primary values of decreased tyranny, increased political participation, and increased experimentation).

118. *Alden*, 119 S. Ct. at 2245.

119. *Id.* at 2264. This, the Court reasoned, creates "substantial costs to the autonomy, the decision making ability, and the sovereign capacity of the States." *Id.* at 2262. A state "is entitled to order the processes of its own governance, assigning to the political branches rather than the courts, the responsibility for directing the payment of debts." *Id.* at 2265.

120. *Id.* at 2264.

121. *Id.*

The third theme is the anomaly of the "national government . . . wield[ing] greater power in the state courts than in its own judicial instrumentalities."<sup>122</sup> The Court previously had noted the anomaly concerns,<sup>123</sup> as had some state courts.<sup>124</sup> It would be an "unprecedented step," the majority in *Alden* argued, to infer from the state courts' obligation to enforce federal law that "Congress's authority to pursue federal objectives through state judiciaries exceeds not only its power to press other branches of the State into its service but even its control over the federal courts themselves."<sup>125</sup>

The final theme is the "'unanticipated intervention [of individuals] in the processes of government."<sup>126</sup> The majority opinion reiterates this apprehension. Drafting a state's courts to enforce federal obligations of the State government could "ultimately . . . commandeer the entire political machinery of the State against its will and at the behest of individuals."<sup>127</sup> "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'"<sup>128</sup> This, the court concluded, sacrifices political accountability.<sup>129</sup> Democratic governance requires that these judgments be made through each state's political process, not by "judicial decrees mandated by the

122. *Id.* at 2265.

123. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) (noting that the federal government's exclusive use of state courts to enforce national policy poses federalism-related concerns); *Howlett v. Rose*, 496 U.S. 356, 365 (1990) (suggesting that it would be anomalous for a state to be forced to consider matters Congress is barred from consigning to the federal courts).

124. See, e.g., *Bunch v. Robinson*, 712 A.2d 585, 592 (Md. Ct. Spec. App. 1998) ("It would be anomalous if the 'States' rights' justices who authored *Seminole Tribe*, and who had vigorously dissented in *Garcia*, acted to uphold [the] States' Eleventh Amendment immunity from suit but, at the same time, affirmed congressional authority to overcome a state's own sovereign immunity under its state constitution.").

125. *Alden*, 119 S. Ct. at 2265.

126. *Id.* at 2264 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

127. *Id.*

128. *Id.* (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)).

129. See *id.* at 2264-65 (In an era of "scarce resources among competing needs and interests," access to the "public fisc" goes to the "heart of the political process" implicating "difficult decisions involving the most sensitive and political of judgments.").

Federal Government and invoked by the private citizen."<sup>130</sup> The Court juxtaposed a suit brought by the United States. These suits "require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting states."<sup>131</sup>

The Court rejected the suggestion that it was adding any of its own preferences into the analysis through these conclusions. All of this, the majority argued, arises from nothing more than respecting "what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system."<sup>132</sup>

The dissent answered the majority's arguments by insisting that the majority decision was based on false historical claims, underinclusive selection of historical data, and an erroneous structural analysis. Specifically, the dissent argued: first, that "[t]here is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood;"<sup>133</sup> second, that there is "no evidence

130. *Id.* at 2245; *see also id.* at 2265 (Federal governmental assertion of control "over a State's most fundamental political processes . . . strikes at the heart of political accountability . . ."). The Court seemed alarmed at the proliferation of federal statutes now regulating the states, a condition that may have aggravated its concern over the intrusion of individuals into the process of governance. The Court noted that prior to the enactment of the FELA, Congress had enacted many statutes authorizing suits in state court, but none "purporting to authorize private suits against nonconsenting States in state court." *Id.* at 2261. Following enactment of the FLSA, however, "similar statutes have multiplied." *Id.* Soon after the Court's decision in *Seminole Tribe*, Henry Monaghan observed that the Court's reasoning in that case might

reflect[ ] a visceral feeling among the majority of the Court that the role of the states in our federal structure has been so diminished as to become unintelligible. This feeling would generate an instinctive reaction to protect—indeed, to create—a role for the states, even if that role became merely symbolic.

Monaghan, *supra* note 117, at 120.

131. *Alden*, 119 S. Ct. at 2267. The Court returned to this theme later in its opinion: "The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National government must itself deem the case of sufficient importance to take action against the State . . ." *Id.* at 2269.

132. *Id.* at 2268.

133. *Id.* at 2269-70 (Souter, J., dissenting). The dissent argued that history has supported many different views of sovereign immunity since the time of the Declaration of Independence. *See id.* at 2273 (Souter, J., dissenting) ("The story of the . . . development of conceptions of sovereignty is complex and uneven; here it is enough to say that by the time independence was declared in 1776, the locus of sovereignty was still an open question . . ."). Similarly, differing opinions existed

that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law" under which the suit was brought;<sup>134</sup> third, that there is no evidence that the structure of the constitution anticipated a unique "scheme of American federalism" that immunizes the States from individual damage actions in any court on federal claims;<sup>135</sup> and 4) that the majority's concept of federalism "ignores the accepted authority of Congress to bind States under [Article I powers] and to provide for enforcement of federal rights in state court."<sup>136</sup>

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after the Revolution. *See id.* (Souter, J., dissenting) (showing that after the Revolution, some states understood they did not possess sovereign immunity from suit whereas others understood they were the "inheritors of the Crown's common-law sovereign immunity and so enacted statutes [incorporating that view]"). Finally, different views of sovereign immunity prevailed during the ratification debates. *See id.* at 2275 (Souter, J., dissenting) (showing that in the "ratification debates . . . a variety of views emerged and the diversity of sovereign immunity conceptions displayed itself"). The dissent found additional support for its view in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The *Alden* dissent noted that none of the five opinions in *Chisholm* articulated the view that "the Tenth Amendment had been understood to give federal constitutional status to state sovereign immunity . . . [or otherwise] hinted at a constitutionally immutable immunity doctrine." *See Alden*, 119 S. Ct. at 2279 (Souter, J., dissenting). Rather, all five opinions in *Chisholm*, including the dissent, "confirmed that virtually everyone who understood immunity to be legitimate saw it as a common-law prerogative (from which it follows that it was subject to abrogation by Congress as to a matter within Congress's Article I authority)." *Id.* at 2283 (Souter, J., dissenting).

134. *Alden*, 119 S. Ct. at 2270 (Souter, J., dissenting). The dissent reasoned that even if the Constitution confers immutable immunity upon the states, the historical evidence still demonstrated that "it may be invoked only by the sovereign that is the source of the right upon which suit is brought . . . [and] if the sovereign is not the source of the law to be applied, sovereign immunity has no applicability." *Id.* at 2286-87 (Souter, J., dissenting). Thus, in their own courts states would be immune on state but not federal causes of action.

135. *Id.* at 2270 (Souter, J., dissenting). The dissent advanced a structural view of federalism that tracks Chief Justice Marshall's reasoning in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Under that view, the federal and state governments are sovereign only "'with respect to the objects committed to [them but not] with respect to the objects committed to the other.'" *Alden*, 119 S. Ct. at 2288 (Souter, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 410). Because one "object" committed to the Congress is authority to enact the FLSA and apply it to the states, "the State of Maine is not sovereign with respect to the national objective of the FLSA." *Id.* (Souter, J., dissenting) Nor, argued the dissent, is the *McCulloch* view of federalism to be denied because authorizing private suits against nonconsenting states is offensive to their dignity as sovereigns. The dissent criticized the majority's vision of sovereign immunity as based on the "'royal dignity [owed] the prince from his subjects,'" *id.* at 2289 (Souter, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*241), a view "inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own," *id.* (Souter, J., dissenting).

136. *Alden*, 119 S. Ct. at 2270 (Souter, J., dissenting). The dissent rejected the

In short, while each side drew from the historical record, past practice, and structural concepts to provide it debating points, these arguments were indeterminate.<sup>137</sup> One might fairly argue that the most valid understanding of the interpretive process deployed in *Alden* is that a majority of the Court preferred state autonomy, fiscal predictability, and political accountability, and disapproved of individuals' ability to influence the course of government through litigation.<sup>138</sup>

### B. College Savings Bank I and II: Circumscribing Congress's Section 5 Power

The two *College Savings Bank* cases represent another installment of the doctrinal shift over the past five years limiting Congress's authority under Section 5 of the Fourteenth Amendment.<sup>139</sup> Previously, in *Fitzpatrick v. Bitzer*,<sup>140</sup> the Court had held that Section 5 of the Fourteenth Amendment authorizes Congress to abrogate States's immunity from suit in

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majority's argument that because no disputes over a state court's duty to hear federal claims brought against that state appear in the historical record, such a duty has never existed. The short answer to this claim, the dissent argued, is that not until modern times has Congress's Commerce Power been understood to include binding state governments. *See id.* at 2291. Thus the Framers' surprise over the federal governments' authority to provide suit on federal claims in state court is surpassed only by the "astonish[ment] [over] the reach of Congress under the Commerce Clause generally." *Id.* (Souter, J., dissenting).

137. *See* Lewis, *supra* note 16 (The Court "picked out shards of doctrine to justify what was plainly a preconceived conclusion."); Jeffrey Rosen, *The Age of Mixed Results*, 220 NEW REPUBLIC 43, June 28, 1999, at 43 (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)) (referring to the "unsettling cynicism about the malleability of legal argument"). *But see* Vázquez, *supra* note 46, at 1725 (noting that although the historical evidence regarding whether states were to enjoy immunity from suit in federal court is indeterminate, the record does point to one point of agreement: "An arrangement under which the states [sic] courts would have been required to entertain suits seeking damages against the states on the basis of federal law, subject to Supreme Court review, would not have satisfied anyone.").

138. *See* Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997)

It is clear . . . that neither the intent of a group of lawmakers nor the original meaning of a legal text is a simple historical fact awaiting discovery by diligent researchers. . . . [F]ixing the relevant intent of a multi-member body . . . is a constructive enterprise from which an interpreter's assumptions, values, and goals can never be excluded entirely.

*Id.*; Vázquez, *supra* note 46, at 1723 ("In the end, the disagreement [over the scope of state sovereign immunity] . . . is not so much about history as about the relative weight constitutional interpreters should give to other types of arguments, including arguments about . . . constitutional structure and principle.").

139. U.S. CONST. amend. XIV, § 5. This Section provides, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

140. 427 U.S. 445 (1976).

federal court.<sup>141</sup> *Seminole Tribe* added the requirement that a reviewing court must determine whether Congress “‘unequivocally expresse[d] its intent to abrogate the immunity’ [and whether Congress acted] ‘pursuant to a valid exercise of power.’”<sup>142</sup> Thus in every case, the plaintiff asserting that Congress has abrogated state judicial immunity through the exercise of Section 5 authority must establish that the exercise of power was valid in the circumstances. This task was made more arduous by the Court’s 1997 holding in *City of Boerne v. Flores*.<sup>143</sup>

In *Boerne*, the Court held that Congress lacked Section 5 authority to enact the Religious Freedom Restoration Act of 1993 (RFRA).<sup>144</sup> RFRA imposed greater restrictions on state and local interference with religious freedom than the Fourteenth Amendment requires.<sup>145</sup> The case focused on the scope of Congress’s Section 5 power to “enforce” the provisions of the Fourteenth Amendment. On the one hand, “Congress has [no] power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”<sup>146</sup> On the other hand, “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of authority previously reserved to the States.’”<sup>147</sup>

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141. *See id.* at 452-56.

142. *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

143. 521 U.S. 507 (1997).

144. 42 U.S.C. §§ 2000bb to -4 (1994).

145. RFRA reversed the effect of the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), by providing that laws that “substantially burden” the exercise of religion are unlawful unless they advance a “compelling governmental interest” and are “the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a),(b). The *Boerne* Court read *Smith* to hold that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *Boerne*, 521 U.S. at 514.

146. *Boerne*, 521 U.S. at 519. (“Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”). Congress’s power is “corrective or preventive, not definitional.” *Id.* at 525.

147. *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

The Court concluded that "RFRA cannot be considered remedial, preventative legislation, if those terms are to have any meaning."<sup>148</sup> In so holding, the Court introduced what has come to be referred to as the "congruence and proportionality" test. "There must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."<sup>149</sup> At a minimum, this test requires a demonstration that the true aim of federal legislation enacted pursuant to the Section 5 power is the elimination of state action that the Supreme Court is prepared to conclude is unconstitutional.<sup>150</sup>

Federal civil rights legislation made applicable to the states has been upheld in the lower courts against state challenges to Congress's Section 5 power. This is true of the Americans with Disabilities Act (ADA),<sup>151</sup> Title VII of the Civil Rights Act of

148. *Id.* at 532 ("RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."). The legislative record in RFRA failed to demonstrate any contemporary evidence of state-sponsored targeting of religious practices in American society. To the contrary, the Court found that "[t]he history of [religious] persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Boerne*, 521 U.S. at 530. This "absence of more recent episodes" was explained by evidence in the legislative record, introduced by RFRA's proponents, that "deliberate persecution is not the usual problem in this country," *id.* (quoting from *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 334 (1993) (statement of Douglas Laycock)), and "[l]aws targeting religious practices have become increasingly rare," *id.* (quoting H.R. REP. NO. 103-88, at 2 (1993)).

149. *Id.* at 520. The Court suggested the test follows from the reasoning of the *The Civil Rights Cases*, 109 U.S. 3 (1883): "Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'" *Boerne*, 521 U.S. at 532 (quoting *The Civil Rights Cases*, 109 U.S. at 13) (alterations in original).

150. *See, e.g.*, *Reynolds v. Alabama Dep't of Transp.*, 4 F. Supp. 2d 1092, 1108 (M.D. Ala. 1998)

The teaching of *Boerne* is that there must be a substantial constitutional hook: The principal object of the legislation must be to address rights that are judicially recognized; Congress can prohibit conduct that is not unconstitutional, but such legislation must be nothing more than incidental to a primary effort of prohibiting conduct that is unconstitutional . . . . [T]he prohibited constitutional conduct must be, at most, always a bridesmaid and never the bride; the bride must always be the unconstitutional conduct.

*Id.*

151. 42 U.S.C. §§ 12101-12213 (1994). Several circuits have held states liable under the ADA. *See Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.*, 176 F.3d 212 (4th Cir. 1999) (2-1 opinion) (holding that Congress has Section 5 power to apply Title II of the ADA to state prisons); *Seaborn v. Florida*,

1964,<sup>152</sup> and other legislation prohibiting discrimination.<sup>153</sup> That could change as courts more clearly understand the demands of the *Boerne* test.<sup>154</sup> The Section 5 power is unavailable to enact business legislation, such as copyright, trademark, and patent legislation, because no fair case can be made that the aim of such legislation is enforcement of the

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143 F.3d 1405 (11th Cir. 1998) *cert. denied*, 119 S. Ct. 1038 (1999); *Autio v. AFSCME Local 3139*, 157 F.3d 1141 (8th Cir. 1998) (en banc) (evenly divided vote of the court affirming Congress's power under Section 5 to enact the ADA); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (2-1 opinion), *affd. on other grounds*, 120 S. Ct. 631 (2000); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998) (2-1 opinion), *cert. denied*, 525 U.S. 819 (1998); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997); *Crawford v. Indiana Dep't. of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997); *see also Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) (declining to address the Section 5 issue but stating in dicta "we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the [abrogation] provision."). *But see Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (2-1 opinion) (holding that regulation promulgated pursuant to Title II of the ADA prohibiting states from charging fees for issuance of parking placards permitting use of handicapped parking spaces is beyond Congress's Section 5 power).

152. 42 U.S.C. §§ 2000e-2000e-17 (1994). For cases holding that Congress possesses Section 5 power to abrogate state sovereign immunity from Title VII claims in federal court see *Reynolds*, 4 F. Supp. 2d 1092, and *Carman v. San Francisco United Sch. Dist.*, 982 F. Supp. 1396, 1405 (N.D. Cal. 1997) (holding that Congress possesses Section 5 power to abrogate state sovereign immunity from Title VII claims in federal court).

153. Courts generally find Section 5 power to enact federal statutes prohibiting discrimination in federally financed programs. This is true of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-7(a)(1) (1994). *See Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998); *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998); *Bryant v. New Jersey Dep't of Transp.*, 1 F. Supp. 2d 426 (D. N.J. 1998). Congress's power to enforce the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) has similarly been upheld. *See Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997); *Nihiser v. Ohio Env'tl. Protection Agency*, 979 F. Supp. 1168, 1172 (S.D. Ohio 1997) (collecting cases); *Armstrong v. Wilson*, 942 F. Supp. 1252, 1262-63 (N.D. Cal. 1996). The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487 (1994 & Supp. 1998) is also enforceable under Section 5. *See Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 823-24 (8th Cir. 1999) (finding IDEA to be within Congress's Section 5 power based on an analysis of the *Boerne* congruence and proportionality test); *id.* at 827 n.7 (collecting cases).

154. In *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), the Court held Congress lacks Section 5 power to extend the Age Discrimination in Employment Act's provisions, 29 U.S.C. §§ 621-634 (1994), to the states. James Pfander has made the point that

Congress adopted many of the extant abrogations before *Seminole Tribe* was decided and did not clearly address the Fourteenth Amendment in the course of its legislative findings. Accordingly, some federal courts have simply refused to reach the Fourteenth Amendment issue on the ground that Congress did not invoke its powers in support of a particular abrogation.

Pfander, *supra* note 68, at 191 n.124. Seizing on Pfander's observation, one might add that Congress's failure to address Fourteenth Amendment concerns could defeat the effort to demonstrate that the real aim of a statute is to remedy or prevent Fourteenth Amendment violations, as *Boerne* now requires.



equal protection of the laws.<sup>155</sup>

However, because patent, trademark, copyright, and perhaps other categories of federal law create species of property, a fair question is whether state infringement of these property rights constitutes a deprivation of property without due process that Congress can remedy through its Section 5 power. This was the plaintiff's theory in the two actions adjudicated in federal district court in *College Savings Bank I* and *II*.

In 1994, College Savings Bank brought two separate actions against the Florida Prepaid Postsecondary Education Expense Board, an entity the parties agreed was an arm of the state of Florida.<sup>156</sup> One action alleged patent infringement<sup>157</sup> and the other alleged false advertising under the trademark laws.<sup>158</sup> After *Seminole Tribe*, federal jurisdiction in these cases depended upon College Savings Bank being able to demonstrate that Congress possesses Section 5 authority to enact the federal rights advanced in these two cases. College Savings Bank argued that the federal rights it asserted were valid exercises of Congress's Section 5 power because each right was designed to secure the Fourteenth Amendment's protections against deprivations of property without due process of law.<sup>159</sup> The district court agreed with respect to the patent infringement claim<sup>160</sup> but not the false advertising claim,<sup>161</sup> and the Third Circuit affirmed.<sup>162</sup>

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155. See discussion *infra* notes 157-74 and accompanying text. The same is true with respect to bankruptcy legislation. See, e.g., *Sacred Heart Hosp. v. Pennsylvania*, 133 F.3d 237 (3d Cir. 1998) (rejecting the Bankruptcy Clause as a source of abrogation authority and holding that bankruptcy statutes are not enacted pursuant to any other constitutional authority); *id.* at 244 (collecting cases).

156. See *College Sav. Bank I*, 119 S. Ct. 2199, 2202-03 & nn.1 & 3 (1999).

157. See *id.* at 2203 (citing 35 U.S.C. § 271(a)).

158. See *College Sav. Bank II*, 119 S. Ct. 2219, 2221 (1999) (citing the Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1125(a) (1990)).

159. See *College Sav. Bank I*, 119 S. Ct. at 2204 (arguing for the validity of the patent action); *College Sav. Bank II*, 119 S. Ct. at 2224 (arguing for the validity of the trademark action).

160. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 425-26 (D. N.J. 1996).

161. See *id.* at 427-28.

162. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1349-50 (3d Cir. 1998) (patent claim); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* 131 F.3d 353, 360-61 (3d Cir. 1997) (trademark claim). College Savings Bank also argued that the district court had jurisdiction over its false advertising claim because defendant had constructively waived its Eleventh Amendment immunity by administering a tuition

The Supreme Court rejected the due process theories in both cases. In *College Savings Bank I*, Chief Justice Rehnquist, writing for the majority, acknowledged that patents are property subject to the protection of the Due Process Clause.<sup>163</sup> But, the majority held that the federal patent laws could not be viewed as remedial or preventive legislation aimed at securing the protections of the patent owner's due process rights. First, the legislative record contained no evidence of any pattern of patent infringement by state governments, undermining the "proposition that Congress sought to remedy a Fourteenth Amendment violation by enacting the [patent laws]."<sup>164</sup> Second, a due process violation consists of a deprivation without due process of law, not just a deprivation. A state's patent infringement thus violates due process "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent . . . ."<sup>165</sup> The legislative history, the Court observed, indicated that "Congress . . . barely considered the availability of state remedies for patent infringement . . . ."<sup>166</sup> Finally, the patent laws define infringement to include both intentional and unintentional conduct, but the Fourteenth Amendment concept of deprivation of property does not include negligent acts.<sup>167</sup> Yet, "Congress did not focus on instances of intentional or reckless infringement on the part of the States" when it extended the patent laws to them,<sup>168</sup> providing further evidence that Congress's aim in enacting the patent laws was not to address unconstitutional conduct.<sup>169</sup> "The statute's apparent . . . aims were to provide a uniform remedy for patent

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prepayment program designed to provide individuals with funds to cover future college expenses. See *College Sav. Bank II*, 119 S. Ct. at 2224. This argument was rejected by both lower courts. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 416-20 (D. N.J. 1996), *aff'd* 131 F.3d 353 (3d Cir. 1997).

163. See *College Sav. Bank I*, 119 S. Ct. at 2208 ("Patents . . . have long been considered a species of property.").

164. *Id.* at 2208; see also *id.* at 2207 (reviewing the legislative history of the Act).

165. *Id.* at 2208-09 ("The primary point made by [congressional] witnesses . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies.").

166. *Id.* at 2209.

167. See *id.* at 2209-10.

168. *Id.* at 2209.

169. See *id.* at 2210 (concluding that "Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution.").

infringement and to place States on the same footing as private parties under that regime."<sup>170</sup> While these may be proper Article I goals, the majority argued, they do not provide Congress Section 5 authority.<sup>171</sup>

*College Savings Bank II*<sup>172</sup> never reached the Section 5 analysis required by *Boerne*. The Court rejected the claim that the false advertising provisions of the Trademark Act of 1946 (Lanham Act) enforced the requirements of Due Process because it held that the right not to be victimized by false advertising is not a property right. "The hallmark of a protected property interest is the right to exclude others."<sup>173</sup> While provisions dealing with infringements of trademarks may protect constitutionally cognizable property interests, "[t]he Lanham Act's false-advertising provisions . . . bear no relationship to any right to exclude."<sup>174</sup>

Nor can participation in the interstate commerce of administering a tuition prepayment program be deemed a waiver of a state's judicial immunity, according to the Court. *College Savings Bank* had argued that if Congress makes clear that a state will be subject to suit in federal court if it engages in conduct governed by a particular federal statute, and if the state voluntarily elects to engage in that conduct, it should be deemed to have waived its judicial immunity.<sup>175</sup> The majority rejected constructive waiver of sovereign immunity as a permissible constitutional principle. First, "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation,"<sup>176</sup> and second, "[r]ecognizing a congressional power to exact constructive

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170. *Id.* at 2211.

171. *See id.*

172. 119 S. Ct. 2219 (1999).

173. *Id.* at 2224.

174. *Id.* at 2224-25. The act of engaging in business, the thing which is impinged by false advertising, also is not property. *See id.* at 2225.

175. *See id.* at 2228. The *College Savings Bank* conceded that a state can never be deemed to have constructively waived its sovereign immunity by engaging in activities that it cannot realistically choose to abandon, such as operation of a police force; but constructive waiver is appropriate where a State runs an enterprise for profit, operates in a field traditionally occupied by private persons or corporations, [or] engages in activities sufficiently removed from core [state] functions . . . .

*Id.* (internal quotation marks omitted).

176. *Id.*

waivers of sovereign immunity through the exercise of Article I powers would . . . as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*.<sup>177</sup>

#### IV. THE *ALDEN TRILOGY* AS A MASTERPIECE OF PRAGMATISM

By deciding the *Alden Trilogy* as it did, the Supreme Court astutely avoided many thorny constitutional issues whose resolution would necessitate a considerable investment of judicial effort and create an appreciable risk of federal-state conflict. The decision in *Alden* demonstrates the point well.

As the majority argued, a contrary result in *Alden* would have created the anomaly of the "national government . . . wield[ing] greater power in the state courts than in its own judicial instrumentalities."<sup>178</sup> Such a strategy to enforce federal statutory rights is problematic. First, one reasonably could expect that many state officials would consider federal commandeering of a state's own courts a greater intrusion on state sovereignty than compelling states to appear before federal courts. A certain degree of resistance to such commandeering is plausible. How would the federal government force an unwilling state court to hear private damage claims against the state? It is not exactly like ordering in riot-trained units of the 101st Airborne Division to desegregate Central High School in Little Rock, Arkansas, contrary to the wishes of Arkansas Governor Orval Faubus. If Federal Executive Branch coercion were an unrealistic option, then the federal judiciary would need to perform the task, although it would undermine the *Seminole Tribe* majority's commitment to federal judicial abstention, to say nothing of the awkwardness of a federal judge placing a state court under a mandatory federal injunction to hear a case it refuses to hear.

Even though outright revolt by the states is remote, the possibility of bias and procedural unfairness in state court proceedings certainly is not.<sup>179</sup> Once state courts become the

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177. *Id.* at 2229; see also *id.* at 2230 ("[C]onstructive waiver is little more than abrogation under another name.").

178. *Alden v. Maine*, 119 S. Ct. 2240, 2265 (1999).

179. Martha Field deftly observed that it would be a questionable strategy for Congress to rely on state courts to enforce federal claims against the state, even if it were constitutional to do so, because of the political pressure state courts would face, including the state court judges' need for re-election. See Martha A. Field, *The*

exclusive repository of judicial authority to enforce federal rights through private damage claims against the states, the federal government necessarily must guarantee the integrity of these state courts. From the point of view of the *Alden* majority, such a federal oversight function would seem structurally undesirable and institutionally unworkable. Claims of bias and procedural unfairness by the state courts would find their way to the Supreme Court through appeals to the Court from adverse state court decisions.<sup>180</sup> The Supreme Court would become the exclusive source of federal judicial review of state court compliance.<sup>181</sup> This role soon could overwhelm its docket, would require the fashioning of a myriad of compliance rules, and easily could subject the Court to criticism, both from the state governments and court systems being monitored and from dissatisfied claimants. The *Alden Trilogy* nicely avoids all of these problems.

Beyond difficulties stemming from recalcitrance, a contrary result in *Alden* would have required the Supreme Court to address some stubborn procedural issues. As Martin Redish and Steven Sklaver have noted, "a natural question that arises concerns the extent to which state courts, in adjudicating federal claims, should be required to employ federal procedures."<sup>182</sup> This "converse *Erie*" problem<sup>183</sup> has received little attention from the Court.<sup>184</sup> *Dice v. Akron, Canton Youngstown Railroad*<sup>185</sup> strongly suggests that state courts must comply if Congress provides that particular procedures be employed in litigation of federal claims in state court.<sup>186</sup> A more

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*Meaning of Federalism*, 23 OHIO N.U. L. REV. 1365, 1376 (1997).

180. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 30-31, 30 n.13 (1990) (holding that the Eleventh Amendment presents no bar to Supreme Court review of federal questions arising in state court litigation (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821))).

181. Cf. Pfander, *supra* note 68, at 166 (proposing and defending the constitutionality of federal legislation "to empower the intermediate federal courts of appeal to hear appeals from state courts in any case otherwise within federal power that the Eleventh Amendment shifts away from federal trial court cognizance").

182. Redish & Sklaver, *supra* note 115, at 99.

183. See Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1961).

184. See Redish & Sklaver, *supra* note 115, at 100.

185. 342 U.S. 359 (1952).

186. But see Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 55 (1999) ("[P]roposals to federalize state court procedures in state tort actions are unconstitutional.").

nettlesome—and more likely—problem arises when congressional intent is unclear regarding the rules of procedure to be employed. Current Court precedent provides no clear answer.<sup>187</sup> In *Johnson v. Fankell*<sup>188</sup> a state obligation to provide an interlocutory appeal upon denial of immunity in a § 1983 action was decided in favor of the state because the denial of interlocutory appeal was not “outcome determinative.”<sup>189</sup> In *Felder v. Casey*,<sup>190</sup> a state was required to abandon its notice of claim rule, which shortened the normal statute of limitations in § 1983 actions, because the requirement “burdens the exercise of the federal right” contrary to the “compensatory aims of federal civil rights law.”<sup>191</sup> In *Dice*, the Court applied “some form of systemic balancing approach to the converse-*Erie* question.”<sup>192</sup>

The Supreme Court’s cobbling together of ad hoc results is questionable federalism policy even when virtually all federal claims are brought to federal court. It is wholly unworkable in the *Seminole Tribe* era. Had *Alden* been decided differently, state courts would have experienced an abundant influx of private damage actions to enforce federal rights against the state. The inevitable result would have been an increased demand on the Supreme Court to mediate the fairness of local procedural rules at a time when the Court’s precedent is somewhat chaotic. This is no-win work for the Court. Either the Court imposes federal procedural rules on discontented state court judges and officials or it abandons plaintiffs to the vicissitudes and burdens of local rules. The *Alden* decision liberated the Court from this trap.

Perhaps the most prickly problem avoided by denying Congress the authority to abrogate state sovereign immunity in a state’s own courts was the problem of developing a jurisprudence of valid excuse. One may recall that in *Howlett v. Rose*,<sup>193</sup> the Court reiterated the oft-cited rule that because

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187. See Redish & Sklaver, *supra* note 115, at 101 (“At various times the Supreme Court appears to have chosen among . . . different models in order to resolve the converse-*Erie* question . . .”).

188. 520 U.S. 911 (1997).

189. *Id.* at 920.

190. 487 U.S. 131 (1988).

191. *Id.* at 141.

192. Redish & Sklaver, *supra* note 115, at 102.

193. 496 U.S. 356 (1990).

federal law is the law in each of the states and because state courts are bound to enforce it in conformance with the Constitution, state courts have a responsibility to enforce federal law "in the absence of 'valid excuse.'"<sup>194</sup> While it is clear that discrimination against federal law is not a valid excuse,<sup>195</sup> it also is clear that "the general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'"<sup>196</sup> Because state courts may enforce "a neutral state rule regarding the administration of the courts,"<sup>197</sup> the question in each case is whether state courts normally enforce the "same types of claims" arising under state law.<sup>198</sup>

In *Alden*, petitioners contended that Maine had discriminated against federal rights by waiving its sovereign immunity with respect to certain state statutory wage and hour provisions while refusing to waive its immunity from suit in state court with respect to the FLSA's wage and hour provisions. The majority avoided the discrimination issue by deciding that the

194. *Id.* at 369; *see also id.* at 370 n.16

[O]ur cases confirm that state courts have the coordinate authority and consequent responsibility to enforce the supreme law of the land . . . [and] also presuppose that state courts presumptively have the obligation to apply federal law to a dispute before them and may not deny a federal right in the absence of a valid excuse.

*Id.*; *accord* *Testa v. Katt*, 330 U.S. 386 (1947); *Claffin v. Houseman*, 93 U.S. 130, 136-37 (1876).

195. *See Howlett*, 496 U.S. at 371-81; *see also McKnett v. St. Louis & San Francisco R.R. Co.*, 292 U.S. 230, 233-34 (1934) ("[T]he Federal Constitution prohibits state courts of general jurisdiction from refusing [to hear a case] solely because the suit is brought under a federal law."). As the Court explained in *McKnett*, because the state court had "general jurisdiction of the class of actions to which [the action] here brought belongs," the refusal to hear the FELA action constituted discrimination against rights arising under federal laws in violation of the Supremacy Clause. *McKnett*, 292 U.S. at 232; *accord* *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912) (the state may not discriminate against federal law when state courts have jurisdiction "appropriate to the occasion." (internal quotation marks omitted)).

196. *Howlett*, 496 U.S. at 372 (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

197. *Id.* at 372. As the Court in *Howlett* explained, "the requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented." *Id.*

198. *Testa*, 330 U.S. at 394. In *Howlett*, Florida had no valid excuse because its courts are courts of general jurisdiction with authority to hear private damage claims and enter judgment against school boards under a wide variety of state causes of action, including matters of the type presented in § 1983 litigation. *See Howlett*, 496 U.S. at 378-81.

valid excuse doctrine does not apply to a state's choices of when it will consent to suit, absent evidence "that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."<sup>199</sup> As the Court explained, "To the extent that Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit."<sup>200</sup>

*Alden* thus split the valid excuse doctrine. For private state court damage actions on federal claims brought against the state, the states are free to decide when they will consent to suit and on what terms, absent evidence "the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."<sup>201</sup> For all other federal claims brought by individuals in state court, the question in each case is whether state courts enforce the "same types of claims" when they arise under state law.<sup>202</sup> This distinction, available to the Court only because it decided the state court immunity issue in *Alden* the way it did, nicely avoids the necessity of hearing appeals over whether federal claims against a state that a state court refuses to hear are the "same types" of claims against the state arising under state law that state courts do hear. These issues are fact intensive and can turn on fine distinctions.<sup>203</sup>

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199. *Alden v. Maine*, 119 S. Ct. 2240, 2268 (1999).

200. *Id.*

201. *Id.*

202. See discussion *supra* note 97 and accompanying text.

203. In *Alden*, petitioners argued that Maine had discriminated against federal law because its state courts are courts of general jurisdiction and are authorized to hear suits against the State of Maine that are "analogous" to the FLSA overtime claim at issue in *Alden*. See Brief for Petitioner (Private parties) at 34-35, *Alden v. Maine*, 119 S. Ct. 2240 (1999) (No. 98-436). The analogous suits were claims against the state for late payment of wages and minimum wage, and claims under a state whistle blower law, a family medical leave act, a human rights act, and a state workers compensation act. See *id.* at 35-36. The State of Maine responded by arguing that the court was required to focus on the "most analogous state law claim." Brief for Respondent at 46-47, *Alden v. Maine*, 119 S. Ct. 2240 (1999) (No. 98-436). Because the FLSA action arose out of an overtime dispute, Maine argued that the most analogous state statute was the state's overtime statute, which exempted state public employees from its coverage. See *id.*; see also Brief for Respondent (United States) at 25, *Alden v. Maine*, 119 S. Ct. 2240 (1999) (No. 98-436) ("[A] finding of discrimination does not depend on the existence of a state claim that is identical to the federal claim in every detail. Rather, discrimination exists when the State entertains suits of the same general type [such as] state-law monetary claims against the State.").



Even if the Court were able to craft workable standards, the Court would not likely be able to review enough cases to police the system thoroughly. Uniformity would likely collapse or suffer severely, as would the deterrence that comes from certainty of review. Given this, a majority of the Court might have concluded that it is better to preclude access to state courts than permit it when federal judicial oversight is so fragmentary.

In addition, had *Alden* been decided differently, plaintiffs throughout the United States would have been subjected to a patchwork quilt of enforcement. Whether or not a plaintiff could bring a damage claim against a state in state court based on a federal cause of action would have depended on whether the employee worked in a state whose courts hear the same type of suits against the state under state law. Not only would such a system create two classes of federal-rights holders, but states would have been presented a strong incentive to repeal state statutes waiving sovereign immunity on state claims to avoid being subjected to federal damage claims against them.<sup>204</sup> *Alden* itself creates the risk of nonuniform enforcement to the extent that some states, but not others, will consent to the FLSA and other federal suits in state court. This two-tier effect was slight when *Alden* was decided<sup>205</sup> but, in any event, could evaporate quickly should most states refuse to consent to federal damage actions in the future.

#### V. THE *ALDEN TRILOGY* AS AN EXERCISE IN MISDIRECTION

Sometimes it is useful to suspend emphasis on decisional rhetoric and instead identify the winners and losers in litigation. The *Alden Trilogy* undoubtedly is a significant victory for advocates of states' rights. *Alden* frees states from congressional efforts to abrogate states' immunity in their own courts. The two *College Savings Bank* cases stifle efforts to

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204. The State of Maine made this latter point to the Court in *Alden*. See Brief for Respondent at 49, *Alden v. Maine*, 119 S. Ct. 2240 (1999) (No. 98-436) ("Petitioners' approach is short-sighted because it simply encourages States to close their doors to all state claims to avoid the prospect that any waiver of the States's sovereign immunity could be treated as an 'analogous' statute which requires the state courts to hear federal claims . . .").

205. It is problematic to claim that states have consented widely to private suits against them on federal claims. See discussion *infra* notes 228-35 and accompanying text.

deploy the Due Process Clause as a means to empower Congress to enact business legislation applicable to the states through Section 5. *College Savings Bank II* ends constructive waiver as a viable constitutional theory.<sup>206</sup> Obscured by the glow of this states' rights victory, however, is an understanding of the *Alden Trilogy's* other winners.

First, the *Trilogy* enhances the enforcement role of the executive branch of the national government. Now, only the national government has authority to sue the states for damages resulting from violations of Article I-based federal rights.<sup>207</sup> Accordingly, the federal government controls the timing, strategy, parties, and amount and type of damages sought in litigation initiated against the states. For example, the Department of Labor now is the litigation czar of damage actions against the states in FLSA wage and overtime matters. The same is true with respect to every other federal agency authorized to bring damage claims against the states pursuant to legislation enacted solely through Congress's Article I powers.

Second, the *Trilogy* and other recent federalism cases strengthen the Supreme Court's policymaking role. *Boerne* and *College Savings Bank I* and *II*, decided within a period of just over two years, evidence the Court's commitment to play an active role in setting limits on Congress's use of Section 5. The *Boerne/College Savings Bank* analytical approach for evaluating the constitutionality of Section 5 legislation provides the Court ample opportunity to interject its policy preferences into the outcomes.<sup>208</sup> In short, the *Trilogy* redistributes power not only from the federal government to the states, but also, at the federal level, from the legislative to the judicial branch.<sup>209</sup>

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206. See discussion *supra* notes 175-77 and accompanying text.

207. See discussion *infra* notes 253-62 and accompanying text.

208. In Section 5 litigation, the Court defines the Fourteenth Amendment right whose enforcement must be the legislation's purpose, it evaluates the legislative record for evidence Congress similarly understood the right and assembled evidence of its infringement by the states, and it determines whether the evidence of state infringement is sufficiently ample to meet the "congruence and proportionality" test. See discussion *supra* notes 143-71 and accompanying text.

209. Vicki Jackson has noted that recent federalism decisions prior to *Alden* also could be understood as reinforcing the Supreme Court's powers by positioning the Court as "the only federal court able to interpret certain federal laws applicable to the states." Vicki C. Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and*

The *Trilogy's* focus on Congress's remedial authority also misdirects attention. Taken at face value, the *Trilogy* appears only to address Congress's ability to provide remedies, not Congress's substantive lawmaking authority.<sup>210</sup> Not once did the *Trilogy* question *Garcia's* commitment that the legislature, not the judiciary, should modulate Congress's exercise of its power to regulate the states as part of a program that affects states and private parties alike.<sup>211</sup> But understanding the *Trilogy* to be only about Congress's remedial authority is myopic for two reasons.

The first reason is that the *Trilogy* contains subtle but strong incentives for Congress to amend federal legislation to eliminate provisions that preempt state law. Even after the *Trilogy*, under *Garcia*, Congress retains authority to enact federal standards that preempt state law. This retained power is highly controversial, and very worrisome to many local officials, particularly as recent federal legislation has preempted local law in such important areas as electronic commerce, tort reform, electric utility deregulation, and telecommunications regulation.<sup>212</sup> For example, the Copyright

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*Rehnquist*, 15 CONST. COMMENTARY 301, 324 (1998). Jackson reasons that the palpable expansion over the past 30 years of federal laws applicable to the states may explain the Court's strong motivation to position itself in that way. She argues that although "a complex set of reasons," *id.* at 303, explains this expansion of federal legislation regulating state activity, three reasons predominate. First, the expansion of state governments' size and scope resulted in states increasingly engaging in the types of activities that subject the private sector to federal regulation. Congress yielded to arguments that states ought to be regulated the same as other legal players. The result was "Congress extended a variety of federal statutes to the states, including minimum wage laws, anti-discrimination laws, environmental laws, bankruptcy, and copyright laws." *Id.* Second, during the last part of this century, the rights revolution "reinvigorat[ed] . . . the Fourteenth Amendment as a constraint on state activities" resulting in increased claims for "equality of treatment" and concomitantly decreased ability of the States to "claim[ ] . . . immunity from federal law." *Id.* at 303-04. Third, the "collective political sense" of the distinction between what is private and what is public "dissipate[d]." *Id.* at 304.

210. In *Alden*, the Court explained that the Tenth Amendment limits Congress's authority to provide judicial remedies against the state, but a state's "privilege . . . to assert its sovereign immunity . . . does not confer upon [it] a concomitant right to disregard the Constitution or a valid federal law." *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

211. See *New York v. United States*, 505 U.S. 144, 160 (1992).

212. See *Regulation of Federal Preemption of State Laws: Hearings on S. 1214 Before the Senate Comm. on Governmental Affairs*, 106th Cong. (1999) (statement of Rep. John Dorso, Chair of the Law and Justice Committee of the National Conference of State Legislatures) available in 1999 WL 20010053 (discussing the adverse effects on state and local government from these legislative initiatives); *Regulation of Federal Preemption of State Laws: Hearings on S. 1214 Before the Senate Comm. on*

Act of 1976 preempts all state copyright laws.<sup>213</sup> However, copyright infringement suits for damages against the states in federal court are barred by *Seminole Tribe* and *College Savings Bank I*. If Congress were to amend the copyright laws to eliminate the exclusive federal jurisdiction federal courts now enjoy,<sup>214</sup> under *Alden* a remedy would only exist when states consent to suit. By refusing to consent, states could exert considerable pressure on Congress because victims of state copyright infringement soon would demand relief. It is plausible that Congress might react by repealing the Copyright Act's preemption provisions, thus permitting each state to go its own way, at least with respect to damages. If one applies this reasoning to trademark, patent, electronic commerce, telecommunications regulation, and the myriad of other federal legislation caught in the web of *Seminole Tribe*, *Boerne*, and the *Alden Trilogy*, states suddenly have much more autonomy than they did before the *Trilogy*.<sup>215</sup>

Understanding the *Trilogy* to be only about Congress's remedial authority is myopic for a second reason. While *Seminole Tribe*, *Boerne*, and the *Trilogy* appear to preserve Congress's substantive authority to extend the requirements of federal law to the states through its Article I powers, these cases effectively thwart Congress's ability to impose liability on the states for violations of those obligations. Without liability,

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*Governmental Affairs*, 106th Cong. (1999) (statement of Mayor Alexander G. Fekete, Vice-Chair Finance, Administration and Intergovernmental Relations Steering Committee of the National League of Cities), available in 1999 WL 20010054 ("It is the National League of Cities' highest priority to put a meaningful check on this preemption of state and local authority.").

213. See 17 U.S.C. § 301(a) (1994); *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999) (en banc) (holding state statute limiting to 42 days the maximum permissible duration of an exclusive licensing agreement between federal copyright holder and motion picture film exhibitor preempted by § 301 of the Copyright Act of 1976); Lowell Wolf, *States' Eleventh Amendment Defense Against Copyright Infringement and Plaintiffs' Alternative Remedies*, 11 WHITTIER L. REV. 885, 901-02 & n.153 (1990) ("Consistent with its goal to create a nationally unified copyright system, Congress enacted section 301 of the Copyright Act of 1976 which states that 'no person is entitled to any [copyright] or equivalent right in any such work under the common law or statutes of any State.'" (quoting 17 U.S.C. § 301(a) (1994))).

214. See 28 U.S.C. § 1338 (1994).

215. Admittedly, this implicit pressure on Congress to eliminate preemption applies only to the preemptive effect on state law of federal legislation that regulates the states themselves, and not regulating the private sector. Still, if the *Trilogy* has this hidden substantive effect on Congress, this would be a federalism bonus far exceeding just remedy.

the dictates of federal law are reduced to exhortations.<sup>216</sup> Depreciating regulatory authority to an exhortation disables it as surely as precluding its exercise altogether.<sup>217</sup> In other words, eliminating the remedy effectively eliminates the substantive right.

## VI. THE *ALDEN TRILOGY* AS INSULATING THE STATES FROM LIABILITY

Those who claim that the Constitution bars Congress from providing a damage remedy against states to enforce federal rights confront an awkward philosophical and political obstacle: federal rights become illusory and states therefore enjoy an exemption from liability not available to other legal actors. Prior to *Alden*, the Supreme Court could, and did, soften the blow of denying plaintiffs a federal forum by suggesting that plaintiffs still could enforce federal rights in state court.<sup>218</sup>

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216. Prior to the *Trilogy*, others had observed that cases that nominally restrict Congress's remedial authority may, in fact, work as proxies for limiting Congress's substantive authority. See, e.g., Caminker, *supra* note 117, at 1007 ("For those who decry the significant expansion of federal power over the past half century [the Court's] bright anti-commandeering line might be a welcome second best strategy."); Jackson, *supra* note 209, at 323 (stating that the "retrenchment of federal judicial power . . . can be understood, in part, as symbolic acts of resistance to political, economic and informational centralization"); Monaghan, *supra* note 117, at 102 (stating that a "narrow, but solid, five-Justice majority" has engaged in a seamless effort to constrict congressional power relating both to remedy and substance).

217. See Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 PA. L. REV. 457, 460 (1992) ("The truism that there is no right without a remedy can be more usefully stated in the form that the reality of the right depends on the effectiveness of the remedy.").

This claim, that limiting Congress's remedial power is a proxy for controlling substantive lawmaking authority, should not be confused with an assertion that (in effect) *Alden* has overruled *Garcia* completely. Under the *National League of Cities* regime that *Garcia* overruled, the Tenth Amendment was viewed as immunizing both state and local governments from Congress's substantive regulatory authority. The *Alden* Court declared that "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

218. See *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 285-87 (1973) (finding that although Congress had not adequately manifested an intent to abrogate states' sovereign immunity in federal court when enacting an amendment extending the FLSA to public employees, that fact did not render the amendment "meaningless" because the amendment "[a]rguably . . . permits [employee] suits in the Missouri courts"); *id.* at 298 (Marshall, J., concurring in judgment) ("[T]he [Missouri] courts . . . have an independent constitutional obligation to entertain employee actions to enforce [FLSA] rights."); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985) (arguing that the

*Alden* now precludes that mollification. Other means are needed to avoid the rule of law problems that the *Alden Trilogy* creates. *Alden*, like *Seminole Tribe* before it,<sup>219</sup> acknowledged these rule of law problems<sup>220</sup> and proffered several “ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.”<sup>221</sup> These alternatives include the following: (1) consent by states; (2) suits against “lesser entities” that are not an “arm of the state”; (3) suits brought by the federal government; (4) suits for prospective relief brought against state officers in their official capacities; and (5) suits for damages brought against state officers in their individual capacities.<sup>222</sup> These alternatives, however, are not adequate to fill the enforcement void that the Court’s recent federalism cases create.

### A. Consent

In *Alden*, the Court stated that “[m]any states, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus ‘mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.’”<sup>223</sup> The Court offered no empirical evidence to support this claim. James Pfander has reported that “virtually every state in the country has overthrown the doctrine of sovereign immunity to some extent and . . . [t]he sheer availability of state-court dockets helps to solve the problem of sovereign immunity . . .”<sup>224</sup> He argues that because

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dissent’s assertion that the absence of a federal forum to prosecute federal claims will exempt the state from compliance

wholly misconceives our federal system. . . . ‘[T]he issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals*.’ It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.

*Employees*, 411 U.S. at 293-94 (Marshall, J., concurring in judgment)) (emphasis in original) (citation omitted).

219. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996).

220. See *Alden*, 119 S. Ct. at 2266 (“Sovereign immunity . . . does not bar all judicial review of state compliance with the Constitution and valid federal law.”).

221. *Id.* at 2268.

222. *Id.* at 2267-68. The Court also included Section 5 suits. See *id.* at 2267. Hampered by *Boerne* and its progeny, the Section 5 power is not likely to be available except for some legislation that prohibits discrimination. See discussion *supra* notes 151-68 and accompanying text.

223. *Alden*, 119 S. Ct. at 2267 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

224. Pfander, *supra* note 68, at 172-73.

many states have waived sovereign immunity for state law actions in tort, contract, and tax refund, the valid excuse doctrine and the nondiscrimination principle that undergirds it will secure state court forums to prosecute federal damage claims against the states.<sup>225</sup> *Alden* undermines this otherwise cogent reasoning. States now are free to decide when they will consent to suit and on what terms, absent "evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."<sup>226</sup> Thus in most cases it does not matter if a state waives its sovereign immunity in state tort or contract actions because a state may withhold consent on similar federal claims.<sup>227</sup>

It is unlikely that many states have consented to suit in their own courts on damage claims by individuals alleging violation of federal rights. *Alden* makes plain that Maine, for example, has not consented to FLSA overtime actions. *Alden*-type litigation was routine prior to the *Trilogy*.<sup>228</sup> In addition to Maine, cases were brought in Arkansas, Florida, Iowa, Louisiana, Maryland, Massachusetts, New Jersey, New Mexico, New York, Tennessee, and Wisconsin.<sup>229</sup> One can say with reasonable assurance that in these states there was no waiver of sovereign immunity permitting state courts to hear damage claims based on the federal causes of action in those cases. Otherwise, there would have been no need to litigate whether nonconsenting states can be sued for damages in state court—the issue in these cases.

Only a thorough state-by-state analysis can provide a full understanding of state waiver of sovereign immunity for damage actions brought on federal claims. Some of that work has begun. It shows that waivers of sovereign immunity normally are drawn narrowly and seldom include waiver of individual damage actions based on federal law. This is true,

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225. *See id.* at 173 ("[T]he Court can now secure an original docket [in state court] for federal claims simply by applying . . . [the] principle of nondiscrimination.").

226. *Alden*, 119 S. Ct. at 2268.

227. In *Alden*, for example, the Court never addressed petitioner's argument that Maine had consented to state law-based claims similar to the FLSA claims because there was no allegation that Maine had systematically manipulated its immunity to discriminate against federal claims. *See id.*

228. *See* discussion *supra* notes 78-80 and accompanying text.

229. *See* cases cited *supra* notes 78-80.

for example, in Pennsylvania,<sup>230</sup> Texas,<sup>231</sup> Georgia,<sup>232</sup> and Wisconsin.<sup>233</sup> In other states like Ohio, state courts, prior to *Alden*, had construed state legislation waiving sovereign immunity for state law-based claims as including waiver to be sued in state court on federal claims, but only because of an erroneous understanding that state courts were constitutionally required to hear such cases.<sup>234</sup> Precedent built on such an

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230. In Pennsylvania, the legislature reaffirmed state sovereign immunity in 1978. See 1 PA. CONS. STAT. § 2310 (1995). Under that statute, "immunity [is] the rule, and the waivers [are] the exceptions." James J. Dodd & Martin A. Toth, *The Emperor's New Clothes: A Survey of Significant Court Decisions Interpreting Pennsylvania's Sovereign Immunity Act and Its Waivers*, 32 DUQ. L. REV. 1, 106-07 (1993). In Pennsylvania, waivers are "strictly construe[d] . . . as the exceptions to the general rule" and none set forth in the statute includes damage claims based on federal law. *Id.* at 108. Waivers are limited to the following categories: operation of a motor vehicle; claims for medical professional liability; claims arising out of the care, custody or control of personal property or a dangerous condition of real estate; claims for potholes and other dangerous conditions created by natural elements; claims for the care, custody or control of animals; claims for liquor store sales; claims for acts of Pennsylvania's military forces; and claims for toxoids and vaccines. See *id.* at 106-07.

231. See John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System, Part Two*, 25 HOUS. L. REV. 245 (1988).

232. See Shea Sullivan, *City of Rome v. Jordan: Georgia Is a Public Duty Doctrine Jurisdiction with No Waiver of Sovereign Immunity—a Good "Call" by the Supreme Court*, 45 MERCER L. REV. 533, 542 n.30 (1993) (discussing an "amendment to the Georgia constitution removing the waiver of sovereign immunity except as per a Georgia Tort Claims Act"). Even when states waive sovereign immunity, its "functional equivalent" often is reintroduced judicially through "the public duty doctrine." Kelly M. Tullier, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 903 (1992). Under this doctrine, "gain[ing] popularity in more and more jurisdictions," Sullivan, *supra* at 538, government's duties are public. Hence, no liability attaches for nonfeasance absent (1) explicit assurance that government would act on behalf of an injured party, (2) knowledge by government that inaction could lead to harm, or (3) justifiable detrimental reliance by the injured party on government's affirmative undertaking. See *id.* at 540.

233. See, e.g., *Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1998) (construing Wisconsin statute authorizing overtime suits "in any court of competent jurisdiction" as waiver of sovereign immunity only with respect to state overtime laws, not the FLSA (citing WIS. STAT. §§ 109.01(2), (3), 109.03 (5) (1999))).

234. For example, in Ohio, the state supreme court in *Mossman v. Donahey*, 346 N.E.2d 305 (1976), dismissed a FLSA claim against the state because the state had not consented to such suit. See *id.* at 315. In *Keller v. Dailey*, 706 N.E.2d 28 (1997), an intermediate Ohio court of appeals nevertheless construed the 1975 Ohio Court of Claims Act, OHIO REV. CODE ANN. §§ 2743.02(A)(1), 4111.01(C), 4111.03, 4111.10(A) (1999), as waiving sovereign immunity for FLSA suits brought against the state in state court, even though nothing in that legislation explicitly refers to consent to be sued on federal claims. See *Keller*, 706 N.E.2d at 30. The court in *Keller* did this to avoid a conflict with the Sixth Circuit Court of Appeals, which had held that "state employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to



erroneous legal foundation likely will be reconsidered in light of *Alden*. Until such a complete evaluation has been undertaken, it is premature to conclude that “[t]he rigors of sovereign immunity are thus ‘mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.’”<sup>235</sup> If anything, the evidence to date contradicts that conclusion.

To some degree, the Court may have considered it unlikely that many states will subject themselves to private damage actions on federal claims. The *Alden* Court emphasized its reliance on the states’ voluntary compliance rather than on suit in state court to remedy noncompliance. The majority was “unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States . . . provides an important assurance that [the demands of the Supremacy Clause will be satisfied].”<sup>236</sup> Although a system in which states are expected to exercise good faith and obey federal law is a worthy aspiration, law libraries are filled with enough examples of noncompliance with federal law to suggest the folly of excessive reliance on a constitutional honor system and to recommend creation of compliance incentives.<sup>237</sup>

### B. Suits Against “Lesser Entities”

The Court advanced a persuasive claim when it argued that the *Trilogy*’s adverse effects on plaintiffs are mitigated by the rule that state sovereign immunity applies only to the state, state agencies, and entities considered arms of the state. State sovereign immunity does not extend to a state’s political

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enforce federal law.” *Keller*, 706 N.E.2d at 30 (quoting *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996)).

235. *Alden*, 119 S. Ct. at 2267 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

236. *Id.* at 2266.

237. Congress may create an incentive for “voluntary” consent by explicitly conditioning receipt of federal funds on states’ consent to suit in federal court to litigate alleged violations of the federal statute providing the funding. *See, e.g., Litman v. George Mason Univ.*, 184 F.3d 544 (4th Cir. 1999) (holding that states accepting funds under Title IX of the 1972 Education Amendments waive their Eleventh Amendment immunity from suit in federal court for Title IX violations); *Bradley v. Arkansas Dep’t of Educ.*, 189 F.3d 745 (8th Cir. 1999) (same applied to the acceptance of funds under the IDEA). *But see Bradley*, 189 F.3d at 755 (noting that Congress lacks authority under its spending power to condition § 504 of the Rehabilitation Act funding unrelated to state waiver of sovereign immunity to all claims under § 504).

subdivisions—local governing bodies such as municipal corporations,<sup>238</sup> counties,<sup>239</sup> cities,<sup>240</sup> and school districts.<sup>241</sup> The continuing ability to bring federal damage claims against these units of local government is significant because it is here that citizens interact with government most and thus here that the greatest danger of infringement of federal rights exists.<sup>242</sup>

Nonetheless, the value of the distinction between the state and its political subdivisions must be discounted for several reasons. First, while the law is clear that a statewide agency of state government is an arm of the state,<sup>243</sup> the law is unclear, and inconsistent, with respect to the status of state boards, corporations, and similar groups. The problem has been described as follows:

Courts classify state bodies according to a dichotomy, labelling [sic] the entities as either arms of the state or as political subdivisions . . . . Between arms of the state and local municipalities, however, lies a wide range of unconventional government-chartered entities that possess attributes of both political subdivisions and state agencies. These hybrid state entities create a vexing problem for Article III courts faced with Eleventh Amendment immunity disputes. Even the more traditional state-created bodies, such as public universities, school districts, and highway and transit agencies, cannot always be placed squarely in the alter ego-political subdivision dichotomy.<sup>244</sup>

Confusion arises because the arm-of-the-state doctrine lacks

238. See *Alden*, 119 S. Ct. at 2267; see also *Howlett v. Rose*, 496 U.S. 356, 376 (1990) (holding that "municipal corporations and similar governmental entities are [§ 1983] 'persons'").

239. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding that the Eleventh Amendment does not bar a federal suit to collect debt against a county).

240. See *Workman v. New York*, 179 U.S. 552, 563-66 (1900).

241. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984) ("[T]he Eleventh Amendment does not apply to 'counties and similar municipal corporations.'" (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977))).

242. See ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 406 (1999) ("The ability to sue local governments in federal court is significant because it is this level of government that provides most social services in this country . . . [and is] most likely to violate [federal law].").

243. See *Edelman v. Jordan*, 415 U.S. 651 (1974) (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945)).

244. Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1243 (1992).

coherent standards,<sup>245</sup> produces contradictory results,<sup>246</sup> and is unsupported based on functional differences between a state and its political subdivisions.<sup>247</sup> Overall, the arm-of-the-state/political subdivision distinction has generated considerable criticism.<sup>248</sup>

Second, the Court has recognized an important, but as yet not fully developed, exception to the rule. Even when it is undisputed that a governing entity is not entitled to state sovereign immunity on its own, the Court will accord immunity when the relief granted would harm the state directly.<sup>249</sup> The crucial factors are the level of state cooperation between state and local officials anticipated by state law and whether the source of funding comes exclusively or primarily from the state.<sup>250</sup>

245. See *id.* at 1243-44. Rogers argues:

The incoherence that plagues the arm-of-the-state doctrine stems from the Court's failure to articulate a principled analytical framework in which to gauge a state governmental body's Eleventh Amendment immunity status. . . . [T]he Court's approach has unleashed the lower courts to craft their own dissimilar, multi-factor tests, which often extend beyond the methodology undertaken by the Supreme Court, vary on the relative weight of each factor, and generate conflicting results.

*Id.*; see also JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 119 (1987) ("[T]he distinction in Eleventh Amendment law between cities and counties on the one hand and states on the other produces bizarre results.").

246. See, e.g., CHEMERINSKY, *supra* note 242, at 407-08; 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.11 (3d ed. 1998).

247. See RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1057 (4th ed. 1996) ("Since a local government is a creature of the state, it is hard to see any functional basis for distinguishing the two.").

248. See ORTH, *supra* note 245, at 119; Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 756 (1978) (concluding that the distinction is anomalous); see also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 57 n.23 (1990) (noting that the distinction is seen as a "doctrinal anomaly"). A parallel issue arises with respect to multi-state agencies created pursuant to a congressionally approved interstate compact. In *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the intent of the states entering into the interstate compact seemed to be determinative of whether the states' sovereign immunity was found to run to the multi-state agency. In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994), the Court emphasized the absence of state financial responsibility in holding that a multi-state agency was not entitled to sovereign immunity. It is unclear how much financial responsibility of the creating states is sufficient to entitle the multi-state agency to sovereign immunity.

249. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124 n.34 (1984).

250. See *Crane v. Texas*, 759 F.2d 412, 417-18 (5th Cir. 1985) ("[T]he most crucial factor to be considered in determining the County's status is 'whether the funds to

*McMillon v. Monroe County*<sup>251</sup> further complicates the problem. In *McMillon*, a county sheriff, locally elected and compensated from local funds, was found to be a state official primarily because he enforced state law. Many local officials enforce state law and, for that reason, can be expected to claim the status of state officials. Until principled limits are placed on *McMillon*, it threatens to consume the arm-of-the-state/political subdivision distinction.

In sum, while the Court in *Alden* is correct that the distinction between a state and its political subdivisions ameliorates the impact of the *Trilogy* on plaintiffs, the distinction's soft boundaries invite manipulation. With so much now riding on whether a governing entity is characterized as an arm of the state or a local political subdivision—and, if a local political subdivision, whether any exceptions apply—one can expect public officials will exert considerable energy to move the law in the direction of more immunity for local governing units and local officials being sued in their official capacity.<sup>252</sup> A cautious response to the Court's "lesser entities" observation is warranted.

### C. Suits Brought by the Federal Government

Over a quarter-century ago, at a time when a majority of state and local employees were not covered by the FLSA, the Solicitor General of the United States argued in an amicus brief in *Employees v. Missouri Public Health Department*<sup>253</sup> that the United States Department of Labor could investigate less than

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defray any award would be derived from the state treasury.'" (quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)); *Pennhurst*, 465 U.S. at 123-24.

251. 520 U.S. 781 (1997).

252. The stakes are particularly high in litigation under 42 U.S.C. § 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Court held that neither states nor officials sued in their official capacities for damages are "persons" within the meaning of § 1983. This is because § 1983 was interpreted as paralleling the scope of state sovereign immunity under the Eleventh Amendment. *See id.* at 66-67. For a discussion of the sovereign immunity protections accorded state officers sued in their official capacity, see *infra* notes 273-305 and accompanying text. Government entities that do not enjoy sovereign immunity, such as municipalities and other local government units, are "persons" under § 1983. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). Accordingly, resolution of the arm-of-the-state versus local political subdivision distinction determines whether a § 1983 action can be brought against a unit of government and its officials sued in their official capacity for damages.

253. 411 U.S. 279 (1973).

four percent of the employing establishments.<sup>254</sup> In 1974, Congress similarly determined, based on the Department of Labor's experience enforcing the FLSA, "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily."<sup>255</sup> The problem was compounded, Congress concluded, by the inclusion in 1974 of additional state government employees, making it "all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights."<sup>256</sup> In *Alden*, the Solicitor General advised the Court that "[w]e have been informed by the Department of Labor that its more recent experience confirms Congress's judgment that private enforcement is necessary to ensure that state employees receive the wages to which they are entitled by federal law."<sup>257</sup> Notwithstanding this evidence, the *Alden* Court included government enforcement of federal rights as one of the "ample [alternative] means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy

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254. See *id.* at 287; see also Brief of Amicus Curiae National Association of Police Organizations in Support of Petitioners at 29, *Alden v. Maine*, 119 S. Ct. 2240 (1999) (No. 98-436) ("Any assertions that the Department of Labor could take over the responsibility for bringing all of these [wage and hour] lawsuits against States, which are or would be brought by affected public employees, strain credibility and are completely unfounded, due to serious resource constraints.").

255. S. REP. NO. 93-690, at 27 (1974).

256. *Id.*

257. Brief for United States at 37, *Alden v. Maine*, 119 S. Ct. 2240 (1999) (No. 98-436). Moreover, the Solicitor General argued that especially with respect to "a right so integral to personal autonomy and well-being as the recovery of wages due under federal law in exchange for one's own labor," an individual should not be left to the vicissitudes of federal officials "who must operate under their own enforcement priorities and resource limitations." *Id.* at 38.

After careful study, Professor Clyde Summers concluded that "[e]nforcement [of the FLSA] through the Department of Labor has marked weaknesses. . . . [T]he agency is woefully lacking in the necessary resources. . . . Inadequate settlements are accepted because of the costs of collecting adequate proof, pursuing litigation, and updating investigations prior to finalizing settlement agreements." *Id.* at 494 (citation omitted). Professor Summers concluded that government enforcement did not deter violators: "Because there are too few compliance officers, a violator only has one chance in five of getting caught." *Id.* at 494-95; see also Stephen G. Wood & Mary Anne Q. Wood, *The Fair Labor Standards Act: Recommendations to Improve Compliance*, 1983 UTAH L. REV. 529, 546-48 (describing the FLSA enforcement procedures).

Clause."<sup>258</sup>

The dissent in *Alden* characterized this view as whimsical.<sup>259</sup> The government enforcement model is unrealistic, as the dissent in *Alden* suggests, both because of the absence of resources<sup>260</sup> and the absence of political will.<sup>261</sup> With 4.7 million employees employed by the fifty states, it is difficult to disagree with the dissent's conclusion that "there is no reason today to suspect that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with [the FLSA]."<sup>262</sup>

258. *Alden*, 119 S. Ct. at 2268.

259. *See id.* at 2293 (Souter, J., dissenting) ("[U]nless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy.").

260. *See Taylor v. Brighton Corp.*, 616 F.2d 256, 263 (6th Cir. 1980) (noting the conclusion by the Secretary of Labor, participating as amicus curiae, that the Department of Labor's lack of adequate resources means that "individual suits offer the only realistic hope of protecting employees from retaliatory discrimination"). In his examination of federal enforcement of federal labor laws, Professor Clyde Summers discovered a pattern of inadequate enforcement due largely to inadequate funding. *See Summers, supra* note 217, at 480-81. This was true of the FLSA as well as other federal statutes. He found that in 1989 the federal government filed only 563 suits for employment discrimination, whereas private litigants brought 7,470 suits. *See id.* at 480. He also found that "[p]rocessing cases through the EEOC is painfully slow. On the average, 280 days are required to investigate a case and make a determination as to reasonable cause and 255 days are consumed in conciliation efforts to obtain voluntary compliance and settlement." *Id.* at 480-81. He noted that the Equal Employment Opportunity Commission (EEOC) "brought suit in less than 30 percent of the cases in which reasonable cause was found and conciliation failed." *Id.* at 481. Professor Summers concluded that "[t]he inadequacy of enforcement through the EEOC is, in large measure, the result of inadequate funds to handle the caseloads, which limits the EEOC's efforts and causes delays." *Id.*

261. *See* NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 157 (1988) ("The record [of the Reagan Administration] clearly manifests an effort to turn back the clock in the enforcement of civil rights laws [and] not merely in comparison with prior administrations. . . . [T]here was 'cyclical movement in the path' . . . notably in the Nixon years."); THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION vii-viii (1993) ("[M]uch of the progress that OSHA made during its first decade was dissipated during the first five years of the Reagan administration. The president's appointment of administrators who were extremely hostile to the agency's mission during this period rendered OSHA impotent."); *see also* BENJAMIN W. MINTZ, OSHA: HISTORY, LAW, AND POLICY xii-xiii (1984) (discussing the mixed enforcement record of OSHA under various Assistant Secretaries of Labor).

262. *Alden*, 119 S. Ct. at 2293 (Souter, J., dissenting). One reader argued this point in stronger terms:

"Mindless" is an apt description [of *Alden*]. The ruling puts aggrieved state workers in an impossible bind. . . . [The case] leaves the federal

The lack of realism of government enforcement as an alternative to private damage actions is exceeded only by its irony. The efficacy of the Court's argument depends on the federal government vastly expanding its enforcement capacity with respect to dozens of federal laws that likely will fall within the rule of *Alden*. The image of a bulging and expensive federal bureaucracy of government attorneys descending on state agencies to enforce federal law is hardly the federalism of Justices Black or Powell or, one would have thought, Justices Rehnquist, Kennedy, or Scalia.<sup>263</sup> Moreover, an effective federal enforcement effort that substantially duplicates the pre-*Seminole Tribe/Alden* private effort does little to alleviate the states' autonomy and fiscal apprehensions, which so manifestly inform the Court's reasoning in *Alden*.<sup>264</sup> Except for the political filter the Court referenced in *Alden*,<sup>265</sup> substituting a government lawyer for a private one does nothing to address the *Alden* majority's many structural concerns. This irony disappears only if one concludes that it is unrealistic to expect the federal government to mount, if it ever could, a sufficiently effective enforcement effort to compensate for the loss of private enforcement caused by *Alden* and *Seminole Tribe*.<sup>266</sup>

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government to sue on a state worker's behalf, which is an option that's long on theory but almost nonexistent in fact. There are almost 4.7 million state workers, and it's clear that enforcement agencies such as the Labor Department can't begin to handle the volume of current and future complaints.

Editorial, *supra* note 17.

263. See Editorial, *Federalism Under Attack*, THE BUFFALO NEWS, June 28, 1999, at B2. The editorial argues that the *Trilogy*

shifts more of the monitoring of state compliance with federal law from individuals—who would be much closer to any problem—to the national government, which lacks the manpower to effectively monitor the alleged violations. This decision will expand personal dependence on government. That, along with weakening personal rights, is a curious pathway for conservatives on the Supreme Court to take.

*Id.*

264. See discussion *supra* notes 116-25 and accompanying text; see also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (“[T]he vulnerability of the State’s purse [is] the most salient factor in Eleventh Amendment determinations.”).

265. See discussion *supra* note 131 and accompanying text.

266. See Editorial, *States and the Court*, WASH. POST, July 7, 1999, at A18 (“[T]he court’s continued expansion of this area is a perverse kind of federalism that doesn’t actually augment state policymaking authority except to the extent that states wish to violate federal law.”).

## D. Suits Against State Officers

After *Seminole Tribe*, three important articles argued that the case was more rhetorical than real. In one, Henry Monaghan maintained that “although *Seminole Tribe* inflates the rhetoric of ‘inherent state sovereignty,’ the majority in fact left firmly in place the fundamental reality of state accountability in federal court for violation of federal law.”<sup>267</sup> John Jeffries expressed a similar view when he stated,

The Eleventh Amendment almost never matters. More precisely, it matters in ways more indirect and attenuated than is usually acknowledged . . . . If it were not possible to circumvent the Eleventh Amendment through Section 1983, the Supreme Court would long ago have confined the Eleventh Amendment to diversity cases or adopted some other debilitating construction.<sup>268</sup>

Carlos Manuel Vázquez concurs, somewhat more cautiously, observing that

[m]uch of the revisionist scholarship on the Eleventh Amendment appears to have been driven by profound discomfort with th[e] enforcement gap created by the *Hans* interpretation of the Eleventh Amendment . . . . [H]owever, I am satisfied that the ‘fictions’ that the Court has used to alleviate the problems created by *Hans* reduce the gap to manageable proportions . . . .<sup>269</sup>

These authors find comfort in the opportunities still available to sue state officers in federal court.<sup>270</sup> The Court in *Alden* also listed these opportunities as meaningful alternatives to private damage actions against the state.<sup>271</sup>

The option to sue state officers operates at two levels—suits against officers in their official capacities and suits against

267. Monaghan, *supra* note 117, at 103.

268. Jeffries, *supra* note 49, at 49, 59.

269. Vázquez, *supra* note 46, at 1695.

270. See Monaghan, *supra* note 117, at 103 (“[L]ittle has changed after the *Seminole Tribe* decision because the rule of *Ex parte Young* remains in full force.”); Jeffries, *supra* note 49, at 49 (“In almost every case where action against a state is barred by the Eleventh Amendment, suit against a state officer is permitted under Section 1983.”); Vázquez, *supra* note 46, at 1790 (“I conclude that as long as the Constitution continues to be interpreted to authorize private suits against state officers who violate federal law, an interpretation of the Constitution as barring private damage actions against the states themselves does not raise severe rule-of-law problems.”).

271. See discussion *supra* note 222 and accompanying text.



officers in their individual capacities.<sup>272</sup> As shown in the next two sections, official capacity suits are inadequate because they neither compensate nor deter, and may soon become history—at least as we have understood them. Individual capacity suits also are inadequate substitutes because they are unavailable when the federal right of action is against the state itself rather than the individual state officer, as is often the case. Moreover, even when statutes create a right of action against state officers individually, qualified immunity too often presents an insurmountable hurdle.

### 1. *Official Capacity Suits for Prospective Relief*

One of the “fictions” in Eleventh Amendment jurisprudence is the rule permitting federal court suits against state officers in their official capacity. Referred to as *Young* actions after the lead case establishing the rule,<sup>273</sup> such suits name the state officer as the nominal party. But, because the suit is against the office, not the officer, the state is the real party in interest.<sup>274</sup> Federal courts have jurisdiction over an official capacity suit against a state official “when that suit seeks only prospective injunctive relief in order to ‘end a continuing violation of federal law.’”<sup>275</sup> These suits may not be maintained for retroactive relief, however, thus precluding suits for damages.<sup>276</sup> Thus, official

272. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (elaborating on “the distinction between personal- and official-capacity suits”).

273. See *Ex parte Young*, 209 U.S. 123 (1908).

274. See *Hafer*, 502 U.S. at 25 (“Suits against state officials in their official capacity therefore should be treated as suits against the State.” (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985))).

275. *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Such suits remain suits against the state for purposes of the state action doctrine but not for purposes of the Eleventh Amendment. This is why the rule has been referred to by the Court as a “fiction.” See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984).

276. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (“[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”). In *Pennhurst*, 465 U.S. 89, the *Young* rule was held also not to apply to prospective relief based on state law. That outcome is the application of the broader principle that “[t]he Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State.” *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985). Indeed, even when a federal court has jurisdiction to hear a private damage claim against the state based on federal law because Congress has validly abrogated state sovereign immunity through its Section 5 power, the courts routinely will dismiss state causes of action based on this reasoning in *Pennhurst*. See, e.g., *Kimel v. Florida Bd.*

capacity suits relax the grip of *Seminole Tribe*, *Boerne*, and the *Trilogy* to some degree. For example, under current doctrine, a patent or copyright holder presumably could use this "fiction" to sue in federal court to enjoin continuing infringement of a patent or copyright.<sup>277</sup> The injunction would operate prospectively from the date of the court's order.

Nonetheless, several limitations discount the value of this as an adequate alternative to a judicially enforced damage claim against the state itself. First, some federal statutes provide for the federal government, but not private parties, to seek injunctive relief to enforce federal rights. The FLSA is a good example. It creates a private right of action to recover "unpaid minimum wages, or . . . unpaid overtime compensation"<sup>278</sup> but, as the Supreme Court is fully aware, only the Secretary of Labor is authorized to sue to enjoin the continuing violation of an employee's statutory right to a minimum wage or overtime compensation.<sup>279</sup>

Second, while this alternative may end ongoing violations of federal law, it does not grant compensation for past wrongs and does not deter noncompliance by the states until injunctive relief is granted.<sup>280</sup> The Court acknowledges that the *Young* fiction is designed to vindicate the supremacy of federal law values in our Constitution but not deterrence or compensation values.<sup>281</sup> The significance one attaches to this limitation varies

of Regents, 139 F.3d 1426, 1433 n.17 (11th Cir. 1998)), *aff'd. on other grounds*, 120 S. Ct. 631 (2000) (involving an ADA action).

277. See, e.g., *Chavez v. Arte Publico Press*, 157 F.3d 282, 291 (5th Cir. 1998) (holding that, even if copyright damage claims cannot be brought against a state in federal court because Congress lacks Section 5 authority to enact the copyright laws, "[t]he *Ex parte Young* doctrine permits suits for prospective injunctive relief . . .").

278. 29 U.S.C. § 216(b) (1994).

279. FLSA § 217 provides for injunctive relief. See *id.* § 217. FLSA § 211(a) states the following: "[T]he Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter." *Id.* § 211(a). Accordingly, the Supreme Court has stated that "in construing the enforcement sections of the FLSA, the courts ha[ve] consistently declared that injunctive relief [i]s not available in suits by private individuals but only in suits by the Secretary." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); see also *Summers*, *supra* note 217, at 491 (noting that employees can sue for back wages and liquidated damages but only the Secretary of Labor can sue for injunctive relief under § 217).

280. A noncomplying state risks a damage suit by the federal government, but that risk may be slight. See discussion *supra* notes 253-66 and accompanying text.

281. See *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." (citations

with one's view of what the rule of law principle should encompass. Even a modest view certainly would insist that there be meaningful deterrence and some compensation for past violations.<sup>282</sup> *Young* remedies provide neither.

In any event, the Court seems likely to curtail the *Young* remedy in the near future. In *Seminole Tribe*, the Court denied a *Young* remedy<sup>283</sup> against the Governor of Florida to compel compliance with the duty to negotiate required by the Indian Gaming Regulatory Act (IGRA).<sup>284</sup> The Court concluded that the availability of the *Young* remedy depended on Congress's intent to provide it and found a lack of intent in IGRA because the statute contained an "intricate remedial scheme."<sup>285</sup> The Court easily could extend this intent requirement to limit *Young* remedies to those statutes containing a clear statement by Congress of an intent to provide them.<sup>286</sup> Such a clear statement limitation could substantially reduce the availability of *Young* remedies.<sup>287</sup> But even under the best possible interpretation,

omitted)).

282. Carlos Manuel Vázquez, for example, advances the view that "[t]he rule-of-law ideal insists that federal courts have the power not just to stop ongoing violations of federal law, but also to remedy at least the most egregious past violations as well." Vázquez, *supra* note 46, at 1686 (emphasis omitted). The Court seems to acknowledge that official capacity suits are a necessary but not sufficient alternative to damage suits against the states. In *Alden*, the Court added damage suits against state officers in their individual capacities to the list of remedial options that, together, comprise an "ample" alternative to damage suits against the state. See *Alden*, 119 S. Ct. at 2267-68; see also discussion *infra* notes 306-97 and accompanying text.

283. *Seminole Tribe v. Florida*, 517 U.S. 44, 74 n.17 ("We find only that Congress did not intend [to authorize federal jurisdiction under *Ex parte Young*] in the Indian Gaming Regulatory Act.").

284. 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (1994). The duty to negotiate is set forth in IGRA, 25 U.S.C. § 2710(d)(7) (1994).

285. *Seminole Tribe*, 517 U.S. at 73-74 ("[T]he duty to negotiate imposed upon the State by [the IGRA] does not stand alone. Rather . . . Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7). Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." (citing *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988))).

286. See Jackson, *supra* note 36, at 530 ("*Seminole Tribe's* treatment of *Ex parte Young* can be understood as part of a broader effort by the Court to limit the availability of federal judicial relief on a range of statutory and constitutional claims, absent explicit congressional authorization.>").

287. Vicki Jackson has found in *Seminole Tribe* an even more ominous possibility. Focusing on language in the case describing *Young* as a "narrow exception to the Eleventh Amendment," *Seminole Tribe*, 517 U.S. at 76, Jackson concludes that the remedy may be limited in the future to constitutional, not statutory, violations. See Jackson, *supra* note 36, at 535 ("[T]he most troubling implication of *Seminole Tribe* is its recasting of *Ex parte Young* as an almost doubtful

"[t]he test will be . . . : Does the statutory scheme evince a congressional design to preclude the [*Young*] remedy . . . ? [The answer] turns on analysis of the terms, history, purpose, and context of the remedial provisions of the particular statute sought to be enforced."<sup>288</sup> *Seminole Tribe* makes plain that a plaintiff no longer can rely confidently on the availability of prospective relief to enforce federal rights in federal court by suing state officers in their official capacity.

One might be more inclined to discount *Seminole Tribe's* likely narrowing of the *Young* remedy if it were not for the decision the following year in *Idaho v. Coeur d'Alene Tribe*.<sup>289</sup> In that case, a Native American Indian tribe sought to enjoin the state from interfering with its asserted beneficial ownership of the submerged lands of Lake Coeur d'Alene. Holding the *Young* exception inappropriate, the Court dismissed the claim as barred by the Eleventh Amendment. To some commentators, the case stands for the relatively benign proposition that the *Young* remedy is unavailable "to quiet title to submerged lands."<sup>290</sup> Yet the reasoning in Justice Kennedy's principal opinion invites a much broader understanding. In *Coeur d'Alene*, the majority examined the effect of the tribe's requested relief on the state's treasury and governing autonomy, concluding that the case implicated "particular and special circumstances."<sup>291</sup> A victory by the tribe, the Court reasoned, would affect the state's "sovereign interest in its lands and waters . . . [as extensively] as almost any conceivable retroactive levy upon funds in its Treasury"<sup>292</sup> and would affect the state's control "over a vast reach of lands and waters."<sup>293</sup> *Coeur d'Alene* thus suggests that the availability of the *Young* remedy may be limited to injunctions that have a minimal impact on a state's treasury or governing autonomy. This

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act of judicial usurpation, justified only in 'narrow' circumstances (possibly those involving constitutional violations not the subject of statutory remedies."); see also *id.* at 535 n.155.

288. David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 550 (1997).

289. 521 U.S. 261 (1997).

290. CHEMERINSKY, *supra* note 242, at 429. In *Coeur d'Alene*, the Court analogized the suit for injunctive relief to a suit to quiet title. See *Coeur d'Alene*, 521 U.S. at 281.

291. 521 U.S. at 287.

292. *Id.*

293. *Id.* at 282.

exception threatens to consume much of the rule.

The Kennedy opinion in *Coeur d'Alene* proposed an even more radical revision of the *Young* doctrine. In a section in which only Chief Justice Rehnquist concurred, the opinion argued for an ad hoc "balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case."<sup>294</sup> Expressing concern over a possible "expansive application of the *Young* exception,"<sup>295</sup> these Justices proposed restricting its availability to cases in which "no state forum [is] available to vindicate federal interests"<sup>296</sup> or when a case presents an otherwise compelling need to vindicate federal rights.<sup>297</sup>

The *Alden* decision is likely to generate renewed interest in limiting *Young* in general and reconsidering adoption of the Kennedy/Rehnquist approach to *Young* in particular. *Alden* creates increased incentives for plaintiffs to seek *Young* injunctions because such suits against state officers in their official capacity are the only remaining judicial remedy available to private plaintiffs seeking to enforce federal statutory rights against a state. From the perspective of states' rights advocates, unless *Young* is confined, states could be denied the blessings of the Court's last half-decade of federalism decisions. A quick review of the *Alden* majority's structural arguments demonstrates the point.

Recall that in *Alden* the Court addressed several structural themes.<sup>298</sup> The first theme was autonomy. The Court stated that "[a] state is entitled to order the processes of its own governance . . . ."<sup>299</sup> The second theme was fiscal stability. In this regard, the Court stated that "an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States . . . could create staggering burdens, giving Congress a power and a leverage over the States that . . . would pose a severe and notorious danger to the States and their resources."<sup>300</sup> And the third theme was the

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294. *Id.* at 278.

295. *Id.* at 274.

296. *Id.* at 291.

297. *See id.* at 278.

298. *See* discussion *supra* notes 117-31 and accompanying text.

299. *Alden v. Maine*, 119 S. Ct. 2240, 2265 (1999).

300. *Id.* at 2264.

“unanticipated intervention [of individuals] in the processes of government.”<sup>301</sup> Democratic governance requires that judgments regarding the allocation of scarce resources be made through each state’s political process, “not by judicial decree mandated by the Federal Government and invoked by the private citizen.”<sup>302</sup> Admittedly, these structural values no longer can be threatened through private damage actions against unconsenting states. But, unless and until *Young* is contained, federal courts will continue to pose a threat to the states’ own ordering of its governmental processes and its fiscal autonomy as a result of unanticipated litigation brought by individual claimants.

Yet, eliminating the *Young* remedy altogether for statutory claims is not likely to generate broad consensus. The remedy is too important for assuring states’ compliance with federal statutory obligations, especially as *Seminole Tribe* and *Alden* have eliminated the possibility of private damage relief against the states. The likely increased reliance on the *Young* remedy thus presents somewhat of a quandary. The Kennedy/Rehnquist proposal to constrict *Young* could present states’ rights advocates with an elegant solution. It creates an incentive for states to waive their sovereign immunity and provide state court remedies to enforce federal rights—the incentive being the offer to eliminate *Young* remedies for those states providing adequate state remedies. If one assumes parity of state and federal courts’ capacity to enforce federal rights, as Justice Kennedy and Chief Justice Rehnquist assume,<sup>303</sup> then their proposal adequately protects federal rights while removing one of the last sources of federal judicial oversight of

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301. *Id.* (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

302. *Id.* at 2265. The Court warned that federal assertion of control “over a State’s most fundamental political processes . . . strikes at the heart of political accountability . . .” *Id.*

303. See *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 274-75 (1997). The Court said:

Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be applicable in federal court but for an exception based on *Young*. For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court. . . . Assuming the availability of a state forum with the authority and procedures adequate for the effective vindication of federal law, due process concerns would not be implicated by having state tribunals resolve federal-question cases.

*Id.* But see *supra* note 68 for a discussion of the parity debate.

the states still available to individual plaintiffs. Many might find this to be an attractive combination.<sup>304</sup>

The preceding discussion strongly suggests that *Seminole Tribe* and *Coeur d'Alene* represent the future jurisprudential landscape in the sense that the *Young* exception as we have known it will not likely continue.<sup>305</sup> Because *Seminole Tribe* and *Alden* expand the likelihood of *Young* injunctions becoming the remedy of choice in federal litigation to enforce federal statutory rights, states can be expected increasingly to voice discontent. It would be a mistake, therefore, to dismiss the Kennedy/Rehnquist proposal to restructure the *Young* remedy simply because it attracted only two votes in *Coeur d'Alene*. The vote count could swell as the incentive system built into the Kennedy/Rehnquist approach becomes more appealing in light of *Alden*. In any event, the adequacy of the *Young* remedy as a substitute for a private damage action against the state must be evaluated in light of the reality that the *Young* fiction has been diluted, is under attack, and seems scheduled for a major overhaul.

## 2. Individual Capacity Suits for Damages

Ann Woolhandler was a strong pre-*Alden* voice arguing that state sovereign immunity prohibits federal damage actions in state court against unconsenting states.<sup>306</sup> Her extensive historical research reveals that "the Court historically did not compel . . . unwilling state courts to provide [damage remedies against the States]; the individual officer was a sufficient target."<sup>307</sup> Eleventh Amendment doctrine has incorporated this tradition of redressing violations of federal law by permitting

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304. *College Savings Bank I* already has deployed a variant of such an incentive system. By holding that Congress lacks Section 5 power to provide a damage remedy against the states for patent infringement when states already provide adequate state remedies to redress infringement, the Court implied a contrary result when the state "provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent . . ." *College Sav. Bank I*, 119 S. Ct. 2199, 2208 (1999).

305. In *Coeur d'Alene*, Justice O'Connor described the traditional understanding: "When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar." *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring) (citing *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977)).

306. See Woolhandler, *supra* note 71, at 148-54.

307. *Id.* at 152.

damage actions against state officers sued in their individual capacity.<sup>308</sup> When state officers are sued in their individual capacity (sometimes referred to as personal capacity suits), the officer—and not the state—is the real party in interest. Therefore, the suit is not against the state, although in virtually every case the allegedly unlawful conduct arose when the officer was acting in an official capacity.<sup>309</sup>

Professor John Jeffries argues that “[i]n almost every case where action against a state is barred by the Eleventh Amendment, suit against a state officer is permitted under Section 1983.”<sup>310</sup> Therefore, “[t]he Eleventh Amendment almost never matters.”<sup>311</sup> The argument is that “a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment. So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably.”<sup>312</sup> Such a strong

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308. See *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (finding that a state governor may be sued for damages in federal court for conduct arising out of his official conduct when the damages are to be paid by the governor himself); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (holding the same with respect to federal officials); cf. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) (holding a damage action may not be maintained even though state officers are named defendants when “the action is in essence one for the recovery of money from the state”).

309. Personal capacity suits sometimes are denied erroneously because the state official sued is found to have been incapable of causing the alleged harm except in his or her official capacity, leading some courts to conclude that any liability against the state officer must be in the officer’s official capacity. See, e.g., *Welch v. Laney*, 57 F.3d 1004 (11th Cir. 1995) (holding that a local sheriff was not an “employer” under the FLSA when he acted in his individual capacity because the sheriff had no control over the plaintiff’s employment when acting in his individual capacity); *Wascara v. Carver*, 169 F.3d 683 (11th Cir. 1999) (holding the same with respect to the Family Medical Leave Act [hereinafter FMLA]). This reasoning misreads the Eleventh Amendment. A similar argument was rejected in *Hafer v. Melo*, 502 U.S. 21, 25 (1991). There, a state official contended that she could not be held liable under § 1983 in connection with the firing of some employees. Because she had acted within the scope of her authority, any suit against her had to be in her “official” capacity. See *id.* at 27-28. The Court disagreed, explaining that this approach ignored congressional intent in enacting § 1983 “to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” *Id.* at 28 (internal citations omitted); accord *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 415 (M.D. Pa. 1999) (“If Congress had made the state actor subject to suit under a particular legislative enactment, then that person may be sued in his or her ‘individual capacity’ regardless of the fact that the alleged liability-creating conduct was part of the defendant’s ‘official duties.’ This is the lesson of *Hafer*.”).

310. Jeffries, *supra* note 49, at 49.

311. *Id.*

312. *Id.* at 50. Professor Jeffries reports that from personal experience he is



endorsement of the efficacy of individual capacity damage actions would seem to lend support to the *Alden* majority's representation that these state officer suits are an adequate substitute for damage actions against the state itself. A closer reading of Jeffries's thesis, however, reveals a somewhat different conclusion.

Jeffries' focus was constitutional, not statutory, violations.<sup>313</sup> As to constitutional violations, the Eleventh Amendment may never matter because § 1983 provides a right of action to sue state officials for damages. Thus, it is accurate to conclude that "[i]n the main, [the Eleventh Amendment] functions to force civil rights plaintiffs to sue state officers rather than the states themselves, thus triggering [a defense of] qualified immunity."<sup>314</sup> Jeffries never claimed that the Eleventh Amendment has no effect on statutory claims. As I show next, much of the time just the opposite is true.

a. *Many Federal Statutes Do Not Provide  
a Right of Action Against State Officers*

The greatest difference between constitutional and statutory damage claims against state officers is that federal statutes routinely provide for entity suits against the state but do not provide a right of action against state officers. This deficiency cannot be cured by deploying § 1983 as a source for the right of action. The Eighth Circuit decision in *Alsbrook v. Maumelle*<sup>315</sup> is a good case in point.

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certain that state officers "can count on government defense and indemnification." *Id.* In his lectures before state and local law enforcement officers, not once has an officer responded "no" to his routine question of whether any knew from personal experience "of any case where an officer sued under § 1983 was not defended and indemnified by his or her agency." *Id.* at 50 n.16. State indemnification does not convert an individual capacity suit against a state officer back into a suit against the state for Eleventh Amendment purposes. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (finding that agreement by the federal government to indemnify a state university did not deprive it of Eleventh Amendment immunity); CHEMERINSKY, *supra* note 242, at 416 n.23, 423 n.48 (collecting cases); Jeffries, *supra* note 49, at 61 ("Whether a state chooses to recognize a right to indemnification surely cannot control the availability of federal remedies or the meaning of federal constitutional guarantees.").

313. *See* Jeffries, *supra* note 49, at 51 ("The ambition of this Article is to analyze the Eleventh Amendment and Section 1983 as an integrated package of liability rules for constitutional violations."). Jeffries noted that "[f]or statutory rights, the role of the Eleventh Amendment is different." *Id.* at 51 n.19.

314. *Id.* at 59.

315. 184 F.3d 999 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 1003 (2000), *cert. dismissed on application of both parties*, 120 S. Ct. 1265 (2000).

In *Alsbrook*, the plaintiff brought a federal court action against the State of Arkansas, an Arkansas state agency, and certain agency officials (called commissioners) in their official and individual capacities. The plaintiff alleged violations of Title II of the ADA and § 1983 and sought both injunctive relief and damages resulting from defendants' refusal to certify him as a police officer due to inadequate vision acuity.<sup>316</sup> The court granted summary judgment for all defendants on both the ADA and the § 1983 claims.

The court dismissed the ADA claim against the state, the state agency, and the commissioners in their official capacity. It held that all defendants enjoyed state sovereign immunity from these claims and Congress lacked authority under Section 5 of the Fourteenth Amendment to enact the ADA to abrogate state sovereign immunity.<sup>317</sup> In addition, the court dismissed the ADA-based damage claims against the state officers in their individual capacities because Title II of the ADA provides disabled individuals redress for discrimination by a "public entity,"<sup>318</sup> a term defined by the ADA to exclude individuals.<sup>319</sup>

Finally, the court held that the "ADA's comprehensive

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316. *See id.* at 1002.

317. *See id.* at 1010. The Court held:

We find, therefore, that the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Consequently, there is no valid abrogation of Arkansas' Eleventh Amendment immunity from private suit in federal court and the district court lacked subject matter jurisdiction over the ADA claim.

*Id.* This finding is contrary to the weight of authority. *See id.* at 1007 n.13. A *Young* remedy might still have been available since that remedy does not depend on Congress's abrogation authority. *See* discussion *supra* notes 269-73 and accompanying text. A *Young* remedy was moot in *Alsbrook*, however, because the plaintiff had received a waiver of his vision impairment and was certified as a police officer, leaving only the damage remedy at issue. *See Alsbrook*, 184 F.3d at 1003 n.5.

318. *Alsbrook*, 184 F.3d at 1005 n.8 (citing 42 U.S.C. § 12131(1) (1994)).

319. *See id.* (citing 42 U.S.C. § 12131(1) (1994)). The court relied on the Supreme Court's admonishment in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979), that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." This finding of no individual liability for state officers is the standard view. *See Alsbrook*, 184 F.3d at 1005 n.8 ("[W]hile no circuit has directly addressed the issue of individual liability under Title II, three have held that there is no liability under Title I against individuals who do not otherwise qualify as 'employers' under the statutory definition."); *Butler v. City of Prairie Village*, 172 F.3d 736, 744 (10th Cir. 1999); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) ("We hold that the [ADA] does not provide for individual liability, only for employer liability."); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280-82 (7th Cir. 1995) (holding same).

remedial scheme bars [plaintiff's] section 1983 claims against the commissioners in their individual capacities."<sup>320</sup> While § 1983 actions are available to enforce both constitutional and statutory rights,<sup>321</sup> they are not available to enforce statutes (such as the ADA) containing a comprehensive remedial scheme as these schemes "evidence[] a congressional intent to foreclose resort to section 1983 for remedy of statutory violations."<sup>322</sup> In sum, the court held that a plaintiff "cannot bring a section 1983 claim against [state officers] in their individual capacities when, as we have earlier concluded, he could not do so directly under the ADA."<sup>323</sup>

Federal statutory provisions for suit against state officials in their individual capacities are erratic. The court's view of the ADA in *Alsbrook* is the standard view.<sup>324</sup> Many other statutes are similarly interpreted. Examples include Title VII of the 1964 Civil Rights Act,<sup>325</sup> the Age Discrimination in Employment Act (ADEA),<sup>326</sup> the Rehabilitation Act,<sup>327</sup> the FELA,<sup>328</sup> the Jones

320. *Alsbrook*, 184 F.3d at 1011. The court also held that "a section 1983 suit cannot be brought against the State or [its agencies]. . . . Nor can a section 1983 suit be asserted against the [state officials] in their individual capacities, because such suit is no different from a suit against the state itself." *Id.* at 1010 (citations omitted). The court noted that "[t]he exception to this rule is that a state official may be sued in his or her official capacity for injunctive relief." *Id.* at 1010 n.19.

321. *See Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

322. *Alsbrook*, 184 F.3d at 1011 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981)). The court also stated that "[c]ourts should presume that Congress intended that the enforcement mechanism provided in the statute be exclusive." *Id.* Further, the Court found that since "Congress has provided [Title II] with detailed means of enforcement that it imported from Title VII . . . . [We] think that Congress has, under the applicable legal principles, rather clearly indicated an intention to make the remedies that Title II itself gives the exclusive ones for the enforcement of that subchapter." *Id.* (quoting *Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034, 1038 (8th Cir. 1998)) (alterations in original).

323. *Alsbrook*, 184 F.3d at 1011.

324. *See discussion supra* note 317.

325. *See Huckabay v. Moore*, 137 F.3d 871, 879 (5th Cir. 1998) ("[T]his circuit will not consider § 1983 as a remedy for employment discrimination unless relief under that section can be asserted on grounds different from those available under title VII."); *Huebschen v. Department of Health and Soc. Servs.*, 716 F.2d 1167, 1170 (7th Cir. 1983) ("[A] plaintiff cannot bring an action under section 1983 based upon Title VII against a person who could not be sued directly under Title VII.").

326. *See Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (holding that state officials acting in their individual capacities "cannot be held liable under the ADEA or Title VII"); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994) ("[T]he ADEA limits civil liability to the employer . . . ."); *Campbell v. The City Univ. Constr. Fund*, No. 98 Civ. 5463, 1999 WL 435132, at \*5 (S.D.N.Y. June 25, 1999) ("Courts that allow concurrent § 1983 and ADEA or ADA claims, only

Act,<sup>329</sup> and the Longshore and Harbor Workers' Compensation Act.<sup>330</sup> Courts find no private right of action against state officers even though most of these statutes create a right of action against the employer and its agents.<sup>331</sup> As the court held in *Mason v. Stallings*,<sup>332</sup> "the 'agent' language was included to ensure *respondeat superior* liability of the employer for the acts of its agents," not to create individual liability against the agents.<sup>333</sup>

Some federal statutes do provide for individual capacity suits against state officers. Examples include the FLSA<sup>334</sup> and

allow the § 1983 claim where it is based on some substantive right other than a violation of the actual ADEA or ADA statute.").

327. See *Davis v. Francis Howell Sch. Dist.*, 104 F.3d 204, 206 (8th Cir. 1997) (expressing the view in dictum that "the comprehensive enforcement mechanisms provided under § 504 [of the Rehabilitation Act] and the ADA suggest Congress did not intend violations of those statutes to be also cognizable under § 1983.").

328. 45 U.S.C. § 51 (1994). The FELA holds every railroad engaged in interstate commerce liable in damages to any person suffering injury while employed by the carrier. See *id.*; *Connors v. Consolidated Rail Corp.*, No. 90-CV-464, 1993 WL 169646, at \*3 (N.D.N.Y. May 19, 1993) ("The FELA, by its very terms, applies only to [common carriers].").

329. 46 U.S.C. app. § 688 (1994). The Jones Act reads in pertinent part:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

*Id.* § 688(a).

330. 33 U.S.C. §§ 901, 905(b) (1994). The term "employer" means

an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

*Id.* § 902(4). The term "employee" means "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." *Id.* § 902(3).

331. See, e.g., *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) ("The definition of 'employer' in the Disabilities Act is like the definitions in Title VII of the 1994 Civil Rights Act, 42 U.S.C. § 2000e(b) [(1994)], and in the Age Discrimination in Employment Act, 29 U.S.C. § 630(b) [(1994)]."); *Campbell*, 1999 WL 435132, at \*2 ("The ADA defines an employer as: 'a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person.' 42 U.S.C. § 12111(5)(A) [(1994)]. The definition of an employer under the ADEA is the same except that it requires twenty or more employees. 29 U.S.C. § 630(b) [(1994)].").

332. 82 F.3d 1007 (11th Cir. 1996).

333. *Id.* at 1009.

334. 29 U.S.C. §§ 201-219 (1994). Several courts have held that, under certain conditions, individual officers may be liable under the FLSA. See, e.g., *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678-79 (1st Cir. 1998) (holding

the Family Medical Leave Act (FMLA).<sup>335</sup> Both cover employing entities (including state governments) plus "any person who acts directly or indirectly in the interest of an employer."<sup>336</sup> In addition, the copyright laws provide a right of action against state officials in their individual capacity.<sup>337</sup> Suits against individual officers are also provided by the trademark<sup>338</sup> and patent<sup>339</sup> laws. Moreover, some

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that although supervisory authority is not alone sufficient for individual liability under the FLSA, individual defendants are liable if they have control over the work situation coupled with personal responsibility for the decision that violated the FLSA); *United States Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) (finding individual defendant liable under the FLSA where he had power over hiring, firing, rates of pay, schedule, and payroll); *Dole v. Solid Waste Servs., Inc.*, 733 F. Supp. 895, 923 (E.D. Pa. 1989), *aff'd mem.*, 897 F.2d 521 (3d Cir. 1990) ("The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under [the FLSA] for unpaid wages." (quoting *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983))).

335. 29 U.S.C. §§ 2601-2654 (1994). Several courts have established individual liability for state officers under the FMLA. See *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 412 (M.D. Pa. 1999) ("[T]he majority of courts have looked to FLSA individual liability case law and determined that individual liability exists under the FMLA."); *Bryant v. Delbar Prods., Inc.*, 18 F. Supp. 2d 799, 808 (M.D. Tenn. 1998) (noting that the majority of courts have determined that FMLA extends individual liability to those who control a plaintiff's ability to take a leave of absence); *Stubl v. T.A. Sys., Inc.*, 984 F. Supp. 1075, 1085 (E.D. Mich. 1997) ("Although reasonable arguments could be made that the policy rationale underlying the Title VII decisions finding no individual liability should dictate the same result under the FMLA, the plain language of the statute and the regulations mandate otherwise.").

336. FLSA, 29 U.S.C. § 203(d) (1994); see also FMLA, 29 U.S.C. § 2611(4)(A)(ii)(I) (1994). Thus, the plain language of each manifests an intent to provide for individual liability. See *Meara v. Bennett*, 27 F. Supp. 2d 288, 291 (D. Mass. 1998) ("This language clearly suggests that individuals are contemplated as defendants under [the FMLA].").

337. The Copyright Act provides liability for "anyone" who participates in an infringement. See 17 U.S.C. § 501 (1982); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) ("Anyone who violates any of the exclusive rights of the copyright owner, that is, anyone who trespasses into [the copyright owner's] exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, is an infringer of the copyright." (quoting 17 U.S.C. § 501(a)). Accordingly, state officials are amenable to suit for copyright violations, irrespective of their employment by a state institution. See *Richard Anderson Photography v. Brown*, 852 F.2d 114, 122 (4th Cir. 1988) ("The mere fact that [a party's] conduct was undertaken in the course of . . . state employment does not of course relieve [the party] of individual liability, even if [the] employer could not be sued for it."); John M. DiJoseph, *The One and the Many—The Expropriation of Intellectual Property by the States: Copyright and the Eleventh Amendment*, 9 LOY. ENT. L.J. 1, 19 (1989) ("The Fourth Circuit's rationale in imposing liability on state officials for copyright infringement is conceptually sound.").

338. See *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74 (2d Cir. 1994); *Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077, 1090 (D. Md. 1995) ("A party who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, will be held liable as a

environmental statutes provide a right of action against both entities and their officials. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)<sup>340</sup> is a prominent example.<sup>341</sup> Some additional environmental statutes adopt that model,<sup>342</sup> but others do

contributory infringer and is jointly and severally liable for the infringement.”). This general rule is applicable both to trademark infringement and unfair trade practices cases. *See* *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 149 (4th Cir. 1987); *Novell, Inc. v. Network Trade Center, Inc.*, 25 F. Supp. 2d 1218, 1231 (D. Utah 1997) (“Corporate officers can be held personally liable for trademark infringement and unfair competition committed by the corporation ‘if the officer is a moving, active conscious force behind the [sic] infringement.’” (quoting *Bambu Sales, Inc. v. Sultana Crackers, Inc.*, 683 F. Supp. 899, 913 (E.D.N.Y. 1988))).

339. *See* *Kersavage v. University of Tenn.*, 731 F. Supp. 1327, 1330 (E.D. Tenn. 1989); *cf.* *Cameco Industries, Inc. v. Louisiana Cane Mfg. Co.*, No. Civ. A. 92-3158, 1996 WL 17170, at \*1 (E.D. La. Jan. 17, 1996) (“Defendant does not dispute that applicable patent law imposes individual liability on corporate officers for certain actions taken by them on behalf of an infringing corporation.” (citing 35 U.S.C. § 271(a) (1994))).

340. 42 U.S.C. §§ 9601-9662 (1994).

341. CERCLA defines person to include *inter alia* individuals and government entities. *See* 42 U.S.C. § 9601(21) (1994). CERCLA thus provides a right of action against state government. *See* *Transportation Leasing Co. v. California*, 861 F. Supp. 931 (C.D. Cal. 1993) (“Congress intended that state governmental entities be liable along with everyone else for cleanup costs recoverable under CERCLA.”). CERCLA also provides a right of action against individuals. *See* *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (stating that for individual liability, one “must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”). George J. Weiner & Lara Bernstein Mathews argue:

Assuming that the other elements of a claim are satisfied, CERCLA imposes liability on several categories of ‘responsible parties,’ including those persons who currently own or operate a facility where a hazardous substance has been released into the environment, formerly owned or operated a facility at the time a hazardous substance was disposed of, and those who generated ‘or otherwise arranged for’ disposal or treatment of a hazardous substance that has been released into the environment. [42 U.S.C. § 9607(a)(1)-(3) (1994).] The definition of ‘person’ includes individuals, corporations, and partnerships.

George J. Weiner & Lara Bernstein Mathews, *Parent Corporation and Individual Liability Under CERCLA After Bestfoods* 13 NAT. RESOURCES & ENV’T 456, 460 (1999).

342. *See* Dean M. Cordiano & Deborah J. Blood, *Individual Liability for Environmental Law Violations* 64 CONN. B.J. 214, 214, 218 (1990). They argue:

Such laws as the Clean Air Act, [42 U.S.C. §§ 7401-7641 (1994),] the Federal Water Pollution Control Act, [33 U.S.C. §§ 1251-1376 (1994),] the Resource Conservation and Recovery Act (RCRA), [42 U.S.C. §§ 6901-6987 (1994),] and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [42 U.S.C. §§ 9601-9662 (1994),] impose civil liability on “persons” and “owners and operators” who violate their provisions . . . . There is now a significant body of federal . . . law interpreting the definition of “person” and “owner or operator” under various statutes to include corporate officers.

*Id.*

not.<sup>343</sup>

In short, enforcing statutory damage claims against state officers is a far cry from enforcing constitutional damage claims. The Eleventh Amendment very much matters when federal statutes do not create a right of action against state officers, as is often the case, for then an individual plaintiff has no forum to seek compensation for past violations of federal rights. But even if the federal statute under which a plaintiff sues does provide a damage remedy against a state official, recovery very often becomes highly problematic because of yet one more hurdle: the qualified immunity doctrine.

*b. The Qualified Immunity Doctrine: A Formidable Barrier to Recovery*

State officials may invoke either absolute or qualified immunity from personal liability for damages. The immunity available depends on the official's functions. Judges in their judicial functions,<sup>344</sup> prosecutors in their prosecutorial capacities,<sup>345</sup> and legislators in their legislative functions<sup>346</sup> are entitled to absolute immunity. Most other state officials may assert qualified immunity.<sup>347</sup>

The modern standard for qualified immunity tests objective reasonableness of a state officer's conduct: "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>348</sup> Accordingly, even if a plaintiff proves a violation of

343. The Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1994), and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401-1445 (1994) regulate the activities of state government but do not provide any private right of action for damages, nor does § 1983 create one. *See Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

344. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam).

345. *See Burns v. Reed*, 500 U.S. 478, 486-96 (1991). Police officers serving as witnesses and the President of the United States also possess absolute immunity for official action. *See CHEMERINSKY*, *supra* note 242, at 500, 510-12.

346. *See Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 406 (1979).

347. *See Richardson v. McKnight*, 521 U.S. 399 (1997); CHEMERINSKY, *supra* note 242, at 513.

348. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

federal law, immunity may still attach. The state officer must show either that the violation made out by the plaintiff's case was not clearly established at the time the officer engaged in the challenged conduct, or that a reasonable officer confronting the facts of the case at the time would not have understood that the challenged conduct violated the plaintiff's clearly established federal rights.<sup>349</sup>

This qualified immunity doctrine severely burdens a plaintiff's ability to secure compensation for violations of federal rights. First, the immunity is not just immunity from liability. Rather, it is an "entitlement not to stand trial or face the other burdens of litigation."<sup>350</sup> Accordingly, a denial of immunity is immediately appealable.<sup>351</sup> In fact, two interlocutory appeals may be available to a state officer before the merits of the case are ever addressed, one following a denial of a motion to dismiss based on the ground of qualified immunity and another when a motion for summary judgment is denied.<sup>352</sup> These interlocutory appeals to the court of appeals substantially delay the litigation and increase its cost.

In addition, the qualified immunity doctrine may impose heightened pleading requirements on plaintiffs. In many circuits, even though qualified immunity is an affirmative defense, plaintiffs must plead facts showing that the federal right invoked was clearly established at the time of the alleged violation.<sup>353</sup> Even in circuits rejecting a *per se* heightened

349. See *Falkner v. Houston*, 974 F. Supp. 757, 759 (D. Neb. 1997); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). The Court in *Lewis* stated:

The better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a [federal] right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.

*Id.*; see also *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("Once a defendant pleads a defense of qualified immunity, . . . 'the judge . . . may determine, not only the currently applicable law, but whether that law was clearly established at the time [of the alleged violation].'" (quoting *Harlow*, 457 U.S. at 818)).

350. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

351. See *id.* at 526-27.

352. See *Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996).

353. See, e.g., *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("[I]n cases involving qualified immunity, where we must determine whether a defendant's actions violate a clearly established right . . . we are guided both by the regular 12(b)(6) [of the Federal Rules of Civil Procedure] standard and by the heightened pleading requirement [that plaintiff allege with



pleading obligation, the district court may retain the discretion to require plaintiffs to plead facts at the summary judgment stage sufficient to answer a qualified immunity defense.<sup>354</sup> The sting of such a heightened pleading requirement is aggravated in those jurisdictions applying a rule that until the threshold immunity question is resolved, there should be no discovery on the merits of the claim.<sup>355</sup>

By far, the greatest hurdle is litigating whether the right asserted was clearly established at the time of its alleged violation. The Supreme Court has not formulated clear rules to determine what nature of precedents is necessary to constitute a right as clearly established. The Court has stated that "in [some] instances a general [federal] rule already identified in

some specificity the facts which make out its claim."); *Breidenbach v. Bolish*, 126 F.3d 1288, 1292 n.2 (10th Cir. 1997) ("[W]e are compelled under the doctrine of *stare decisis* to continue to apply our heightened pleading standard in cases concerning individual government officers."); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995) ("Complaints seeking damages against government officials . . . are subject to a heightened standard of pleading . . ."); *White v. Town of Chapel Hill*, 899 F. Supp. 1428, 1436 (M.D.N.C. 1995) ("The Fourth Circuit has held that the litigant who brings suit against public officials bears the burden of clearly establishing the law allegedly violated."). *But see* *Black v. Coughlin*, 76 F.3d 72, 75 (2d Cir. 1996) (holding that because qualified immunity is "an affirmative defense that the defendants have the burden of raising in their answer and establishing at trial or on a motion for summary judgment, a plaintiff, in order to state a claim of [federal rights] violation, need not plead facts showing the absence of such a defense.").

354. *See, e.g., Brown v. Valmet-Appleton*, 77 F.3d 860, 863 n.11 (5th Cir. 1996). The court found:

there no longer exists a *per se* 'heightened' pleading requirement in qualified immunity cases. . . . Rather, in such cases any requirement that a plaintiff clarify the allegations set forth in his or her complaint arises solely out of the district court's discretionary authority to order a reply to defendant's proffer of a qualified immunity defense.

*Id.*

355. Any discovery allowed is limited to addressing the qualified immunity claim. *See Crawford-El v. Britton*, 523 U.S. 574, 593 n.14 (1998) ("Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but . . . we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity."); *Hegarty v. Somerset County*, 25 F.3d 17, 18 (1st Cir. 1994) ("The immunity from suit includes protection from the burdens of discovery. 'Until this threshold immunity question is resolved, discovery should not be allowed.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); *Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994). The *Castro* court held:

Where the claimant's description of the events suggests that the defendants' conduct was unreasonable, and the facts that the defendants claim are dispositive are solely within the knowledge of the defendants and their collaborators, summary judgment can rarely be granted without allowing the plaintiff an opportunity for discovery as to the questions bearing on the defendants' claims of immunity.

*Id.*

the decisional law may apply with obvious clarity to the specific conduct in question.<sup>356</sup> However, seldom will a rule from one case apply with "obvious clarity" to the facts of another case.<sup>357</sup> This problem is especially acute when interpreting regulatory statutes, as courts tend to articulate standards rather than precise rules, and outcomes tend to be fact-specific, leaving the exact contours of the right ill-defined.<sup>358</sup>

Often, federal statutes receive different interpretations in various circuits. Some circuits use such a "conflict of views" to conclude that a right is not clearly established.<sup>359</sup> In other courts, a right may be found to be clearly established

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356. *United States v. Lanier*, 520 U.S. 259, 271 (1997).

357. Sometimes the standard of clearly established is stated as a requirement that "prior cases logically lead to the right asserted by Plaintiff." *Mennone v. Gordon*, 889 F. Supp. 53, 58 (D. Conn. 1995). This formulation is no more determinate since such a logical linkage is seldom self-evident or noncontroversial.

358. Title I of the ADA, 42 U.S.C. §§ 12111-12117 (1994), as interpreted by most courts, does not provide a right of action against individual state officers. See discussion *supra* note 319 and accompanying text. But even if Congress eliminated that infirmity through statutory amendment, a plaintiff suing a state officer for damages would confront almost insurmountable obstacles demonstrating that asserted rights are clearly established because so much of the ADA is set forth as general standards rather than concrete rules. For example, ADA § 102 limits coverage to a "qualified individual with a disability." 42 U.S.C. § 12112 (1994). ADA § 3(2) defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *Id.* § 12102. ADA § 101(8) defines "qualified individual with a disability" as "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position," and explains that "[f]or the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential . . ." *Id.* § 12111(8). ADA § 101(9)(A) defines "reasonable accommodation" as, *inter alia*, "making existing facilities used by employees readily accessible to and usable by individuals with disabilities . . ." *Id.* § 12111(9)(A). ADA § 102(b)(5)(A) prohibits "not making reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship . . ." *Id.* § 12112(b)(5)(A). ADA § 101(10) defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in [the next subsection]." *Id.* § 12111(10). ADA § 103(b) permits an employer to require that an employee not pose a "direct threat" to the health or safety of other individuals in the workplace. *Id.* § 12113(b). ADA § 101(3) defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3). Other sections of the ADA permit employer actions that may be detrimental to the interests of persons with disabilities if "shown to be job-related . . . and . . . consistent with business necessity." *Id.* § 12112(b)(6); see also *id.* § 12112(c)(4)(A).

359. *Soares v. Connecticut*, 8 F.3d 917, 922 (2d Cir. 1993) ("[I]n light of the presently existing conflict of views, it is plain that [defendants] did not violate plaintiff's 'clearly established' rights . . .").

notwithstanding a circuit split "as long as 'no gaping divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule' to the contrary."<sup>360</sup>

In most jurisdictions, the right is not clearly established unless it is clearly established either in the Supreme Court or the circuit court of appeals hearing the case.<sup>361</sup> Other circuit courts of appeal take a broader view.<sup>362</sup> While the tests for qualified immunity are intended to be objective, in reality, the availability of the defense (and concomitantly the availability of redress for violation of federal statutory rights) can depend largely on in which federal judicial circuit one litigates a claim. It bears emphasis that the qualified immunity doctrine creates a lack of uniformity because of disagreement among circuits regarding whether a certain federal right exists and has been violated in a given case. This is a normal risk in any litigation. The qualified immunity doctrine creates additional

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360. *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) (quoting *Biergu v. Reno*, 59 F.3d 1445, 1459 (3d Cir. 1995)).

361. *See, e.g., Wilson v. Layne*, 141 F.3d 111, 116-17 (4th Cir. 1998), *aff'd* 526 U.S. 603 (1999) (There must be "clear law from the Supreme Court, this court, or the Court of Appeals of Maryland. . . . [R]eliance on decisions from other circuits to determine that a given proposition of law is clearly established is inappropriate as a general matter . . ."); *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528, at \*3 (4th Cir. Jan. 15, 1998) ("The plaintiff's resort to . . . out-of-circuit cases merely underscores the lack of Fourth Circuit and Supreme Court law establishing the right for which she contends."); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) ("[N]either the Supreme Court nor any other court in this circuit nor [any court in this state] . . . had ever actually applied the test [upon which plaintiffs rely] . . . . School officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority."); *Russell v. Selsky*, 35 F.3d 55, 60 (2d Cir. 1994) ("We conclude that in the absence of Supreme Court or Second Circuit precedents prescribing [the right asserted by plaintiff], there is no such clearly established right . . . ."); *Marsh v. Arn*, 937 F.2d 1056, 1069 (6th Cir. 1991) ("[W]hen there is no controlling precedent in the Six Circuit our court places little or no value on the opinions of other circuits in determining whether a right is clearly established.")

362. *See, e.g., Soto v. Flores*, 103 F.3d 1056, 1065 (1st Cir. 1997) ("[A] violation of clearly settled law may be found even where the Supreme Court and the circuit in question have not specifically addressed the question."); *Biergu v. Reno*, 59 F.3d 1445, 1459 (3d Cir. 1995) ("[T]he absence of a previous decision from our court on the [legality] of the conduct at issue is not dispositive."); *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ("Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."); *Romero v. Kitsap County*, 931 F.2d 624, 629 (9th Cir. 1991) (discussing that the court should look to other circuits in the absence of binding precedent); *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238, 1262 (E.D. Va. 1992) (comparing the conflicting views across circuits as to whether precedents from other jurisdictions can "clearly establish" a right for deciding qualified immunity questions).

inconsistency because the right asserted may have been clearly established in one circuit but not another when the federal right was violated.

All of the above pales in comparison with what has been described as the “chronic difficulty” of accurately defining the right at issue.<sup>363</sup> It has been argued that if the right is framed at too great a level of generality, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.”<sup>364</sup> Conversely, if the right is defined too narrowly, “the defined right would rarely if ever be said to have been previously established,”<sup>365</sup> and defendants would be able to “define away all potential claims.”<sup>366</sup> Thus, a court has great latitude to insert its policy preferences by choosing the level of generality and incorporation of fact required to satisfy the clearly established standard.

Even absent disagreement over characterization of the right, widely varying results also can arise depending on the factual correspondence a court requires between previous cases and the case at bar. In some jurisdictions the defense of qualified immunity prevails unless pre-existing law can be said to “truly compel” the conclusion that defendant violated plaintiff’s federal rights.<sup>367</sup> Or as another court has stated the test, “a public official must not simply violate plaintiff’s rights; rather the violation of plaintiff’s rights must be so clear that no reasonable public official could have believed that his actions did not violate plaintiff’s rights.”<sup>368</sup> This approach is obviously very defendant-oriented. A few jurisdictions deny the qualified immunity defense if the defendant’s conduct clearly

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363. *LaBounty v. Coughlin*, 137 F.3d 68, 73 (2d Cir. 1998).

364. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). This overstates the risk because a plaintiff always must prove the case on the merits, whether or not the affirmative defense of qualified immunity is made available to defendant.

365. *Smith v. Garretto*, 147 F.3d 91, 95 (2d Cir. 1998).

366. *Carnell v. Grimm*, 74 F.3d 977, 980 (9th Cir. 1996) (internal quotation marks omitted); *see also Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 465 (5th Cir. 1994) (There exist “hazards of framing the legal question at too great a level of generality. [But] [t]he error can be made in the opposite direction—a search so narrowed that legal nuance rises to uncertainty and ultimately confounds common sense.”).

367. *Cope v. Heltsley*, 128 F.3d 452, 460 (6th Cir. 1997) (internal quotation marks omitted).

368. *Gomez v. Pellicone*, 986 F. Supp. 220, 226 (S.D.N.Y. 1997).

undermines the objectives federal law is designed to preserve.<sup>369</sup> This approach favors plaintiffs. These different approaches seem to reflect different attitudes regarding the desirability of holding state officers personally liable. Occasionally, a court will reveal its proclivity in this regard, as the Eleventh Circuit Court of Appeals did in *Alexander v. University of North Florida*,<sup>370</sup> when the court stated that "qualified immunity for government officials is the rule, liability and trials for liability the exception."<sup>371</sup> In that circuit, qualified immunity, "the rule," can be overcome only by precedent in that circuit "developed in such a concrete and factually defined context to make it obvious to all reasonable actors, in the defendant's place, that what he is doing violates federal law."<sup>372</sup> One would not expect many exceptions from the general rule of officer immunity when a court applies such

369. See *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994). The court in *Ayeni* held that even absent any

reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities . . . [t]he argument [that there is no clearly established rule prohibiting such an act] lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy [and accordingly] law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. [Defendant] exceeded well-established principles when he brought into the [plaintiff's] home [members of the press] who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

*Id.* at 686.

However, the court in *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998), disagreed. That court stated that even if the Fourth Amendment clearly prohibits officers from bringing

third parties [into plaintiff's home] who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts[,] . . . we could not conclude that it was clearly established that the conduct [of bringing a reporter to observe and photograph the execution of an arrest warrant] manifestly fell within the ambit of that rule [since] [w]hen this incident took place in 1992, there was no clear law from the Supreme Court, this court, or the Court of Appeals of Maryland [prohibiting the conduct].

*Id.* at 115-16.

370. 39 F.3d 290 (11th Cir. 1994).

371. *Id.* at 291.

372. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149-50 (11th Cir. 1994) (internal quotation marks omitted) ("For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*") (emphasis in original).

an understanding of qualified immunity.<sup>373</sup>

Diana Hassel has examined the qualified immunity doctrine in detail. Her study of all federal court cases over a two year period found that courts sustained the defense of qualified immunity in 80 percent of the cases.<sup>374</sup> Her conclusions comport with those of others.<sup>375</sup> Professor Hassel's study observes that "[t]he broad qualified immunity standard allows for a determination concerning liability of the defendant that is very flexible and almost completely subject to the policy beliefs of the judge making the decision."<sup>376</sup> She concludes that it is the "court's almost unfettered judgment [that] determines the outcome of the application of the defense."<sup>377</sup>

*Alden* exacerbates the qualified immunity doctrine's burden on plaintiffs by channeling all federal-law-based private damage actions against states into suits against state officers. Today, irrespective of the merits of a plaintiff's legal arguments under applicable federal statutory standards, a court in most cases is able to limit recovery to those plaintiffs it considers to be truly worthy suing state officers that the court considers to be truly blameworthy. If history is prologue, very few plaintiffs suing state officers for damages based on federal rights will meet this test.

373. The Supreme Court revealed a similar proclivity in *Hunter v. Bryant*, 502 U.S. 224 (1991). The Court stated, "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 228 (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)).

374. See Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999).

375. See, e.g., Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 68 (1997) ("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through."); Alfredo Garcia, *The Scope of Police Immunity from Civil Suit Under Title 42 Section 1983 and Bivens: A Realistic Appraisal*, 11 WHITTIER L. REV. 511, 534 (1989) ("[T]he individual citizen who seeks redress for a . . . violation [of federal law] faces a formidable obstacle[:] the doctrine of qualified immunity . . . ."); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN L.J. AM. U. 1105, 1143 (1996) ("Since the 1980s, it has become very difficult for plaintiffs . . . to win a [state officer damage] case."); see also Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 982 (1989) ("If clearly-established is narrowly defined . . . it becomes nearly impossible to overcome qualified official immunity.").

376. Hassel, *supra* note 374, at 124.

377. *Id.* at 137.

In sum, state officer personal capacity suits are an inadequate alternative to damage suits against the state itself because, as currently administered, the qualified immunity doctrine too often presents an insurmountable bar to meritorious claims. Some have challenged this conclusion, claiming that personal capacity suits are "generally effective" in promoting compliance with law.<sup>378</sup> It is fair to ask why the personal capacity damage suit is an inadequate remedial mechanism for adjudicating statutory damage claims given the fact that such suits, with all of the limitations of the qualified immunity doctrine, have long been the primary mechanism for adjudicating constitutional damage claims. There are two answers.

First, the qualified immunity doctrine is equally ill-suited for the litigation of both constitutional torts and statutory claims. The function of the qualified immunity doctrine is to reconcile the need for compensation and deterrence with the need to discourage unwanted timidity in public officials, to reduce the risk of deterring able candidates from pursuing careers in public service, and to eliminate needless distractions from public duties.<sup>379</sup> The weight of academic authority is that the qualified immunity doctrine is an unsatisfactory vehicle to accomplish this balancing and should be abandoned, or at least modified.<sup>380</sup> It is not an adequate policy-effecting instrument for either statutory or constitutional claims.

Even if the qualified immunity doctrine was well suited for the litigation of constitutional torts, its use in personal capacity statutory damage actions still is ill-advised. The reason is that

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378. Vázquez, *supra* note 46, at 1800 ("[F]ull compensation for undeserved governmental injuries [cannot be offered] without bankrupting the state. What the rule of law does require . . . is a remedial scheme that is generally effective at producing systematic compliance with legal norms.").

379. See *Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997) (discussing the various reasons for the qualified immunity doctrine); *White by White v. Chambliss*, 112 F.3d 731, 736 (4th Cir. 1997) (suggesting that without a meaningful qualified immunity defense "the course of public agencies would invariably become one of inaction").

380. See *Hassel*, *supra* note 374, at 148-49, nn.116-17 & 120-24. *Hassel* observes:

A large body of literature critiques the [qualified immunity] defense . . . . There are vociferous critics of the qualified immunity doctrine who attack the doctrine as a whole. This commentary suggests that the problem with the qualified immunity doctrine is that it is applied to the wrong group of defendants or that it should be eliminated entirely.

statutory claims differ fundamentally from constitutional claims in two respects: (1) the different factual contexts in which they arise and (2) the different goals they seek to advance.

Diana Hassel's two-year study shows that courts are most likely to uphold a qualified immunity defense in cases arising in the context of a confrontation between law enforcement officials and the public, a factual context that is a bountiful source of qualified immunity litigation.<sup>381</sup> In *Norwood v. Bain*,<sup>382</sup> the Fourth Circuit offered a plausible explanation. It explained that in police confrontation cases there often are "exigencies of time or circumstance" that make it reasonable for a police officer to believe that conduct subsequently found to be unlawful is in fact lawful.<sup>383</sup> Similarly, in other situations,

a police officer [may be] confronted with a fast-moving situation involving immediate threat to himself or others that require[s] quick action on perhaps a mistaken perception of the true circumstances. In such situations, qualified immunity principles may require finding a resulting violation of right nevertheless excusable as a reasonable one under the circumstances.<sup>384</sup>

Barbara Armacost also has identified the peculiarities of law enforcement as an important force conditioning the boundaries of the qualified immunity doctrine.<sup>385</sup> She explains that "it is necessary to appreciate both the *kinds* of situations faced by law enforcement officials and the *nature* of the legal standards they are required to apply."<sup>386</sup> As to the former, "[l]aw enforcement requires the exercise of significant discretion, 'often on inadequate information in situations bordering on

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381. See *id.* at 146 (finding that if the "alleged violation takes place in a confrontation with law enforcement officials, [the litigation] will rarely result in the denial of qualified immunity"); see also Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 51 (1998) ("[S]uits against police officers are disfavored . . . Plaintiffs who . . . sue police officers generally confront an amazing thicket of procedural snarls which often prevent federal courts from hearing the merits of their claims.").

382. 143 F.3d 843 (4th Cir. 1998).

383. *Id.* at 857.

384. *Id.*

385. See Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 628 (1998).

386. *Id.*



emergency."<sup>387</sup> As to the legal environment in which law enforcement officials operate, "law enforcement officials are faced with the difficult task of conforming their conduct—in a virtually infinite variety of factual circumstances—to a set of imprecise constitutional standards, the parameters of which are unclear even to trained lawyers."<sup>388</sup> In short, law enforcement officials, due to the conditions of their work and the legal standards under which they work, are thought to be less blameworthy when making legal mistakes, and, therefore, more entitled to the leeway the qualified immunity doctrine provides.

Yet, it is these pro-defendant rules, so substantially fashioned to meet the needs of the law enforcement community, that constitute the corpus of precedent that will be applied following *Alden* in state officer damage actions enforcing federal regulatory statutes. Even if one were to agree that these rules properly accommodate competing interests in the context of confrontation between law enforcement officials and the public, the factual and legal context of federal regulatory legislation hardly demands such leeway for state officers. Courts are not likely to develop one qualified immunity doctrine for constitutional torts and another for statutory claims. Even now, qualified immunity is a unitary doctrine: The rules developed for law enforcement contexts are interchangeably applied in all other constitutional torts litigation.<sup>389</sup> There is no reason to expect that will change when, after *Alden*, the courts begin hearing increased numbers of cases against state officers alleging violation of federal statutory rights.

Another important distinction between constitutional tort litigation as compared to litigation alleging violation of federal statutory rights is the different objectives these two types of litigation seek to attain. Barbara Armacost's pioneering work has argued persuasively that "qualified immunity—like fair notice in criminal law—employs notice or knowledge of

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387. *Id.* (quoting John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 77 (1998)).

388. *Id.* at 628.

389. *See id.* at 634 ("The Supreme Court has held that qualified immunity is a unitary defense, presumptively intended to apply to the full range of constitutional claims." (citing *Anderson v. Creighton*, 483 U.S. 635, 642-43 (1987))).

illegality as a proxy for fault."<sup>390</sup> She concludes that the qualified immunity doctrine works to identify state officers who are blameworthy and does this by isolating those who acted with "knowledge that the relevant conduct is forbidden."<sup>391</sup> She argues that this makes sense in constitutional tort litigation just as fault identification makes sense in criminal law. In both, the law's aim is "moral blaming," as she calls this function of fault identification.<sup>392</sup> Moral blaming is designed to stigmatize unlawful behavior as a means of "creating and maintaining societal consensus on what constitutes appropriate conduct."<sup>393</sup> It "build[s] norms" and "harness[es] the compliance power of interpersonal relationships and interpersonal morality."<sup>394</sup> In the constitutional tort context, "constitutional rights are especially valued in comparison with other kinds of rights, [and] it follows that constitutional violations would be viewed by society as especially serious and deserving of opprobrium."<sup>395</sup>

In short, both criminal law and the fault-identifying effect of the qualified immunity doctrine aim to "'signal[] moral condemnation of the offender, while civil liability does not."<sup>396</sup> And that is the point. Civil law does not exist to assign moral blame to offenders. Ignorance of the rules of contract or tort law, for example, is no defense. Liability is not limited to knowing offenders. So also, "[i]n the administrative and regulatory context . . . , failure to know the law is generally not an excuse, at least as far as civil liability is concerned."<sup>397</sup> This is because unlike criminal law and constitutional law, administrative and regulatory legislation is not designed to operate through the mechanism of limiting liability to those

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390. *Id.* at 624.

391. *Id.*

392. *Id.* at 669.

393. *Id.*

394. *Id.*

395. *Id.* at 674. Limiting liability to knowing violators may be appropriate for constitutional torts because "important moral and societal interests are vindicated by a regime that makes blameworthy officials personally liable for their unconstitutional behavior, even if they do not ultimately pay the judgment [because of the prevalence of indemnification arrangements]." *Id.* at 670 (footnote omitted).

396. *Id.* at 668 (quoting Paul H. Robinson, *Symposium: The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996)).

397. *Id.* at 585.

who are blameworthy. Regulatory legislation seeks to establish uniform national standards to protect the environment, set floors of rights for workers, protect copyright holders, encourage invention through the patent laws, promote economic growth through the regulation of bankruptcy, and a myriad of other societal goals having nothing to do with moral blaming.

Making failure to know the law an excuse, and thereby limiting liability to those who are knowing law violators, defeats federal regulatory legislation's goals by underinclusively compensating and deterring violations. Moreover, it tears regulatory legislation from its philosophical and functional moorings by converting it from a vehicle to advance primarily economic ends into a instrument to assign blame. For the above reasons, state officer damage suits, with their qualified immunity limits, are an inadequate alternative to damage suits against a state to enforce federal statutory rights. This conclusion follows even if the qualified immunity regime is appropriate for the litigation of constitutional violations.

## VII. CONCLUSION

By any account, the *Trilogy* is a stunning development in federal-state relations. Its genesis is the Court's hostility to Congress's relatively recent decision to include the states within a rapidly expanding framework of federal regulatory statutes.<sup>398</sup> That decision precipitated a backlash. As the *Alden* case makes plain, the Court believes that federal regulation of the states can cause undue interference with the states' governing ability and fiscal autonomy, especially when it permits individuals to participate so extensively in the formation of state policy through the initiation of litigation

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398. See *Alden v. Maine*, 119 S. Ct. 2240, 2261 (1999) (noting the recent proliferation of "statutory enactments purporting in express terms to subject nonconsenting States to private suits"); Rosen, *supra* note 137, at 43 ("[A]n explosion of federal lawmaking during the past decade raised questions about whether Congress deserved deference because of its purported ability to transcend factionalism, as it federalized great patches of regulatory authority . . . that had previously been left to the states."); Sherry, *supra* note 1 (discussing the "dramatic expansion in the number of federal laws and the court's hostility toward Congress's increasing activity."); discussion *supra* note 205.

enforcing federal standards.<sup>399</sup> When the *National League of Cities* strategy of imposing broad substantive restraints on Congressional power proved unworkable, it was replaced in *Garcia* with one relying primarily on the political process, rather than the judiciary, for modulating Congress.<sup>400</sup> By the mid-1990s, a new Court majority concluded Congress could not be so restrained and thus abandoned reliance on the political process in favor of renewed judicial activism. The Court devised a new three-pronged strategy: limit the scope of the commerce power,<sup>401</sup> reinstate *National League of Cities* to a limited degree by prohibiting federal commandeering of state legislative and executive functions,<sup>402</sup> and expand the protections provided by the doctrine of state judicial immunity.

The *Seminole Tribe* decision most forcefully expresses the state judicial immunity prong of this new federalism. Its goal is to insulate the states from individually-initiated damage actions as a means of safeguarding states' governing and fiscal autonomy. This goal cannot be achieved merely by stripping Congress of all Article I-based authority to abrogate state sovereign immunity from suit in federal court. Congressional power must be reduced in at least two additional ways. First, because the Section 5 power contains abrogation authority, Congress easily could circumvent *Seminole Tribe* unless its Section 5 power is checked. The Court dramatically restricted that power in *Boerne*, and reinforced those limits in *College Savings Bank I* and *II*. Second, Congress could continue to invade state governing autonomy and impose fiscal demands if it were permitted to provide for private damage suits in state court to enforce federal rights against unconsenting states. *Alden* prevented that. The clash in *Alden* thus was as inevitable as its outcome was predictable.

The result in *Alden* also was assured by the unworkability of the alternative. In this article, I have demonstrated that exclusive reliance on state courts to enforce private federal statutory damage claims against the state is not feasible. Policing such a system would fall to the Supreme Court,

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399. See discussion *supra* notes 117-31 and accompanying text.

400. See discussion *supra* notes 25-37 and accompanying text.

401. See *United States v. Lopez*, 514 U.S. 549, 559-67 (1995).

402. See discussion *supra* note 39.

adding extraordinarily to the Court's workload and threatening to draw it into a maelstrom of controversy.<sup>403</sup> *Alden* deserves praise for avoiding that quagmire, but it is difficult to believe the Court would have permitted itself to be so positioned in any event.

I also have "praised" *Alden* here as a masterful example of judicial misdirection. This praise is for the skill witnessed, not the result achieved. The *Trilogy's* focus is states' rights but its holdings significantly empower the executive branch of the federal government.<sup>404</sup> It concentrates on remedy but much of its effect is substantive.<sup>405</sup> Its primary complaint is excess federal power (that of Congress) but its response is the empowerment of another federal branch—the Supreme Court itself.<sup>406</sup> Not perhaps since the earliest days of the New Deal has the Court assumed such a pivotal role as active policymaker with respect to federal-state relations.<sup>407</sup> The Court's expanded role as primary federal guardian of the states' sovereign prerogatives is somewhat ironic. The Court, the federal branch most removed from the states' political processes, assumes this role by replacing Congress, the federal branch that is least removed from the states' political processes. This transfer of power over the last half-decade from the Congress to the judicial and executive branches of the federal government, through cases championing states' rights, truly has been a tour de force.

This Article also has leveled a strong protest, most of it directed at *Alden*. The much-emphasized alternatives to private damage actions against the states do not adequately protect federal rights. Neither individually nor in combination do they compensate for the loss of private damage actions against the states. Either they are "whimsical,"<sup>408</sup> they are underinclusive

403. See discussion *supra* notes 176-202 and accompanying text.

404. See *supra* text accompanying note 207.

405. See discussion *supra* notes 206-14 and accompanying text.

406. See Greenhouse, *supra* note 1 (observing that at the same time "Congress and the executive branch have appeared nearly paralyzed by partisan stalemate and by their own internal weaknesses," the *Alden Trilogy* resulted in a palpable flow of "governmental power in Washington . . . in the court's direction"); discussion *supra* notes 204-05 and accompanying text.

407. See Greenhouse, *supra* note 1 (The majority opinion in *College Savings Bank I* "assumed for the court a veto power beyond any it has exercised in modern times.").

408. See discussion *supra* notes 220-34, 250-58 and accompanying text.

and plagued by a maze of contradictions and exceptions,<sup>409</sup> they fail to compensate or deter,<sup>410</sup> they have been undermined by recent developments,<sup>411</sup> or they fail to provide relief most of the time when used to enforce statutory rights, even when claims are meritorious.<sup>412</sup> These alternatives, in combination with the regime of *Seminole Tribe*, *Boerne*, and the *Alden Trilogy*, too often render federal statutory rights illusory. It simply is not credible for the Court to represent them as efficacious alternatives, and by doing so the Court risks creating the impression of being both partisan and disingenuous.

Legislative responses are available to fill some of the enforcement gap these recent federalism cases create. Government enforcement could be augmented with additional resources. Creative use of the spending power could coax more "voluntary" waiver of sovereign immunity from the states. Congress could amend federal regulatory statutes to make a clear statement of intent to provide a *Young* remedy and a private right of action against state officers. Congress could legislate revised qualified immunity standards that more neutrally accommodate the needs for deterrence and compensation with the competing instrumental needs of government to protect state officers from frivolous suits. It is beyond the scope of this Article to evaluate the legal and political issues such legislative responses would generate, but clearly there is considerable room for a legislative response.

Finally, one wonders what to make of Justice Souter's soon-to-be-famous prophecy in his *Alden* dissent, that equates the constitutionalizing of sovereign immunity doctrine with the *Lochner* era's constitutionalizing of economic self-reliance and predicts a short life for the Court's new sovereign immunity experiment.<sup>413</sup>

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409. See discussion *supra* notes 235-49 and accompanying text.

410. See discussion *supra* notes 269-302 and accompanying text.

411. See discussion *supra* notes 269-302 and accompanying text.

412. See discussion *supra* notes 303-91 and accompanying text.

413. See *Alden v. Maine*, 119 S. Ct. 2240, 2294-95 (1999) (Souter, J., dissenting).  
The full quote is:

The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to

My sense is such a prediction is premature.<sup>414</sup> Vicki Jackson's observation deserves repeating: "Federalism is quintessentially a political deal among different governments. Workability is its core . . . . To be successful, federalism must be pragmatic and it must be dynamic."<sup>415</sup> To some degree, the *Alden Trilogy* is a pragmatic masterpiece, as I have argued. Even those who support the *Trilogy* agree, however, that it might thwart the ability to govern effectively in an age of global communications, trade, and multiculturalism.<sup>416</sup> Indeed, many view the *Trilogy* as an opportunity for the states to disregard federal law.<sup>417</sup> If this experiment in sovereign immunity in fact renders federal statutory rights illusory, it never will take

history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting.

*Id.*

414. One can obtain opinions in both directions. Compare Greenhouse, *supra* note 10 (The *Alden Trilogy* is "the most powerful indication yet of a narrow majority's determination to reconfigure the balance between state and federal authority in favor of the states."), and Greenhouse, *supra* note 1 (Justice Rehnquist "appears on the verge of succeeding [in curtailing the national government's authority over the states] to a degree that would have seemed implausible only a few years ago."), with Warren Richey, *Rehnquist's Legacy Takes Shape*, CHRISTIAN SCI. MONITOR, June 28, 1999, at 1 ("[T]he jurisprudence remains highly unstable . . . . It is really much too early to know whether these precedents will stand up over time." (quoting Professor Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law)).

415. Jackson, *supra* note 116, at 2228.

416. See, e.g., David Ignatius, *Back to the States*, WASH. POST, June 27, 1999, at B7. David Ignatius worries:

There's a danger, certainly, that the court's growing enthusiasm for state government could begin to erode the federal government's ability to respond to genuine national issues—such as the environment, or racial and sexual discrimination . . . . [S]ome sound national policies—such as workplace laws or privacy laws—may now be enforceable against everyone but the states, which is a perverse result.

*Id.*; see also Sherry, *supra* note 1 (The recent federalism cases "jeopardize[] many federal statutes that purport to govern the states in their capacity as employers, as market participants and as service providers.").

417. See Chemerinsky, *supra* note 16. Chemerinsky argues:

The Supreme Court based its rulings on its desire to protect federalism and state sovereignty. Yet, in doing so, the court subverted the most basic constitutional principle of federalism: the supremacy of federal law. . . . The effect of [the] decision is that state governments now can ignore federal law, and no court will be available to enforce it.

*Id.*; see also Editorial, WASH. POST, July 7, 1999, at A18 ("But the blow the court struck raises real worries about the states being freer to violate long presumed rights of individuals. It tends to deprive individuals of the power to do anything about state violations of important federal laws.").

root.<sup>418</sup> On the other hand, if it is true that “[t]he flowering of competence and creativity at the state government level is one of the underappreciated developments of the past few decades,” then the *Trilogy* might be just right for “the new regionalism” that some see as the “corollary of globalization.”<sup>419</sup> Whatever may be the *Trilogy*’s longevity, it will endure as a hallmark of the Rehnquist Court whose prominent place in American legal history it helps secure.

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418. Deeply embedded in our constitutional tradition is the value that a properly constituted government’s legislative and judicial power ought to be co-extensive. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 818 (1824) (“[T]he legislative, executive, and judicial powers, of every well-constructed government, are co-extensive with each other.”). Securing rights through meaningful remedies is thought to be a cultural imperative of the highest order. See *ECONOMIST*, *supra* note 14, at 11 (“The [*Trilogy*]’s rulings also seem to breach a fundamental tenet of Anglo-American law: no right without a remedy.”); Lewis, *supra* note 16 (criticizing the *Trilogy* for permitting the “states [to] break [the] law without fear of being sued”).

419. Ignatius, *supra* note 411 (Globalization implies this new regionalism because “just as the world is becoming more centralized in economic matters, it’s becoming more diverse and decentralized in cultural and political affairs . . . the nation state is too big for the small problems of life and too small for the big problems.” (citing sociologist Daniel Bell)).



