

2008

## What's Dignity Got to Do with It?: Using Anti-Commandeering Principles to Preserve State Sovereign Immunity

Jennifer L. Greenblatt

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

---

### Recommended Citation

Greenblatt, Jennifer L. (2008) "What's Dignity Got to Do with It?: Using Anti-Commandeering Principles to Preserve State Sovereign Immunity," *California Western Law Review*. Vol. 45 : No. 1 , Article 2.  
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol45/iss1/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

# CALIFORNIA WESTERN LAW REVIEW

VOLUME 45

FALL 2008

NUMBER 1

## WHAT'S DIGNITY GOT TO DO WITH IT?: USING ANTI-COMMANDEERING PRINCIPLES TO PRESERVE STATE SOVEREIGN IMMUNITY

JENNIFER L. GREENBLATT\*

INTRODUCTION .....	2
I. A FOCUS ON STATES' RIGHTS: <i>ALDEN v. MAINE</i> AND ELEVENTH AMENDMENT SOVEREIGN IMMUNITY .....	4
A. <i>Freeing Eleventh Amendment from Its Textual Mooring</i> .....	5
B. <i>Alden's Fixation on State Dignity</i> .....	8
II. A FOCUS ON THE LIMITS OF FEDERAL POWER: THE ANTI-COMMANDEERING PRINCIPLE.....	11
A. <i>Anti-Legislative Commandeering</i> (New York v. United States) .....	11
B. <i>Anti-Executive Commandeering</i> (Printz v. United States).....	14
III. EXTENDING THE ANTI-COMMANDEERING PRINCIPLE TO STATE COURTS .....	15

---

\* Law clerk to the Honorable Richard Clifton, United States Court of Appeals for the Ninth Circuit. J.D., Stanford Law School, 2008; B.A., Cornell University, 2005. I would like to thank Lawrence Lessig for his much-appreciated inspiration and support, Robert Weisberg for his generous guidance and mentorship throughout my law school career, and the editors of the *California Western Law Review* for their many helpful comments.

A. *Sovereign Immunity as Regulating State Court Jurisdiction*..... 16

B. *The Testa Line of Cases and Overcoming the Supremacy Clause* ..... 18

C. *The Rationales of New York and Printz Apply with Equal Force to the State Judiciary*..... 21

IV. IMPLICATIONS OF ADOPTING THE ANTI-COMMANDEERING PRINCIPLE IN PLACE OF THE ELEVENTH AMENDMENT ..... 23

A. *Limiting State Court Power over Ordinary Defendants: Wal-Mart Hypothetical Statute*..... 23

B. *Limiting State Court Power over Non-Consenting States: University of Texas Hypothetical Statute* ..... 26

V. SUING THE STATE WITHOUT GETTING CONSENT: METHODS OF LAST RESORT (COMING TO A FEDERAL COURT NEAR YOU) ..... 29

A. *Retrospective, Equitable Remedies (Ex parte Young)* ..... 30

B. *Suits by the United States or an Individual State in Its Own Court* ..... 31

C. *Waivers: Dole Incentivizing/Political Pressure*..... 31

D. *Congressional Abrogation and Due Process (Fourteenth Amendment Section 5 Enforcement and Bankruptcy Article I Powers)*..... 32

CONCLUSION..... 34

INTRODUCTION

In *Alden v. Maine*, the United States Supreme Court entangled itself in yet another extra-textual quagmire by importing notions of Eleventh Amendment sovereign immunity into cases brought in state court.<sup>1</sup> Page after page of historical conceptions of state dignity merely begged the real (and insufficiently addressed) question: by what constitutionally-bestowed power did Congress force the State of

---

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

Maine to hear a federal cause of action without its consent?<sup>2</sup> A wiser jurisprudential approach to deciding *Alden* would have been to “start with first principles,” and explicitly recognize that “[t]he Constitution creates a Federal Government of *enumerated* powers.”<sup>3</sup> Having just decided *New York v. United States*<sup>4</sup> and *Printz v. United States*,<sup>5</sup> the anti-commandeering principle was particularly apropos to the occasion: the federal government unequivocally lacks the power to press state courts into federal service. A careful reading of case law reveals that nothing in the *Testa*<sup>6</sup> line of cases or the Supremacy Clause<sup>7</sup> alters the essential postulates of the anti-commandeering doctrine with respect to state judiciaries. In fact, as discussed below, all of the same rationales for barring federal usurpation of state political branch powers apply with equal force to commandeering the state judiciary.

Part I of this article frames the debate by revisiting the tumultuous history of the Eleventh Amendment and the misgivings of *Alden v. Maine*, which incorporated Eleventh Amendment limitations of federal judicial power into state court sovereign immunity jurisprudence. Part II provides the background principles of anti-commandeering articulated in *New York* and *Printz*, which *Alden* failed to integrate in the state judicial sphere. Part III advocates for adopting an alternative approach to sovereign immunity claims made in state court. The anti-commandeering principle articulated in *New York* and *Printz*, rather than textually and logically inapplicable Eleventh Amendment jurisprudence, should guide future cases of congressional abrogation of state immunity.<sup>8</sup> State judiciaries, no less

---

2. Throughout this article, every claim, suit, or action against a state or immunity-claiming defendant involves a demand for retrospective, monetary relief unless otherwise noted. Also, any federal cause of action is assumed to provide its own cause of action independent of 42 U.S.C. § 1983 to avoid extended discussion of the limits inherent in that statute.

3. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (emphasis added).

4. *New York v. United States*, 505 U.S. 144 (1992).

5. *Printz v. United States*, 521 U.S. 898 (1997).

6. See *infra* note 83.

7. U.S. CONST. art. VI, cl. 2.

8. A similar plea was made prior to *Alden* in Richard Seamon’s insightful article, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319 (1998), which necessarily did not seek to criticize the yet-to-be-decided *Alden*

than state legislatures and state executive officials, should not be forced to throw open their courtroom doors, unless already opened, to carry out Congress's policy objectives. Using the illustrative tool of hypothetical statutes, Part IV sketches the implications of applying an anti-commandeering analysis to requiring states to adjudicate federal claims that would otherwise be barred by neutral state law. To negate the argument that anti-commandeering would lead to a parade of apocalyptic constitutional violations, Part V details avenues open to litigants barred from asserting federal law claims in state court to sue in federal court in accord with current Eleventh Amendment constraints.

### I. A FOCUS ON STATES' RIGHTS: *ALDEN V. MAINE* AND ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Emulating a past strategy of protecting rights derived from so-called constitutional penumbras,<sup>9</sup> *Alden* concluded that the Eleventh Amendment embodies "background principles" ratified at the Constitution's founding unencumbered by the limited textual reach of the Amendment itself.<sup>10</sup> A far cry from the scenario in *Chisholm v. Georgia*<sup>11</sup> that triggered the expedient adoption of the Eleventh Amendment, later Supreme Court cases have expanded the types of parties and causes of action that strip federal courts of their ability to hear cases against non-consenting states.<sup>12</sup> Essentially eschewing any

---

case. Some of the arguments in this article echo principles expounded in Professor Seamon's article, although with substantial departures from his methodology and reasoning along the way.

9. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). At least four current Supreme Court Justices see the similarity. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting) (complaining the "expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the present majority's perception of *constitutional penumbras rather than constitutional text*" (emphasis added)).

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

11. *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793) (holding the federal judicial power extends to a suit against a state brought by a citizen of another state). See also *infra* note 15 and accompanying text.

12. See *infra* notes 23-25 and accompanying text.

notion of fidelity to textually-bounded interpretations, the Supreme Court announced for the first time in *Alden*, over vigorous dissent, that Eleventh Amendment principles apply not just in federal courts, but in *state* courts as well.<sup>13</sup> A more logical, textually-coherent means to the same end was unfortunately disregarded. Anti-commandeering principles, discussed at length below, could have and should have resolved the issue raised in *Alden*: by what enumerated power does the federal government tell state courts which classes of defendants to exercise jurisdiction over?

### A. *Freeing the Eleventh Amendment from Its Textual Mooring*

A jurisprudential mess is encapsulated in the Court's mantra "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."<sup>14</sup> To understand why *Alden* should not have relied on sovereign immunity principles derived from the Eleventh Amendment, a brief doctrinal review is in order. About the only thing uncontroversial about the proper scope of the Eleventh Amendment is this: *Chisholm* (finding that federal judicial power extended to a suit by a non-state citizen against the sovereign immunity-invoking State of Georgia) was overruled by it.<sup>15</sup> Constituting the first, but by no means the last,<sup>16</sup> instance of direct backlash against a Supreme Court opinion, the

---

13. *Alden*, 527 U.S. at 746-47, 758-59.

14. *Seminole Tribe of Fla. v. United States*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991)).

15. *Compare* *Chisholm v. Georgia*, 2 U.S. 419, 420-21, 450-51, 455, 465, 469, 477-78 (1793) (finding in separate opinions that a South Carolina merchant could maintain a suit against Georgia to collect a debt owed for supplies provided under contract), *with* U.S. CONST. amend. XI (tracking the language of *Chisholm*'s majority holding in removing federal jurisdiction in suits brought by foreign citizens or citizens of another state against a state); *see also* JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 1-2 (2d ed. 2007) (describing the Eleventh Amendment as clearly overruling *Chisholm*).

16. The most famous instance of such backlash is Section 1 of the Fourteenth Amendment granting citizenship to all persons born or naturalized in the United States, which overruled the infamous *Dred Scott* decision finding freed slaves lacked citizenship under the Constitution. *Dred Scott v. Sandford*, 60 U.S. 393, 413 (1856). For discussions on the history of the *Dred Scott* case, *see, e.g.*, Richard L. Aynes, 39 *AKRON L. REV.* 289, 290-300 (2006); Cass R. Sustein, *The Dred Scott Case*, 1 *GREEN BAG* 39, 40-46 (1997).

Eleventh Amendment was specifically “drafted and ratified in great haste to overrule *Chisholm*.”<sup>17</sup>

It was not until nearly one hundred years later<sup>18</sup> in the landmark *Hans v. Louisiana*<sup>19</sup> case that the Court would significantly address the confines of the Eleventh Amendment. *Hans* became the beacon for what is now settled law: the Eleventh Amendment encompasses a principle of state sovereign immunity—namely, that a state cannot be sued without its consent.<sup>20</sup> The strength of constitutionally-secured sovereign immunity derives from the Court’s willingness to vastly expand the doctrine beyond constitutional text.<sup>21</sup> For instance, although not compelled by Eleventh Amendment text, *Hans* unwaveringly held (though not without controversy)<sup>22</sup> that states

---

17. Lackland H. Bloom, *Interpretive Issues in Seminole and Alden*, 55 SMU L. REV. 377, 377 (2002); see also Katherine Florey, Comment, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CAL. L. REV. 1375, 1386-87 (2004). For a historical account of the origin of state sovereign immunity, see MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 179-81 (2d ed. 1990).

18. The lapse in time is not entirely surprising given that Congress did not give lower federal courts federal question jurisdiction until 1875, making the Eleventh Amendment a largely irrelevant doctrine in most cases. See Louise Weinberg, *The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts,”* 78 TEX. L. REV. 1405, 1412-13 (2000).

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

20. See *id.* at 16-17; see also *Seminole Tribe of Fla. v. United States*, 517 U.S. 44, 64 (1996) (“[T]he Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts’ jurisdiction under Article III.”). For a criticism of recognizing sovereign immunity in any form, see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

21. The Eleventh Amendment states in its entirety “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The seemingly limited context addressed in the Amendment is hardly recognizable following the line of Supreme Court decisions extending the extra-textual principles originating in *Hans*.

22. There has been a strong academic movement to limit the Eleventh Amendment to diversity-based jurisdiction cases alone, although the proposition has never commanded a majority of the Court. See, e.g., Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1133-41 (2001) (noting “[s]ome historians will tell you . . . that if any Eleventh Amendment case should have been surprising, it was not *Chisholm*, but *Hans*”);

cannot be compelled to submit to suits brought by private parties in federal court even if premised on federal question, as opposed to diversity, jurisdiction.<sup>23</sup> Even though the Eleventh Amendment speaks of suits in “law and equity,” which technically does not cover admiralty actions, *In re State of New York* found state sovereign immunity applies in that context as well.<sup>24</sup> Perhaps the most significant case for protecting states’ prerogative to avoid suit was *Seminole Tribe v. Florida*, which held that Congress may not use its Article I powers to circumvent the restrictions on federal jurisdiction imposed by the Eleventh Amendment (as expansively interpreted by the Court) for lawsuits filed in federal court.<sup>25</sup> Though numerous

---

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-75 (1987) (arguing the Eleventh Amendment is inapplicable to cases invoking federal question or admiralty jurisdiction); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1130 (1983) (“[T]he adopters of the amendment originally had the more modest purpose of requiring that the state-citizen diversity clause of [A]rticle III be construed to confer jurisdiction on the federal courts only when a state sued an out-of-state citizen . . . [therefore,] the amendment left both admiralty and federal question jurisdiction to operate according to their own terms, authorizing federal courts to entertain private citizens’ suits against the states whenever based on valid substantive federal law.”).

23. See *Hans*, 134 U.S. at 1, 20-21. Moreover, because states can only act through their officers, simply suing state officers or agencies without naming the state as a party defendant will not bar sovereign immunity invocation. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (“It has long been settled that the reference to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.”); *Ex parte Ayers*, 123 U.S. 443, 492-508 (1887); see also *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) (“The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of caption and pleading.”).

24. *In re State of New York*, 256 U.S. 490, 500 (1921); see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (holding a state may assert the sovereign immunity defense in an action by a private party brought in a federal administrative agency tribunal); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991) (finding sovereign immunity restricts suits against states by Indian tribes); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 330-31 (1934) (holding foreign states may not sue a state without its consent); *Smith v. Reeves*, 178 U.S. 436, 446-47 (1900) (holding a state may claim exemption from being sued by a congressionally-created corporation).

25. *Seminole Tribe of Fla. v. United States*, 517 U.S. 44, 72-76 (1996).

exceptions to the absolute bar on compelling states to submit to suit remain intact,<sup>26</sup> for the most part, *Seminole Tribe* prevents nearly all private litigants from forcing a state to pay retrospective monetary damages stemming from a constitutional violation.<sup>27</sup> While *Seminole Tribe* arguably proved to be the greatest impenetrable shield of state immunity, the most surprising foray into expansively interpreting the reach of Eleventh Amendment-style immunity awaited a case that has sparked renewed criticism of federalism-driven jurisprudence: cue the entrance of *Alden*.

### B. Alden's Fixation on State Dignity

*Alden* picked up where *Seminole Tribe* left off asking: what happens when a private party sues a state in *state court*?<sup>28</sup> Despite the fact the Eleventh Amendment all but excludes faithful application outside of federal judicial forums,<sup>29</sup> *Alden* barred private suits against non-consenting states in *state court*, myopically focusing on the rights inherent in sovereignty, rather than probing the source of Congress's sovereign immunity abrogation power. *Alden* involved a suit for monetary damages by probation officers against the State of Maine for unlawful withholding of overtime wages in contravention of the Federal Fair Labor Standards Act of 1938.<sup>30</sup> As Richard Seamon

---

26. See *infra* Part V.

27. See *Seminole Tribe of Fla.*, 517 U.S. at 72-76; *Edelman v. Jordan*, 415 U.S. 651, 662-63 (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.”); see also Ana Maria Merico-Stephens, *Of Maine's Sovereignty, Alden's Federalism, and the Myth of Absolute Principles: The Newest Oldest Question of Constitutional Law*, 33 U.C. DAVIS L. REV. 325, 376-87 (2000) (arguing the remaining alternatives after *Seminole Tribe* are insufficient to protect constitutional rights); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 94-95 (1999) (discussing the right-remedy gap created by Eleventh Amendment law).

28. *Alden v. Maine*, 527 U.S. 706, 711-12 (1999).

29. See U.S. CONST. amend XI; Matthew Mustokoff, *Sovereign Immunity and the Crisis of Constitutional Absolutism: Interpreting the Eleventh Amendment After Alden v. Maine*, 53 ME. L. REV. 81, 85 (2001) (“Textually speaking, the Eleventh Amendment neither discusses nor remotely implicates any judicial forum other than the federal system.”).

30. *Alden*, 527 U.S. at 711.

points out, the Court seemed to view the question as one of symmetry—whether “a State’s immunity in its own courts [is] symmetrical to its immunity in federal court.”<sup>31</sup> Framing the question in this way, however, led the Court to a lengthy and, as discussed in other parts of this article,<sup>32</sup> unnecessary focus on the state’s “immunity from private suits *central to [its] sovereign dignity*.”<sup>33</sup>

While paying lip service to the limits of federal powers,<sup>34</sup> the *Alden* majority suggested that abrogation of state immunity by Congress was barred by some heretofore undefined “fundamental postulates implicit in the constitutional design” bestowing an affirmative constitutional right upon states.<sup>35</sup> Matthew Mustokoff hints at the real driving force stating, “[i]t is paradoxical that the *Eleventh Amendment* is referenced so often within the *Alden* opinion when one considers that the question presented by the case . . . does not technically raise an Eleventh Amendment issue.”<sup>36</sup> With *Hans* having long ago freed Eleventh Amendment-based sovereign immunity from any real textual constraints,<sup>37</sup> Justice Kennedy’s decree in *Alden* that “the sovereign immunity of the States neither

---

31. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1095-96 (2001).

32. *See infra* Part III.

33. *Alden*, 527 U.S. at 715 (emphasis added).

34. *See id.* at 712 (“We hold 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 courts.”). The rest of the Court’s reasoning belies its claim that a lack of congressional power, rather than a notion of constitutionally-secured affirmative sovereignty right, formed the rationale for its holding. *Id.* at 730-55. As Part IV shows, this is a distinction that has real consequences for the scope of not only claims implicating sovereign immunity, but actions involving exclusively non-state parties as well.

35. *Alden*, 527 U.S. at 728-29; *see also* Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245, 250 (2000) (suggesting *Alden* invokes a states’ rights model as opposed to normative federalism).

36. Matthew Mustokoff, *supra* note 29, at 85 (emphasis added); *accord* Seamon, *supra* note 31, at 1097-98 (discussing how *Alden* linked federal court immunity with state court immunity).

37. *See supra* notes 22-23 and accompanying text.

derives from nor is limited by the terms of the Eleventh Amendment” is of no real moment.<sup>38</sup>

While it made for a great trip down memory lane complete with discussions of Framers, Federalist Papers, and original intent,<sup>39</sup> *Alden* deviated from a framework more appropriate to the question at hand. *Alden* should have completed the trilogy that *New York v. United States* began. As discussed below at length, *New York* established the anti-legislative commandeering principle, *Printz v. United States* established the anti-executive commandeering principle, and *Alden* should have established the anti-judicial commandeering principle. The problem is, albeit making passing reference to the anti-commandeering line of cases,<sup>40</sup> *Alden* based much of its reasoning on an unstable notion of states’ affirmative rights that is both incoherent and vulnerable to attack. The Court assumed that immunity is a constitutionally-secured state right (analogous to Bill of Rights liberties) rather than finding the federal government lacked the power to abrogate state immunity.<sup>41</sup> Should the issue present itself again (as

---

38. See *Alden*, 527 U.S. at 713; see also JOHN C. JEFFRIES, JR. ET AL., *supra* note 15, at 29-30 (“Obviously, *Alden* rests heavily on *Hans*, which reflects the same conception of a preexisting constitutional immunity broader than that specified in the Eleventh Amendment.”); Ana Maria Merico-Stephens, *supra* note 27, at 367-68 (describing the holding in *Alden* as just another instance of “*Hans* rear[ing] its unsightly head once again to facilitate the ideological bootstrapping the Court is so determined to turn into an intractable constitutional decree”).

39. See *Alden*, 527 U.S. at 760-64 (Souter, J., dissenting) (criticizing the majority’s reliance on historically-based arguments regarding the constitutionalized concept of sovereign-inherent immunity from suit); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1620-24 (2000) (describing *Alden*’s argument as “almost wholly a direct appeal to history” and further insinuating the majority displayed an unwieldy devotion to justifying its holding on historical grounds); see also Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1121 (2000) (repeating a joke that the Y2K bug hit the Court early making it think it was the year 1900 when it decided *Alden v. Maine*). See generally *Alden*, 527 U.S. at 715-59.

40. See *Alden*, 527 U.S. at 732-34 (referring to *Printz* as an “analogous context” and briefly quoting it for the proposition that congressional laws must be *proper* to be constitutional, but then immediately shifting back to a discussion of the asserted constitutional protection of state sovereign immunity); see also *id.* at 749-57 (appearing to invoke an anti-judicial commandeering principle derived from *Printz* and *New York*, but then quickly reverting back to the importance of state sovereign immunity to state integrity).

41. See Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28

it no doubt will) the Court should shift its focus from *state* dignity to *federal* power, or more specifically the lack thereof, in commandeering state judiciaries.

## II. A FOCUS ON THE LIMITS OF FEDERAL POWER: THE ANTI-COMMANDEERING PRINCIPLE

Unlike the technique employed in *Alden* of fixating on inherently-bestowed, constitutionally-protected state sovereign rights, *New York v. United States* and *Printz v. United States* established a solid principle of anti-commandeering. Anti-commandeering is short-hand for the notion that the federal government, though supreme in its own sphere of operation, may not constitutionally carry out its powers vis-à-vis compelled state service. The ensuing brief summary of the founding anti-commandeering case law provides the structure that this Article argues should be employed in cases of federal encroachment of state court jurisdiction (in other words, forcing the state to decide cases it otherwise would not have under non-discriminatory state law).

### A. Anti-Legislative Commandeering (*New York v. United States*)

New problems with disposing of radioactive waste collided with old problems of respecting the balance of power between federal and state governments in *New York v. United States*.<sup>42</sup> In 1980, Congress passed a law allowing states to enter into regional compacts with other states to dispose of radioactive waste and charge differential rates for states not party to the compact.<sup>43</sup> However, five years later many

---

HASTINGS CONST. L.Q. 1, 15-20 (2000) (suggesting *Alden* secretly hoped to restore *National League of Cities v. Usery*'s thoroughly discredited regime of banning federal regulation of "States qua States" that was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*); Ana Maria Merico-Stephens, *supra* note 27, at 327-28 (describing *Alden* as the reincarnation of *National League of Cities*). For an argument that the Supreme Court should get out of the business of sustaining the limits of federal power, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 288-93 (2000).

42. *New York v. United States*, 505 U.S. 144, 149 (1992).

43. Congressional consent was a constitutionally-compelled prerequisite for a state to be able to create regional state compacts and charge differential rates to non-member states. See U.S. CONST. art. 1, § 10, cl. 2 (barring states from imposing import charges without congressional authorization); U.S. CONST. art. 1, § 10, cl. 3

states had failed to join a compact and, according to the law, could soon be precluded from shipping waste to existing facilities.<sup>44</sup> In response to the real threat that states would refuse to accept radioactive waste from states outside of regional compacts (non-member states), Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985, the subject of the suit in *New York v. United States*.<sup>45</sup> The goal of the Act was to have each state eliminate waste generated within the state by either joining a regional waste-shipping compact, or creating a disposal facility within the state. To that end, a three-part incentive scheme provided that (1) surcharges could be imposed on non-member states that would be redistributed to states meeting specific statutory objectives, (2) states failing to achieve statutory objectives could be denied waste-disposal access by states housing disposal facilities, and (3) states that neither entered into a regional compact nor developed a state facility to accommodate waste produced within the state by a certain date would be forced to take title and assume liability for the waste.<sup>46</sup>

The State of New York brought suit against the United States challenging each of the three incentive mechanisms. Searching in each instance for the enumerated power behind the statutory provision, the Court found the first incentive was “an unexceptional exercise of Congress’s” Commerce Clause and Spending Clause powers to authorize states to levy surcharges on non-member states and then redistribute the funds to states meeting milestone achievements.<sup>47</sup> Similarly, the second incentive was within Congress’s Commerce Clause power to allow states to discriminate against interstate commerce: states failing to join a compact or attain self-sufficiency were therefore properly subject to “federal regulation authorizing sited States and regions to deny access to their disposal sites.”<sup>48</sup> Unlike the first two incentives, the third take-title provision was a different animal. Compelling the state to “choose” between “accepting

---

(barring states from forming compacts with one another absent congressional consent).

44. *New York*, 505 U.S. at 150-51.

45. *Id.* at 151, 154.

46. *See id.* at 151-54, 171-77.

47. *See id.* at 171-73.

48. *See id.* at 173-74.

ownership of waste or regulating according to the instructions of Congress” was beyond Congress’s enumerated powers thereby necessarily impinging on state sovereignty reserved by the Tenth Amendment.<sup>49</sup> The former alternative was no more than a congressional directive that states legislatively assume private waste and its corresponding liability; the latter alternative was no more than “a simple command to state governments to implement legislation enacted by Congress.”<sup>50</sup> States could not be constitutionally compelled to select from a menu of “unconstitutionally coercive regulatory techniques.”<sup>51</sup>

The take title-provision thus sparked the announcement of the anti-commandeering principle, which serves to preserve federalism and accountability values alike.<sup>52</sup> Addressing the third incentive mechanism, the *New York* Court found “[e]ither type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”<sup>53</sup> After all, states are their own sovereign entities not mere “regional offices [or] administrative agencies of the Federal Government.”<sup>54</sup> While Congress could regulate private activity itself

---

49. *See id.* at 175-77.

50. *Id.*

51. *Id.* at 176.

52. *See* Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 830-31 (1995) (discussing the importance of the Court preserving the federalism system through review of congressional laws encroaching on state power). If citizens do not like the laws enacted and implemented, they therefore know which level of government lawmaker (state or federal) to blame. *See* William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and Alden v. Maine*, 75 NOTRE DAME L. REV. 1069, 1074 (2000) (“Where the Federal Government compels the States to regulate, the accountability of both state and federal officials is diminished.”).

53. *New York*, 505 U.S. at 175. The Supreme Court had first hinted that Congress cannot constitutionally force a state to enact and enforce federal laws in *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981). While the law in *Hodel* was upheld because it gave the states the valid options of regulating or being preempted by federal law, the anti-commandeering notion would endure. *Hodel*, 452 U.S. at 288; *see also New York*, 505 U.S. at 176 (quoting *Hodel*, 452 U.S. at 288).

54. *New York*, 505 U.S. at 188.

or utilize its spending powers to incentivize states to adopt similar regulations,<sup>55</sup> the choice of the Virginia Plan over the New Jersey Plan at the Convention clearly negated a federal power to impress states into federal service.<sup>56</sup> Encapsulating the newly-minted anti-commandeering principle, the Court pronounced “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>57</sup> Perhaps most importantly, the anti-commandeering principle is impervious to the strength of the federal interest sought to be advanced through congressional enactments; no commandeering means no commandeering.<sup>58</sup>

### *B. Anti-Executive Commandeering (Printz v. United States)*

*New York* made *Printz v. United States* an easy case. *Printz* involved an interim provision of the federal Brady Handgun Violence Prevention Act that required *state* law enforcement officers to conduct background checks on individuals attempting to purchase handguns.<sup>59</sup> Looking to historical practice and understanding, case precedents, and constitutional structure, *Printz* found the anti-commandeering principle *New York* announced *categorically* prohibits state executive officers from being “‘dragooned’ [] into administering federal law . . . .”<sup>60</sup> Just as states may not force the United States executive branch to administer state law, so too must Congress enforce its own laws through federal executive officers. Otherwise, Congress could gratuitously enlist state officials to carry out federal laws with the corresponding conflation of accountability and drain on state resources.<sup>61</sup>

---

55. *See id.* at 166-68.

56. *See id.* at 165 (noting the adoption of the Virginia Plan was a recognition that “Congress would exercise its legislative authority over individuals rather than over States”); *accord* *Printz v. United States*, 521 U.S. 898, 919-20 (1997).

57. *New York*, 505 U.S. at 188.

58. *Id.* at 178 (denying that a strong federal interest can empower Congress to command the states to regulate); *see also* Seamon, *supra* note 8, at 332 (expounding on the absolute quality of the anti-commandeering principle).

59. *Printz v. United States*, 521 U.S. 898, 902-04 (1997).

60. *Id.* at 905-28, 933.

61. *See id.* at 928, 930-31.

Illustrating how *Printz* is a logical extension of *New York*, the Court stated:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.<sup>62</sup>

In stark contrast to the lavish attention *Alden* paid to concepts of state sovereign immunity, *Printz*, like *New York*, kept the attention correctly focused on the constitutional allocation of powers to the necessarily limited federal legislative branch.<sup>63</sup> After all, *people*, and not *states*, are the ones who ultimately possess affirmative constitutional rights, and federalism is but a conduit to secure benefits to these individuals.<sup>64</sup>

### III. EXTENDING THE ANTI-COMMANDEERING PRINCIPLE TO STATE COURTS

Which kinds of cases and classes of parties state courts may preside over is a prerogative of the state that should be impervious to congressional intrusion absent some constitutionally-compelled waiver or especially-authorized abrogation power. The power of state

---

62. *Id.* at 935.

63. Compare *Printz*, 521 U.S. at 935, and *New York v. United States*, 505 U.S. 144, 187-88 (1992), with *Alden v. Maine*, 527 U.S. 706, 757-60 (1999); see also Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 163-64 (2001) (reading the anti-commandeering cases to only apply to legislative and executive commandeering). For an extended argument predating *Alden* for applying *Printz* and *New York* to the state judicial commandeering context, see Seamon, *supra* note 8.

64. See Florey, *supra* note 17, at 1412 ("Commentators have routinely decried the *Alden* view as an unnecessary personalization of states. . . ."). See generally Ann Althouse, *supra* note 35, at 260-61.

courts is defined by states themselves and the anti-commandeering doctrine highlights Congress's inability to broaden state court jurisdiction, both in the sovereign immunity context and beyond. *Testa* merely stands for the rule that once a state decides to exercise judicial review over particular state causes of action and litigants, that state may not discriminatorily exclude those same actions and litigants because federal law forms the basis for suit. Analogously, the Supremacy Clause requires federal law to reign supreme in cases *properly* brought before state courts. The Supremacy Clause in no way requires state courts to preside over cases or parties that neutral state law would otherwise prohibit. The anti-commandeering doctrine yields the same benefits when applied to the judicial branch as it does when applied to the legislative and executive branches. Anti-commandeering, and not some notion of constitutionalized state sovereign immunity, should therefore guide adjudication of sovereign immunity claims arising in *state* courts.

#### A. Sovereign Immunity as Regulating State Court Jurisdiction

Once sovereign immunity is seen for what it really is—a limitation on judicial power—the applicability of the anti-commandeering principle to state judiciaries becomes all the more apparent. This article adopts the definition of “jurisdictional” propounded by the Supreme Court in *Kontrick v. Ryan*—something is “jurisdictional” if it “delineat[es] the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”<sup>65</sup> While scholars have debated whether it partakes more of personal versus subject matter jurisdiction, consensus coalesces around the view that state sovereign immunity is in fact a limit on judicial power to adjudicate lawsuits.<sup>66</sup>

---

65. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). For an engaging debate on the correct use of the term “jurisdictional,” see Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1459-60, 1479-81 (2006).

66. See *Howlett v. Rose*, 496 U.S. 356, 361 n.5 (1990) (noting many Florida courts found sovereign immunity goes to the jurisdiction of the court to hear the case); see also *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 285-87 (5th Cir. 1999) (interpreting sovereign immunity to go to subject matter jurisdiction). Caleb Nelson, for example, marshals an impressive historical argument for treating sovereign immunity as a personal jurisdiction, as opposed to a subject matter jurisdiction, concept. See generally Caleb Nelson, *Sovereign Immunity as a*

Moreover, “the [Supreme] Court has frequently stated that the doctrine, whether or not rooted in the Eleventh Amendment, is either a limit on subject matter jurisdiction or something closely analogous to it.”<sup>67</sup> The text of the Eleventh Amendment itself, removing federal *jurisdiction* in language mirroring Article III—the source of all federal jurisdiction—further confirms state sovereign immunity’s jurisdictional character.<sup>68</sup> Finally, the Court’s willingness to view federal and state sovereign powers as mirroring one another suggests states are free to delineate state power by barring claims against them absent consent.<sup>69</sup> Louise Weinberg convincingly argues that *Congress* could constitutionally limit federal courts’ jurisdiction as it pleases. Applying Weinberg’s logic to the state judicial domain, “[t]hat which [states] hath power to give, [states] hath power to take away.”<sup>70</sup>

It is far from a controversial proposition that states have the power to both establish and define the scope of their courts’ authority.<sup>71</sup> As

---

*Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002). The consequences of adopting one jurisdictional view over the other primarily relate to when the immunity defense claim must first be raised and whether the court has an obligation to raise it *sua sponte*. The resolution of the debate, while interesting, has little impact on the thesis of this article, which deals with how sovereign immunity in state court suits should be justified to begin with.

67. Florey, *supra* note 17, at 1385; see also *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (stating the sovereign immunity defense “sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court”); *accord Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984).

68. Compare U.S. CONST. art. 3, § 2, cl. 2, with U.S. CONST. amend. XI. See also *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 285 n.9 (5th Cir. 1999) (“[T]he historical context surrounding the enactment of the Eleventh Amendment supports the position that the Eleventh Amendment, if not part and parcel of the Article III restrictions, is certainly intertwined with Article III jurisprudence.”).

69. See, e.g., *Printz v. United States*, 521 U.S. 898, 928 (1997) (asking whether states would have the power to compel federal officers to carry out state law to decide whether Congress had comparable power to compel state officers to implement federal law).

70. Weinberg, *supra* note 18, at 1410-11.

71. *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (“The States . . . have great latitude to establish the structure and jurisdiction of their own courts.”). See HENRY ROBERT GLICK & KENNETH V. VINES, *STATE COURT SYSTEMS* 28-33 (1973) (discussing the widely varying ways states have chosen to structure their courts); see also Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 968-72 (2006) (confirming through historical analysis that states

the Court has acknowledged, “[T]he States *obviously* regulate the ordinary jurisdiction of their courts.”<sup>72</sup> Whether by legislative enactment or constitutional amendment, state political entities (or the people themselves) decide what state courts have the power to do.<sup>73</sup> Perhaps more significantly, there is not a single federal statute in the history of the United States claiming to *expand* or *establish* state court power.<sup>74</sup> And, “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”<sup>75</sup> Accordingly, state governments, no less than the federal government, are entitled to decide (within the boundaries discussed below), which matters and parties may be heard before state tribunals.

### *B. The Testa Line of Cases and Overcoming the Supremacy Clause*

In contrast to state legislative and executive members, the Supremacy Clause of the Constitution imposes specific affirmative obligations on state judges. Laws made pursuant to the Constitution “under the Authority of the United States, *shall be the supreme Law of*

---

should have the power to determine the scope of state judicial power). Some states have acknowledged a form of “inherent powers of the judiciary,” that, although not specifically bestowed, are necessarily conferred upon the state courts. FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* 3-15 (1994).

72. *Printz*, 521 U.S. at 907 n.1 (emphasis added and quotation omitted).

73. See, e.g., FLA. CONST. art. 5, § 6 (giving state legislatures the unbridled power to shape trial court jurisdiction with the caveat such jurisdiction must be uniform throughout the state); TEX. CONST. art 5, § 8 (providing a somewhat detailed layout of state court jurisdiction within the text of the state constitution); *accord* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 800-02 (1995) (discussing the powers retained by states under the Constitution).

74. *Alden v. Maine*, 527 U.S. 706, 744 (1999) (concluding no federal statute has ever claimed to authorize suits in state courts against non-consenting states); cf. *Second Employers’ Liability Cases*, 223 U.S. 1, 56-57 (1912) (suggesting that an attempt by Congress “to enlarge or regulate the jurisdiction of state courts” would be unconstitutional).

75. *Printz*, 521 U.S. at 928 (citing *Texas v. White*, 74 U.S. 700, 725 (1868)). For a discussion of the threat that many recent federal statutes pose to state court autonomy, see Georgene M. Vairo, *Trends in Federalism and What They Mean for the State Courts*, in *STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?* 5-24 (Roscoe Pound Inst. ed., 2006).

*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.”<sup>76</sup> Perhaps the most famous Supreme Court case expounding the effect of the Supremacy Clause on the duties of state judiciaries is *Testa v. Katt*, which held that state courts cannot refrain from adjudicating federal claims brought in state court merely because the state disagrees with the legislative policies.<sup>77</sup> Therefore, Rhode Island could not refuse to enforce a federal penal statute because a state’s contradictory views on federal substantive law cannot form a “valid excuse” for failing to entertain federal claims.<sup>78</sup>

While *New York* and *Printz* heavily cite to *Testa* to show the comparative lack of constitutional impositions on state legislative and executive officials, *Testa* is nothing more than a federal discrimination prohibition: a state cannot avoid hearing federal suits in its courts when “[that] *same type of claim* arising under *state law* would be enforced by that [s]tate’s courts.”<sup>79</sup> In a sense, *Testa* and its progeny track the rational-basis review doctrines applied in other constitutional arenas.<sup>80</sup> A state may limit the kinds of cases and classes of parties it exercises power over, but it may not do so for illegitimate reasons.<sup>81</sup>

---

76. U.S. CONST. art. VI, § 1, cl. 2 (emphases added); *see also* *Printz*, 521 U.S. at 907 (stating the Constitution imposed prescriptions on state judges, but not state executive members); *New York v. United States*, 505 U.S. 144, 178-79 (1992) (distinguishing state courts from state legislatures on the ground that the Constitution directly commands judicial enforcement of federal law).

77. *Testa v. Katt*, 330 U.S. 386, 392-94 (1947).

78. *Id.* at 392-93.

79. *Id.* at 393; *see also* *Seamon*, *supra* note 8, at 351 (“The Supremacy Clause is offended only when the state allows its courts to hear a state-law claim but prohibits them from hearing a federal claim arising from the same facts.”).

80. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-91 (1955) (contending that state legislatures are free to pass certain economic regulations so long as they have some legitimate basis for doing so); *see also* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorizing and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (“If the standard is rationality, the government is supposed to win—and any lawyer who hires expert witnesses to dispute the empirical basis for legislation under this standard of review is wasting the client’s money.”); Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006) (describing the presumption of constitutionality the doctrine of rational basis entails).

81. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 972 (2001) (“[T]he Judges Clause does not provide Congress

Discriminatorily keeping federal claims out of state court is simply not a legitimate state purpose. Professor Seamon describes the state of affairs mandated by *Testa* as follows:

[T]he *Testa* cases establish that the Supremacy Clause, of its own force, (1) invalidates state laws that require or permit state courts to discriminate against federal claims; and (2) requires state courts to hear federal claims that they have power to hear under the state law that remains intact when any discriminatory state laws are disregarded. Apart from invalidating such discriminatory state laws, the Supremacy Clause does not enlarge the jurisdiction of state courts. Thus, the Supremacy Clause, standing alone, would not compel a state court to hear a private federal claim against its own state if state law barred the state courts from hearing any private claim against the state. The Clause would, however, compel a state court to hear a federal claim against a state if state law waived the state's immunity in its courts from a state-law claim arising on the same facts as did the federal claim.<sup>82</sup>

*Howlett v. Rose* confirms the anti-discriminatory principle of the Supremacy Clause setting forth three parameters for determining whether a state's refusal to adjudicate a federal claim in state court violates the Constitution: First, absent a "valid excuse" state courts may not decline to hear a federally-authorized suit; if jurisdiction exists, courts have a duty to exercise it.<sup>83</sup> Second, trying to distance state courts from federal law because of "disagreement with its

---

with an independent font of authority over state courts; it merely directs state courts to enforce federal laws validly enacted under another congressional power.").

82. Seamon, *supra* note 8, at 335.

83. *Howlett v. Rose*, 496 U.S. 356, 369-70 (1990) (quoting *Douglas v. New York*, 279 U.S. 377, 387-88 (1929)); *see, e.g., Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding a state court could not decline to exercise pre-existing jurisdiction because the plaintiff sought to enforce a federal right); *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 232-34 (1934) (compelling a state court to hear a federal claim because the jurisdiction of the court encompassed the suit and the parties before it under state law); *cf. Second Employers' Liability Cases*, 223 U.S. 1 (1912) ("[T]his court can doubtless compel the state courts to exercise in aid of the new Federal right *such jurisdiction* as those courts *have under state laws*." (emphases added)). *See generally* MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 172-78 (2d ed. 1990) (reviewing the "valid excuse" doctrine of state court jurisdiction abstention).

content or a refusal to recognize the superior authority of its source” can never be a “valid excuse.”<sup>84</sup> Third, “[w]hen a *state court refuses jurisdiction* because of a *neutral state rule* regarding the administration of the courts, [reviewing courts] must act with *utmost caution* before deciding that it is *obligated to entertain the claim*.”<sup>85</sup> In accordance with these guidelines, states have been found to have the power to refuse to hear a case when state law applying to both federal and state claims alike insisted at least one party be a state resident,<sup>86</sup> required the claim to have arisen in particular territorial limits,<sup>87</sup> or directed the case be dismissed under the doctrine of *forum non conveniens*.<sup>88</sup>

### C. The Rationales of New York and Printz Apply with Equal Force to the State Judiciary

Accountability and resource depletion have been identified by the Court and scholars as harms flowing from federal commandeering of state political entities.<sup>89</sup> Forcing a state court to adjudicate cases that would otherwise be barred by neutral state law creates the same problems. Most importantly, when the federal government commands state courts to throw open their doors to cases otherwise barred, *state* and not *federal* government officials are likely to be punished if the electorate disagrees with the results. Deciding additional cases will force legislatures to either allocate more money to the state judiciary or allow the justice system to become incrementally slower than it would have otherwise been. As Professor Seamon notes, “[e]ither

---

84. See *Howlett*, 496 U.S. at 371-72 (explaining that policy is established nationwide when enacted by Congress pursuant to valid constitutional powers).

85. *Id.* at 372 (emphases added).

86. *Douglas v. New York*, 279 U.S. 377, 387 (1929).

87. *Herb v. Pitcairn*, 324 U.S. 117, 121-23 (1945).

88. *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 4-5 (1950); see also *Howlett*, 496 U.S. at 374-75 (discussing *Douglas v. New York*, *Herb v. Pitcairn*, and *Missouri ex rel. Southern Railway Co. v. Mayfield* with approval). Overall, these cases establish that “a state may neutrally control the volume and types of cases that its courts can hear.” Seamon, *supra* note 8, at 340.

89. See *New York v. United States*, 505 U.S. 144, 168-69 (1992); *Printz v. United States*, 521 U.S. 898, 929-31 (1997); see also *Alden v. Maine*, 527 U.S. 706, 749-52 (1999); Bellia, *supra* note 81, at 956-57; Seamon, *supra* note 8, at 363-66.

route would cause state residents to blame members of the state legislature, rather than members of Congress, for the increase in costs or the decrease in efficiency.”<sup>90</sup> Aside from draining judicial resources by deciding cases otherwise excludable, voters may wonder why states have authorized proceedings against the state for money that will come from public coffers to begin with and vote accordingly.<sup>91</sup> In addition to indirect electoral responses felt by the state legislature, state court judges are not immune from political pressure either. Unlike Article III federal judges who are appointed for life during good behavior,<sup>92</sup> over three-fourths of state judges are selected by popular election.<sup>93</sup>

Judicial commandeering puts the same strain on state resources as legislative or executive commandeering. “Simply put, the more time and money that Congress require[s] state courts to devote to hearing federal cases, the less the courts would have for hearing state cases.”<sup>94</sup> There is no reason to think “[c]ongressional commandeering of state courts could [not] consume just as much state energy as could congressional commandeering of the other branches of state government.”<sup>95</sup> The costs of adjudicating claims are part and parcel of policy implementation budgeting. There is a real danger that the federal government will abuse the ability to provide benefits without needing to overtly tax the general public to cover the expense of judicially administering regulatory programs.<sup>96</sup> Further, as experience

---

90. Seamon, *supra* note 8, at 364; *accord Alden*, 527 U.S. at 750-52 (arguing that the political process should guide resource allocation and federal commandeering of state courts would usurp that process).

91. Marshall & Cowart, *supra* note 52, at 1080-81.

92. U.S. CONST. art. III, § 1.

93. Tonya M. Gray, Note, *Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143, 163 (1999) (discussing the political character of state courts).

94. Seamon, *supra* note 8, at 363; *see also* TEX. GOV'T CODE ANN. § 311.034 (Vernon 2007) (“In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected [sic] by clear and unambiguous language.”).

95. Seamon, *supra* note 8, at 364.

96. *See* *New York v. Printz*, 521 U.S. 898, 930 (1997) (discussing the free rider problem associated with forcing states to administer federal programs).

has shown,<sup>97</sup> the “line between that which is ‘judicial’ and that which is ‘executive’ is not always easy to draw,” and *Printz* clearly forbids executive members from being converted into puppets of the federal government.<sup>98</sup>

#### IV. IMPLICATIONS OF ADOPTING THE ANTI-COMMANDEERING PRINCIPLE IN PLACE OF THE ELEVENTH AMENDMENT

The following hypothetical statutes are designed to colorfully illustrate the implications and constitutional issues arising from substituting flawed notions of constitutionalized sovereign immunity in place of the established doctrine of anti-commandeering. The Wal-Mart hypothetical statute purposefully stretches the limits of state power to define the parties over which a court may exercise jurisdiction. The lesson to take away is that anti-commandeering has the potential to place *less* constraint on state power than the *Alden* jurisprudence contemplates. In contrast, the University of Texas hypothetical statute portrays the consequences of adopting anti-judicial commandeering as the guiding principle in sovereign immunity battles. As demonstrated, *Testa* and its progeny will result in *more* restrictions on what the state may permissibly do to keep from being an unwilling defendant in its own state courts.

##### A. *Limiting State Court Power over Ordinary Defendants: Wal-Mart Hypothetical Statute*

The following hypothetical statute tests the limits of the anti-commandeering doctrine in permitting a state to restrict the kinds of parties or causes of action that may be brought before state tribunals. This statute is for illustrative purposes only—to show how anti-commandeering analysis is used to address state laws that have the effect of denying jurisdiction over some federal claims.<sup>99</sup> On April 15,

---

97. G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 16-35 (2005) (examining cases that floundered in distinguishing between “executive” and “legislative” functions that were theoretically immune from judicial review).

98. Bellia, *supra* note 81, at 988.

99. For another example of the use of a hypothetical statute for instruction rather than policy reform, see Jarrod Forster Reich, “*No Provincial or Transient Notion*”: *The Need for a Mistake of Age Defense in Child Rape Prosecutions*, 57

2007, the Texas Legislature passed the following law with the popular title “Keeping Wal-Mart’s Prices Low Tort Reform Act of 2007”:<sup>100</sup>

The Legislature finds that Wal-Mart is a good corporate citizen and has been subjected to unfair media portrayal in recent years. Because of said negative media coverage, individuals have been encouraged to sue Wal-Mart for often frivolous tort claims. Due to the rising costs of such litigation in the State of Texas, Wal-Mart has been forced to raise prices in all of its Texas stores. The Legislature has determined that it is in the best interest of the people of Texas to ensure that Wal-Mart remains a source of low-priced merchandise. Without Wal-Mart many individuals might not otherwise have access to low-cost retail goods.

The purpose of this Act is to ensure that all Texas citizens are able to enjoy low, low prices at Wal-Mart retail stores. This purpose can be accomplished by granting Wal-Mart the equivalent of government sovereign immunity in any lawsuit sounding in tort filed in a Texas state court irrespective of whether the claim is brought under state or federal law. And because in Texas sovereign immunity removes subject matter jurisdiction, no state court will have the power to hear such claims.

Under the anti-commandeering doctrine propounded at length above, would a state court’s refusal to hear a federal-based tort claim for monetary damages against Wal-Mart under the hypothetical Wal-Mart Act be unconstitutional?<sup>101</sup>

---

VAND. L. REV. 693, 964-97 (2004) (explaining the outrageous consequences flowing from passing a hypothetical statute that the author then argues stem from a real statute).

100. Some of the language was adopted from real statutes such as the Improving America’s Schools Act of 1994, 20 U.S.C. § 6301 (2007), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2007).

101. For purposes of this hypothetical, the due process implications are ignored. Some of the ramifications of removing all judicial forums will be discussed later in the article. See *infra* Part V. Also, it is assumed that the law does not violate any of the provisions of the Texas Constitution. Finally, for simplicity’s sake it is assumed the Wal-Mart Act is self-executing, that is, § 1983 need not be used to authorize a private party to initiate a lawsuit.

Starting from the proposition that states “obviously regulate the ordinary jurisdiction of their courts[,]”<sup>102</sup> removing a specific party (Wal-Mart) from the jurisdiction of state courts seems consistent with residual state powers. Looking to the Supremacy Clause limits, as delineated in the *Testa* line of cases,<sup>103</sup> Texas likely has a “valid excuse” for enacting the Wal-Mart Tort Reform Act—furthering the economic well-being of its citizens. Unless the legislature’s stated purpose was a pretext for discrimination against federal tort law (and we have no reason to believe it was), reviewing courts are unlikely to force Texas to retract its jurisdictional limit on tort cases against Wal-Mart. Essential to the Act’s constitutionality, Texas was willing to forgo lawsuits against Wal-Mart under both state *and* federal law.<sup>104</sup> Had Texas conferred jurisdiction over cases against Wal-Mart sounding in state tort law, it would have had to grant jurisdiction on an equal basis for federal tort claims. Assuming the legislation comports with the Bill of Rights, a state, like Congress, has plenary power to control access to its courts.<sup>105</sup> Applying the anti-commandeering doctrine, Congress is absolutely barred from compelling state courts to throw open their doors to Wal-Mart tort suits, unless, as explained in Part V, Texas has consented (the Act negates this) or the Constitution authorizes congressional abrogation (Article I Commerce Clause powers, the likely source of such tort law, does not authorize this). Applying the *Howlett* three-part test,<sup>106</sup> the Keeping Wal-Mart’s Prices Low Tort Reform Act of 2007 does not appear to be constitutionally infirm.

Absent valid waiver or abrogation, our hypothetical jurisdiction-removing statute leaves Congress powerless to demand the *state* employ its state judiciary to enforce federal tort law. However, the availability of *some* court to hear federal tort suits against Wal-Mart is not hindered *at all*. If Congress wants to authorize individuals to sue

---

102. *Printz v. United States*, 521 U.S. 898, 907 n.1 (1997) (quotation omitted).

103. *See supra* notes 82-83 and accompanying text.

104. This discrimination inquiry closely parallels analysis in other areas of constitutional law. For example, Virginia was under no obligation to establish a state-funded, military university; however, once it did, it was unconstitutional to exclude females from the school on the basis of their gender. *See United States v. Virginia*, 518 U.S. 515, 519, 534, 545-46, 557-58 (1996).

105. *See Weinberg, supra* note 18, at 1410-16.

106. *See supra* notes 83-85 and accompanying text.

Wal-Mart, it can. The only catch is that *federal* courts will be the only available forum. And what about the Eleventh Amendment that posed so much trouble for individuals trying to sue states in federal court? For all its textual infidelities, the Supreme Court has read the Eleventh Amendment to only apply to suits against *state* entities.<sup>107</sup> Wal-Mart can therefore be forced to submit to a suit seeking monetary recovery in federal court, the indignity of the experience notwithstanding. The important point is that while states' ability to control their courts' jurisdiction is greater under an anti-commandeering versus a sovereign-rights based doctrine, federal claims (the real source of worry since states can simply remove and/or fail to grant state law causes of action) are just as likely to have a chance to be heard, at least against nongovernmental entities.

*B. Limiting State Court Power over Non-Consenting States:  
University of Texas Hypothetical Statute*

The next hypothetical statute illustrates the consequences of adopting the anti-commandeering framework in the precise situation that arose in *Alden v. Maine*: a federal claim for retrospective, monetary relief against a non-consenting state filed in state court.<sup>108</sup> This faux statute comes with the same caveats as the Wal-Mart hypothetical—the goal is to evaluate the constitutionality and effects of adopting an anti-commandeering approach to *Alden*-like claims, not to make normative suggestions about state jurisdictional legislation. That being said, on April 15, 2007, the Texas Legislature enacted the “Stabilizing the University of Texas Law School’s Tuition Tort Reform Act of 2007”.<sup>109</sup>

---

107. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (noting only state entities and “arm[s] of the State” are covered by the Eleventh Amendment); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding “[t]he [E]leventh [A]mendment limits the jurisdiction only as to suits against a state[,]” which did not include municipal corporations).

108. In reality, this hypothetical statute would be superfluous: Texas law already prohibits suits against states unless a constitutional or statutory provision unequivocally waives sovereign immunity. See *Holland v. City of Houston*, 41 F. Supp. 2d 678, 710 (S.D. Tex. 1999); accord *Tooke v. City of Mexia*, 197 S.W.3d 325, 344-46 (Tex. 2006).

109. Again, the statutory language was borrowed in small part from actual statutes like the Improving America’s Schools Act of 1994, 20 U.S.C. § 6301

The Legislature finds that the University of Texas Law School provides high-quality legal training to future Texas lawyers at a very reasonable price. In the past five years, there has been a marked increase in suits filed against the University of Texas Law School by private Texas law schools alleging unfair price competition, mostly under state law. Also, a new clinic called the University of Texas Sovereign Immunity Law Clinic has brought slews of state law actions against the University of Texas Law School. While providing great in-court training for University of Texas law students, the suits are costing the Law School a fortune to defend. If the barrage of lawsuits does not end, the University of Texas will be forced to raise law school tuition, which threatens Texas's goal of providing low-cost, high-quality legal education to all students.

The purpose of this Act is to ensure that the University of Texas Law School continues to be able to charge students low tuition rates so everyone admitted can afford to attend. This purpose can be accomplished by extending the University of Texas Law School full sovereign immunity rights for any tort suit seeking retrospective, monetary remedies irrespective of whether the claim is brought under state or federal law. Sovereign immunity removes subject matter jurisdiction under Texas law, so state courts lack the power to hear such claims.

Could Texas state courts now constitutionally refuse to hear federal tort claims requesting monetary relief from the University of Texas Law School pursuant to the hypothetical University of Texas Law School Act?<sup>110</sup>

Texas has likely exercised its power within the boundaries of the Constitution in effectively removing state court jurisdiction over compensatory tort claims against the University of Texas Law School. A state, no less than Congress, can choose to bar state courts from hearing compelled tort suits against it.<sup>111</sup> As with the Wal-Mart Act,

---

(2007), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2007).

110. This hypothetical does not address due process considerations and takes as a given that the law would not violate the Texas Constitution. Also, this hypothetical presumes some other federal statute besides § 1983 authorizes a suit for damages since § 1983 does not permit suits against states. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989).

111. A state university is "an arm of the State" and is therefore entitled to

the University of Texas Act has a rational, non-discriminatory purpose—keeping law school tuition in check. While some federal suits may be barred, nothing denotes that the motivation behind the Act was to keep *federal* claims out of state court. While the language of the legislation suggests it may be discriminatory against *state* law actions, the rationale in *Testa* for banning state disapproval of the content of federal laws is that Congress sets policy for all of the United States. In contrast, there is nothing in the *Testa* line of cases or the Supremacy Clause that suggests states cannot discriminate against their own *state* law claims. If leaving a state entity vulnerable to state claims is detrimental to the state (or a reasonable legislature could believe so),<sup>112</sup> there is no constitutional prohibition on removing state judicial power to entertain claims against that state entity: a valid excuse will create a strong presumption of constitutionality.<sup>113</sup> Lacking waiver and abrogation power under Article I, Congress cannot force Texas to grant jurisdiction to its state courts to adjudicate federal tort claims brought against the University of Texas Law School. Therefore, the Stabilizing the University of Texas Law School's Tuition Tort Reform Act of 2007 is a valid exercise of Texas's legislative powers.

Whereas denying state court jurisdiction over *non-state* defendants merely had the effect of channeling federal tort claims brought by individuals into federal court, barring jurisdiction over non-consenting *state* defendants makes monetary recovery on federal tort claims impossible unless Congress is willing and able to abrogate immunity under an applicable enumerated power (even if Eleventh Amendment immunity is abrogated the claim must be filed in *federal* court). While state entities may be granted total immunity from monetary liability for federal claims under the anti-commandeering framework, that immunity comes at a price: states must withhold jurisdiction for equivalent federal *and* state claims alike (equal claims must be treated equally). In contrast, the *Alden* approach with its emphasis on the dignity of state sovereignty would seem to permit

---

challenge claims on the basis of state sovereign immunity under the Eleventh Amendment. See *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 535 (2002); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430-31 (1997).

112. See sources cited *supra* note 80 and accompanying text.

113. See *supra* note 85 and accompanying text.

states to preferentially waive immunity to submit to suits under state, but not federal law (as long as it was in practice and not through explicit discriminatory legislation). At the very least, it is less certain that the Supremacy Clause would trump the constitutionalized state sovereign immunity right under the analysis used in *Alden*. Perhaps the neutrality restriction on invoking state sovereign immunity will force states that want to consent to *state* claims to consent to *federal* claims as well, making it easier for individuals to sue states for monetary damages. Moreover, unlike in the *Alden* world of state affirmative dignity-based rights, the neutrality principle incorporated into the anti-judicial commandeering doctrine also means that individuals could choose to bring suit in federal *or state* court when the state consents to be sued in a class of cases (with state and federal causes of action being waived or not waived equally).

#### V. SUING THE STATE WITHOUT GETTING CONSENT: METHODS OF LAST RESORT (COMING TO A *FEDERAL* COURT NEAR YOU)

While doctrinal differences between the anti-commandeering principle of *New York* and *Printz* and the affirmative state rights model of *Alden* were expounded above, there are exceptions to Eleventh Amendment state sovereign immunity that would apply regardless of the adjudicatory method employed.<sup>114</sup> These exceptions include retrospective, equitable relief; suits brought by government rather than individual parties; individualized or across-the-board claim and/or party-based waivers of immunity; congressional abrogation under the Fourteenth Amendment Section 5 enforcement power or the Article I Bankruptcy Clause; and possibly (although not firmly established) suits alleging procedural due process violations from barring a suit from being brought in a specific forum. These types of suits may all be brought against a state in federal court without violating the commands of the Eleventh Amendment (which apply in federal, but not state forums).

---

114. While the Eleventh Amendment itself is only applicable in federal court (*Alden* transports its principles, but does not purport to apply the Amendment directly to suits brought in state court), exceptions to the Eleventh Amendment preserve a forum for adjudicating many federal claims—the most striking consequence of applying state sovereign immunity.

A. *Retrospective, Equitable Remedies* (Ex parte Young)

Throughout the article, suits against defendants claiming immunity and/or a lack of jurisdiction were all assumed to be seeking retrospective, monetary relief.<sup>115</sup> *Ex parte Young* is probably the most frequently utilized exception to the sovereign immunity bar under the Eleventh Amendment—suits against state officials (otherwise protected by state immunity) seeking prospective (forward-looking), equitable (usually commanding the official to do or refrain from doing something) remedies are not barred.<sup>116</sup> *Ex parte Young* indulges in the fiction that state officers are stripped of their state character when they violate a court-issued injunction forbidding *future* unconstitutional behavior.<sup>117</sup> However, the Supreme Court has kept the doctrine narrowly defined and suits for monetary recovery against the state for past harm may not be adjudicated in federal court absent waiver or proper congressional abrogation.<sup>118</sup>

---

115. See *supra* text accompanying note 2.

116. See sources cited *infra* note 117.

117. See *Ex parte Young*, 209 U.S. 123, 149-51, 159-61, 168 (1908) (punishing the Attorney General—Edward T. Young—for violating a federal court order enjoining the enforcement of an unconstitutional state price-fixing law); see also JOHN C. JEFFRIES, JR., ET AL., *supra* note 15, at 12 (describing the outcome and significance of *Ex parte Young*); Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 225-26 (2006) (discussing the legal fiction behind *Ex parte Young*). Suits against officers in their individual capacity, so long as funds are not certain to come from the state treasury, are also allowable under Eleventh Amendment jurisprudence. See *id.*

118. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (barring relief “measured in terms of a *monetary loss* resulting from a *past breach* of a legal duty on the part of the defendant state officials”); accord *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 264, 280-88 (1997) (refusing to apply the *Ex parte Young* fiction and accordingly dismissing the action on Eleventh Amendment grounds when the plaintiff tribe had essentially requested a quiet title action in the form of injunctive relief). The one exception to the prohibition of monetary relief is for violations of prospective injunctions—*Ex parte Young* provides for damages of that sort. See Jesse H. Choper & John C. Yoo, *Effective Alternatives to Causes of Action Barred by the Eleventh Amendment*, 50 N.Y.L. SCH. L. REV. 715, 720-21 (2005).

### *B. Suits by the United States or an Individual State in Its Own Court*

*United States v. Texas* decreed that a suit by the United States against a state or a suit between two states is cognizable in federal court because states submitted to such jurisdiction by ratifying the Constitution.<sup>119</sup> Choper and Yoo contend that sovereign immunity was always understood to prevent lawsuits “brought by private individuals against state governments.”<sup>120</sup> Thus “[t]o avoid the Eleventh Amendment,” Choper and Yoo explain, “the national government itself need only bring more enforcement actions against states or move to intervene in privately filed suits.”<sup>121</sup> As they point out, however, “[s]ince Congress has not taken any of these steps since *Seminole Tribe* and *Alden*, it would seem that the political will does not currently exist to expand the level of federal enforcement of various constitutional and statutory provisions against the states.”<sup>122</sup> As an independent sovereign entity, a state may also sue another state without needing consent in its own state courts.<sup>123</sup>

### *C. Waivers: Dole Incentivizing/Political Pressure*

Unlike traditional subject matter jurisdiction requirements, sovereign immunity may be waived by states either on a case-by-case basis, or pursuant to statutory or constitutional provisions; however, such waiver must be explicit.<sup>124</sup> “Sovereign immunity bars suit only in the absence of consent.”<sup>125</sup> Congress may constitutionally incentivize states (it is uncertain at what point incentives become coercion

---

119. See *United States v. Texas*, 143 U.S. 621, 645-46 (1892); see also JOHN C. JEFFRIES, JR., ET AL., *supra* note 15, at 31 (stating *Alden* acknowledged it is “settled doctrine that in the original Constitution, the states had surrendered their immunity from suit by other states or by the United States”).

120. Choper & Yoo, *supra* note 117, at 233.

121. *Id.*; accord *Alden v. Maine*, 527 U.S. 706, 755-57 (1999); *Employees of the Dep’t of Pub. Health & Welfare of Mo. v. Dep’t of Pub. Health and Welfare of Mo.*, 411 U.S. 279, 286 (1973).

122. Choper & Yoo, *supra* note 117, at 235.

123. *Nevada v. Hall*, 440 U.S. 410, 411-12, 425-27 (1979).

124. See Choper & Yoo, *supra* note 117, at 259-60. See generally Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U.L. REV. 273 (2002).

125. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

though) to submit to suits by private individuals using its plenary Spending Clause power.<sup>126</sup> The power of the purse is significant because, as Choper and Yoo point out, given that *South Dakota v. Dole*<sup>127</sup> is still good law, “Congress [can] simply require states that receive federal funds to waive their sovereign immunity in any lawsuit brought to enforce a constitutional or statutory right.”<sup>128</sup> Also, political pressure to compensate injured citizens for government wrongdoing may explain the persistence of many state waivers (albeit limited) for tort suits.<sup>129</sup> Similarly, economic pressure to contract on equal terms with other market players probably explains why the vast majority of states waive sovereign immunity for suits involving government contracts.<sup>130</sup>

*D. Congressional Abrogation and Due Process (Fourteenth Amendment Section 5 Enforcement and Bankruptcy Article I Powers)*

The first in a long line of abrogation cases, *Fitzpatrick v. Bitzer* held that “Congress has the power to authorize Federal courts to enter [money damages for private individuals against a state government] as a means of enforcing the substantive guarantees of the *Fourteenth Amendment*.”<sup>131</sup> Thus Congress can pass legislation requiring states to submit to suits in federal court to enforce Fourteenth Amendment mandates; the later-in-time principle means that the Eleventh Amendment is necessarily qualified by the Fourteenth Amendment.<sup>132</sup>

Congress must overcome several hurdles to successfully abrogate state sovereign immunity: First, the proper source of power *must* be

126. *See id.*; *see also* Choper & Yoo, *supra* note 118, at 723-24.

127. *South Dakota v. Dole*, 483 U.S. 203 (1987).

128. Choper & Yoo, *supra* note 118, at 724. Alternatively, “Congress could attach as a condition to federal funding that states offer their own remedial process for violations of federal rights.” *Id.*

129. *See id.* at 725-27.

130. *Id.*

131. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48, 455-57 (1976) (emphasis added).

132. *See* Choper & Yoo, *supra* note 117, at 259-60; *see also* U.S. CONST. amend. XIV, § 5 (“Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]” (emphasis added)); *City of Boerne v. Flores*, 521 U.S. 507, 528-29 (1997).

relied upon in enacting the abrogating legislation. Section 5 of the Fourteenth Amendment along with the recent addition of the Article I Bankruptcy Clause are the only sources of power Congress may employ to abrogate immunity.<sup>133</sup> Second, while *Fitzpatrick* remains good law, the Court has required Congress to be extremely clear in its intent to abrogate state sovereignty.<sup>134</sup> Moreover, implementing the *Seminole Tribe* rule that Congress lacks the power to abrogate state sovereign immunity under general Article I powers, *City of Boerne v. Flores* directs courts to determine whether “[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>135</sup> If not, the abrogation is invalid and the case will be dismissed on Eleventh Amendment grounds.<sup>136</sup> Finally, while not currently embraced by the Supreme Court, Professor Seamon makes a compelling argument that states consented to be sued *in their own courts* for alleged due process violations, in particular, for violations of the Just Compensation Clause.<sup>137</sup>

---

133. A good rule of thumb is that if the right would receive heightened scrutiny under the Supreme Court’s individual rights regime, then congressional law abrogating state immunity is much more likely to be upheld. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Title II legislation abrogating state immunity for suits by disabled individuals denied courthouse access—a fundamental right); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding Congress’s authorization of money damages for violations of the Family and Medical Leave Act family-care provision because gender discrimination is a concern of the Equal Protection Clause and there was evidence of widespread discrimination); *cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (rejecting abrogation of state immunity under a federal law barring age discrimination noting age is not a suspect class); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (denying a congressional abrogation power to protect procedural due process in patent infringement suits). Drawing heavily on historical arguments, *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), recently held that states consented to suit in bankruptcy proceedings observing that Congress is instructed to make “uniform” bankruptcy laws, which implies state waiver. For a detailed discussion of the *Katz* case, see Anthony J. Enright, Note, *The Originalist’s Dilemma: Katz and the New Approach to the State Sovereign Immunity Defense*, 81 NOTRE DAME L. REV. 1553 (2006).

134. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-41 (1985).

135. *Flores*, 521 U.S. at 520, 526 (“Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”).

136. *Id.*

137. *See Seamon, supra* note 31, at 1069-70.

## CONCLUSION

*Alden v. Maine* took the wrong approach in answering a politically-sensitive question: when can a state court refuse to hear an otherwise valid federal claim? The anti-commandeering principle announced in *New York* and *Printz* should have been the framework used to decide the state sovereignty claim dilemma in *Alden*, thereby keeping the interpretively-suspect Eleventh Amendment out of state court. Utilizing anti-judicial commandeering jurisprudence would not only avoid applying a dubious set of state affirmative rights principles, but would also preserve political accountability and prevent misuse of limited government resources. The Supremacy Clause and the cases executing it do not require states to expand their neutral, jurisdiction-limiting laws, but do require that state courts not abstain from deciding cases against any set of claims or defendants in order to avoid implementing federal policy. Thus, if a state court exercises jurisdiction over certain state claims or parties suing under state law, it must grant jurisdiction for similarly-situated federal claims or parties suing under federal law. Adopting the anti-judicial commandeering approach to deciding claims of state sovereign immunity made in state court in some ways expands and in some ways shrinks a state's ability to implement its jurisdictional preferences. Finally, *some* access to federal courts is ensured under either the *Alden* or anti-judicial commandeering scheme as neither the affirmative state sovereign rights jurisprudence nor the anti-judicial commandeering principle alter the many existing exceptions to the Eleventh Amendment bar on suits brought in federal court against non-consenting states.