Notre Dame Law Review

Volume 75 | Issue 3 Article 7

3-1-2000

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I. INTRODUCTION

In *Alden v. Maine*,[1] the United States Supreme Court ruled that Congress could not subject nonconsenting states to private suits for money damages in state court. The case closely followed the Court's decision three years earlier in *Seminole Tribe v. Florida*,[2] which held that Congress could not subject nonconsenting states to private suits for money damages in federal court. The two cases together thus virtually immunize the states from private suits for damages based upon federal statutory law.[3]

The *Alden* opinion, although controversial in result,[4] was, for the most part, unremarkable in methodology. The Court utilized the tex-

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1 119 S. Ct. 2240 (1999).

2 517 U.S. 44 (1996).

3 The one exception would appear to be private causes of action enacted by Congress under Section 5 of the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 422 U.S. 445 (1976).

Neither *Alden* nor *Seminole Tribe* reached the question of whether the states are absolutely immune from private damage suits alleging constitutional violations. Although *Hans v. Louisiana*, 134 U.S. 1 (1890), held that states were immune from such suits in federal court, *Alden* and *Seminole Tribe* (and *Hans*) leave open the possibility that states could be subject to constitutional damage claims in state court. *See infra* note 50.

4 The decision provoked a strong dissent, *see Alden*, 119 S. Ct. at 2269, and has been heavily criticized by some commentators, *see, e.g.*, Vicki Jackson, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. (forthcoming 2000); David Shapiro, *Seductions of Coherence, State Sovereignty, Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. (forthcoming 2000).

tual,[5] historical,[6] and precedential[7] tools that it had employed in previous state immunity decisions. Intriguingly, however, in *Alden* the Court incorporated a new line of analysis into its state immunity jurisprudence that it had previously applied primarily in its state sovereignty cases.[8] Borrowing from these recent state sovereignty decisions, *Alden* held, in part, that Congress's attempt to subject the states to private damage suits in enforcement of federal statutory laws was unconstitutional because it would violate constitutional principles of political accountability.

The significance that the Court placed on the accountability argument in *Alden* is not immediately apparent. First, the Court was less

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5 In the case of state immunity, the better word is "non-textual." At least since *Hans* the Court has not related the protection of state immunity to explicit constitutional text. The 11th Amendment, which is the textual provision that is most on point explicitly provides only that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI.

Alden is not reached by the text of the 11th Amendment for two separate reasons. First, *Alden* was brought in state court. The Eleventh Amendment by its own terms only applies to federal courts. Second, *Alden* was brought by in-state citizens against their own state. The text of the 11th Amendment addresses only state immunity from out-of-state citizens.

For the position that the 11th Amendment should be read to mean what it says, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

6 Both the majority and dissent relied heavily on historical materials. *See Alden*, 119 S. Ct. at 2247–53 (Kennedy, J.); *id.* at 2270–85 (Souter, J., dissenting). The conclusiveness of the historical evidence, however, is debatable. As Ann Althouse has noted, history may be used to support a wide range of approaches to the state immunity question, and as with many other areas of constitutional law, is unlikely to provide definitive answers. *See* Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. (forthcoming 2000).

7 The majority relied upon such precedential stalwarts as *Hans* and *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

8 In this Essay, the term "state immunity" refers to the constitutional protections of the state from suit, and "state sovereignty" refers to the substantive constitutional protections of the state from federal regulation. The two issues are distinct. As *Alden* indicates, a state may not enjoy substantive state sovereignty protections from federal statutes such as the Fair Labor Standards Act (FLSA), yet it still may be entitled to state immunity from certain suits based upon violations of that statute. *See Alden*, 119 S. Ct. at 2269.

For a thorough discussion of these terms, their meaning, and an overview of this area of the Court's jurisprudence, see George Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363 (1985), and Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

than clear in explaining how political accountability concerns specifically pertain to state immunity doctrine.[9] Second, because other rationales may also explain the *Alden* decision, it is unclear whether the accountability argument was intended to stand on its own or was offered mainly to reinforce other justifications.[10] Third, as will be discussed, *Alden*'s reluctance to take the accountability rationale to its logical conclusion suggests that the Court itself may not be fully committed to this theory as an explanation of state immunity doctrine.[11]

This Essay will address the political accountability argument as set forth in *Alden*. Part II presents the doctrinal background. Part II.A traces the development of the political accountability rationale as it has been applied in the Court's state sovereignty jurisprudence. Part II.B examines the extent to which the Court has implicitly applied accountability principles in its prior state immunity jurisprudence. In particular, this Section will examine the "clear statement rule" and its relationship to issues of political accountability. Part III focuses on *Alden* itself. It discusses the political accountability arguments present in the case (explicit and implicit) and evaluates the strengths and weaknesses underlying each rationale. Finally, Part IV offers a brief conclusion.

There is one caveat. For the purposes of this Essay, the authors do not question the legitimacy of the political accountability rationale as a constitutional principle. We leave that issue to others. Rather, our focus is whether the political accountability rationale, *if legitimate*, supports the decision in *Alden*.

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9 As will be discussed, the precise meaning of the Court's accountability argument in *Alden* is not free from doubt. At one point, the Court related accountability to federally imposed judicial interference with the state's budgetary process. *See Alden*, 119 S. Ct. at 2265–66. At another, the Court tied accountability concerns to the federal government's failure to bring suit against the state itself. *See id.* at 2267; *see also infra* notes 62–75 and accompanying text.

10 *See* William P. Marshall, *Understanding* Alden, 31 RUTGERS L.J. (forthcoming 2000) (setting forth the various rationales that may explain the *Alden* decision).

11 *Alden* does not, for example, apply the accountability rationale to bar demands by private parties for prospective relief although that relief would presumably harm accountability interests as well. *See infra* notes 57–60, 78–79 and accompanying text.

II. DOCTRINAL BACKGROUND

A. *Political Accountability and State Sovereignty*

1. *Garcia* and *National League of Cities*

The development of the political accountability rationale begins with *Garcia v. San Antonio Metropolitan Transit Authority*,[12] although to understand this development one must begin with *Garcia*'s antecedent case *National League of Cities v. Usery*.[13] In *National League of Cities* the Court held that the Commerce Clause did not empower Congress to subject the states to minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).[14] This decision, based upon principles of state sovereignty, concluded that the federal government was forbidden from regulating the states in the same way that it regulated the behavior of private individuals or corporations.[15] Rather, the states were held to enjoy substantive protection from federal regulation in areas of "traditional governmental functions."[16] *National League of Cities*, however, proved difficult to implement as lower courts struggled to define "traditional governmental functions." *Garcia* eventually overruled the decision.

Garcia abandoned the "traditional governmental functions approach" and embarked upon what initially appeared to be a complete judicial abdication of any role in policing the lines of permissible federal regulation of the states. While acknowledging that the Constitution intended to divide power between states and the federal government, and that the preservation of strong and autonomous states was important to our federal system, the Court concluded that state challenges to congressional actions were non-justiciable.[17] Rather, according to the Court, the protections of the states as states were to be found in the structure of the federal government—a structure in which the interests of the states were amply and pervasively represented. Under this theory, known as "process federalism," the

12 469 U.S. 528 (1985).

13 426 U.S. 833 (1976). The precise point or case in which the political accountability rationale was born is impossible to determine. However, because the theory of process federalism, embodied in *Garcia*, has become the primary interpretive model for resolving state sovereignty issues, and for the reasons explored below, we consider *Garcia* to be ground zero in the Court's political accountability jurisprudence.

14 *See id.* at 852.

15 *See id.* This holding was overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968).

16 *National League of Cities*, 426 U.S. at 852.

17 *See Garcia*, 469 U.S. at 551.

protection of the states did not require judicial policing.[18] As the Court stated,

> [T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given 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. . . . In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[19]

The *Garcia* decision marked what in hindsight might be viewed as the Court's first use of a political accountability rationale.[20] Shifting away from the substance-based analysis in *National League*, the *Garcia* Court explained that because the federal government was politically accountable to the states, there was no reason for the Court to oversee federal decisions to regulate the states.

2. *New York v. United States*

In 1992, the Court's decision in *New York v. United States*[21] inserted a new type of political accountability concern into the Court's federalism jurisprudence. In *New York v. United States*, the Court re-

18 The Court's reasoning in this respect was heavily influenced by the works of Jesse Choper and Herbert Wechsler. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548 (1954).

19 *See Garcia*, 469 U.S. at 550–52.

20 The political accountability aspect of *Garcia* was immediately noted by one scholar. In 1985, Professor D. Bruce La Pierre presciently argued that political accountability was the key to understanding the holding in *Garcia*. *See* D. Bruece La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1985).

21 505 U.S. 144 (1992).

viewed a challenge to the "take title" provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985 (Amendments).[22] The Amendments required that the states would have to take possession of nuclear waste or enact legislation regulating the waste in accordance with congressional instruction. The issue before the Court was whether Congress had the power to "commandeer" the states in this manner.

The Court held that Congress was without such power because commandeering the states in this way unconstitutionally violated political accountability principles. The Court's discussion is notable:

> [W]here the Federal Government compels the States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[23]

New York v. United States represented an important change in the Court's approach to state sovereignty issues for two reasons.[24] First, it indicated that federal regulation of the States would, contrary to the implication of *Garcia*, be subject to judicial intervention in some instances.[25] Second, it indicated that the basis for this intervention would be a type of political accountability concern not previously dis-

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22 42 U.S.C. § 2021(b)–(j) (1994).

23 New York v. United States, 505 U.S. at 168–69.

24 Although *New York v. United States* was the first decision to explicitly invoke the political accountability of governments to the citizens they represented as a basis for decision, Justice O'Connor's partial dissent in *FERC v. Mississippi*, 456 U.S. 742 (1982), had raised the idea previously. As she stated, "Local citizens hold their utility commissions accountable for the choices they make. . . . Congressional compulsion of state agencies, unlike pre-emption blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs." *Id.* at 787.

25 *See* Deborah Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1572 n.34 (1994) (arguing that *New York v. United States* is a significant rejection of *Garcia*'s deference to process federalism).

cussed in the Court's state sovereignty jurisprudence.[26] Unlike *Garcia*, which had focused on the political accountability of the federal government to the states, *New York v. United States* examined the lines of political accountability running between citizens and their representative governments. On this basis, the Court found the Waste Policy Amendments to be problematic on two counts. First, the Amendments interfered with the lines of accountability between state governments and state citizens by forcing the states to shoulder the negative political fallout inherent in the disposition of nuclear waste. Second, the Amendments interfered with the lines of accountability between the federal government and the national electorate by allowing the former to avoid its own political responsibility for unpopular decisions. These political accountability problems, explained Justice O'Connor, rendered the Amendments unconstitutional.[27]

3. *Printz v. United States*

In *Printz*, the Court was again confronted with a federal statute that ordered state officials to take certain actions. At issue in *Printz* was whether interim provisions of the Brady Handgun Violence Protection Act,[28] which required certain local authorities to determine whether a proposed gun sale would violate the law, were constitutional. As it had in *New York v. United States*, the Court struck down the federal statute on state sovereignty grounds. Unlike *New York v. United States*, however, this case involved an attempt to require state executive officers (as opposed to state legislatures) to perform certain acts dictated by federal law. In an opinion written by Justice Scalia, the Court held that the commandeering of state executive officers, like the commandeering of state legislatures, was unconstitutional.[29]

The Court's opinion relied upon a variety of arguments but drew its greatest support from the lines of political accountability rationale advanced in *New York v. United States*. As the *Printz* Court explained,

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26 *See id.* (explaining how political accountability theory differs from process federalism).

27 *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (examining Justice O'Connor's theory of federalism, as embodied by her opinion in *New York v. United States* and other cases, and concluding that while her theory of political accountability does not flow naturally from the vision of federalism held by the constitutional framers, it may be justified by more prudential concerns for the continued autonomy of the states in an era of ever expanding federal power).

28 18 U.S.C. § 922(s)(2) (1994).

29 For an insightful assessment of the doctrinal ramifications of *Printz*, and the extent to which the decision is defensible on constitutional grounds, see Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199.

> 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 States' 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.[30]

The *Printz* equation was direct and to the point. The distinction between state legislatures and state executives did not make a difference. The need to protect the lines of accountability between state citizens and state executive officers was indistinguishable from the need to protect the lines of accountability between state citizens and their legislatures. Similarly, just as the federal government should not be able to shield itself from political liability by forcing state legislatures to suffer the consequences of potentially unpopular decisions, so too must it be prevented from forcing state executive officers to incur political repercussions more appropriately aimed at the federal government. The Court explained that

> [b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the [state executive officer] and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the [state executive officer], not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected.[31]

In *Printz*, like *New York v. United States*, the Court explained that federal commandeering diminished the political accountability of (1) the federal government to the national electorate and (2) state governments to state citizens. According to the Court, this loss of political accountability seriously threatened the maintenance of a strong federal system and violated basic postulates of American federalism.

B. Political Accountability and State Immunity

Accountability concerns have, prior to *Alden*, never been an explicit part of state immunity jurisprudence. They may, however, be

30 Printz v. United States, 521 U.S. 898, 935 (1997).

31 *Id.* at 930 (citations omitted).

implicit in one corner of the Court's Eleventh Amendment case law—the so-called "clear statement rule." The clear statement rule requires that Congress must provide "unmistakably clear" language if it intends to abrogate state immunity in federal court.[32] Originally, the theoretical basis of the clear statement rule was not immediately apparent as the Court's early decisions were largely silent about what the underlying rationale might be. Instead, the clear statement rule was simply premised on vague ideas about the important constitutional interests at stake when state immunity was abrogated.[33]

Then, in the same year that the Court handed down its decision in *Garcia*, it decided *Atascadero State Hospital v. Scanlon*.[34] Although the decision itself was no more specific about precisely how or why the clear statement rule worked within a broader conception of federalism,[35] its chronological proximity to *Garcia* arguably placed the clear

32 *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."); *see also* Dellmuth v. Muth, 491 U.S. 223, 251 (1989) (requiring clear language in statute to abrogate state's 11th Amendment immunity); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 475–76 (1987) (quoting *Atascadero*, 473 U.S. at 242, for the proposition that Congress failed to state an "unmistakably clear expression" to abrogate 11th Amendment immunity); Green v. Mansour, 474 U.S. 64, 68 (1985) (stating that "[s]tates may not be sued in federal court . . . unless Congress . . . unequivocally expresses its intent to abrogate the immunity"); Quern v. Jordan, 440 U.S. 332, 343 (1979) (stating that "[o]ur cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity"); Edelman v. Jordan, 415 U.S. 651, 673 (1974) (supporting the proposition that a waiver of state immunity will be found only "where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'" (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909))); Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973) (noting that "[i]t would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away").

33 *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (explaining that "[o]ur reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system"); *Quern*, 440 U.S. at 343–44 (noting that the "long enjoyed" status of state immunity helps to explain clear statement requirement); *Edelman*, 415 U.S. at 678 (noting that the constitutional status of immunity and importance of state fiscal administration justify a clear statement rule).

34 473 U.S. 234 (1985).

35 *See Atascadero*, 473 U.S. at 238–39 (explaining that "because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States, . . . we have required an 'unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States"'").

statement rule in a new light.[36] *Garcia*'s central premise was that the states' interests were institutionally protected by the structure of the federal government. Clear statement requirements could be seen as complimentary mechanisms to reinforce this understanding.[37] Since Congress was institutionally designed to ensure that the states' interests were conscientiously considered, it might make sense that Congress be required to clearly express its desire to overcome those interests when it abrogated the states' sovereign immunity.[38] Seen from this perspective, the "clear statement rule" had forced Congress to do exactly what *Garcia* assumed it was designed to do—seriously

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36 *Atascadero* is significant because it is often credited with introducing the modern day clear statement rule. *See* Brown, *supra* note 8; 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, 1305–06 (1994); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1962 (1994) [hereinafter *Clear Statement Rules*].

For a discussion of the development of clear statement rules in the 11th Amendment context, see Cloherty, *supra*, at 1305–06 (examining the doctrinal basis of the clear statement rule, suggesting that the rule may have been based on an assumption that state courts could exercise jurisdiction over cases barred in federal court, and suggesting that in cases involving exclusive federal jurisdiction the clear statement rule should be relaxed), and *Clear Statement Rules*, *supra*, at 1962 (explaining extent to which clear statement rule is consistent with the political safeguards theory of *Garcia*).

37 *See generally* HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 142 (1984).

38 *See id.* at 142. Fink and Tushnet state that

> [t]he Wechslerian political safeguards approach to federalism justifies the imposition of a clear statement requirement: if national legislators are to consider states' interests effectively before overriding them in the service of a greater national interest, they must be aware of the degree to which states' interests are at stake. The Court can promise such awareness by forcing the process of drafting legislation to produce proposals that signal their impact.

Id.; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–8, at 317 (2d ed. 1988) (stating that "[t]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests"); Brown, *supra* note 8, at 390 (arguing that the clear statement rule is "process [federalism] with a bite" and explaining that "[i]f Congress is the only source of protection of the states' interests, it does not seem unfair for the Court to force Congress to do its job"); *accord* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988) (arguing that a clear statement requirement may be advisable even if state immunity has no constitutional component). *But see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (arguing that clear statement rules are not consistent with *Garcia*); William P. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DEPAUL L. REV. 345, 353–54 (1990) (explaining "anomalies and inconsistencies" between the clear statement rule and the premise of *Garcia*).

consider the interests of the states. Clear statement rules, in short, reflected a concern for the type of political accountability discussed in *Garcia*.[39]

III. POLITICAL ACCOUNTABILITY AND *ALDEN*

Alden, as previously noted, explicitly cited political accountability concerns as one of the grounds for its decision. The opinion, however, did not clearly explain how, or if, its use of the political accountability rationale related to the use of that justification in previous cases (i.e., in *Garcia*, *Atascadero*, *New York v. United States*, and *Printz*). Accordingly, the meaning and derivation of political accountability as used in *Alden* is not clear. This Section, therefore, will attempt to unpack and then critique the political accountability rationale as presented in *Alden*.

Alden itself presented political accountability concerns in two different contexts. First, the Court examined accountability in relation to the interference with the states' budgetary processes caused by federal authorization of private damage suits against the states.[40] We will refer to this form of accountability as "budgetary accountability." Second, the Court examined the extent to which accountability concerns were implicated when private parties, rather than the federal government, brought damage suits against the states to enforce federal law.[41] We will refer to this form of accountability as "enforcement accountability." Each will be addressed in turn.

A. Budgetary Accountability

The first form of accountability referred to in *Alden* is budgetary accountability. According to the Court,

> A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in

39 It is interesting to note that the clear statement rule seems to flow much more naturally from *Garcia*, because of the rule's relationship to the accountability of the federal government to the states, than does the Court's anti-commandeering rule in *New York* and *Printz*, which concerns the relationship of the states and the federal government to their respective electorates.

40 *See Alden*, 119 S. Ct. at 2265–66.

41 *See id.* at 2267.

> full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. "It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."[42]

Budgetary accountability, as articulated in *Alden*, arguably follows from the political accountability issues raised in *New York v. United States* and *Printz* because it concerns the lines of accountability between the state and its citizens.[43] In *New York v. United States*, for example, the Court was concerned with the ability of state officials to legislate according to the will of their constituents when the federal government ordered the state to regulate notwithstanding that popular will.[44] Similarly, in *Printz*, the Court was concerned with the effect that forcing state executive officials to enforce federal law would have on the accountability of those officials to their constituents.[45] The concern for state budgetary accountability concerns, like the accountability discussed in *New York* and *Printz*, is grounded in the belief that it is constitutionally necessary to ensure that state governments are not forced to take responsibility for unpopular policy decisions not of their own making.[46]

As applied to state immunity in *Alden*, the budgetary accountability rationale has some explanatory force. First, the Court's connection between the allocation of scarce resources in budgetary decisionmak-

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42 *Id.* at 2264–65 (citing Louisiana v. Jumel, 107 U.S. 711, 727–28 (1883)).

43 Interestingly, the Court cites *Printz* but does not cite *New York v. United States* in this section of the opinion although it is the accountability of state legislatures rather than state executive officers which is presumably harmed by federal interference with the state's budgetary process.

44 *See* New York v. United States, 505 U.S. 144, 168–69 (1992).

45 *See* Printz v. United States, 521 U.S. 898, 930 (1997) (noting that state executive officials would be unfairly blamed by their constituents for the cost and defects of the federal policy if they were forced to enforce it).

46 Although raised in the litigation, *Alden* did not relate the anti-commandeering rule of *New York v. United States* and *Printz* to the federal government's enlisting state courts to enforce federal statutory rights. This is actually not surprising. *Printz* has foreshadowed this result by suggesting, in dicta, that anti-commandeering principles did not apply to the required enforcement of federal rights by state courts because of the State Judges Clause of the United States Constitution. *See* U.S. CONST. art. VI, cl. 2; *Printz*, 521 U.S. at 933–34. For a critique of this issue, 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 (1998).

ing, and the "essence" or "heart" of state sovereignty, helps to explain why state immunity doctrine has generally been tied to the protection of state treasuries.[47] As such, the justification provides a unifying theory for state immunity cases.[48]

Second, the budgetary accountability concern provides a direct link between *Alden* and *Seminole Tribe.* After all, if the key question is whether the federal government can interfere with the states' budgetary processes by authorizing private suits against the states for money damages, it makes no difference whether the private suit takes place in state or federal court. Budgetary accountability thus offers an answer to those who would otherwise argue that there is a lesser intrusion on the states in subjecting them to suits in their own courts, as opposed to suits in federal court.[49] From the perspective of budgetary accountability, the intrusion is the same.[50]

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47 *See* Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890); *see also* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation,* 102 HARV. L. REV. 1372, 1396 (1989).

48 *See Edelman,* 415 U.S. at 651 (setting forth the retospective-prospective relief distinction that pervades state immunity jurisprudence). The tying of budgetary accountability to government immunity may also explain federal sovereign immunity, which like state sovereign immunity has also been interpreted to apply only to suits for damage relief. *Compare* Lynch v. United States, 292 U.S. 571 (1934), *with* Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

49 *See generally* Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 294 (1973) (Marshall, J., concurring in the result); Jackson, *supra* note 4; Shapiro, *supra* note 4.

50 The *Alden* Court's concern with budgetary accountability may be even broader than a limited concern for budgetary interference that occurs at the behest of the federal government. In one passage the Court suggests that budgetary accountability concerns are raised any time courts become involved in the budgetary process. As the Court states,

> The asserted authority would blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments, displacing "state decisions that 'go to the heart of representative government.'" 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. . . . If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very constitution from which its existence derives.

Alden, 119 S. Ct. at 2265 (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)).

This broad reading of the accountability rationale may be significant. If this reflects the Court's position on the issue, it would suggest that States may be immune in state courts from private suits for damages brought for constitutional violations—an issue left open in *Alden.* After all, if the problem to be avoided is judicial interference

Nevertheless, the Court's reliance on the budgetary accountability rationale in *Alden* is surprising on a number of counts. First, the budgetary accountability concern was not raised in *Seminole Tribe.* An immediate question, therefore, is whether its use in *Alden* is truly an explanatory theory or is only an offer of a makeweight.

Second, and more importantly, the budgetary accountability theory as presented in *Alden* fails on its own terms. There are simply too many ways remaining after *Alden* through which the state fisc may be invaded to suggest that budgetary accountability is the governing rationale. *Alden,* for example, explicitly approved of suits for damages brought against the states by the federal government.[51] Such actions not only invade state treasuries, because the federal government is authorized to collect damages on behalf of individuals,[52] they also cost the states the very same amount as actions brought by private parties.

Alden does not even foreclose all private damage suits affecting state treasuries. Private suits against the states for damages may be available in sister state courts.[53] Damage suits may also be brought in federal court or in a state's own court if based on a statutory right duly created under Section 5 of the Fourteenth Amendment.[54] Finally, state treasuries may be indirectly affected by private suits of state officers and political subdivisions.[55]

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with the budgetary process, then it would make no difference whether the source of the interference was the constitution or federal statutory law. Indeed, this broad reading of budgetary accountability in *Alden* would also implicate the Court's decision in *Nevada v. Hall,* 440 U.S. 410 (1979) (holding that states are not immune from private damage suits in sister state courts). If judicial interference with the state budgetary process is really the evil to be prevented, this concern should also apply with equal force to private suits brought in sister state courts.

For an argument that *Alden* stands for the proposition that the states must enforce private damage suits for federal constitutional violations against itself, see Michael Wells, *Suing States for Money in the State Courts: Constitutional Remedies After* Alden *and* Florida Prepaid, 31 RUTGERS L.J (forthcoming 2000).

51 *See Alden,* 119 S. Ct. at 2267.

52 *See* United States v. California, 297 U.S. 175, 188 (1936) (holding that California was subject to suit in federal district court for violations of the Safety Appliance Act and liable to the United States for resulting penalties); *see also* Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity,* 73 TEX. L. REV. 539, 552 (1995) (arguing that the federal government can sue the states and award any damage award to private citizens).

53 *See Hall,* 440 U.S. at 410.

54 *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

55 *See* Scheuer v. Rhodes, 416 U.S. 232 (1974) (stating that state officers may be subject to suits for damages and cities and/or political subdivisions are also not protected from damage remedies); *see also* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977);

The road for private individuals to the state treasury, moreover, does not even end here. Private injunctive actions against the states available under the doctrine of *Ex parte Young*[56] also interfere with state budgets. Compliance with affirmative injunctions may require the states to expend significantly more funds than would many, if not most, suits for retrospective relief.[57] Negative injunctions also impose substantial costs. Consider, for example, the cases of patent and trademark infringements addressed in *Alden*'s companion cases, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[58] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[59] Although *Florida Prepaid* and *College Savings Bank* held that the states could not be subject to damage actions for patent and trademark violations, they did not prevent injunctive suits to enforce these rights. Such suits, however, may impose substantial costs upon the states by requiring them to pay license fees or other such costs if the states chose to continue the patent or trademark uses. Finally, injunctive actions impose liability upon the states for "ancillary" costs such as attorneys' fees.[60] Ancillary awards, needless to say, also obviously drain state resources.

There is no question, in short, that the limited protection of the state's fisc offered in *Alden* and *Seminole Tribe* will not effectively insulate the states' budgetary processes from federal statutory claims. Budgetary accountability does not explain state immunity law.[61]

Lincoln County v. Luning, 133 U.S. 529 (1890); Melvyn Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994).

When state officers or state subdivisions are forced to pay private damage awards, state treasuries are affected because many, if not most, states indemnify their officers and/or assume some of the costs of municipalities. *See, e.g.*, GA. CONST., art III, § 5 (1983); CAL. GOV'T. CODE § 16649.92 (West 1995); 5 ILL. COMP. STAT. 350/2 (West 1999); OHIO REV. CODE ANN § 9.87 (Anderson 1999); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section* 1983, 84 VA. L. REV. 47, 50 (1998) (discussing states routinely indemnifying state officers).

56 209 U.S. 123 (1908).

57 *See* Milliken v. Bradley, 433 U.S. 267 (1977) (suggesting that compliance with affirmative injunction may require significant expenditures of state resources without violating principles of state immunity).

58 119 S. Ct. 2199 (1999).

59 119 S. Ct. 2219 (1999).

60 *See* Hutto v. Finney, 437 U.S. 678 (1978) (holding that attorneys fees may be awarded against the states without violating state immunity protections).

61 The Court may be suggesting that interference with the state budget would offend constitutionally based accountability concerns *unless* that interference occurs as a result of the direct interference of the federal government, i.e., the federal government itself brings the suit. This rationale assumes that federal government enforcement against the states will be more sympathetic to state budgetary concerns

B. Enforcement Accountability

The second form of accountability addressed in *Alden* is "enforcement accountability." According to the Court, requiring the federal government, rather than private individuals, to sue the states for damages would promote accountability concerns by assuring that the decision to sue was informed by responsible political judgment. As the Court explained,

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," differs in kind from the suit of an individual . . . . Suits brought by the United States itself 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.[62]

Enforcement accountability as a rationale for state immunity has some appeal. First, like the budgetary accountability rationale, enforcement accountability also provides a common doctrinal denominator for both *Alden* and *Seminole Tribe.* To the extent that the Court is concerned about the federal government's refusal to appropriately consider and bear the financial burden of federal statutory enforcement actions against the state—this concern is equally implicated regardless of whether the suit is brought in state or federal court.[63]

Second, as a matter of pure theory, the rationale appears to tie together both strands of political accountability previously discussed. Enforcement accountability draws equally from the lines of political accountability rationale present in *New York v. United States* and *Printz* and the ideas about federal accountability to the states that underlie *Garcia* and the clear statement rule.[64]

Enforcement accountability is derivative of the lines of authority rationale because it, like the anti-commandeering rule, examines the

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than would a private litigant. If this is indeed the meaning underlying this version of accountability, then budgetary accountability concerns are supported by the same policies that underlie the enforcement accountability rationale to be discussed in the Section that follows.

62 *Alden*, 119 S. Ct. at 2267 (citations omitted).

63 Of course, also like budgetary accountability, the strength of this rationale is diminished in that it was not mentioned in the *Seminole Tribe* opinion.

64 The Court does not identify the theoretical basis of its enforcement accountability argument. In fact, while the *Alden* opinion cites *New York v. United States, Printz,* and *Garcia* elsewhere for general propositions relating to federalism and the sovereign status of the states, it does not refer to any of these decisions in its discussion of why federal statutory damage claims must be brought by the United States.

extent to which the federal government is accountable to the national electorate for its actions. By requiring the federal government to sue the states directly, as opposed to allowing private parties to bring suit, the *Alden* decision has the same effect as *New York v. United States* and *Printz*—it forces the federal government to bear the political and financial costs of federal policy choices and enforcement.[65] Recall that in *Printz* Justice Scalia explained that "[b]y forcing the state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."[66] Similarly, if the federal government authorizes private citizens to sue the states to enforce federal law, it avoids accountability to the national electorate for the way the law is enforced.[67]

The enforcement accountability rationale also resonates in the accountability theory that underlies *Garcia* and the clear statement rule. *Alden* focused on the fact that "[s]uits brought by the United States itself 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."[68] This passage harkens back to *Garcia*'s assumption that the design of the

65 *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 74–76 (1990) (arguing that the importance of executive enforcement of federal law lies, in part, in the fact that the executive is uniquely accountable for its actions whereas non-executive enforcement is not subject to any type of electoral accountability); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1799, 1803–04 (1993) (observing that suits by the executive branch, as opposed to private suits to enforce federal law, have a variety of benefits including: promotion of accountability by ensuring an avenue of political redress; minimization of the potential for self-interested behavior; ensured coordination and centralization over matters of importance to the public at large; and the ability to take overriding policy considerations into account).

66 Printz v. United States, 521 U.S. 898, 930 (1997).

67 *See* La Pierre, *supra* note 20, at 642 (observing that the federal government is only accountable to the national electorate if it is forced to bear the financial and administrative costs of its decisions because these costs must be passed on through higher taxes).

This argument is problematic, however, because it may prove too much. If the federal government is less politically accountable to the national electorate when it uses private citizens to enforce federal law, this would seem to be equally true regardless of whether a state, or some other entity, is the defendant. The best, and perhaps only, response to this criticism is that political accountability is only relevant when considering issues of federalism and the interrelationship between federal and state power.

68 *Alden*, 119 S. Ct. at 2267.

federal government protects the states' interests. While *Garcia* itself discussed the states' ability to influence pending legislation,[69] this passage in *Alden* implies that the design of the federal government also protects the states' interests when federal legislation is enforced against the states.

Third, apart from its theoretical foundations, the enforcement rationale also has practical merit. The states' interests will be better protected if the United States must bring damage claims against the states rather than authorizing individuals to bring private claims. To begin with, the United States can be expected to engage in more nuanced enforcement than would private parties.[70] First, the states and the federal government have ongoing mutually interdependent relationships that would counsel against federal authorities antagonizing their state counterparts.[71] Second, federal enforcement, in any event, is likely to be undertaken with long-term goals in mind and these goals may not include a desire to maximize monetary damages in every case.[72] Third, the states are likely to have political channels open to them that may place pressure on the federal executive even when the executive may be initially inclined to aggressively proceed against the state.[73] In contrast, when the federal government empowers private citizens to sue the states, these advantages are lost. Private individuals have no incentive for any result other than the maximization of their own damage awards.[74] Their focus, quite justifiably, will not be on the long-term interests of federal enforcement nor on the legitimate governing interests of the states.[75]

Nevertheless, while the enforcement accountability rationale is somewhat attractive, on both theoretical and practical grounds, it does have limitations. To begin with, application of the enforcement

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69 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985).

70 *See generally* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 770 (1992) (noting that prospective remedial decrees are often the product of negotiation among the parties and that courts work to accommodate the needs of both parties).

71 *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (noting that formal and informal relationships between federal and state officials ensures that each level is concerned about, and dependent upon, the other).

72 *See* Krent & Shenkman, *supra* note 65, at 1803–04.

73 *See generally* Kramer, *supra* note 71.

74 *See id.* at 1808 (explaining that private parties have self-interested reasons for bringing suit).

75 *See generally* Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 1985 CHI.-KENT L. REV. 61, 79 (noting that sovereign immunity can be viewed as a protective device created to protect governments from "insensitive citizen demands").

accountability theory to state immunity cases actually results in triple accountability. The first layer of accountability is created by *Garcia*'s suggestion that the federal government is institutionally accountable to the states, and that it will regulate the states with the states' interests in mind. The second layer of accountability is established by the clear statement rule which ensures that Congress seriously considers the states' interests before abrogating state immunity. The third layer, added by *Alden,* is the requirement that only federal enforcement agents may bring suits against the states so that the states' interests are considered in enforcement actions.

Arguably this is overkill. The advantages to the states of forcing the federal government to bring enforcement actions itself, as noted previously, are significant.[76] But there is no reason why Congress should not be able to consider these advantages itself when it decides whether or not to subject the states to private damage claims.[77] The litigation benefits to the states of federal enforcement, after all, hardly seem the stuff of constitutional entitlement.

More significantly, the enforcement accountability rationale, like the budgetary accountability rationale, is inconsistent with the Court's continued adherence to the prospective/retrospective distinction.[78] Simply stated, from the perspective of enforcement accountability, prospective and retrospective claims against the states are indistinguishable. Both types of suits allow the federal government to avoid political accountability to the national electorate, because in both instances the federal government is allowed to avoid the political or financial costs of enforcement. Furthermore, both types of suits allow the federal government to avoid accountability to the states, because in both instances the states are denied the value of whatever institutional protections might protect their interests if the federal government were forced to bring suit.[79]

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76 *See supra* notes 70–75 and accompanying text.

77 One potential justification of triple accountability may be that *Garcia* and the clear statement rule do not sufficiently protect the states, and therefore additional safeguards like executive enforcement may be required. *See* Althouse, *supra* note 6 (observing that if *Garcia* really worked, Congress should have decided on its own to require executive enforcement).

78 For a discussion of the logic and fallacies of the retrospective/prospective distinction, see Carlos Manual Vázquez, *Night and Day:* Couer d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine,* 87 GEO. L.J. 1 (1998).

79 In other contexts, the prospective/retrospective distinction has been explained on the grounds that prospective suits are more important to the federal interest because they ensure that states will follow federal law in the future, whereas retrospective suits only compensate a single individual for a harm suffered in the past.

Indeed, the force of the enforcement accountability rationale seems particularly undermined by the Court's endorsement of private prospective suits. Unlike private retrospective suits, which ask a court to award a single payment from the state treasury, private prospective suits ask a court to enjoin the state from implementing its own policy decisions. While the former causes a one-time drain on state resources and risks the possibility that other legislative choices may be affected in the future, the latter will have an ongoing and definite effect on the state's ability to make independent policy choices. Given that the enforcement accountability rationale is concerned with the extent to which the states, and the national electorate, can hold the federal government accountable for enforcement decisions affecting the states, this rationale would seem especially implicated by prospective suits because of the substantial interference they can cause in state decisionmaking. Enforcement accountability, like budgetary accountability, is unable to explain immunity law.

IV. CONCLUSION

State immunity jurisprudence is not generally known for its great legal craftsmanship.[80] After all, the first case in this area, *Chisholm v. Georgia*,[81] triggered a constitutional amendment.[82] The two foundational decisions underlying current state immunity law—*Hans v. Louisiana*[83] and *Ex parte Young*[84]—in turn rest upon logic and reasoning that only Franz Kafka could love.[85] With this background in mind, it

See Althouse, *supra* note 77, at 1143 n.83. While there may be a sound reason (outside of political accountability) for the distinction which the Court has drawn, the point here is that the enforcement accountability rationale does not contain within it any principled basis for distinguishing between prospective and retrospective relief. Therefore, this rationale cannot serve to unify or justify the broader jurisprudence of state immunity law.

80 Where else, for example, do justices assert that they will not follow stare decisis in one case because the majority of the Court refused to follow precedent in a previous decision? *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting).

81 2 U.S. (2 Dall.) 419 (1793).

82 *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934) (stating that *Chisholm* created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted").

83 134 U.S. 1 (1890).

84 209 U.S. 123 (1908).

85 *See generally* FRANZ KAFKA, THE TRIAL (1969). *Hans* held that states were immune from suits brought by their own citizens in federal court although the text of the 11th Amendment only prohibits suits against states by out-of-state citizens. *Hans* never made clear whether the basis of this holding was (a) the 11th Amendment, (b) Article III, (c) sovereign immunity, (d) other, or (e) all of the above.

is difficult not to welcome any decision which purports to introduce a new clarifying element into state immunity analysis.

Alden was such a case. The *Alden* Court attempted more than just reworking old arguments into a new context—an enterprise that accurately describes most state immunity cases. Rather, the Court attempted to infuse the state immunity discussion with a new analytic tool—political accountability.

The Court's use of the political accountability rationale was creative as well as original. The Court integrated two separate strands of political accountability theory into its immunity analysis. Borrowing from recent state sovereignty cases, the Court questioned whether subjecting states to suits in state court would interfere with the lines of political accountability running from the electors to the elected, especially in relation to matters of state budgeting. Additionally, the Court reinvigorated themes present in *Garcia,* and the clear statement decisions, and suggested that subjecting states to suit in state court might also undermine the federal government's political accountability to the states.

The Court's reliance on the political accountability rationale in the context of state immunity, moreover, reflected serious practical and policy considerations. The federal government's authorization of private suits for damages against the states *can* interfere with the state's budgetary allocations in ways that limit the ability of elected state representatives to serve their constituents. Similarly, significant political protections for the states *are* lost when enforcement actions are brought by individuals with only monetary motives, rather than by the United States with whom the states have a longstanding and mutually interdependent relationship.

The promise of political accountability theory as a governing explanation of state immunity, however, proved to be illusory. Although political accountability concerns could be used to justify state immunity, there would be a significant price to pay for that approach. Most importantly, the Court would have to abandon the prospective/retrospective distinction that pervades state immunity law because the logic of the political accountability theory does not allow for this distinc-

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Young, in turn, ruled that a state officer enforcing state law is not the state when sued for injunctive relief but left intact the rule that a state officer may be considered the state when sued for damages. The Court has applied this rule in cases where the official action triggering the claims for injunctive and monetary relief is the same thus leading to the schizophrenic result that a state officer defendant may be deemed both the state, and not the state, in the very same action. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

tion. The Court, undoubtedly for the better,[86] refused to pursue this tact.

The failure of the Court to fully implement the political accountability rationale into the state immunity context suggests that the approach may not work as a truly independent justification. Rather, it may, in the end, serve only as a re-justification of existing doctrine. *Alden*, in short, has not moved state immunity doctrine forward. It has merely provided new terms for an old debate.

86 *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 292 (4th ed. 1983) (noting that "the doctrine of *Ex Parte Young* seems indispensable to the establishment of constitutional government and the rule of law"), *cited in* ERWIN CHEMNRINSKY, FEDERAL JURISDICTION 413 (3d ed. 1999).