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## Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense

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# Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense

## **Keywords**

Federal Rights, Federalism

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# ENFORCEMENT OF FEDERAL RIGHTS AGAINST STATES: *ALDEN* AND FEDERALISM NON-SENSE

DAAN BRAVEMAN\*

## TABLE OF CONTENTS

Introduction.....	611
I. Limiting the Role of Federal Courts.....	614
A. <i>Younger</i> Doctrine.....	620
B. Eleventh Amendment.....	625
II. Limiting the Role of State Courts.....	637
Conclusion.....	655

## INTRODUCTION

Chief Justice Salmon P. Chase stated more than 100 years ago that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”<sup>1</sup> This observation describes the essential feature of our ongoing experiment with federalism. “Our Federalism”<sup>2</sup> represents a “system in which there is sensitivity to the legitimate interests of both State and National Governments.”<sup>3</sup> As Justice Black cautioned, however, federalism does not mean “blind deference to ‘State’s Rights’ any more than it means centralization of control over every important issue in our National Government and its courts.”<sup>4</sup> Much of our constitutional history has

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1. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

2. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). In *Younger*, Justice Black noted that the “slogan, ‘Our Federalism,’ born in the early struggling days of our Union of State, occupies a highly important place in our Nation’s history and its future.” *Id.*

3. *Id.* at 44 (holding that a plaintiff in an action challenging the constitutionality of California’s Criminal Syndication Act was not entitled to relief in federal court because of pending state court issues involving the Act).

4. *Id.*

involved attempts to allocate power between the two indestructible units and to find appropriate ways to accord sensitivity to the legitimate state and federal interests.<sup>5</sup>

One aspect of our federalism focuses on the distribution of power between state and federal courts. During the past two decades, the Supreme Court has articulated federalism concerns to restrict a person's ability to sue a state in federal court for federal rights violations. In an attempt to strike a balance between state and federal power, the Court sided with the states. Relying in some instances on general federalism concerns<sup>6</sup> and in others<sup>7</sup> on the Eleventh Amendment,<sup>8</sup> the Court effectively closed the federal courthouse doors to many lawsuits alleging state violations of the Constitution or federal statutes.

This past term, the Supreme Court championed states' rights in a manner that extended federalism notions well beyond existing boundaries. In *Alden v. Maine*,<sup>9</sup> for the first time in our history a Court majority held that the Constitution is not limited to protecting states from lawsuits in federal court. Rather, the Constitution embodies a much broader principle of sovereign immunity that protects states from suits brought in their own state courts.<sup>10</sup> *Alden* and other recent cases<sup>11</sup> limiting congressional authority to abrogate a

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5. See DAAN BRAVEMAN, PROTECTING CONSTITUTIONAL FREEDOMS: A ROLE FOR FEDERAL COURTS 11 (1989) ("We have a dual system of government, and one of the fundamental issues in our development has been, and continues to be, the relationship between the two indestructible components of that system. Indeed much of our constitutional history has involved a struggle to find a proper distribution of power between the states and the central government.").

6. See *infra* notes 66-96 and accompanying text (discussing the *Younger* doctrine and its development to close federal courts to lawsuits that challenge state conduct).

7. See *infra* notes 95-195 and accompanying text (discussing the use of the Eleventh Amendment to dismantle the federal courts as guardians of federal rights).

8. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

9. 119 S. Ct. 2240 (1999).

10. See *id.* at 2260-61 (noting that "nothing... in any other part of the Constitution suggested the states could not assert immunity from private suit in their own courts").

11. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999) (holding that federal courts lack jurisdiction in suits where an individual wishes to sue a state because of Congress' failure to effectively abrogate state sovereign immunity or to obtain a state waiver of sovereign immunity); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (holding that Congress could not abrogate a state's sovereign immunity through the Patent and Plant Variety Protection Remedy Clarification Act); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress does not have the authority to subject a state to the jurisdiction of a federal court if an individual

state's immunity from suit seriously erode an individual's ability to enforce federal rights against a state. Indeed, the Court's current approach to sovereign immunity creates an "enforcement gap"<sup>12</sup> in federal law and converts federalism into a one-way protection for states that disregards the federal government's interests.

The purpose of this Article is to examine the impact of the latest federalism developments on the judicial enforcement of federal rights.<sup>13</sup> To illustrate the shift that occurred in this past term, this Article first will review the Court's reliance on federalism to restrict the role of the federal courts "to adjudicate claims alleging state violations of federal rights."<sup>14</sup> Regardless of the propriety of such reliance, it is evident that the Court's decisions assumed that state courts would be available to protect federal interests. Second, this Article analyzes *Alden* and examines its implications for enforcing federal rights and maintaining an appropriate balance between state and federal concerns.<sup>15</sup> This Article concludes that by constraining the ability of any court to ensure that states follow federal law, the Court largely has disregarded the necessity for sensitivity to both state

asserts a federal right).

12. *College Sav. Bank*, 119 S. Ct. at 2235 (Breyer, J., dissenting) (stating that "a Congress that includes the State not only within its substantive regulatory rules but also, (expressly) within a related system of private remedies" avoids an "enforcement gap" and gives Congress considerable power to regulate private conduct).

13. This Article focuses on the use of federalism to limit the role of the courts in enforcing federal laws against the states. Recently, the Court also has relied on federalism to limit congressional power to impose requirements on state legislative and executive bodies. See *Printz v. United States*, 521 U.S. 898, 900 (1997) (holding that the obligation of state officers to perform handgun background checks was an unconstitutional imposition on state officials to execute the federal law); *New York v. United States*, 505 U.S. 144, 145 (1992) (holding that a federal law requiring states to accept and to regulate nuclear waste according to congressional instruction falls outside of Congress' enumerated powers). The Court will continue to examine federalism limits on congressional power to direct the operations of a state's legislative or executive branches. See *United States v. Morrison*, 120 S. Ct. 11 (1999) (deciding whether Congress has power to enact the Violence Against Women Act). In *Reno v. Condon*, 120 S. Ct. 666 (2000), the Court held that the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994), does not violate the Tenth Amendment by restricting the state's ability to disclose information in motor vehicle department records. The Court distinguished *Printz* and *New York* in the following way:

[T]he DPPA does not require the states in their sovereign capacity to regulate their own citizens. The DPPA regulates the states as the owners of databases. It does not require the South Carolina legislature to enact any laws or regulations and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

*Id.* at 672.

14. See *infra* Part I (discussing the role of federal courts, particularly in the context of *Younger* and the Eleventh Amendment).

15. See *infra* Part I (discussing *Alden* and its role in maintaining a balance between state and federal interests).

and federal interests, a concept that lies at the heart of federalism.<sup>16</sup>

### I. LIMITING THE ROLE OF FEDERAL COURTS<sup>17</sup>

In recent years, the Court created two paths by which it diminished the power of federal courts to prevent states from encroaching on federal rights. One approach relied on a federal court's equitable powers and comity principles,<sup>18</sup> while the other depended specifically on the Eleventh Amendment.<sup>19</sup> These separate paths shared a common theme: the Court's preservation of federalism.

The focus of this Article is not to review in depth the historical events leading to the emergence of the federal courts as protectors of federal rights. Instead, this Article shall concentrate on the developments over the past two decades, specifically the use of federalism, to immunize states from liability when they violate federal law. Nevertheless, to appreciate these more recent developments, some background is necessary.

Although our federal structure includes dual judicial systems, the roles of the state and federal courts in protecting federal rights never have been precise. In fact, the courts' roles have been the subject of ongoing controversy.<sup>20</sup> Interestingly, at the Constitutional Convention, the Founding Fathers devoted far more attention to the structure and function of the legislative and executive branches than the judicial branch.<sup>21</sup> The total time spent discussing the creation of the federal judiciary fit into one afternoon.<sup>22</sup> Proponents of a national judiciary feared that state courts could not be trusted to enforce federal law.<sup>23</sup> They argued that federal courts were needed to ensure the supremacy and uniform application of federal law.<sup>24</sup> The

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16. See *infra* notes 228-36 and accompanying text (concluding that the Court has not appropriately or adequately balanced state or federal interest).

17. For a more detailed discussion of the issues in this section, see BRAVEMAN, *supra* note 5, which discusses the closing of federal courts to individuals who wish to challenge the conduct of state and local officials.

18. See *infra* Part I.A (reviewing the *Younger* doctrine).

19. See *infra* Part I.B (discussing the Eleventh Amendment and the federal courts' role in protecting federal rights).

20. See generally BRAVEMAN, *supra* note 5 (discussing the historical controversy between state and federal courts to protect rights).

21. See F. BARASH, *THE FOUNDING* 161 (1987).

22. See *id.* at 162.

23. See 4 *THE FOUNDER'S CONSTITUTION* 137 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[T]he Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General and local policy at variance.") (statement of Mr. Ghorum).

24. See *THE FEDERALIST* NO. 78, at 230-32 (Alexander Hamilton) (Roy Fairfield ed., 1981) (discussing that life tenure, among other characteristics of the federal

states' rights advocates urged that a national judiciary would diminish state authority.<sup>25</sup> They expressed particular concern about the possibility of lower federal court judges dispersed around the country.<sup>26</sup> Pierce Butler of South Carolina observed that "[t]he states will revolt at such an encroachment."<sup>27</sup>

The Constitutional Convention did not address the specific issue of whether states could be subject to suit in federal court.<sup>28</sup> Nevertheless, the issue was certainly on the minds of the Framers. "The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution . . . ."<sup>29</sup>

To resolve the controversy regarding the creation of a national judiciary, the Convention adopted two related compromise provisions. First, Madison proposed a compromise<sup>30</sup> that became Article III. The Constitution would provide for one Supreme Court and would authorize Congress to decide in the future on the creation of lower federal courts.<sup>31</sup> The second compromise involved the authority to declare state laws unconstitutional. The delegates rejected Madison's proposal that Congress be authorized to veto state laws.<sup>32</sup> Instead, the delegates adopted Luther Martin's compromise<sup>33</sup>

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judiciary, will provide supremacy and uniformity in the application of the law); THE FEDERALIST NO. 80, at 236-41 (Alexander Hamilton) (Roy Fairfield ed., 1989) (discussing in a letter written to the people of the State of New York the instances in which a federal judiciary would have authority over a particular matter).

25. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 127-28 (Max Farrand rev. ed., 1966) (discussing the establishment of the federal judiciary and the implications for states' rights).

26. See MERRILL JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 50 (1964) (examining the Constitutional Convention debate over the role of inferior courts).

27. FARRAND, *supra* note 25, at 125.

28. See *Edelman v. Jordan*, 415 U.S. 651, 661 n.9 (1974) (discussing the Constitutional Convention debate over the right of the federal judiciary to adjudicate a state's legal rights and liabilities).

29. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1922); see also *Monaco v. Mississippi*, 292 U.S. 313, 323-25 (1934) (discussing whether the Framers intended the Constitution to allow for a state to surrender its immunity when a suit is brought against it).

30. See generally Michael Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42 (accounting "for the Court's reluctance to embrace fully a Supremacy Clause argument that would compel state courts to provide a forum for the disposition of all federal judicial business . . .").

31. See FARRAND, *supra* note 25, at 227 (resolving to establish a federal judiciary to consist of "One Supreme tribunal"); JENSEN, *supra* note 26, at 50-51 (noting that the passage of the Virginia plan included a provision to establish inferior courts).

32. See FARRAND, *supra* note 25, at 229 (resolving that Congress may only veto laws that invoke or interfere with federal laws).

33. See JENSEN, *supra* note 26, at 67-68 (noting that Martin's proposal rested on

that became the Supremacy Clause,<sup>34</sup> which bound state judges to follow federal law.

These compromises, of course, did not resolve the controversies over the role of the federal judiciary in enforcing federal law against the states. They postponed the resolution for another day, or perhaps more properly, for many future days. One of those days arrived when the First Congress enacted the Judiciary Act of 1789,<sup>35</sup> representing another compromise between the federalists and antifederalists. The Act established a lower federal court system and authorized the Supreme Court to review decisions by the highest state courts that ruled against a federal claim.<sup>36</sup>

The antifederalists attacked the Act, describing it as a "vile law system, . . . with a design to draw by degrees all law business into the Federal Courts. The Constitution is meant to swallow all the State constitutions, by degrees, and to swallow, by degrees, all the State Judiciaries."<sup>37</sup> Virginia Senator William Grayson was more direct when he characterized the Act as "monstrous."<sup>38</sup> From the perspective of the states' rightists, his description was a bit overstated, at least with respect to the power of the lower federal courts to entertain claims arising under federal law. The antifederalists had succeeded in keeping such claims out of the federal courts. The Act provided that challenges involving the Constitution or federal law would be initiated in state courts and enter the federal system only through Supreme Court review under Section 25.<sup>39</sup>

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the premise that acts of Congress and U.S. treaties were binding on state courts).

34. See U.S. CONST. art. VI, § 2, cl. 2.

35. Judiciary Act of 1789, 1 Stat. 73.

36. The constitutionality of Section 25, which permitted Supreme Court review of state court decisions, was upheld in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). In response to Virginia's arguments that such review intrudes on its sovereignty, Justice Story observed that the Constitution "is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives." See *id.* at 343. Moreover, he commented on the importance of Supreme Court review:

If there were no revising authority to control these jarring and discordant judgments [by the states], and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.

*Id.* at 347-48.

37. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 109 (1924) (quoting Pennsylvania Senator William Maclay's notes pertaining to the passage of the Judiciary Act).

38. See *id.* at 52 ("Senator William Grayson of Virginia wrote, immediately after its passage, that it was 'monstrous,' that the states would take alarm, and that its destruction might be predicted.").

39. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.



This structure remained in place, with minor modifications,<sup>40</sup> until well after the Civil War. During the interim period, the Supreme Court strengthened its own role as guardian of federal rights. The decisions in *Marbury v. Madison*,<sup>41</sup> *Cohens v. Virginia*,<sup>42</sup> and *Martin v. Hunter's Lessee*<sup>43</sup> secured the Court's authority to review state court judgments and ensure the supremacy and uniform application of the Constitution and federal laws. These decisions, however, neither increased the power of the lower federal courts nor altered the reliance on state courts in the first instance as protectors of federal rights.

The lower federal courts' transformation into guardians of federal law was a slow process that began during the Reconstruction Period. Relying on the new source of power contained in the Fourteenth Amendment, Congress passed a series of Civil Rights statutes and authorized lower federal courts to enforce the provisions.<sup>44</sup> Among these provisions was the predecessor of section 1983,<sup>45</sup> which authorized damages and injunctive relief against persons who acted under color of state law to deprive others of federal rights.<sup>46</sup> The Court subsequently described section 1983 as "an important part of the basic alteration in our federal system."<sup>47</sup> The Court noted that the statute was designed to open "federal courts to private citizens,

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40. For example, in 1815 Congress provided for removal from state to federal courts of suits against federal officers attempting to collect war revenues. *See* Revenue Act of February 4, 1815, 3 Stat. 195. It subsequently authorized removal of other suits against federal officers. *See generally* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 508-09 (1928) (describing, among other acts, the Act of February 4, 1815, as an example of a "specific and temporary protection of [a] federal claim[] through the national courts").

41. 5 U.S. (1 Cranch) 137 (1803) (determining that the question of whether a right has been vested is a question for the judicial branch).

42. 19 U.S. (6 Wheat.) 264 (1821) (determining that the Supreme Court must preserve the intent and meaning of the Constitution).

43. 14 U.S. (1 Wheat.) 304 (1816) (ruling that the Supreme Court may review any final state court judgment involving federal statutes, treaties, or the Constitution).

44. *See* Civil Rights Rights Act of 1875, ch. 114, § 3, 18 Stat. 335, 336 (providing that the U.S. district and circuit courts shall have jurisdiction over all violations of terms of the Civil Rights Act of 1875); Civil Rights Act of 1871, ch. XXII, § 1, 17 Stat. 13 (providing for enforcement of certain provisions of the Fourteenth Amendment, including the ability of citizens to bring an action against person who act under the color of state law); Enforcement Act of 1870, ch. CXIV, § 18, 16 Stat. 140, 144 (re-enacting the Civil Rights Act of 1866 that provides for the protection of the civil rights of the United States citizenry).

45. *See* 42 U.S.C. § 1983 (1994) (authorizing constitutional damage claims against state and local government officials).

46. *See id.*

47. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972).

offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."<sup>48</sup>

As part of the transformation process, Congress also enacted the Judiciary Act of 1875,<sup>49</sup> which included a general grant of federal question jurisdiction. This Act

gave the federal courts the vast range of power that had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.<sup>50</sup>

The Reconstruction Period, therefore, provided the potential for a radical transformation of the legal structure that enforced federal rights. This new structure altered the balance of federalism and recognized the federal interest in preserving federal rights. As Justice Blackmun observed: "Taken collectively, the Reconstruction Amendments, the Civil Rights Acts, and these new jurisdictional statutes, all emerging from the caldron of the War Between the States, marked a revolutionary shift in the relationship among individuals, the States, and the Federal Government."<sup>51</sup> The revolution, however, did not occur immediately; rather, it took several decades to become a reality.<sup>52</sup>

Two decisions in the early twentieth century strengthened the role of the lower federal courts in protecting citizens from state action. In

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48. *Id.* at 239.

49. 28 U.S.C. § 1331 (1994). *See generally* William Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969) (describing the expansion of federal court jurisdiction between 1863-1875).

50. FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1927).

51. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 6 (1985).

52. The Supreme Court played a significant role in delaying the legal order envisioned by the Reconstruction amendments and laws. *See* *Slaughterhouse Cases*, 83 U.S. 36 (1872) (refusing to invalidate state zoning restrictions in Louisiana); *Civil Rights Cases*, 109 U.S. 3 (1883) (holding unconstitutional the Civil Rights Acts of 1875); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of a Louisiana public accommodations statute providing for the separation of black and white train passengers); *see also* JOHN ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 53-57 (1987) (reviewing the political maneuvering that fueled the growth of federal judicial power). *See generally* HAROLD HYMAN & WILLIAM WIECEK, *EQUAL JUSTICE UNDER LAW* 473-79 (1982) (outlining the history of federal usurpation of states' rights); Blackmun, *supra* note 51, at 11 (asserting that the Supreme Court joined the other branches of the federal government in creating "our Dark Ages of Civil Rights").

*Ex parte Young*,<sup>53</sup> the Supreme Court held that a federal district court could enjoin a state official attempting to enforce an unconstitutional state law.<sup>54</sup> Justice Harlan, in his dissent, noted the significance that the decision would have on federalism when he wrote that the decision "would inaugurate a new era . . . in the relations of the National and state governments."<sup>55</sup> In the second decision, *Home Telephone & Telegraph Co. v. Los Angeles*,<sup>56</sup> the Court further enhanced the power of the lower federal courts when it made clear that an injunction could be used to enjoin unconstitutional state conduct even when the misconduct also violated state law.<sup>57</sup>

Perhaps the most significant breakthrough in the transformation process occurred in *Brown v. Board of Education*.<sup>58</sup> In striking down state segregation, the Supreme Court dramatically altered the relations between the states and the national government, and made the federal courts the primary guardians of federal rights.<sup>59</sup> In the years following *Brown*, the lower federal courts became the litigation forum for state school segregation cases, as well as actions challenging a wide range of other state activities, including zoning, reapportionment, police misconduct, and prison conditions.<sup>60</sup>

Notably, *Brown* was not decided in isolation but rather at a time when the world outside the courtroom was changing dramatically. The other branches of the federal government had a national and international agenda, which included the expansion of federal rights and a federal interest in protecting those rights from state deprivation.<sup>61</sup> "A new spirit of nationalism"<sup>62</sup> replaced the

53. 209 U.S. 123 (1908).

54. *See id.* at 167.

55. *Id.* at 175.

56. 227 U.S. 278 (1913).

57. *See id.* at 283 (holding that federal courts need not wait for final state adjudication in cases implicating state and constitutional liberties).

58. 347 U.S. 483 (1954).

59. *See id.* at 490 (ordering the end of state-mandated racial segregation in public education).

60. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1295 (1976) (reviewing the public function served by litigation with regard to "how a government policy or program shall be carried out"). *See generally* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978) (providing a historical look at the injunction as a remedy and the prominence of its use in the twentieth century as a way of impeding organized labor and labor strikes).

61. *See* Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (stating that *Brown* was, in part, the result of "those whites in policy making positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation").

62. John J. Gibbons, *Our Federalism*, 12 SUFFOLK U. L. REV. 1087, 1096 (1978).

isolationism of the turn of the century and, as Judge Gibbons stated: "In the global village, deference to local solutions for problems that transcend local interests is a quaint anachronism."<sup>63</sup> By the 1960s, the structure envisioned during Reconstruction was firmly established. Individuals had federal rights, federal remedies, and a federal forum to challenge state conduct that violated federal law.

#### A. *Younger Doctrine*

Beginning in the 1970s and continuing over the next two decades, the Burger and Rehnquist Courts dismantled the legal structure described above, swinging the federalism pendulum back in the direction of states' rights. To deconstruct the federalist structure, the Court used the comity principle described in *Younger v. Harris*.<sup>64</sup> John Harris, a criminal defendant in California state court, filed a lawsuit in federal court seeking to enjoin the state criminal proceeding on the ground that the prosecution violated his First Amendment rights. The federal district court agreed that the state law authorizing the prosecution was unconstitutional and enjoined the district attorney from proceeding with the state criminal case.<sup>65</sup> On appeal, the Supreme Court reversed, holding that a federal district court should not enjoin a pending state criminal prosecution except in extraordinary circumstances.<sup>66</sup>

The Court based its noninterference policy, in part, on traditional equitable principles. First, a court should not award injunctive relief where there is an adequate remedy at law.<sup>67</sup> Second, injunctive relief is available only if the party can establish irreparable harm.<sup>68</sup> The

63. *Id.* at 1119.

64. 401 U.S. 37 (1971).

65. See *Harris v. Younger*, 281 F. Supp. 507, 516 (C.D. Cal. 1968) (holding that the "application of present and more enlightened concepts of the meaning of the First Amendment requires the holding that the Act is unconstitutional on its face").

66. See *Younger*, 401 U.S. at 41 ("[W]e have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.").

67. See *id.* at 43-44 (noting that "the basic doctrine of equity jurisprudence [provides] that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief"). *Younger* actually was a misapplication of this equity principle. "An 'adequate remedy at law,' as a bar to equitable relief in the federal courts, refers to a remedy on the law side of the federal courts." *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 359 (1951) (Frankfurter, J., concurring).

68. See *Younger*, 401 U.S. at 46 ("In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that . . . even

Court held that injunctive relief was not appropriate because Harris could challenge the constitutionality of the state law as a defense to the state prosecution and, thus, had an adequate remedy at law.<sup>69</sup>

The Court, however, did not rely merely on equity rules, but instead invoked notions of federalism and comity. The ruling stated that “comity” encompasses a “recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”<sup>70</sup> The Court concluded that out of respect for state courts a federal district court should not enjoin a pending criminal proceeding.<sup>71</sup> *Younger*, therefore, involved the application of principles of federalism in a context where equitable relief was sought in federal court to restrain a pending state criminal proceeding.

Subsequently, the Court extended *Younger* in two significant ways to close federal courts to suits challenging state conduct. In a series of cases,<sup>72</sup> the Court applied *Younger* in a civil, rather than criminal, context. In *Trainor v. Hernandez*,<sup>73</sup> for example, a federal court enjoined state officials from unconstitutionally attaching the property of welfare recipients as part of a state civil action to recover fraudulently obtained welfare benefits. The district court held that *Younger* and its comity principle did not apply because the pending state proceeding was neither criminal nor quasi-criminal.<sup>74</sup> The Supreme Court rejected such a narrow reading of *Younger* and held that the noninterference policy is applicable to state civil proceedings.<sup>75</sup> The Court cited the following factors: (1) the state

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irreparable injury is insufficient unless it is ‘both great and immediate.’”) (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)).

69. See *id.* at 54 (holding that “the possible unconstitutionality of a statute ‘on its face’ does not in itself justify an injunction against good-faith attempts to enforce it . . .”).

70. *Id.* at 44.

71. See *id.* at 53 (reaffirming “the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions”).

72. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975) (applying *Younger* in a civil public nuisance context); *Trainor v. Hernandez*, 431 U.S. 434, 435 (1977) (applying *Younger* in a civil action premised on fraudulently obtained public assistance benefits).

73. 431 U.S. 434 (1977).

74. See *id.* at 439 (“These major distinctions preclude this court from extending the principles of *Younger*, . . . beyond the quasi-criminal situations set forth in *Huffman*.”).

75. See *id.* at 444 (“[T]he principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity.”).

proceeding was brought by the state in its sovereign capacity and (2) was initiated to vindicate an important state policy, such as the fiscal integrity of its welfare program.<sup>76</sup>

*Younger* was cut even further “adrift from its original doctrinal moorings”<sup>77</sup> when the Court eliminated the requirement that the state must bring a pending state proceeding in its sovereign capacity. Although both parties in *Pennzoil Co. v. Texaco, Inc.*<sup>78</sup> were corporations, the Supreme Court concluded that the federal court should not enjoin state proceedings because the state’s interest in the proceedings was “so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.”<sup>79</sup> Yet, the only interest mentioned by the Court is one that exists in all cases—the interest in securing compliance with the judgments of the state courts.<sup>80</sup>

Although the Court may not have articulated the concerns underlying the *Younger* noninterference doctrine, some possible justifications for the outcome are discernible. Professor Martin Redish identified the following four possible reasons for federal court abstention in the *Younger* line of cases: (1) to avoid the suggestion that state judges are unable or unwilling to enforce federal rights; (2) to prevent interference with state court proceedings; (3) to preserve the discretion of the state executive officials; and (4) to avoid interference with state legislative policies.<sup>81</sup> Professor Redish concluded, however, that these rationales are “inconsistent or internally flawed.”<sup>82</sup>

With respect to the first justification, it is difficult to assess empirically whether state judges are insulted when cases involving federal claims are removed from their dockets. As a practical matter, the federal injunction consists of “removal of a state case from a list of unheard cases kept in the clerk’s office.”<sup>83</sup> The state judge may not be aware of the federal proceeding. Moreover, even if aware of the case, the state judge might welcome the reduction in her caseload,

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76. *Id.*

77. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 30 n.2 (1987) (Stevens, J., concurring).

78. 481 U.S. 1 (1987).

79. *Id.* at 11.

80. *See id.* at 13 (noting the “importance to the States of enforcing the orders and judgments of their courts”).

81. *See* Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 465-66 (1978).

82. *Id.* at 466.

83. Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59, 70 n.65 (1981).

particularly the removal of a controversial case.<sup>84</sup> Finally, the litigant decides whether to seek federal relief and the insult, if any, is a product of the litigant's conduct, not the conduct of the federal courts.

The second possible justification, the desire to avoid interference with the state court's judicial process, certainly reflects a legitimate concern. Repeated federal court interference with ongoing state court litigation might lead to additional costs and delays in resolving the dispute. These burdens may justify a comity policy that restricts piecemeal interference with state judicial proceedings. Additional costs and delays, however, do not support a policy that prohibits a federal court injunction to prevent any federal proceeding whatsoever in state court. Such an injunction would allow a case to be heard in the federal forum and does not result in repeated interference with the work of the state court.

Similarly, *Younger*-style abstention is not justifiable by a desire to avoid interference with a state's executive or legislative functions. Any such interference would flow from a decision on the merits of the claim,<sup>85</sup> and would not necessarily result from the court forum, which is the basis for the *Younger* doctrine. Indeed, the *Younger* noninterference principle does not guarantee any specific result on the underlying question of whether state officials have violated federal law. Instead, *Younger* allocates the decision to the state court. Of course, the unstated premise of the *Younger* line of cases may be that state courts will be more sympathetic to the states' interests and less likely to find that state officials have violated federal law. Such a premise, however, ignores the federal interest in the uniformity and supremacy of federal law and is "embarrassingly inconsistent with . . . the desire to avoid insulting state judges by questioning their willingness to protect federal rights."<sup>86</sup>

Noticeably absent from *Younger* and its offspring is any recognition

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84. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 779 (3d ed. 1999) ("Since most states have some form of electoral review of judges it is at least plausible that state court judges prefer to have federal judges take the heat of declaring state laws unconstitutional.").

85. Compare *Printz v. United States*, 521 U.S. 98 (1997) (noting that the Court has "made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. [W]e [have] sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law"), with *New York v. United States*, 505 U.S. 144 (1992) (denying congressional intrusion on state administrative and legislative functions).

86. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 348 (2d ed. 1990).

of a federal interest in having a federal forum available to hear the federal claim. Congress plainly recognized a federal interest when it enacted section 1983 and other Reconstruction Era laws. The purpose of these provisions was to empower the federal courts to serve as guardians of federal rights.<sup>87</sup> Congress understood the tensions created by federal judicial interference with state court proceedings and, as a general matter, prohibited such intrusion in the anti-injunction statute.<sup>88</sup> That statute, however, created an exception to the general prohibition for cases brought under section 1983.<sup>89</sup> The Reconstruction efforts were intended to open the “federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.”<sup>90</sup>

In the name of federalism, the *Younger* line of cases closed the federal courts to many kinds of cases challenging state misconduct. Unfortunately, the Court often used “sloganeering references”<sup>91</sup> to federalism concerns and failed to identify the real threats to our federal structure or to balance the national and local interests at stake. Indeed, a search for any recognition of the federal interest in the *Younger* line of cases would be in vain. The *Younger* doctrine, initially sensitive to the legitimate interests of both state and federal governments, became engrossed in only the former. As Justice Stewart observed, the federal-state balance became “distorted beyond recognition.”<sup>92</sup>

One final aspect of the *Younger* line of cases is noteworthy, particularly as background for the discussion of *Alden*. An underlying assumption of those cases is that state courts would be available to resolve the federal claims. Whether state courts are in fact equally willing and able to protect federal rights is a topic that some

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87. See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (observing that § 1983 was intended as a means of enforcing the 14th Amendment in order “to protect the people from unconstitutional action under color of state law . . .”).

88. See 28 U.S.C. § 2283 (1994) (outlining the requirements for obtaining a federal injunction in a state court proceeding).

89. See *Mitchum*, 407 U.S. at 242-43 (“[W]e conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the ‘expressly authorized’ exception of that law.”).

90. *Id.* at 239. See generally Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977) (discussing the development of the *Younger* doctrine).

91. Gibbons, *supra* note 62, at 1117.

92. BRAVEMAN, *supra* note 5, at 97 (quoting *Hicks v. Miranda*, 422 U.S. 332, 357 (1975) (Stewart, J., dissenting)).



academics dispute.<sup>93</sup> Nevertheless, it is clear that the Court assumed that state courts would be open to federal claims and would be competent to resolve them. As the Court stated, "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."<sup>94</sup> Thus, under *Younger* it was clear that *some* court would be available to protect the federal interests.

### B. Eleventh Amendment

The Supreme Court also used the Eleventh Amendment to unseat the federal courts as guardians of federal rights and to return to a pre-Reconstruction scheme for the enforcement of those rights. Admittedly, the Eleventh Amendment has been the subject of extensive debate among the Justices<sup>95</sup> and within the legal academic community.<sup>96</sup> The purpose of this Section is not to enter the debate,

93. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988) (proposing that "litigants with federal constitutional claims should generally be able to choose the forum, federal or state, in which to resolve their disputes"); Thomas Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315 (determining that in the area of students' rights litigation lawyers overwhelmingly select federal courts to adjudicate federal questions); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (reviewing the historical preference for federal court adjudication of federal rights and offering an institutional explanation for such preference); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 215 (1983) (contending that parity between federal and state courts concerning federal rights does exist).

94. *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976).

95. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999). In responding to Justice Breyer's dissenting opinion, Justice Scalia, writing for the majority, characterized the dissenting viewpoint as one "which believes that States should not enjoy the normal constitutional protections of sovereign immunity when they step out of their proper economic role to engage in . . . ordinary commercial ventures." *Id.*; see also *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding, in a five Justice majority opinion, that the Indian Commerce Clause does not permit Congress to abrogate states' sovereign immunity).

96. See, e.g., ORTH, *supra* note 52, at 149-50; Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1978) ("There is . . . little agreement about many issues concerning the scope of state immunity."); 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, 1033 (1983) ("The Eleventh Amendment is one of the Constitution's most baffling provisions . . ."); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 (1988) ("The Eleventh Amendment to the United States Constitution is an enigma of increasing concern to the Supreme Court and to scholars."); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S.

but rather to illustrate the Court's use of the Eleventh Amendment to restrict the federal courts' availability to enforce federal laws against the states. Like the *Younger* line of cases, the Court relied on vague federalism concerns as a basis for the Eleventh Amendment's restriction on federal jurisdiction. So too, the Court largely ignored the federal interests that might exist in having a federal forum decide the cases.

The Court has explained<sup>97</sup> that the Eleventh Amendment was adopted to overrule the *Chisholm*<sup>98</sup> decision. Beyond the reason for the Amendment's adoption, much remains in dispute. Until *Alden*, the debate centered on whether the Amendment should be read as a source of sovereign immunity that limits the *federal* courts' power to entertain claims arising under federal law against states. Four Justices maintained that the Eleventh Amendment prevents suits against states in federal court only when federal jurisdiction is based on diversity.<sup>99</sup> A Court majority adopted a much broader view, however, concluding that the Amendment deprives the lower federal courts<sup>100</sup>

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CAL. L. REV. 51, 52 (1990) (arguing that the Supreme Court has not clearly resolved the issue of state sovereign immunity and Congress' ability to override the Eleventh Amendment); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1414 (1975) (arguing that the distinction between Congress' power to create a private, federal cause of action and the Judiciary's power to imply a cause of action is key to Eleventh Amendment analysis); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1806 (1997) (advocating that states adopt officer-liability rules and insurance/indemnity arrangements as a more efficient means of ensuring state compliance with federal law rather than attempting to interpret the Court's Eleventh Amendment decisions).

97. See *Hans v. Louisiana*, 134 U.S. 1, 18-21 (1890) (determining that the adoption of the Eleventh Amendment following the *Chisholm* decision is indicative of the fact that *Chisholm* was rejected by the country); *Seminole Tribe*, 517 U.S. at 101 ("The adoption of the Eleventh Amendment soon changed the result in *Chisholm* . . .") (Souter, J., dissenting).

98. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (holding that the Constitution provides the Supreme Court with jurisdiction when a citizen of a state sues a different state).

99. See *Seminole Tribe*, 517 U.S. at 78 (Stevens, J., dissenting) (maintaining that "there can be no serious debate . . . over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear"); *id.* at 110 (Souter, J., dissenting) (noting that "the history and structure of the Eleventh Amendment convincingly shows that it reaches only to suits subject to federal jurisdiction exclusively under the citizen-state diversity clauses").

100. It is well established that the Eleventh Amendment does not preclude Supreme Court review of suits against the states. See *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 166 (1999) (noting that there is a "long established and uniform practice of reviewing state court decisions on federal matters, regardless of whether the State was a plaintiff or defendant in trial court"); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Fla. Dep't. of Bus. Regulation*, 496 U.S. 18, 27 (1990) (holding that "we have repeatedly and without question accepted

of jurisdiction over any case against a non-consenting state.<sup>101</sup> The language of the Amendment, of course, refers only to suits brought “against one of the United States by Citizens of another State” and, thus, does not support the broad reading. The majority, however, rejected a literal interpretation of the Amendment and instead held that it reinstated the Framers’ original intent that a non-consenting state could be immune from suit in federal court.

This conclusion erects a substantial barrier to the enforcement of federal rights against the states in the federal courts. Eighteen years after *Hans v. Louisiana*,<sup>102</sup> the Court navigated a route around that obstacle. In *Ex parte Young*,<sup>103</sup> the Court held that federal courts could issue injunctive relief against state officials in violation of federal laws. The Court stated:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. *The State has no power to impart to him immunity from responsibility to the supreme authority of the United States.*<sup>104</sup>

The *Ex parte Young* doctrine, allowing federal jurisdiction over suits against state officials, essentially ensured that states must comply with federal law. Indeed, one could interpret *Ex parte Young* to support the proposition that *Hans* was simply a pleading problem. The Eleventh Amendment would preclude federal jurisdiction over lawsuits naming the state as defendant, but would not preclude

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jurisdiction to review issues of federal law arising in suits brought against States in state court”); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (determining that the Supreme Court’s jurisdiction to review suits by the United States against a state is “inherent in the constitutional plan”). In *McKesson*, the Court explained that when a state court entertains a case, “the State assents to appellate review by this Court of the federal issues raised in the case ‘whoever may be the parties to the original suit, whether private persons, or the state itself.’” 496 U.S. at 30 (quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 585 (1837)). The Court adheres to this constructive waiver in the context of its own appellate jurisdiction despite its unwillingness to rely on constructive waivers of immunity to suits against the states in the lower federal courts or in state courts. *See College Sav. Bank*, 119 S. Ct. at 2228 (determining that a state must make a “clear declaration” of its consent to be ruled).

101. *See Seminole Tribe*, 517 U.S. at 72-73 (determining that the Eleventh Amendment prevents Congress from authorizing private party suits against “uncontesting states”).

102. 134 U.S. 1 (1890).

103. 209 U.S. 123 (1908).

104. *Id.* at 159-60 (emphasis added).

federal jurisdiction in suits naming the state official as the defendant.

The Court rejected any notion that the Eleventh Amendment restriction on federal jurisdiction can be avoided by artful pleading.<sup>105</sup> To the contrary, the Court has whittled away at the *Ex parte Young* doctrine and utilized the Eleventh Amendment as a vehicle to restrict access to the federal courts. The decision in *Edelman v. Jordan*<sup>106</sup> illustrates this pattern. The plaintiffs in *Edelman* were welfare recipients who alleged that Illinois officials denied welfare benefits in violation of the Constitution and federal statutes.<sup>107</sup> They sought retroactive repayment of the wrongfully withheld welfare benefits and an injunction compelling the state officials to comply with federal law.<sup>108</sup> The district court found the state officials in violation of federal regulations, ordered them to repay the illegally withheld benefits, and enjoined them from future violations.<sup>109</sup> The Court of Appeals affirmed, relying on *Ex parte Young* to conclude that the Eleventh Amendment does not preclude a federal court from ordering such relief against the Illinois officials.<sup>110</sup>

The Supreme Court agreed that the Eleventh Amendment did not preclude the prospective injunctive relief against the state officials but held that it prevented a federal court from directing the repayment of the welfare benefits.<sup>111</sup> The Court noted that *Ex parte Young* was a "watershed case" that permitted the Civil War Amendments to "serve as a sword, rather than merely as a shield."<sup>112</sup> The majority, however, observed that the relief in *Ex parte Young* was prospective only, and that the award of retroactive relief "stands on quite a different footing."<sup>113</sup> In concluding that the Eleventh

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105. *Id.* at 168 (noting that "it has never been supposed there was any suit against the state by reason of serving the writ [of habeas corpus] upon one of the officers of the state in whose custody the person was found"); *infra* notes 106-35 and accompanying text (discussing the Court's tendency to restrict the application of *Ex parte Young* in cases where state officials were sued).

106. 415 U.S. 651 (1974).

107. *See id.* at 655-56.

108. *See id.* at 656.

109. *See id.*

110. *Jordan v. Weaver*, 472 F.2d 985, 993-94 (7th Cir. 1973) (determining that although *Ex parte Young* requires a state's consent for a citizen to recover monetary damages, a difference exists between damages and restitution, and the plaintiffs are entitled to restitution as an equitable remedy).

111. *See Edelman*, 415 U.S. at 664 (noting that the district court's opinion contained both retroactive and prospective relief and that under the Eleventh Amendment only prospective relief is constitutional).

112. *Id.*

113. *Id.* at 665 (noting that the retroactive award would derive from funds from the general revenues of the state "and thus the award resembles far more closely the monetary award against the State itself, . . . than it does the prospective injunctive

Amendment bars retroactive relief, the Court conceded that the difference between the type of relief permitted by *Ex parte Young* and the relief barred “will not in many instances be that between day and night.”<sup>114</sup> Indeed, the *Ex parte Young* injunction had an impact on the state’s treasury because the injunction prevented the Attorney General from collecting monetary penalties.<sup>115</sup> Similarly, the prospective relief in *Edelman*<sup>116</sup> would have had financial implications for Illinois because the state would have been required to process welfare applications and award benefits more promptly in the future. Nevertheless, the Court determined that the financial impact of an order directing retroactive benefits is different from the impact of an order granting prospective injunctive relief.<sup>117</sup> Without clearly explaining the difference, the Court suggested that the state might be better able to budget for future compliance.<sup>118</sup>

As in the *Younger* line of cases, the Court in *Edelman* protected the state without considering the federal interest. To be sure, a federal court order requiring the state to pay retroactive welfare benefits affects the state’s ability to implement its own legislative policies.<sup>119</sup> Equally clear is the threat to the federal interest when Illinois fails to comply with federal law. Congress determined that national policy is served best by prompt payment of welfare benefits to people living in poverty. The federal law reflected Congress’ intent to implement this policy. Other than a passing mention in a footnote,<sup>120</sup> the Court made no reference at all to this federal interest, nor did the opinion discuss a need to have a federal forum to resolve the dispute.

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relief awarded in *Ex parte Young*”) (citations omitted).

114. *Id.* at 667.

115. *See id.* (citing cases in which the award of injunctive relief had the indirect effect of imposing monetary penalties on the state).

116. The prospective relief sought was a permanent injunction requiring the state to award all plaintiff’s benefits wrongfully withheld. *See id.* at 656.

117. *See id.* at 666-68 (determining that the payment of state funds as a form of compensation for past wrongs as opposed to “a necessary consequence of compliance in the future with a substantive federal-question determination” violates the Eleventh Amendment).

118. *Id.* at 666 n.11 (holding that although welfare decisions by federal courts may have an impact on a state’s finances, the financial impact is not the same as when “a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief”).

119. For example, in *Edelman*, the Court noted that the “ordering by a federal court of retroactive payments to correct delays in . . . [benefit] processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.” *Id.* at 666 n.11.

120. *See id.* (quoting with approval the statement of Judge McGowan in *Rothstein v. Wyman*, 467 F.2d 226, 235 (2d Cir. 1972), that a federal policy advanced by retroactive payments is “the satisfaction of the ascertained needs of an impoverished persons”).

In the two decades after *Edelman*, the Court continued to restrict the reach of *Ex parte Young*, forcing litigants out of federal courts. In *Pennhurst State School & Hospital v. Halderman*,<sup>121</sup> the Court noted that the Eleventh Amendment “bars a suit against state officials when ‘the state is the real, substantial party in interest.’”<sup>122</sup> In general, this bar to a federal court suit exists whether the litigant seeks money damages or injunctive relief.<sup>123</sup> The *Ex parte Young* exception is “necessary to permit the federal court to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’”<sup>124</sup> The doctrine applies only when the litigant requests a federal court to order prospective relief against state officials who are violating *federal* law.<sup>125</sup> Thus, the *Pennhurst* Court held that *Ex parte Young* does not allow a federal court to direct state officials to comply with *state* law.<sup>126</sup> The Eleventh Amendment, it ruled, bars such relief.<sup>127</sup>

More recently, the Court continued to pay lip service to the importance of *Ex parte Young* while limiting its application. In *Seminole Tribe of Florida v. Florida*,<sup>128</sup> the Court determined that *Ex parte Young* was inapplicable where Congress has provided a remedial scheme for the enforcement of the federal right against the state.<sup>129</sup> In such circumstances, the Court held that the Eleventh Amendment bars the federal action, even if the parties seek prospective injunctive relief.<sup>130</sup> Moreover, two Justices, Chief Justice Rehnquist and Justice Kennedy, appear ready to abandon *Ex parte Young* completely and to permit a federal court to enjoin state officials only when there is no

121. 465 U.S. 89 (1984).

122. *Id.* at 101 (quoting *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945), that although decisions prior to *Pennhurst* were not consistent on Eleventh Amendment issues, the principle that the Eleventh Amendment bars suits against state officials when the State is a party is firmly established).

123. *See id.*

124. *Id.* at 105 (quoting *Ex Parte Young*, 209 U.S. 123, 160 (1908)).

125. *See id.* (“Our decisions repeatedly have emphasized that the Young doctrine rests on the need to promote the vindication of federal rights.”).

126. *See id.* at 106 (“We conclude that *Young* . . . [is] inapplicable in a suit against state officers on the basis of state law.”).

127. *See id.* (determining that a federal court mandate to state officers to conform their conduct to state law violates the federalism principle underlying the Eleventh Amendment).

128. 517 U.S. 44 (1996).

129. *See id.* at 74 (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”).

130. *See id.* at 73-76 (determining that even in cases of prospective injunctive relief, *Ex parte Young* is inapplicable to the case at hand as Congress has created a remedial scheme for the enforcement of a federal right).

available state forum.<sup>131</sup>

Finally, while Justices O'Connor, Scalia, and Thomas were not willing to join that "reformulation,"<sup>132</sup> they opened the door to additional restrictions on *Ex parte Young*. In *Idaho v. Coeur d'Alene Tribe of Idaho*,<sup>133</sup> the Court determined that a federal court could not issue prospective injunctive relief against state officials because such relief would interfere with the state's regulatory power over land.<sup>134</sup> The exact scope of this further limitation on *Ex parte Young* is unclear and undoubtedly will be determined by future cases. The limitation might apply only to cases involving the state's sovereign interest in land. Alternatively, the restriction might apply more broadly whenever the party challenges a state's regulatory powers, regardless of the specific area of regulation. Either approach represents a dilution of the power recognized in *Ex parte Young*. As the dissenters observed, the fact that the state's regulatory power is the focus of the case should have no bearing on the application of *Ex parte Young*,<sup>135</sup> which involved an effort to enjoin the state's regulation of railroad rates, an activity that could be considered "central to state sovereignty."<sup>136</sup>

The Court has recognized only two avenues to avoid the Eleventh Amendment restriction on federal district court jurisdiction. First, the restriction is inapplicable if the state waives its immunity and consents to the lawsuit in federal court.<sup>137</sup> Consistent with the general states' rights approach, the Court has adopted a "stringent" test to establish a waiver.<sup>138</sup> A general consent to sue and to be sued is insufficient to constitute a waiver.<sup>139</sup> Moreover, a state's consent to suit in its own courts,<sup>140</sup> or in any court of competent jurisdiction,<sup>141</sup> is

131. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 271 (1997) (stating that *Ex parte Young* has special significance when there is no available state forum).

132. *Id.* at 296.

133. 521 U.S. 261 (1997).

134. *Id.* at 294.

135. *Id.* at 309 (Souter, J., dissenting) ("The relevant enquiry . . . is whether the state officers are exercising ultra vires authority over the disputed submerged lands.").

136. *Id.* at 310.

137. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999) (noting that immunity from suit is not absolute); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (maintaining that waiver of the immunity is a "well-established exception[] to the reach of the Eleventh Amendment").

138. See *Atascadero*, 473 U.S. at 241.

139. See *Florida Dep't. of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (determining that a specific waiver of immunity is necessary to circumvent the Eleventh Amendment).

140. See *Smith v. Reeves*, 178 U.S. 436, 441 (1900) (holding that although

not deemed to be a waiver of Eleventh Amendment immunity in federal court. Finally, a waiver will not be implied from a state's voluntary participation in federally regulated conduct.<sup>142</sup> Such an implied waiver will not be found even when the state engages in commercial ventures unassociated with customary sovereign activities.<sup>143</sup>

Second, Congress may abrogate the Eleventh Amendment immunity and thereby subject states to suits in federal court. The Court, however, has construed congressional power very narrowly. The federal Rehabilitation Act, for example, prohibits recipients of federal funds from discriminating against disabled persons in making employment decisions and expressly authorizes enforcement actions against them in federal court.<sup>144</sup> Despite the existence of the Act, the Court ruled that the Eleventh Amendment barred a federal court lawsuit against a state that received federal funds.<sup>145</sup> The Court stated: "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically."<sup>146</sup>

The Court has found a way to protect the states from federal court jurisdiction, even when congressional intent to lift the Eleventh Amendment immunity has been unmistakably clear. The plaintiffs in *Seminole Tribe* sued to enforce the provisions of the Indian Gaming Regulatory Act,<sup>147</sup> which Congress enacted under the Indian Commerce Clause.<sup>148</sup> The Act includes a clear statement of Congress' intent to abrogate state immunity from an enforcement lawsuit in

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California consented to have its Treasurer sued in state court "we think it has not consented to be sued except in one of its own courts").

141. See *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946) (concluding that a state has a right "to reserve for its own tax litigation because of the direct impact of such litigation upon its finances").

142. See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding that the state's participation in a federal program does not constitute the express waiver necessary to circumvent the Eleventh Amendment).

143. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2229 (1999) (overruling *Parden v. Terminal Ry. Co. of Ala. Docks Dep't*, 377 U.S. 184 (1964) (reasoning that as state sovereign immunity is constitutionally protected a waiver must be express)).

144. See 29 U.S.C. § 794(a) (1994) (providing the remedies in Title VI of the Civil Rights Act of 1964 be available).

145. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) (holding that Congress must use specific language to subject states to federal jurisdiction).

146. *Id.*

147. See 25 U.S.C. § 2710(d)(1)(C) (1994).

148. U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the power to regulate commerce "within the Indian Tribes").



federal court.<sup>149</sup> A divided Court ruled, however, that Congress lacks the power under Article I to lift the state's immunity from a lawsuit in federal court.<sup>150</sup>

The *Seminole* majority did not question the continuing vitality of its *Fitzpatrick v. Bitzer*<sup>151</sup> holding that Congress, under section five of the Fourteenth Amendment, may abrogate a state's immunity from suit in federal court.<sup>152</sup> The *Seminole* Court observed that the Fourteenth Amendment expanded federal power "at the expense of state autonomy . . . [and] fundamentally altered the balance of state and federal power struck by the Constitution."<sup>153</sup> This distinction demonstrates the supremacy of federal law, as the states lost some of their autonomy when they ratified a Constitution that conferred power to the central government in Article I.<sup>154</sup> *Seminole* was a particularly inappropriate case to announce a narrow construction of congressional power because the issue involved a statute that sought to regulate Indian affairs,<sup>155</sup> an area in which Congress historically has

149. See 29 U.S.C. § 2710(d)(7) (1994) (setting forth the circumstances under which a U.S. district court has jurisdiction under the Act).

150. See *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996) (overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.")). The *Seminole* decision sparked an active scholarly discussion. See, e.g., Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 769-72 (1998) (discussing the implications of recent Supreme Court decisions on state-federal relations); David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 547-51 (1997) (arguing that Congress does not have the power to grant federal courts jurisdiction over non-Article III matters); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 546 (1997) (contending that *Seminole Tribe* was wrongly decided and presenting the repercussions of that decision); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 2 (discussing the implications of *Seminole Tribe*); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 103 (1996) (contending that after *Seminole Tribe* the states are still accountable in the federal court system for federal law violations); Vazquez, *supra* note 96, at 1691 (presenting the contradiction between the decisions in *McKesson* and *Seminole Tribe* on the issue of Eleventh Amendment immunity).

151. 427 U.S. 445 (1976).

152. See *Seminole Tribe*, 517 U.S. at 59 ("[Section] 5 of the Fourteenth Amendment allowed congress to abrogate the immunity from suit guaranteed by that Amendment.").

153. *Id.* (citing the finding of the *Fitzpatrick* court). During the past term, the Court has construed narrowly Congress' Fourteenth Amendment power to abrogate immunity. See *infra* notes 294-326 and accompanying text (discussing the Court's erosion of Congress' power to abrogate state immunity from suits involving federal law violations).

154. See *Seminole Tribe*, 517 U.S. at 61 ("While . . . Congress' power . . . would be incomplete without the power to abrogate, that statement is made solely in order to emphasize the broad scope of Congress' authority. . . .").

155. See *id.* at 48 (citing Congress' Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (1994), as the statute involved in the litigation).

exercised plenary power to the exclusion of the states.<sup>156</sup>

The cumulative impact of the Eleventh Amendment developments prior to this past term had a very practical impact on litigants seeking to remedy the deprivation of federal rights by states. In theory, a litigant could sue state officials for prospective injunctive relief in federal court and bring a separate lawsuit in state court for damages or retroactive benefits.<sup>157</sup> This approach, however, not only increases the cost of litigation but also raises the risk that preclusion rules might bar litigation of one of the cases.<sup>158</sup> Thus, as in the *Younger* line of cases, the developments forced litigants into state court to enforce their federal rights.<sup>159</sup> A federal court may consider a litigant's claim only through Supreme Court review.<sup>160</sup>

Until *Alden* the assumption was that the Eleventh Amendment would not prevent a suit against state officials in state court.<sup>161</sup> *Edelman* itself is instructive on this point. In *Edelman*, the issue was whether Illinois had waived its *common law* sovereign immunity in its state courts.<sup>162</sup> The Court viewed such common law immunity as separate and distinct from the Eleventh Amendment immunity.<sup>163</sup> The Court responded: "Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of

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156. See, e.g., *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 90 (1977) (upholding an Act of Congress providing for distribution of funds to Delaware Indians); *United States v. Kagama*, 118 U.S. 375, 385 (1886) (finding that the power of the federal government is necessary "because it alone can enforce its laws on the tribes"); see also Martha Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 17-18 (1997) (explaining that Congress believed the states had "proved too ready to enrich themselves at the expense of Indian tribes and Indian lands").

157. See, e.g., *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984). In *Migra*, after a school board refused to renew her claim, the plaintiff sued in state court for breach of contract and subsequently sued in federal court for injunctive relief. See *id.* at 78-80.

158. See *id.* at 85 (holding that petitioner/plaintiff's state court judgment has a preclusive effect in the federal court); *Allen v. McCurry*, 449 U.S. 90 (1980) (stating that federal courts generally have consistently accorded preclusive effect to issues decided by state courts).

159. See, e.g., *Allen*, 449 U.S. at 104 ("There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.").

160. See *supra* note 100 (discussing case law interpreting the Eleventh Amendment).

161. See *supra* note 10 and accompanying text.

162. *Edelman v. Jordan*, 415 U.S. 651, 677 n.19 (1974) ("Respondent urges that the state of Illinois has abolished its common-law sovereign immunity in its state courts . . .").

163. See *id.*

whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts.”<sup>164</sup>

Moreover, on remand in *Edelman*, the Court of Appeals ordered state officials to notify class members of the availability of state administrative procedures to determine whether they were entitled to retroactive benefits.<sup>165</sup> The state officials maintained that the Eleventh Amendment barred such notice because it would have led to the payment of state funds for retroactive benefits.<sup>166</sup> The Supreme Court rejected that argument, finding that the order fell on the *Ex parte Young* side of the line.<sup>167</sup> The Court determined that the Eleventh Amendment was not implicated because “whether or not the class members will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not the federal court.”<sup>168</sup> The Court did not indicate whether the state officials could assert a constitutionally based immunity in state court.<sup>169</sup>

The Court addressed that specific issue in *Hilton v. South Carolina Public Railways Commission*.<sup>170</sup> In the case, Kenneth Hilton initially filed an action under the Federal Employers’ Liability Act (“FELA”) <sup>171</sup> in federal court against the Railways Commission, a state agency.<sup>172</sup> While the case was pending, the Supreme Court decided that the Jones Act,<sup>173</sup> which incorporated the remedial provisions of FELA, does not abrogate a state’s Eleventh Amendment immunity.<sup>174</sup> Based on the assumption that the Eleventh Amendment barred his FELA action, Hilton dismissed the federal court suit and refiled in South

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164. *Id.*

165. *See* *Jordan v. Trainor*, 563 F.2d 873, 878 (7th Cir. 1977) (en banc) (holding that a modified notice advising applicants that a state administrative procedure exists does not violate of the Eleventh Amendment).

166. *See* *Quern v. Jordan*, 440 U.S. 332, 346-47 (1979) (deciding the issue of whether the notice constituted permissible prospective relief or a retroactive one that requires the payment of funds from the state treasury).

167. *See id.* at 347-48 (finding that the notice simply appraises plaintiff class members of the existence of administrative procedures already available).

168. *Id.* at 348.

169. *See id.* at 349 (concluding that “[t]he notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue”).

170. 502 U.S. 197 (1991).

171. 45 U.S.C. §§ 51-60 (1994).

172. *See Hilton*, 502 U.S. at 199 (stating that the commission is a common carrier engaged in interstate commerce and is an agency of the State of South Carolina).

173. 46 U.S.C. § 688 (1994).

174. *See Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (holding that the general language of the Jones Act does not authorize suits against the states in federal court).

Carolina state court.<sup>175</sup> Subsequently, the South Carolina Supreme Court concluded that FELA does not subject a state to liability in state courts.<sup>176</sup> The Supreme Court reversed, making quite clear that the case involved two distinct inquiries.<sup>177</sup> The first inquiry was one of statutory construction, and the Court held that FELA does apply to state-owned railroads.<sup>178</sup> The second inquiry was whether the Eleventh Amendment bars the lawsuit.<sup>179</sup> The Court concluded that the holding of *Welch* was not determinative of whether a FELA action may be maintained in state court against a state agency.<sup>180</sup> The Court repeated that the Eleventh Amendment does not apply in state courts.<sup>181</sup> The Court reversed the state court's judgment and remanded the case for further proceedings.<sup>182</sup>

More recently, even Justice Kennedy and Chief Justice Rehnquist appeared to assume in *Coeur d'Alene Tribe of Idaho*<sup>183</sup> that the Constitution would not preclude a suit in state court against state officials.<sup>184</sup> While finding that the Eleventh Amendment barred the federal court from hearing the Tribe's claim to ownership of specified submerged lands,<sup>185</sup> they emphasized that the state court was available to resolve the federal claim:

Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be applicable in federal court but for an exception based on *Young*. . . . Assuming the availability of a state forum with the authority and procedures adequate for the effective vindication of federal law, due process concerns would not be implicated by having state tribunals resolve federal-question cases.<sup>186</sup>

The Eleventh Amendment and *Younger* line of cases effectively

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175. See *Hilton*, 502 U.S. at 199-200.

176. See *Hilton v. South Carolina Pub. Ry. Comm'n*, 411 S.E.2d 424 (S.C. 1990).

177. See *Hilton*, 502 U.S. at 206 ("The requirement also serves to make parallel two separate inquiries into the state liability.").

178. *Id.* at 201-04.

179. See *id.* at 206.

180. See *id.* at 204.

181. *Id.* at 205 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980); and *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979)).

182. See *id.* at 207.

183. 521 U.S. 261 (1997).

184. See *id.* at 287-88 (allowing Idaho to rely on Eleventh Amendment immunity and permitting the state to insist upon responding to the Tribe's claims in its own courts instead of a federal forum).

185. See *id.* at 274 (finding the Idaho State courts to be an adequate judicial forum for resolving the dispute between the tribe and the state).

186. *Id.* at 274-75.

limited the federal courts' role in enforcing federal law against state officials.<sup>187</sup> The parallel trends re-established, to some extent, the pre-Reconstruction scheme for federal law enforcement.<sup>188</sup> In many circumstances, litigants are forced to pursue their federal claims against state officials in state court, and then seek Supreme Court review.<sup>189</sup> The Court inadequately explained federalism concerns as the basis for restricting federal jurisdiction and returning to the earlier scheme.<sup>190</sup> Moreover, in its deference to states' rights, the Court paid little, if any, attention to the federal interests in providing a federal forum.<sup>191</sup> Indeed, the Court seemed to reject the idea that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."<sup>192</sup> Although the federal judiciary's role was restricted, both trends presupposed that state courts would be available to protect federal rights from state intrusion.<sup>193</sup> During the past term, the Court began dismantling that remaining half of the protection.

## II. LIMITING THE ROLE OF STATE COURTS

The *Alden* case began in 1992 when ninety-six current and former probation and parole officers sued their employer, the State of Maine, in federal district court, alleging that the state failed to pay overtime as required by the Fair Labor Standards Act ("FLSA").<sup>194</sup> Government agencies are included within FLSA's definition of employer.<sup>195</sup> FLSA provides that an action to recover liability "may be maintained against any employer (including a public agency) in any

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187. See Soifer & Macgill, *supra* note 90, at 1142 (stating that in *Younger v. Harris* the Court began limiting federal judicial power and thereby advantaging the states).

188. See *id.* at 1143 (asserting that the Court's holding in *Younger* undermined the post-Reconstruction concept of federalism).

189. See, e.g., *supra* notes 124-27 and accompanying text (explaining that federal courts do not have the power to adjudicate disputes brought against state officers and involving state law).

190. See Soifer & Macgill, *supra* note 90, at 1142 (stating that the Court's opinion in *Younger* articulated vague doctrines of equity and states' rights rhetoric in order to justify restricting federal jurisdiction).

191. See, e.g., *id.* at 1142-43 (discussing how the *Younger* Court subordinated federal courts to state courts as "guarantors of civil liberties").

192. William J. Brennan, Jr., *State Constitutions and Protections of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

193. See *id.* at 502-03 ("Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary.").

194. 29 U.S.C. §§ 201-219 (1994).

195. See *id.* § 203(d) (defining the term "employer" to include a public agency).

Federal or State court of competent jurisdiction by any one or more employees.<sup>196</sup> The action was commenced before the *Seminole* decision, and at the time the Eleventh Amendment did not bar the federal lawsuit because FLSA contained a clear statement of congressional intent to abrogate the state's immunity.<sup>197</sup>

Maine's defense was that the officers were exempt from the overtime provisions of FLSA.<sup>198</sup> The district court determined, however, that FLSA covered the plaintiffs, who were only partially exempt.<sup>199</sup> Following that ruling, Maine altered its policy to comply in the future with federal law.<sup>200</sup> Nevertheless, a dispute remained over the entitlement to overtime back pay, and the district judge submitted the plaintiffs' claims to a special master.<sup>201</sup> While the proceedings on damages were pending, the Supreme Court decided *Seminole*, holding that Congress lacks the power under Article I to abrogate a state's immunity from suit in federal court.<sup>202</sup> Relying on *Seminole*, the state moved to dismiss the federal action for lack of subject matter jurisdiction, and the district court granted the motion.<sup>203</sup> On appeal, the Court of Appeals agreed that *Seminole* required the federal lawsuit to be dismissed.<sup>204</sup>

The plaintiffs then refiled the action in state court.<sup>205</sup> Despite the clear statutory language authorizing a state court action under FLSA, the Superior Court dismissed the lawsuit on the basis of sovereign immunity.<sup>206</sup> The plaintiffs appealed to the Maine Supreme Court, which framed the issue in a rather interesting fashion.<sup>207</sup> The court

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196. *Id.* § 216(b).

197. *See Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997) ("Congress has clearly manifested its intent to abrogate state sovereign immunity from private FLSA suits in federal courts. . .").

198. *See id.* at 41.

199. *See Mills v. Maine*, 839 F. Supp. 3, 6 (D. Me. 1993) (finding that the plaintiffs were not exempt from FLSA's coverage).

200. *See Mills*, 118 F.3d at 41 ("Following the district court's ruling, the state brought itself into compliance with FLSA's wage and hour requirements.").

201. *See id.* (stating that the special master was to settle dispute between litigants as to how much overtime backpay Maine owed the probation officers).

202. *See Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) ("The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court.").

203. *See Mills*, 118 F.3d at 41.

204. *See id.* at 56 ("[W]e conclude that the district court's decision to dismiss for lack of subject matter jurisdiction was correct."). The court also concluded that FLSA's abrogation of immunity could not be viewed appropriately as an exercise of Congress' Fourteenth Amendment enforcement powers. *See id.* at 48.

205. *See Alden v. Maine*, 715 A.2d 172, 173 (Me. 1998).

206. *See id.* (granting the state's motion for judgment on the pleadings on the grounds of the doctrine of state sovereign immunity).

207. *See id.*

did not focus on whether the state was immune under the state's common law or a state statute. Instead, the court addressed the question of "whether state sovereign immunity, *as reflected in the Eleventh Amendment*, protects the State from this federally created cause of action in its own courts."<sup>208</sup> A divided court answered the question in the affirmative.<sup>209</sup> The majority relied on quotations taken out of context from *Seminole*,<sup>210</sup> and observed that "[i]f Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims."<sup>211</sup>

The United States Supreme Court granted certiorari<sup>212</sup> to resolve this conflict among the lower courts.<sup>213</sup> At first glance, the case looks like an easy one to decide. FLSA explicitly applies to the states, and the Court previously upheld the constitutionality of the Act in *Garcia*.<sup>214</sup> Because the Eleventh Amendment does not apply in state court,<sup>215</sup> the state might try to assert a sovereign immunity defense based on state law. If state law conferred immunity under such circumstances, however, it would be inconsistent with FLSA, which states that private parties may bring enforcement suits in state court.<sup>216</sup> The sovereign immunity defense, therefore, should fail under the Supremacy Clause.<sup>217</sup> *Hilton* supports this result<sup>218</sup> and

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208. *Id.* (emphasis added).

209. *See id.* at 173-74 ("Although Congress may have intended to subject the states to the overtime provisions of the FLSA, it does not have the necessary power, pursuant to the Constitution, to accomplish this end.").

210. *See id.* at 174.

211. *Id.*

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

213. *See Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998), *abrogated by Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress can not subject a state to suit in state court without its consent).

214. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (deciding that the "FLSA contravened no affirmative limit on Congress' power under the Commerce Clause").

215. *See* U.S. CONST. amend. XI ("The judicial power of the *United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.") (emphasis added).

216. *See* 29 U.S.C. § 216(b) (1994) ("An action to recover liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees. . .").

217. *See* U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . .").

218. *See supra* notes 138-49 and accompanying text; *see also* *Howlett v. Rose*, 496 U.S. 356, 367 (1990) (noting that "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws by the state legislature"); *Felder v. Casey*, 487 U.S. 131 (1988) (stating

*Seminole* is easily distinguishable on the ground that it dealt with Eleventh Amendment immunity in federal court.<sup>219</sup>

*Alden* may illustrate that even easy cases can make bad law. Continuing to protect states' rights,<sup>220</sup> the Court held for the first time that a state's sovereign immunity in state court is constitutionally based<sup>221</sup> and that Congress lacks the power under Article I to abrogate this immunity.<sup>222</sup> The Court conceded, as it must, that the Eleventh Amendment does not literally support this result.<sup>223</sup> Rather, the Court pieced together arguments based on "history, practice, precedent, and the structure of the Constitution"<sup>224</sup> in concluding that the states' immunity in these circumstances is supported by "fundamental postulates implicit in the constitutional design."<sup>225</sup>

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"[p]rinciples of federalism, as well as the Supremacy Clause, dictate that such a state law must not give way to vindication of the federal right when that right is asserted in state court").

219. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Respondent's motion to dismiss argued that "the suit violated the State's sovereign immunity from suit in federal court." *Id.* at 52 (emphasis added).

220. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (stating that the federal government may neither issue directives requiring states to address particular problems, nor require officers of the states to administer or enforce any federal regulatory program); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997) (finding that Idaho's "dignity and status of its statehood allows [the state] to rely on its Eleventh Amendment immunity and to insist upon responding to [the] claims in its own courts"); *Seminole Tribe*, 517 U.S. at 76 (holding that the Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government may not compel states to enact or administer a federal regulatory program).

221. See *Alden v. Maine*, 527 U.S. 706, 730 (1999) (stating that "[t]his separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution").

222. See *id.* at 732 ("Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.").

223. "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the State's immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." See *id.* at 728-29.

224. *Id.* at 741.

225. *Id.* at 729. My criticism of *Alden* focuses on the Court's attempt to use federalism as a justification for the result. Another criticism may be directed against what appears to be a misapplication of sovereign immunity. As Justice Holmes explained, a sovereign is immune "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (deciding that a Michigan statute addressing maritime and admiralty issues was constitutional). In *Alden*, of course, the suit is not against the United States, which is the authority that made the law. For a discussion of sovereign immunity more generally, see CLYDE



For historical evidence, the majority pointed to the ratification debates, excerpts from the Federalist Papers, and debates surrounding the adoption of the Eleventh Amendment.<sup>226</sup> To be sure, this material supports the proposition that the states' sovereign immunity was an important matter. After the Revolutionary War, the states were heavily indebted and were concerned about being sued in newly created federal courts.<sup>227</sup> The prompt response to *Chisholm* underscored the seriousness of the states' concern in the issue.<sup>228</sup> The historical evidence, however, does not address the issue of a state's immunity from suit in its own court but rather focuses on immunity in federal court.<sup>229</sup> The Court previously reviewed this historical material in *Nevada v. Hall* and concluded that "all of the relevant debate[ ] concerned questions of *federal-court jurisdiction* and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves *in those courts*."<sup>230</sup>

Even the historical context surrounding the adoption of the Eleventh Amendment does not assist in resolving the issue in *Alden*. The Court remains divided over the purpose of the Eleventh Amendment.<sup>231</sup> However, acceptance of the majority's view at best leads to the conclusion that the Amendment was intended to restore an original understanding that Article III did not alter state sovereign immunity from suit in federal court. That view begs the question of whether the source of the immunity is the common law or the Constitution and, in any event, whether it focuses only on immunity in federal court.

The *Alden* majority also relied on congressional practice to support

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JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

226. See *Alden*, 527 U.S. at 715. Although the Court relies heavily on the Federalist Papers, it previously recognized that the "Federalist reads with a split personality' on matters of federalism." *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997) (quoting DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 198-99 (3d ed. 1996)).

227. See *Nevada v. Hall*, 440 U.S. 410, 418 (1979) (examining the rise of the doctrine of sovereign immunity in the United States in addressing the issue of whether a state is constitutionally immune from suit in the courts of another state).

228. See *id.* at 420 (noting that the decision in *Chisholm* quickly led to the adoption of the Eleventh Amendment).

229. See *id.* at 420-21 (emphasizing that the historical evidence, which focuses on suits against states in federal courts, does not readily clarify the issue before the court of a state's immunity from suits in another state's courts).

230. *Id.* at 420-21 (emphasis added).

231. See *supra* notes 97-101 and accompanying text (detailing the jurisprudential evolution of the Eleventh Amendment as it applies conflicts between the federal and state governments).

its conclusion.<sup>232</sup> Such reliance is troubling both in this specific context and as a general matter of constitutional interpretation. The majority suggested that its historical analysis was supported by early congressional practice, which did not include statutes subjecting states to suits in their own courts.<sup>233</sup> As the majority conceded,<sup>234</sup> Congress, in fact, enacted statutes that required state courts to hear certain matters. Federal laws adopted between 1790-1802 obligated state courts to perform the following duties: record applications for citizenship, transmit naturalization records to the Secretary of State, register aliens seeking naturalization, resolve controversies involving seaworthiness of vessels, hear claims of slave owners to fugitive slaves, accept claims of Canadian refugees who assisted the United States during the Revolutionary War, and order deportation of alien enemies.<sup>235</sup> The majority noted the absence of any federal laws subjecting states to lawsuits in state court and therefore concluded that Congress did not believe it could authorize such suits.<sup>236</sup>

The Court's conclusion is a nonsequitur. One cannot conclude that because Congress failed to enact a law, Congress must lack the power to do so. In this regard, Justice O'Connor in *New York v. United States* noted:

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.<sup>237</sup>

The dissenters in *Alden* echoed this theme when they observed that

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232. See *Alden v. Maine*, 527 U.S. 706, 743-44 (1999) (stating that early congressional practice provided convincing evidence of the Constitution's meaning).

233. See *id.* (contrasting the lack of such statutes with the enactment of certain statutes authorizing federal suits in state courts).

234. See *id.* (acknowledging the existence of various statutes authorizing federal suits in state courts).

235. See *Printz v. United States*, 521 U.S. 898, 905-06 (1997) (stating that these requirements "applied only in states that authorized their courts to conduct naturalization proceedings"). See generally Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925) (describing the statutory sources of various obligatory duties of state courts).

236. See *Alden*, 527 U.S. at 744.

237. 505 U.S. 144, 157 (1992) (holding that although Congress may offer incentives to states to adopt programs to further federal interests, Congress may not compel states to enact a federal regulatory program).

there are many instances, including FLSA, in which Congress enacted laws that did not exist in the past.<sup>238</sup> “The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes. But, the Framers surprise . . . is no threat to the constitutionality of any one of them. . . .”<sup>239</sup>

The *Alden* majority’s reliance on precedent is equally unpersuasive. No prior case addressed whether a state’s sovereign immunity is constitutionally based or whether Congress can lift that immunity in state court cases. The majority was forced to rely on language from cases that are not on point,<sup>240</sup> and strained to distinguish *Hilton*, perhaps the most analogous case and the one decision supporting the proposition that Congress may subject non-consenting states to suit in state court.<sup>241</sup> The Court read that decision narrowly,

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238. See *Alden*, 527 U.S. at 807 (Souter, J., dissenting) (commenting on the reach of Congress under the Commerce Clause).

239. *Id.* More troubling perhaps than the lapse in logic is the majority’s underlying premise of constitutional interpretation. The Court’s attempt in *Alden* and other contexts to limit the powers of the federal branches of government to those that may have existed centuries ago fundamentally restricts the function of the Constitution. See, e.g., *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (holding that, in an action for monetary damages, a federal court does not have the authority to issue a preliminary injunction barring a defendant from transferring assets in which no lien or equitable interest is claimed); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the obligation to conduct background checks on prospective handgun purchasers imposed an unconstitutional obligation on state officers); *New York v. United States*, 505 U.S. 144 (1992) (ruling that the monetary and access incentive of the Low Level Radioactive Waste Policy Act are consistent with the Constitution). While the current majority’s approach to constitutional interpretation is worthy of a separate article, it is sufficient here to recall Justice Holmes’ observation:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

*Missouri v. Holland*, 252 U.S. 416, 433 (1920) (addressing whether a U.S. Treaty and a related federal statute providing for the protection of migratory birds in the United States and Canada is void as interfering with the states’ reserved rights, in a decision upholding the treaty and the statute).

240. See *Alden*, 527 U.S. at 727-28 (examining decisions of the Court, such as *Hans v. Louisiana*, 134 U.S. 1 (1889), that held sovereign immunity barred a citizen from bringing suit against his own state under federal question jurisdiction).

241. See *supra* notes 170-81 and accompanying text (denying the application of the Eleventh Amendment to state courts and thereby subjecting non-consenting states to state court adjudication).

confining it to the specific circumstances of the case.<sup>242</sup> Similarly, the Court dismissed the relevance of the statement that the Eleventh Amendment is inapplicable in state court as a “truism” that does not resolve the issue.<sup>243</sup> Finally, the majority simply ignored the implicit understanding of *Edelman* that the state courts would be available to resolve the federal question.<sup>244</sup>

The majority suggested that *Ex parte Young* supports its conclusion that the states may assert a constitutionally based sovereign immunity in state courts.<sup>245</sup> The Court reasoned that “[h]ad we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine.”<sup>246</sup> This explanation of *Ex parte Young* is novel, at best, and was not the previously stated basis for the decision. *Ex parte Young* was not premised on a desire to provide *some* forum for the lawsuit but rather on the need to provide a *federal* forum to vindicate federal rights.<sup>247</sup> The Court previously explained the rationale for the *Ex parte Young* rule as follows:

[T]he injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is “stripped of his official or representative character,” . . . . [T]he *Young* doctrine has been accepted as necessary to permit the *federal* courts to vindicate federal rights and hold state officials responsible to “the supreme authority of the United States.”<sup>248</sup>

The real heart of *Alden* lies not in history, practice, or precedent, but in the majority’s view of the structure of the Constitution or, as

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242. *Alden*, 527 U.S. at 735-38 (stating that its holding was not a recognition of congressional power to subject non-consenting states to suits in their own courts, but was merely an adherence to “the narrow proposition that certain states had consented to be sued by injured workers covered by FELA, at least in their own courts”).

243. *Id.* at 735-36.

244. *See supra* notes 162-68 and accompanying text (analyzing the application of the Eleventh Amendment against state officials in state courts).

245. *See Alden*, 527 U.S. at 747.

246. *Id.*

247. *See* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984) (discussing the *Ex Parte Young* rule in addressing whether a federal court may award injunctive relief against state officials on the basis of state law).

248. *Id.* at 104-05 (emphasis added) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1909), which noted that such principles include the requirement that Congress treat the statute in a way that reflects their “status as residuary sovereigns and joint participants in the governance of the Nation”).

they described the matter, the “essential principles of federalism.”<sup>249</sup> The Court observed that a threat to federalism exists because the imposition of liability may impair the financial integrity of the state, undermine state autonomy, and strain the state’s ability to govern according to the will of its citizens.<sup>250</sup> In making this observation, the majority blurred the distinction between the substantive provisions of the Act and the duty to enforce those provisions. The identified threats are a product of the underlying substantive provisions of the federal law that impose wage requirements on the state.<sup>251</sup> Under the Supremacy Clause, the states are bound to follow FLSA wage requirements and, in doing so, may be forced to displace their own policies and alter their own fiscal plans.<sup>252</sup> The majority did not question the constitutionality of these substantive requirements as applied to the states, which have a checkered constitutional past,<sup>253</sup> but were upheld in *Garcia*.<sup>254</sup> The Court previously explained—and *Alden* did not dispute<sup>255</sup>—that *Garcia* stands for the proposition that Congress has the power under the Commerce Clause to impose generally applicable requirements on the states.<sup>256</sup> Any displacement of state policies, thus, is a result of the states’ obligation to comply with the substantive mandates of federal law, and does not flow from the duty of state courts to enforce the provisions.

The requirement that state courts enforce the underlying federal provisions undermines state policies only if one assumes that in the absence of judicial enforcement the state is free to ignore federal law

249. See *Alden*, 527 U.S. at 748.

250. See *id.* at 749 (detailing the Court’s reluctance to “commandeer the entire political machinery of the state against its will”).

251. See *id.* at 712.

252. See *id.* at 806 (Souter, J., dissenting) (asserting that “the law is settled that federal legislation enacted under the Commerce Clause may bind states without having to satisfy a test of undue incursion into state sovereignty”).

253. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* in holding that Congress may enforce wage requirements against a local government’s mass-transit authority); *National League of Cities v. Usery*, 426 U.S. 883 (1976) (holding that Congress may not impose wage and hour requirements upon states).

254. See *supra* note 216 (citing 29 U.S.C. § 216(b), which allows actions against any employer in either federal or state court).

255. Indirectly, *Alden* seriously erodes the *Garcia* decision by making FLSA unenforceable against the states, unless they waive their sovereign immunity. See *Alden*, 527 U.S. at 759-60.

256. See *New York v. United States*, 505 U.S. 144, 160 (1992) (stating that in previous cases, the Court had interpreted the Tenth Amendment to authorize Congress to subject the states to generally applicable laws). In addition, the *Alden* majority concedes that the federal government could bring enforcement proceedings against the states, thereby creating the very threats supposedly created by the challenged provision. See *Alden*, 527 U.S. at 757.

and pursue its own policies. This assumption would leave compliance with federal law to the whim of state officials, thereby turning the Supremacy Clause on its head, and defeating the supremacy and uniformity of federal law.

Certainly, a federal law that requires state courts to entertain federal claims has an impact on the allocation of state resources, specifically state judicial resources.<sup>257</sup> The time of judges, court clerks, and other judicial officers would be devoted to the disposition of federal claims.<sup>258</sup> These costs, however, can be considered a threat to state sovereignty only if federal law is analogous to the law of a country. To the contrary, when Congress adopts a federal law it speaks for all the people and all the states, and the federal policy is as much the policy of the state as if enacted by the state legislature.<sup>259</sup> The Court emphasized this point when it held that

[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount, sovereignty.<sup>260</sup> The laws of the United States and the individual state form "one system of jurisprudence, which constitutes the law of the land for the State."<sup>261</sup>

The majority's notion that federal power to authorize suits for damages would "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens"<sup>262</sup> is difficult to understand. This view treats the states as completely separate and independent sovereigns and overlooks the fundamental concept that the "will" of state citizens should be viewed to include federal law.<sup>263</sup> Even Justice Kennedy and Chief Justice Rehnquist, two of the Court's strongest champions of states' rights, previously recognized this basic proposition:

Interpretation of federal law is the proprietary concern of state, as

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257. See *Alden*, 527 U.S. at 750-51 (discussing the allocation of "scarce resources among competing needs and interests").

258. See *id.* (noting that this allocation "lies at the heart of the political process").

259. See *Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912) (discussing the inadmissibility of the notion that a state court may freely decline jurisdiction when a federal law is in conflict with state policy).

260. *Claffin v. Houseman*, 93 U.S. 130, 136 (1876) (discussing whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, or treaties of the United States).

261. *Id.* at 137.

262. *Alden*, 527 U.S. at 803.

263. See *id.* (Souter, J., dissenting) (asserting that "the will of the citizens of the United States . . . trumps that of the citizens of the State").

well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself. The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order.<sup>264</sup>

The majority appears to adopt a rather curious "symmetrical" view of federalism. Under this view, state courts cannot be required to hear FLSA claims against the states because federal courts cannot be required to do so.<sup>265</sup> This notion disregards the impact of the Eleventh Amendment, which prevents the suit in federal court but does not apply in the state forum.<sup>266</sup> Moreover, the Court considered and rejected a similar argument fifty years ago in *Testa v. Katt*.<sup>267</sup> There, the State of Rhode Island argued that its state courts need not enforce federal penal laws because federal courts are not required to enforce state penal laws.<sup>268</sup> Justice Black, writing for a unanimous Court, rejected this suggestion, noting that it ignores the "effect of the supremacy clause on the relation of federal laws to state courts."<sup>269</sup>

The practical effect of *Alden* and *Seminole* is to limit the enforceability of federal law against the states. In federal court, the states are protected by Eleventh Amendment immunity, which Congress cannot lift using its Article I powers.<sup>270</sup> In their own courts, states can now assert the constitutionally based sovereign immunity doctrine.<sup>271</sup> Of course, as the majority suggested, the supremacy of

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264. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275-76 (1997) (analyzing whether the Eleventh Amendment is a bar to seeking prospective relief against individual state officers in a federal court based on a federal right).

265. See *Alden*, 527 U.S. at 753 (calculating that otherwise "Congress may in some cases act only through instrumentalities of the state").

266. See generally *Coeur d'Alene Tribe*, 521 U.S. at 261 (holding that the Eleventh Amendment bars suit against states in federal courts based on federal rights, but does not preclude the action in a state court).

267. 330 U.S. 386 (1947) (considering the issue of whether a state can deny enforcement to claims stemming from a valid federal law).

268. See *id.* at 388 (reasoning that a state is not obligated to enforce the penal laws of government which is foreign, such as the United States).

269. *Id.* at 393-94.

270. See *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (addressing the issue of whether a court should allow an action based on *Ex parte Young* where Congress has prescribed a detailed remedial scheme).

271. See *Alden v. Maine*, 527 U.S. 706, 758 (1999) (stating that the Court is merely

federal law might be achieved by the good faith of the states in honoring federal requirements.<sup>272</sup> In light of Maine's initial failure to comply with FLSA, however, it seems somewhat disingenuous to rely on that good faith.

As a theoretical matter, there may be ways to lessen *Alden*'s potential to seriously restrict an individual's ability to enforce federal law against a state. The decision, for example, does not preclude a suit—in state or federal court—against state officials for prospective injunctive relief.<sup>273</sup> For two reasons, such an action for limited relief may not be effective in securing state compliance with federal law. First, the continued vitality of the *Ex parte Young* rule is uncertain. In *Seminole*, the Court held that where Congress prescribes a detailed remedial scheme, a court should hesitate before permitting an action based on *Ex parte Young*.<sup>274</sup> Moreover, in *Coeur d'Alene* the Court sent signals to state officials that it may be willing to consider additional limits on the *Ex parte Young* rule.<sup>275</sup>

Second, the availability of prospective relief alone may not be sufficient to encourage state compliance with federal mandates. Prior to *Alden*, a state was immune from damages in federal court<sup>276</sup>

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attempting to establish "what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system"). Unless the Court is ready to reconsider well-settled principles, even after *Alden* it should hold that a state may not manipulate its sovereign immunity to discriminate against federal rights. See *Testa*, 330 U.S. at 388 (deciding whether state courts can decline to enforce federal laws if the state court deems a federal law to be outside of its jurisdiction). See generally Nicole Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1152-53 (1984) (asserting that the Supremacy Clause requires state courts to adjudicate federal claims and apply federal substantive law, or to adjudicate claims under concurrent jurisdiction); Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 340 (1976) (examining the obligation of state to hear federal cases).

272. See *Alden*, 527 U.S. at 755 (declaring that the Court is "unwilling to assume the states will refuse to honor the Constitution or obey the binding laws of the United States").

273. See *id.* at 755-57 (discussing lawsuits to which the Court's holding would not extend).

274. See *Seminole Tribe*, 517 U.S. at 74. See generally Vicki Jackson, *supra* note 150. But see Monaghan, *supra* note 150 (arguing that *Seminole* leaves *Ex parte Young* intact).

275. See *supra* notes 131-36 and accompanying text. State officials responded to this signal in a recent case, *Summit Medical Associates P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999). Plaintiffs sued Alabama officials, challenging enforcement of certain abortion statutes. See *id.* at 1329. Relying on *Coeur d'Alene*, the officials argued that the Eleventh Amendment bars the litigation and that the *Ex parte Young* rule did not apply because the case involves special sovereignty interests. See *id.* at 1337-38. The Eleventh Circuit rejected the argument, finding that the state has a significant interest in regulating abortions but that the relief would not impair that interest. See *id.* at 1340-41. Nevertheless, as the case illustrates, state officials have read *Coeur d'Alene* to create another possible argument limiting the *Ex parte Young* rule.

276. See *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1889) (holding that a state may not



but faced the possibility of having a state court direct damages or retroactive relief.<sup>277</sup> After *Alden*, there is no real cost to the state for ignoring federal law.<sup>278</sup> Absent the threat of damages, the state has little, if any, incentive to align its policies with federal requirements.<sup>279</sup> State officials can ignore federal requirements, confident that if they are sued and lose they simply will be directed to comply in the future. In *Alden* itself, Maine eventually agreed to change its practices to conform to FLSA but was relieved of any responsibility to pay damages for its past illegality.<sup>280</sup>

*Alden* mentioned that individuals might attempt to enforce federal law by filing damage actions against state officials in their individual capacities.<sup>281</sup> The Eleventh Amendment and the *Alden* doctrine bar damage actions where the judgment would be paid by the state; they do not restrict an award of damages to be paid by the state official.<sup>282</sup> Practical restrictions, however, reduce the likelihood of recovering money judgments from state officials. First, officials may assert a personal immunity from damage actions. Some officials, such as judges, are absolutely immune from lawsuits.<sup>283</sup> Other officials, such as members of the executive branch, have a qualified immunity and cannot be held liable unless their conduct violates “clearly established

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be sued by its own citizens or citizens of another state for money). The state was not immune, of course, if it waived its immunity, *see id.* at 17, or Congress used its Fourteenth Amendment power to abrogate the immunity. *See Seminole Tribe*, 517 U.S. at 59 (indicating that section 5 of the Fourteenth Amendment gave congress the power to abrogate state sovereign immunity).

277. *See, e.g., Willis v. Lascaris*, 499 F. Supp. 749, 760 (N.D.N.Y. 1980) (stating that New York state courts recognized the remedy of retroactive relief in public assistance cases).

278. In some instances the federal law may authorize the prevailing party to recover attorneys’ fees, thus imposing a possible cost on the state. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court ruled that the Eleventh Amendment does not preclude an award of attorney’s fees against the state under the Civil Rights Attorney’s Fees Award Act, 42 U.S.C. § 1988 (1994), because such an award is “ancillary” to the injunctive relief. *See id.* at 690 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)).

279. *Cf. Owen v. City of Independence*, 445 U.S. 622, 652 (1980) (noting that the threat of damages creates an incentive for officials of municipalities to institute rules which will minimize the infringement of constitutional rights).

280. *See Alden v. Maine*, 527 U.S. 706, 759 (1999) (noting that although Maine altered its conduct to comply with federal law, the state should not be stripped of its immunity).

281. *See id.* at 757 (stating that a state officer in his official capacity is subject to a suit for damages so long as the relief sought is not from the treasury).

282. *See id.* (indicating that an individual may obtain money damages if the relief comes from the officer personally).

283. *See Stump v. Sparkman*, 435 U.S. 349, 355-56 (1974); *see also Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1976) (discussing absolute immunity of prosecutors).

statutory or constitutional rights of which a reasonable person would have known.”<sup>284</sup> Second, actions seeking damages against public officials can be heard by juries, which may be reluctant to impose personal liability on individuals attempting to perform their public duties.<sup>285</sup> Finally, even if a jury directs a damage award, the officials may be judgment-proof.

The majority in *Alden* also suggested that compliance with federal law might be achieved through litigation brought by the United States against the state.<sup>286</sup> Undoubtedly, the states cannot assert an Eleventh Amendment or sovereign immunity defense to suits brought by the federal government.<sup>287</sup> Although suits by the United States may not be barred, for practical reasons, they are not likely to serve as effective vehicles to enforce the federal law.<sup>288</sup> In many instances, the United States does not have adequate enforcement resources.<sup>289</sup> The experience with FLSA illustrates the difficulty. When Congress amended FLSA in 1974, it determined that “the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming.”<sup>290</sup> Moreover, Congress recognized that because the 1974 amendments extended

284. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing qualified immunity for discretionary functions of government officials).

285. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 70 (1983) (reporting that the risk of an official being held personally liable is very small).

286. See *Alden*, 527 U.S. at 759-60 (noting that the Constitution permits the United States to bring a suit against a state on behalf of a party).

287. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) (stating that the Supreme Court has jurisdiction over suits by the United States against a state). In *Alden*, the Court attempted to justify the distinction between a suit by the United States and one by private citizens as follows:

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,” U.S. Const., Art. II, §3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States’ sovereign immunity. 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.

*Alden*, 527 U.S. at 755-56.

288. See *Alden*, 527 U.S. at 810 (Souter, J., dissenting) (indicating that the federal government’s enforcement capability is sufficient).

289. See *id.* (citing to congressional findings that the Secretary of Labor could not provide adequate relief in all cases).

290. S. REP. NO. 93-690, at 26-27 (1974) (providing justification for why enforcement mechanisms that permit state employees to bring suit are necessary).

coverage to additional state employees “it is now all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights.”<sup>291</sup>

The majority observed that enforcement actions against states are permitted if Congress enacts the provisions using its Fourteenth Amendment powers.<sup>292</sup> The Court stated: “When Congress enacts appropriate legislation to enforce this Amendment, . . . federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution.”<sup>293</sup> What the Court gave with one hand, it took away with the other. In two cases<sup>294</sup> decided a month after *Alden*, the Court narrowly construed congressional power under the Fourteenth Amendment to abrogate a state’s immunity.

The decision in *Florida Prepaid Postsecondary Education Expense Board*<sup>295</sup> exposes the Court’s limited view of the scope of Congress’ Fourteenth Amendment powers. There, the College Savings Bank brought a patent infringement action under the Patent and Plant Variety Protection Remedy Clarification Act<sup>296</sup> against Florida Prepaid, a Florida state entity.<sup>297</sup> The Act, as amended in 1992, expressly abrogates a state’s immunity under the Eleventh Amendment or any other doctrine of sovereign immunity.<sup>298</sup> The congressional history<sup>299</sup> indicates that Congress justified the Act under the Commerce Clause,<sup>300</sup> the Patent Clause,<sup>301</sup> and section 5 of the

291. *Id.*

292. See *Alden*, 527 U.S. at 756 (explaining that the states surrendered a portion of sovereignty when the Fourteenth Amendment was adopted).

293. *Id.*

294. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) (holding that the Trademark Remedy Ratification Act did not validly abrogate Florida’s sovereign immunity under the Fourteenth Amendment); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

295. 119 S. Ct. 2199 (1999).

296. 7 U.S.C. §§ 2541(a)–(b), 2570 (1994); 35 U.S.C. §§ 271(h), 296 (1994).

297. See *Florida Prepaid*, 119 S. Ct. at 2203 (describing College Savings’ allegations that Florida Prepaid willfully infringed upon its patent).

298. See 35 U.S.C. § 296(a) (1994). The statute provides: “Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a state acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity from suit in federal court. . . .” *Id.*

299. See H.R. REP. NO. 101-960, at 39-40 (1990) (stating the provision was a proper exercise of Congress’ power to abrogate state sovereign immunity) (citing U.S. CONST. art. I); S. REP. NO. 102-280, at 7-8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3087, 3093-94 (indicating that Congress’ power to abrogate state sovereign immunity was constitutional “under the Patent Clause, Commerce Clause, and the enforcement provision of the Fourteenth Amendment”).

300. See U.S. CONST. art. I, § 8, cl. 3.

Fourteenth Amendment.<sup>302</sup>

The Court in *Florida Prepaid* agreed that the congressional intent to abrogate state immunity from suit “could not have been made any clearer.”<sup>303</sup> Nevertheless, it concluded that Congress lacked power to abrogate that immunity.<sup>304</sup> Following its decision in *Seminole*, the Court held that Congress lacked power under either the Commerce Clause or the Patent Clause to lift a state’s immunity.<sup>305</sup> Moreover, it determined that the abrogation of immunity could not be justified by Congress’ express reliance on the Fourteenth Amendment.<sup>306</sup> Citing *City of Boerne v. Flores*,<sup>307</sup> the Court stated that for “Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”<sup>308</sup>

Initially, the Court determined that Congress failed to identify conduct that violated the Fourteenth Amendment.<sup>309</sup> The majority observed that a state’s infringement of a patent does not itself violate the Constitution.<sup>310</sup> There is a taking of property without due process only if the state provides inadequate remedies to the injured party.<sup>311</sup> Congress, however, did not find intentional patent infringement by the states, or the existence of inadequate state remedies.<sup>312</sup> The Court concluded that the “legislative record does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation.”<sup>313</sup>

With respect to the second prong of the *Flores* test, the Court held

301. See U.S. CONST. art. I, § 8, cl. 8.

302. See U.S. CONST. amend. XIV, § 5.

303. *Florida Prepaid*, 119 S. Ct. at 2205 (noting that Congress explicitly stated that no state would be immune in § 296(a)).

304. See *id.* at 2210-11 (stating that the Patent Remedy Act was not a constitutional exercise of Congress’ power to abrogate state sovereign immunity on Fourteenth Amendment or Article I grounds).

305. See *id.* at 2211 (indicating that *Seminole Tribe* prevents the Court from ruling that the Act is constitutional abrogation of state sovereign immunity Article I).

306. See *id.* at 2210 (stating that the historical record of the Act is a constitutional abrogation based on the Fourteenth Amendment).

307. 521 U.S. 507 (1997).

308. *Florida Prepaid*, 119 S. Ct. at 2207 (finding that “Congress identified no pattern of patent infringement by the States”).

309. See *id.*

310. See *id.* at 2208 (stating that the deprivation of a constitutionally protected interest by a state is not itself unconstitutional in procedural due process claims).

311. See *id.* (holding that a patent infringement is unconstitutional if a state provides inadequate remedies for injured patent owners or no remedies at all).

312. See *id.* at 2209 (noting Congress’ failure to make the required findings).

313. *Id.* at 2210 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)).

that the provisions of the Act are out of proportion to the remedial objective.<sup>314</sup> Congress lifted the immunity of all states for all kinds of patent infringements.<sup>315</sup> The Court faulted Congress for failing to limit the abrogation to instances in which the state refuses to provide a state remedy, or to instances of intentional infringement.<sup>316</sup>

Although the *Florida Prepaid* decision is consistent with the Court's trend to favor states' rights, the opinion, nevertheless, is curious.<sup>317</sup> Most interesting perhaps is the Court's reliance on the test announced in *Flores*, a case that presented a very different kind of issue.<sup>318</sup> That case involved a statute in which Congress attempted to use its section 5 powers to change the substantive meaning of the First Amendment and to overrule the Court's interpretation of the Constitution.<sup>319</sup> By contrast, the Patent Remedy Act did not attempt to redefine the substantive scope of any constitutional provision.<sup>320</sup> Instead, as the dissenters noted, it "was passed to prevent future violations of due process, based on the substantiated fear that States would be unable or unwilling to provide adequate remedies for their own violation of patent-holders' rights."<sup>321</sup> In short, it was a purely remedial measure.<sup>322</sup>

The majority's method to resolve the issue in *Florida Prepaid* is a greater threat to Congress' remedial powers under section 5 than the holding itself. In the past, the Court chose to defer to reasonable congressional judgments regarding the exercise of section 5 power.<sup>323</sup>

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314. See *id.* (stating that the disproportionality prevents an understanding of how the statute is responsive to the unconstitutional behavior).

315. See *id.* at 2203 (stating that Congress enacted the Patent Remedy Act to clarify the intent to subject states to patent infringement suits).

316. See *id.* at 2210.

317. See, e.g., *id.* at 2219 (Stevens, J., dissenting) (disagreeing with the majority's "expansive and judicially crafted protection of States' rights"). See generally Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996) (discussing the Supreme Court's activism which seeks to protect states' rights).

318. See *Florida Prepaid*, 119 S. Ct. at 2207.

319. See *City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997) (stating that Congress' disagreement with the Court's interpretation of the First Amendment resulted in the enactment of the Religious Freedom Restoration Act ("RFRA") of 1993).

320. See *Florida Prepaid*, 119 S. Ct. at 2218 (Stevens, J., dissenting) (claiming that the Act had no impact on substantive state law).

321. *Id.* at 2217 (Stevens, J., dissenting) (contrasting the Patent Remedy Act from the RFRA, which attempted to overrule the Court's interpretation of the First Amendment).

322. See *id.* (Stevens, J., dissenting) (stating that the Patent Remedy Act was passed out of concern that States would be unwilling or unable to provide adequate remedies for its own violations).

323. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress may permit private suits against states when it acts pursuant to section 5 of the

In sharp contrast, the approach in *Florida Prepaid* involves close judicial scrutiny of the legislative record to find evidence that Congress is remedying a “widespread and persisting deprivation of constitutional rights.”<sup>324</sup> Additionally, the Court demands a showing that the prophylactic measure is “genuinely necessary”<sup>325</sup> to prevent a Fourteenth Amendment violation. This approach substantially erodes Congress’ section 5 powers, including its power to abrogate state immunity from suits for violations of federal law.<sup>326</sup>

The Supreme Court’s recent decision in *Kimel v. Florida Board of Regents*<sup>327</sup> illustrates the continued erosion of congressional power. Relying on *Flores* and *Florida Prepaid*, the Court held that Congress does not have power under section 5 to subject states to suit by private individuals under the Age Discrimination in Employment Act (“ADEA”).<sup>328</sup> The legislative record included some evidence of age discrimination by the states. Nevertheless, rather than defer to congressional judgment, the Court independently assessed the legislative history and concluded that the “legislative record confirms that Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the

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Fourteenth Amendment); *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970) (upholding Congress’ power to control the election of federal officers); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) (declaring that Congress’ power to pass legislation under section 5 is broad and does not require the judiciary to make determinations of constitutionality in every instance); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (holding that the Voting Rights Act was a proper exercise of Congress’ power under section 5). See generally Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 (analyzing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which granted Congress broad power under section 5); Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601 (1998) (arguing that *Flores* was wrongly decided and that Congress may use section 5 powers to expand rights); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975) (examining the doctrine of dual federalism as a limit on Congress’ powers under section 5).

324. *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *Flores*, 521 U.S. at 526).

325. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2225 (1999) (stating that *Flores* requires the Court to consider “whether the prophylactic measure taken under purported authority of § 5 . . . was genuinely necessary to prevent violation of the Fourteenth Amendment”).

326. Lower courts have applied *Flores* to the immunity issue. See, e.g., *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1006-07 (8th Cir. 1999) (en banc) (following the *Flores* reasoning to rule that Title II of the Americans with Disabilities Act does not apply to the states); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 701 (4th Cir. 1999) (holding that Congress lacks power under section 5 to abrogate state immunity from suits under the American with Disabilities Act).

327. 120 S. Ct. 631 (2000).

328. 29 U.S.C. § 621 *et seq.* (1994).

states, much less any discrimination “whatsoever that rose to the level of constitutional violation.”<sup>329</sup> Despite the ADEA’s unequivocal language subjecting states to enforcement suits,<sup>330</sup> the majority ruled that Congress lacked power to abrogate the states’ sovereign immunity.<sup>331</sup>

In theory there may be ways to limit *Alden*’s impact, but as a practical matter, the alternatives are unsatisfactory.<sup>332</sup> Just as *Seminole* restricts the jurisdiction of the federal courts to direct recovery from states for violations of federal law,<sup>333</sup> *Alden* restricts a person’s access to state courts.<sup>334</sup> The experience of the Maine parole and probation officers reveals that the two decisions combine to hinder the ability of injured parties to secure state compliance with federal law.<sup>335</sup> In the name of federalism, these developments create an “enforcement gap”<sup>336</sup> with respect to a wide range of federal laws that apply to the states.<sup>337</sup>

329. *Kimel*, 120 S. Ct. at 648-49.

330. See 29 U.S.C. § 630(b)(2) (1994) (defining employers subject to enforcement as including “a state or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State”).

331. The Court observed that the decision does not “signal the end of the line. . . .” *Kimel*, 120 S. Ct. at 650 (listing state age discrimination statutes), for victims of age discrimination by states. State employees may rely on state law where available. See *id.* at 650.

332. Congress might attempt to use its spending powers to condition the receipt of federal funds on a waiver of state immunity. See, e.g., *Litman v. George Mason Univ.*, 186 F.3d 544, 557 (4th Cir. 1999) (holding Congress may condition state’s receipt of Title IX funds on waiver of immunity). See generally *South Dakota v. Dole*, 483 U.S. 203 (1987) (discussing how Congress may attach conditions on states’ receipt of federal funds).

333. See *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996).

334. See *Alden v. Maine*, 527 U.S. at 754 (1999) (holding that states retain their immunity from private suit in state courts).

335. See *id.* at 809 (Stevens, J., dissenting) (arguing that *Alden* and *Seminole Tribe* have created a “total barrier” to individual enforcement of FLSA).

336. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2235 (1999) (Breyer, J., dissenting) (stating that an exemption for states from a substantive regulatory program and a related system of private remedies would threaten the enforcement of a program created by Congress).

337. Congress has abrogated state immunity in a number of statutes. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12202 (1994) (indicating that a state shall not be immune from an action for a violation of the Act); Bankruptcy Reform Act of 1978, 11 U.S.C. § 106(a) (1994) (indicating that sovereign immunity has been waived); Copyright Act, 17 U.S.C. § 511(a) (1994) (stating that a state is not immune from suit under the Eleventh Amendment); Education of Individuals with Disabilities, 20 U.S.C. § 1403(a) (1994) (establishing the abrogation of state sovereign immunity); Equal Employment Opportunity Act, 42 U.S.C. § 2000e(a) (1994) (stating that governments and government agencies are “persons” who can be sued as “employers” for unlawful discrimination); False Claims Act, 31 U.S.C. § 3729(a) (1994) (stating that “any person” is liable for presenting a fraudulent claim to the government); Family Medical Leave Act of 1993, 29 U.S.C. §§ 2611(4), 2617(a)(2) (1994) (permitting an action for damages against a public agency); Plant

## CONCLUSION

Federalism is the thread that draws together the *Younger* doctrine, the Eleventh Amendment jurisprudence, and the *Alden* decision. It is worthwhile to recall that "federalism" is not an end but rather a means to allocate governmental power between the national government and the states. This process is thought to serve a number of values.<sup>338</sup> First, some argue that federalism prevents tyranny by bringing power in certain instances closer to the people.<sup>339</sup> Second, individual liberty might be better protected by the separation of power between the national government and the states.<sup>340</sup> Third, the division of power may enhance governmental efficiency and effectiveness.<sup>341</sup> Finally, a federal system encourages local innovation, allowing a state to serve as a "laboratory"<sup>342</sup> for experiments in social and economic policies.

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Variety Protection Act of 1970, 7 U.S.C. § 2570 (1994) (declaring that states shall be liable for infringement of plant variety protection provisions); 42 U.S.C. § 2000d-7(a) (1) (providing that no state would be immune from suit for a violation of federal statutes prohibiting discrimination).

The Court has agreed to decide whether Congress has power to abrogate immunity in *qui tam* actions under the False Claims Act. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999) (considering whether a state may be subject to suit under the False Claims Act).

338. See, e.g., BRAVEMAN, *supra* note 226, at 194-95 (examining arguments that claim federalism promotes values such as keeping government close to the people, individual liberty, and government effectiveness); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1248-49 (1994) (arguing that federalism can reduce the risk of abuse by the state or federal government); James Blumstein, *Federalism and Civil Rights: Contemporary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1252 (1994) (asserting that federalism serves the goal of encouraging and facilitating "geographically-based political autonomy"); Richard Briffault, *"What About the 'Isms'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) (considering the purported values of federalism such as "increasing opportunities for political participation, keeping government close to the people, intergovernmental competition and representation of diverse interests"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389-405 (1997) (providing a catalogue of the values of federalism); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1573-75 (1994) (assessing the values promoted by the autonomy model of federalism).

339. See BRAVEMAN, *supra* note 226, at 194-95; Briffault, *supra* note 338, at 1305.

340. See BRAVEMAN, *supra* note 226, at 194-95; Amar, *supra* note 338, at 1249 (claiming that a federalist system allows a citizen to use either the federal or state government if the other invades the citizen's constitutional rights).

341. BRAVEMAN, *supra* note 226, at 194-95 (stating that one reason for the establishment of separation of powers in the constitution was efficiency).

342. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states must have the power to experiment to address social and economic problems); Friedman, *supra* note 338, at 397 (discussing the idea that states can be laboratories for experimentation); Merritt, *supra* note 338, at 1575 (indicating that "states offer the laboratories for social experimentation").



Unfortunately, *Alden*, like its federalism companions, fails to explain how those federalism values are threatened by the exercise of jurisdiction against the states. Indeed, the cases limiting the state and federal judiciary's roles lack any meaningful discussion of the ways in which the exercise of jurisdiction would disserve the purposes of our federal structure. Rather, the Court refers to "federalism" as if the reference itself conveys all one needs to know.<sup>343</sup> Moreover, the Court disregards the national interests that support the congressional determination to subject states to federal requirements and compliance lawsuits. In short, the Court seems to lose sight of the proposition that "our federalism" recognizes the legitimate interests of both the national and state governments.

Taken together, *Alden*, *Younger*, and the current Eleventh Amendment jurisprudence prevent the implementation of national policies by restricting individuals in their ability to force the states to comply with federal law. Judge Gibbons' conclusion regarding the earlier use of federalism to close the federal courts is equally applicable here: "One suspects that at the core of this philosophy is nostalgia for a return to an earlier era; a conviction that by restricting the reach of national law the Court can insulate the status quo; that if matters were left to the states, people and institutions would again know their places."<sup>344</sup> It is not surprising that this willingness to restrict enforcement of national policy against the states reminds some<sup>345</sup> of the discredited *Lochner*<sup>346</sup> doctrine. The similarity to *Lochner* is twofold: first, these cases "deprive Congress of necessary flexibility"<sup>347</sup> to address national problems; and second, they assume for the Court the responsibility to draw the proper lines of authority.<sup>348</sup>

In this regard, Justice Breyer observed that one of the important

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343. See *Alden*, 527 U.S. at 748 (referring to "our federalism" as a concept which requires Congress to treat the States as "residuary sovereigns").

344. Gibbons, *supra* note 62, at 1117.

345. See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2238 (1999) (Breyer, J., dissenting) (drawing an analogy between the majority's decision and *Lochner*).

346. See *Lochner v. New York*, 198 U.S. 45, 57 (1905) (holding that a New York statute limiting the number of hours an individual may work violated a person's freedom to contract).

347. *College Sav. Bank*, 119 S. Ct. at 2238 (stating that the court's theory of sovereign immunity set forth in *Seminole Tribe* is similar to *Lochner* in that Congress will be restricted from creating remedies critical to the nation's advancement toward the future).

348. See *Alden v. Maine*, 527 U.S. 706, 814 (1999) (Stevens, J., dissenting) (comparing the majority's decision to the Court's "*Lochner* era's industrial due process").

goals of a federalist structure is the protection of liberty by “promoting the sharing among citizens of governmental decisionmaking authority.”<sup>349</sup> To protect this kind of liberty, legislative flexibility is necessary to determine the proper allocation of power between the central and the state governments.<sup>350</sup> Many of the modern problems, such as matters relating to commerce and technology, involve national and global issues but at the same time directly affect the daily lives of citizens.<sup>351</sup> To resolve these problems, a balance must be found that preserves some local control but avoids a “regulatory ‘race to the bottom’”<sup>352</sup> on issues with national and international implications. This balance, Justice Breyer noted, is highly context specific and cannot be struck easily by courts.<sup>353</sup> Justice Breyer concluded that “the modern substantive federalist problem demands a flexible, context-specific legislative response (and it does not help to constitutionalize an ahistoric view of sovereign immunity that, by freezing its remedial limitations, tends to place the State beyond the reach of law).”<sup>354</sup>

With *Alden*, the federalism pendulum has swung fully in the direction of states’ rights. By elevating sovereign immunity in state court to a constitutional doctrine, the Court has taken another step toward insulating states from liability for federal law violations. Like previous applications of federalism that limited judicial enforcement, the current approach is anachronistic and ill-designed to protect national interests.

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349. *College Sav. Bank*, 119 S. Ct. at 2239.

350. *See id.* (explaining the need for legislative flexibility in order to protect liberty).

351. *See id.*

352. *Id.* (describing the need for a balancing of interests by the courts when considering national issues that also implicate local interests).

353. *See id.* (describing the judiciary’s limitations in maintaining the “proper local/national/international balance”).

354. *Id.*