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The States' Immunity From Suit in Federal and State Court

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Andrew H. Baida. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

In the past, papers such as this were published in addenda to *Selected Studies in Highway Law* (*SSHL*). Volumes 1 and 2 of *SSHL* dealt primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covered government contracts. Volume 4 covered environmental and tort law, intergovernmental relations, and motor carrier law. Between addenda, legal research digests were issued to report completed research. The text of *SSHL* totals over 4,000 pages comprising 75 papers. Presently, there is a major rewrite and update of *SSHL* underway. Legal research digests will be incorporated in the rewrite where appropriate.

Copies of *SSHL* have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel of the highway agency. The intended distribution of the updated *SSHL* will be the same.

APPLICATION

This report examines the scope and recent interpretations of the Eleventh Amendment to the United States Constitution. That amendment restricts the judicial power of the United States over States. As the Congress enacts legislation applicable to States, States are increasingly questioning the courts' authority to enforce requirements arising from these laws.

The goal of this report is to assist transportation officials by providing information that enables better understanding of the States' immunity from suit.

The report should be useful to attorneys, transportation administrators, legislators, planners, and policy officials.

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THE STATES' IMMUNITY FROM SUIT IN FEDERAL AND STATE COURT

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I. INTRODUCTION

This paper addresses one of the most important rights of the States: the right not to be sued without their consent. That right was a core attribute of State sovereignty at the time the Constitution was ratified, so much so that it was made an explicit part of our national framework upon the adoption of the Eleventh Amendment. This constitutional provision provides in full that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[1] As evidenced by several significant cases that the Supreme Court decided recently, the immunity principles bound up in the Eleventh Amendment are as much an essential component of State sovereignty today as they were when this country was formed over 200 years ago.

These principles are also responsible for a rapidly changing legal landscape that has borne witness to a historic shift in the balance of power between the States and the federal government that they comprise. It is no exaggeration to say that each year basic assumptions about when and where States may be sued have been toppled by a growing number of court decisions. These developments make it even more imperative to understand the many facets of the States' immunity from suit. The goal of this paper is to assist in this endeavor.

II. SCOPE OF THE ELEVENTH AMENDMENT AND DESCRIPTION OF THE STATES' IMMUNITY FROM SUIT

At first glance, the Eleventh Amendment appears only to apply in cases brought against a State by citizens of another State. The Supreme Court has recognized, however, that "[a]lthough the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition...which it confirms.'"[2] Identifying that "presupposition" for the first time in *Hans v. Louisiana*,[3] the Court divided it into two parts in holding that, despite the literal language of the Eleventh Amendment, the States are immune from suits brought by their own citizens. The first part lay in the recognition that each State is a sovereign entity in the federal system of government created by the framers of the Constitution. The second is grounded in the notion that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[4] Although several members of the Supreme Court in recent years have expressed an interest in revisiting and redefining these principles, "[t]hese criticisms and proposed doctrinal revisions, however, have not found acceptance with a majority of the Court."[5] Until a fifth Justice joins their views, the Eleventh Amendment will continue to apply, as it has for over 100 years, to suits brought by any citizen against any State.

The sweep of the Eleventh Amendment in that application is broader than virtually any other immunity defense recognized at common law. Defenses such as absolute immunity and qualified immunity are available only to government officials and immunize those individuals only from personal monetary liability.[6] Unlike these defenses, which are inapplicable to equitable relief, the Eleventh Amendment applies whenever any relief is sought from a State or one of its agencies,[7] and "necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State."[8] This is because "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury'."[9] Rather, the Amendment "also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial

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[1] U.S. CONST. amend. XI.

[2] Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

[3] 134 U.S. 1 (1890).

[4] *Id.* at 13 (quoting THE FEDERALIST No. 81, at 487) (emphasis omitted).

[5] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997).

[6] *See, e.g.*, Kentucky v. Graham, 473 U.S. 159, 166–67 (1985).

[7] *See* Seminole Tribe of Florida v. Florida, 517 U.S. at 58; Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993); Green v. Mansour, 474 U.S. 64, 73–74 (1985); Cory v. White, 457 U.S. 85, 91 (1982); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). *See also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).

[8] Missouri v. Fiske, 290 U.S. 18, 27 (1933).

[9] Seminole Tribe of Florida v. Florida, 517 U.S. at 58 (quoting Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 48 (1994)).

tribunals at the instance of private parties.'"[10] With the exception of those situations to be discussed later in this paper in which the States' immunity has been validly lifted by Congress, or in which a State has consented to be sued, the Eleventh Amendment bars any effort to secure any relief from the States.

Other features highlight the unique status of the States' immunity from suit. In recognizing that the Eleventh Amendment confers an "immunity from suit" and not "merely a defense to liability,"[11] the Supreme Court has held that an order denying a motion to dismiss based on Eleventh Amendment immunity grounds is immediately appealable because, among other reasons, the immunity "is for the most part lost as litigation proceeds past motion practice."[12] While the Court has also held that court orders denying motions asserting absolute immunity and qualified immunity are immediately appealable,[13] the Court has limited immediate appeals in qualified immunity cases to those instances in which the denial of immunity "turns on an issue of law,"[14] and does not raise a "question of 'evidence sufficiency.'"[15] In the Eleventh Amendment context, however, the Court has stated that it sees "little basis for drawing such a line."[16]

Perhaps more fundamentally, while an appellate court may refuse to consider an absolute or qualified immunity defense when such a defense has not been made at the trial level, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[17] Indeed, the Supreme Court has stated that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment...even though urged for the first time in this Court."[18] The "jurisdictional" characterization is somewhat of a misnomer, as the Court itself has recognized that "because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."[19] Nevertheless, the description illustrates the distinctive character of the States' immunity from suit.

III. IMMUNITY BARS ALL CLAIMS AGAINST A STATE EXCEPT WHEN IMMUNITY HAS BEEN VALIDLY LIFTED BY CONGRESS OR THE STATE HAS CONSENTED TO SUIT

The rule of immunity is fairly simple to understand: as a general matter, the States cannot be sued without their consent. The qualifications to this rule, however, are not so uncomplicated.

A. Unilateral Abrogation by Congress

1. Clear and Unequivocal Intent to Abrogate Must Exist

The first of these qualifications is that Congress may, in appropriate circumstances, unilaterally abrogate the States' immunity from suit. While Congress has passed a number of statutes purporting to do this, the validity of any federal legislation making such an attempt depends on the answer to "two questions: 'first, whether Congress has 'unequivocally express[ed] its intent to abrogate the immunity'...and second, whether Congress has acted 'pursuant to a valid exercise of power.'"[20] The case law concerning the first question is relatively straightforward. In recognition that "the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States,"[21] the Supreme Court has held that "Congress' intent to abrogate the States' immunity from suit must be obvious from a 'clear legislative statement.'"[22] "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[23] Rather, "in this area of the law, evidence of congressional intent must be both unequivocal and textual."[24] "Textual" means what it says: "if Congress' intention is not unmistakably clear, recourse to legislative history will be futile."[25] Stated differently, "Con-

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[10] Seminole Tribe of Florida v. Florida, 517 U.S. at 58 (quoting Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. at 146).

[11] Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. at 145.

[12] *Id.* (footnote omitted).

[13] *See* Mitchell v. Forsyth, 472 U.S. 511, 525 (1985); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[14] Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (quoting Mitchell v. Forsyth, 472 U.S. at 530).

[15] Johnson v. Jones, 515 U.S. 304, 311–12 (1995).

[16] Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. at 147.

[17] Edelman v. Jordan, 415 U.S. 651, 678 (1974).

[18] Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 467 (1945).

[19] Patsy v. Board of Regents of Florida, 457 U.S. 496, 515 n.19 (1982).

[20] Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199, 2205 (1999) (quoting Seminole Tribe, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. at 68)).

[21] Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 (1985).

[22] Seminole Tribe, 517 U.S. at 55 (quoting Blatchford v. Native Village of Noatak, 501 U.S. at 786).

[23] Atascadero State Hospital v. Scanlon, 473 U.S. at 246.

[24] Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

[25] *Id. See also* Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96, 104 (1989) ("If congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, Atascadero will not be satisfied.").

gress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[26]

The Court has had several occasions to identify what is, and what is not, "unmistakably clear" language. Citing a provision in the Patent and Plant Variety Protection Remedy Clarification Act, which provides that "[a]ny State...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...for infringement of a patent,"[27] the Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* observed that "Congress' intent to abrogate could not have been any clearer."[28] The same conclusion was reached in *Seminole Tribe* with respect to the Indian Gaming Regulatory Act, which, as the Court observed, "vests jurisdiction in '[t]he United States district courts...over any cause of action...arising from the failure of a State to enter into negotiations...or to conduct such negotiations in good faith.'"[29] The Court found that "[a]ny conceivable doubt as to the identity of the defendant...is dispelled" by other provisions that "refer to the 'State' in a context that makes it clear that the State is the defendant to the suit...."[30]

Conversely, the Court in *Quern v. Jordan* found that Congress had not "intended by the general language of [42 U.S.C.] § 1983 to override the traditional sovereign immunity of the States,"[31] determining that § 1983 "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States,"[32] even though it provides that "[e]very person" who violates the federal rights of another while acting under color of law "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[33] Similarly, in holding that the Eleventh Amendment barred an action brought against two State agencies under the Rehabilitation Act, which at one time provided that "[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance," the Court in *Atascadero State Hospital v. Scanlon* found that, "given their constitutional role, the States are not like any other class of recipients of federal aid....When Congress chooses to subject the States to federal jurisdiction, it must do so specifically."[34] The requisite clear language was also absent in *Hoffman v. Connecticut Dept. of Income Maintenance,* in which the Court held that a bankruptcy turnover action brought against a State to recover funds was barred by the Eleventh Amendment, even though a provision of the bankruptcy code explicitly provided that "'notwithstanding any assertion of sovereign immunity—(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and (2) a determination by the court of an issue arising under such a provision binds governmental units.'"[35] Construing this language "as not authorizing monetary recovery from the States,"[36] the Court held that "in enacting § 106(c) Congress did not abrogate the Eleventh Amendment immunity of the States."[37]

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[26] Atascadero State Hospital v. Scanlon, 473 U.S. at 242. *See also* Blatchford v. Native Village of Noatak, 501 U.S. at 786 ("We agree with petitioner that § 1362 does not reflect an 'unmistakably clear' intent to abrogate immunity, made plain 'in the language of the statute.'").

[27] 35 U.S.C. § 296(a).

[28] 119 S. Ct. at 2205.

[29] 517 U.S. at 57 (quoting 25 U.S.C. § 2710(d)(7)(A)(i)).

[30] 517 U.S. at 57.

[31] 440 U.S. 332, 341 (1979).

[32] *Id.* at 345.

[33] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ten years later, the Court in Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), held that a § 1983 action could not be brought against the States in their own courts and confirmed "what some considered implicit in Quern: that a State is not a 'person' within the meaning of § 1983." 491 U.S. at 64. In reaching this conclusion, the Court found that "[t]he language of § 1983...falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" 491 U.S. at 65 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. at 242).

[34] 473 U.S. at 245–46.

[35] 492 U.S. 96, 100–01 (1989) (quoting 11 U.S.C. § 106(c)).

[36] 492 U.S. at 102.

[37] *Id.* at 104. Another statute that the Court found deficient with respect to the "unmistakably clear" language requirement was addressed in Dellmuth v. Muth, in which the Court found no "unequivocal declaration" despite the Education of the Handicapped Act's "frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children," and despite the Court's agreement that these references "make the states, along with local agencies, logical defendants in suits alleging violations of the EHA." 491 U.S. at 232. *See also* Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) (finding insufficient abrogation language in 28 U.S.C. § 1362, which provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."); Employees of the

Hilton v. South Carolina Public Railways Commission[39] represents a possible exception to the unmistakably clear language rule, although it is not clear that this case is an exception at all. The plaintiff in *Hilton* originally brought suit in federal court against a State agency under the Federal Employers' Liability Act (FELA). While that case was pending, the Supreme Court held that another case brought under the Jones Act, which incorporates the remedial scheme set forth in the FELA, was barred by the Eleventh Amendment "because Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act."[39] After the latter case was decided, the plaintiff in *Hilton* refiled his FELA action in State court.[40] The Supreme Court refused to overrule its prior interpretation made 28 years before in *Parden v. Terminal Railway of Alabama Docks Dept.*[41] that Congress intended to subject the States to suit under the FELA, and held that an action brought under that Act that was barred by the Eleventh Amendment nevertheless could be brought against the States in their own courts.

The language that the Court used in reaching this holding gives rise to a possible exception to the rule that Congress must use unmistakably clear language to abrogate the States' immunity. Characterizing the clear statement rule as a "rule of constitutional law based on the Eleventh Amendment,"[42] the Court observed that, "as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'"[43] Distinguishing its federal court Eleventh Amendment decisions from its State court sovereign immunity cases that "apply an 'ordinary rule of statutory construction,'"[44] the Court concluded that "the clear statement inquiry need not be made and we need not decide whether FELA satisfies that standard, for the rule in any event does not prevail over the doctrine of stare decisis as applied to a longstanding statutory construction implicating important reliance interests."[45]

At first blush, *Hilton* seems to suggest that a more relaxed standard applies when determining whether a federal statute abrogates the States' immunity from suit in their own courts. Such a suggestion would make little sense, however, in light of the Supreme Court's subsequent decision in *Alden v. Maine*,[46] which held that the same immunity principles that bar an action brought against the States in federal court also apply in State court suits. The better explanation for *Hilton*'s apparent dichotomous result is set forth in *Alden*, in which Justice Kennedy, who wrote the majority opinions in both *Hilton* and *Alden*, made two points. First, he noted that the Court in *Hilton* confronted a situation where "[c]losing the courts to FELA suits against state employers would have dislodged settled expectations and required an extensive legislative response" because "[s]ome States had excluded railroad workers from the coverage of their workers' compensation statutes on the assumption that FELA provided adequate protection for those workers."[47] Second, "[t]he respondent in *Hilton*, the South Carolina Public Railways Commission, neither contested Congress' constitutional authority to subject it to suits for money damages nor raised sovereign immunity as an affirmative defense."[48] The Court in *Alden* thus read *Hilton* "as simply adhering, as a matter of stare decisis

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Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare, 411 U.S. 279 (1973) (addressing an earlier version of the Fair Labor Standards Act).

While the Supreme Court has yet to address the question, federal courts have held that insufficient abrogation language exists in the Clean Water Act. *See* Burnette v. Carothers, 192 F.3d 52, 56–58 (2d Cir. 1999); Michigan Peat v. United States Environmental Protection Agency, 175 F.3d 422, 428 (6th Cir. 1999). *Cf.* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1397–98 (9th Cir. 1992) (dismissing on Eleventh Amendment grounds claim brought against Montana under its Environmental Policy Act, and agreeing with Montana that the federal National Environmental Policy Act did not apply to the State defendants in that case). The Clean Air Act, 42 U.S.C. § 7604(a)(1), and Endangered Species Act, 16 U.S.C. § 1540(g), contain substantially the same citizen suit provisions set forth in the Clean Water Act, and so presumably do not contain the requisite abrogation language. In contrast, Title VI provides that "[a] State shall not be immune under the Eleventh Amendment...from suit in Federal Court for a violation of Title VI...or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7. The federal appellate courts have uniformly found this language sufficient to abrogate the States' Eleventh Amendment immunity. *See* Sandoval v. Hagan, 197 F.3d 484, 493–94 (11th Cir. 1999) (citing cases).

[38] 502 U.S. 197 (1991).

[39] Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 475 (1987). Although Justice Powell's main opinion in Welch was joined by three Justices and so constituted a plurality opinion, Justice Scalia concurred separately and added the fifth vote on the clear language holding. *See id.* at 496 (Scalia, J., concurring in part and concurring in judgment) ("[A]lthough the terms of the Jones Act (through its incorporation of the FELA) apply to all common carriers by water, I do not read them to apply to States.").

[40] Hilton, 502 U.S. at 200.

[41] 377 U.S. 184 (1964).

[42] 502 U.S. at 204.

[43] *Id.* at 205 (quoting Will v. Michigan Dept. of State Police, 491 U.S. at 63–64) (other citations omitted).

[44] 502 U.S. at 205 (quoting Will, 491 U.S. at 65).

[45] 502 U.S. at 206-07.

[46] 119 S. Ct. 2240 (1999).

[47] Alden, 119 S. Ct. at 2258 (citing Hilton, 502 U.S. at 202).

[48] Alden, 119 S. Ct. at 2258 (citing the Brief for Respondent in Hilton). In light of South Carolina's failure to raise the immunity issue, the Supreme Court had no obligation to do so on its own. *See* Patsy v. Board of Regents, 457 U.S. at 515 n.19. This is another illustration of how the Eleventh Amendment defense is not truly jurisdictional in nature.

and presumed historical fact, to the narrow proposition that certain States consented to be sued by injured workers covered by the FELA, at least in their own courts."[49]

2. *Constitutional Authority to Abrogate Must Exist*

a. No Authority Exists Under Article I to Authorize Suits Against the States

The judicially-imposed requirement that Congress must adequately manifest its intent to abrogate the States' immunity is relatively unremarkable, in large part because Congress can easily eliminate any legislative ambiguity that the federal courts identify. If such an intent has been clearly expressed, however, the next determination to be made, namely, whether Congress has the authority to abrogate the States' immunity, is anything but routine, because amending the Constitution in some cases is the only fix available for a legislative act declared by the Supreme Court to be an invalid exercise of Congress's power. It has been in the latter context that the Court has decided the "States' rights" cases that have generated so much media attention in the recent past: *Alden v. Maine*,[50] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[51] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[52] *Kimel v. Florida Board of Regents*,[53] and, most recently, *United States v. Morrisson*.[54] While those cases deserve the attention that they received, they were preceded by several years by one of the most significant Eleventh Amendment decisions that the Court has ever issued: *Seminole Tribe of Florida v. Florida*.[55]

In that case, the Court held that Congress lacks the authority under Article I to abrogate the States' immunity from suit in federal court, stating that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[56] It is difficult to exaggerate the magnitude of this holding or the breadth of its sweep: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[57] This means that Eleventh Amendment immunity bars federal court actions based on the exercise of Article I powers such as the bankruptcy, copyright, antitrust, and environmental laws. Indeed, in reaching its decision, the Court overruled *Pennsylvania v. Union Gas Co.*,[58] in which a plurality of the Court held, just 7 years earlier, that the States could be sued in federal court under the Comprehensive Environmental Response, Compensation and Liability Act, *i.e.*, legislation enacted pursuant to Congress's Article I Commerce Clause powers. Justice Stevens did not engage in overstatement when he observed in his dissenting opinion in *Seminole* that the Court's holding applies to virtually any federal statute enacted pursuant to Congress's Article I powers, and "prevents Congress from providing a federal forum for a broad range of actions against the States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."[59] As he subsequently stated in his dissenting opinion in *Kimel*, "*Seminole Tribe* is a case that will unquestionably have serious ramifications in future cases."[60]

Many plaintiffs whose actions could not be brought in federal court in the wake of *Seminole Tribe* thought they had found a safe harbor in the State courts because the express language of the Eleventh Amendment restricts only the exercise of federal judicial power under Article III of the Constitution. Typifying those individuals, the plaintiffs in *Alden v. Maine* first brought their action under the Fair Labor Standards Act (FLSA) in federal court and then refiled it in State court after the U.S. Court of Appeals for the First Circuit held that, under *Seminole Tribe*, they could not sue Maine in federal court because the FLSA is an impermissible exercise of Congress's Article I powers.[61] Rebuffing the effort to bring the same claims in State court, the five Justices who comprised the majority in *Seminole Tribe* held in *Alden v. Maine* that Congress also lacks the authority under Article I to abrogate the States' immunity from suit in their own courts.

The Court in *Alden* observed that "[t]he Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."[62] One of those postulates was that the "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their

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[49] 119 S. Ct at 2258.

[50] 119 S. Ct. 2240 (1999).

[51] 119 S. Ct. 2199 (1999).

[52] 119 S. Ct. 2219 (1999).

[53] 120 S. Ct. 631 (2000).

[54] 120 S. Ct. 1740 (2000).

[55] 517 U.S. 44 (1996).

[56] 517 U.S at 72–73.

[57] *Id.* at 72.

[58] 491 U.S. 1 (1989).

[59] 517 U.S. at 77 (Stevens, J., dissenting) (footnote omitted).

[60] Kimel, 120 S. Ct. at 653 (Stevens, J., dissenting).

[61] *See* Mills v. Maine, 118 F.3d 37 (1st Cir. 1997). A number of other courts have held, in the wake of Seminole, that actions brought against the States under the FLSA are barred by the Eleventh Amendment. *See* Abril v. Virginia 145 F.3d 182 (4th Cir. 1998); Mueller v. Thompson, 133 F.3d 1063 (7th Cir. 1998); Powell v. Florida, 132 F.3d 677 (11th Cir. 1998); Quillin v. Oregon, 127 F.3d 1136 (9th Cir. 1997); Close v. New York, 125 F.3d 31 (2d Cir. 1997); Raper v. Iowa, 115 F.3d 623 (8th Cir. 1997); Aaron v. Kansas, 115 F.3d 813 (10th Cir. 1997).

[62] 119 S. Ct. at 2254.

consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"[63] Rejecting the argument that the States surrendered their immunity by delegating to Congress the powers set forth in the Supremacy Clause, the Court stated that "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design,"[64] and that

> [t]he Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power.[65]

Finding that Article I of the Constitution does not authorize Congress to abrogate the States' immunity, the Court in *Alden* held that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."[66]

b. Congress Has Authority to Abrogate Under the Fourteenth Amendment, but Only if the Exercise of Section 5 Power is Appropriate

Read together, *Seminole Tribe* and *Alden* close the door on *any* suit based on Article I of the Constitution that is brought against the States in federal or state court without their consent.[67] The Supreme Court has recognized, however, one circumstance in which Congress can unilaterally abrogate the States' immunity from suit: "Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance."[68] Stating that the prohibitions of the Fourteenth Amendment are "restrictions of state power" because they "are directed to the States,"[69] the Court held in *Ex parte Virginia* that the enforcement of these laws "is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact."[70] As the Court observed almost 100 years later, legislation passed under the Fourteenth Amendment does not violate the States' sovereign immunity because such legislation is "grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a 'carv[ing] out'...."[71]

While Congress has the power under the Fourteenth Amendment to abrogate the States' immunity, such an abrogation is valid only if it is pursuant to an "appropriate" exercise of Congress's remedial enforcement power under Section 5 of that constitutional provision. This power encompasses "[l]egislation which deters or remedies constitutional violations...."[72] The power to enact legislation pursuant to Section 5 is not unlimited, however, as Congress "does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[73]

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[63] *Id.* (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 323 (1934) (quoting THE FEDERALIST No. 81, at 487)).

[64] 119 S. Ct. at 2255.

[65] *Id.*

[66] *Id.* at 2266.

[67] Still to be decided is whether the principles of sovereign immunity embodied in the Eleventh Amendment bar a complaint filed with a federal administrative agency by a private party seeking monetary and injunctive relief against an unconsenting State pursuant to a statute enacted under Congress' Article I powers. While some courts have stated that "[t]he text of the Amendment clearly indicates that it does not apply to arbitration proceedings," Premo v. Martin, 119 F.3d 764, 769 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998), and so there is "no Eleventh Amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals," Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 567 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981), these cases predate Alden v. Maine, in which the Supreme Court made clear that the Eleventh Amendment merely "confirmed rather than established sovereign immunity as a constitutional principle." 119 S. Ct. at 2254. After Alden and Seminole it would seem that Congress cannot use its Article I powers to strip the States of their immunity from claims brought by a private party in any forum without their consent because, "as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today...." Alden, 119 S. Ct. at 2246–47. Indeed,"[t]he suability of a state, without its consent, was a thing unknown to the law." Hans v. Louisiana, 134 U.S. 1, 16 (1890). Although Article I administrative agencies did not exist at the time of the constitutional debates, the Constitution's subsequent ratification was not intended to disturb the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted." Alden, 119 S. Ct. at 2253 (quoting Hans v. Louisiana, 134 U.S. at 18). A strong argument can be made that the States did not relinquish their immunity from any claim of any private party, regardless of the forum in which such a claim could be brought, as "the sovereign's right to assert immunity...was a principle so well established that no one conceived it would be altered by the new Constitution." *Id.* at 2260. This issue has been raised in a case that, at the time this paper was published, was pending before the U.S. Court of Appeals for the Fourth Circuit. *See* South Carolina State Ports Authority v. Federal Maritime Commission, No. 00-1481.

[68] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2223 (1999).

[69] Ex parte Virginia, 100 U.S. 339, 346 (1880).

[70] *Id.*

[71] Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976).

[72] City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

[73] *Id.* at 519.

Accordingly, the Court has held that "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[74] Absent such a connection, the legislation is not appropriate because it constitutes "a substantive change in the governing law...."[76] Several decisions issued in the Supreme Court's last two Terms illustrate the considerable difficulties that private litigants face in trying to establish that their cases are based on an appropriate exercise of congressional power.

In holding that the Patent and Plant Variety Protection Remedy Clarification Act was not a proper exercise of that power, the Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* observed 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."[76] The Court found that the Act fell short of this standard, stating that in passing the legislation at issue, "Congress identified no pattern of patent infringement by the States, let alone constitutional violations."[77] Observing that "the legislative record... provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act,"[78] the Court found that Congress "barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment."[79] Rather, "[t]he statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*."[80]

Using a similar approach in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court held that the Trademark Remedy Clarification Act is not valid Section 5 legislation. Stating that "the term 'enforce' is to be taken seriously" and that "the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations,"[81] the Court held that the Act was not appropriate legislation because the false advertising claims at issue in that case did not give rise to any right that "qualifies as a property right protected by the Due Process Clause."[82] As a result, the Court stated it would not pursue the second question that it would otherwise be required to address, namely, "whether the prophylactic measure taken under purported authority of § 5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was genuinely necessary to prevent violation of the Fourteenth Amendment."[83]

That question was addressed and resolved in favor of the States in *Kimel v. Florida Board of Regents*, in which the Court held that the Age Discrimination in Employment Act (ADEA) does not validly abrogate the States' Eleventh Amendment immunity.[84] Asserting that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act,"[85] the Court relied upon several of its age discrimination decisions for the proposition that the Constitution permits the States to discriminate on the basis of age "if the age classification in question is rationally related to a legitimate state interest."[86] The ADEA, in contrast, "is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'"[87] because the Act, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[88]

After stating this, however, the Court asserted that this "does not alone provide the answer to our § 5 inquiry" because "[d]ifficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."[89] The Court proceeded to examine "the legislative record containing the reasons for Congress' action" in an effort to determine whether the ADEA is "an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination."[90] That review revealed that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age,"[91] which the Court found "confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[92] The Court accordingly held that the ADEA did not validly abrogate the States' immunity in light of "the indiscriminate scope of the Act's

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[74] *Id.* at 520.
[75] *Id.* at 519.
[76] 119 S. Ct. at 2207.
[77] *Id.*
[78] *Id.* at 2208.
[79] *Id.* at 2209.
[80] *Id.* at 2211 (footnote omitted).
[81] 119 S. Ct. at 2224.
[82] *Id.*
[83] *Id.* at 2225.
[84] 120 S. Ct. 631 (2000).
[85] *Id.* at 645.
[86] *Id.* at 646.
[87] *Id.* at 647 (quoting City of Boerne, 521 U.S. at 532).
[88] Kimel, 120 S. Ct. at 647.
[89] *Id.* at 648.
[90] *Id.*
[91] *Id.* at 649.
[92] *Id.* at 650.

substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States...."[93]

The Court's most recent decision in *United States v. Morrisson*,[94] in which the Court struck the constitutionality of the Violence Against Women Act, underscores the high level of scrutiny it applies in conducting a Section 5 analysis. That Act provides that a person who commits a crime of violence motivated by gender can be held liable for monetary and equitable relief.[95] The proponents of the law argued that the Act was appropriate Section 5 legislation because (1) there is "pervasive bias in various state justice systems against victims of gender-motivated violence,"[96] (2) "this bias denies victims of gender-motivated violence the equal protection of the laws,"[97] and (3) "Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in state courts."[98] The Court rejected these arguments.

The Court found that the Act lacked the requisite congruence and proportionality because "the Fourteenth Amendment, by its very terms, prohibits only state action,"[99] and the Violence Against Women Act "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[100] Moreover, "unlike any of the § 5 remedies that we previously upheld,"[101] the Violence Against Women Act "applies uniformly throughout the Nation" even though "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."[102] The remedy was not directed, as it was in the case of the Voting Rights Act as an example, "only to the State where the evil found by Congress existed" or to "those States in which Congress found that there had been discrimination."[103] The Court accordingly found that the Act did not constitute valid Section 5 legislation.

In light of these cases, it remains to be seen how the Court will now view two significant civil rights statutes: the Americans with Disabilities Act (ADA) and Title VII. With respect to the ADA, the Supreme Court recently heard argument in *University of Alabama v. Garrett*,[104] in which the Eleventh Circuit held that the University of Alabama Board of Trustees was not immune from suit under Titles I and II of the ADA because Congress both unequivocally expressed its intent to abrogate the States' immunity under that statute and validly exercised its power to do so under Section 5 of the Fourteenth Amendment. The federal appellate courts that addressed the Section 5 issue both before and after *Kimel* are divided on whether the ADA is valid legislation.[105]

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[93] *Id.* The Supreme Court's decision in Kimel also seems to reconfirm its previously expressed view that Congress need not explicitly identify the source of its constitutional authority when enacting legislation. *See* EEOC v. Wyoming, 460 U.S. 226 (1983). One federal appellate court has stated that it would "not presume that Congress intended to enact a law under a general Fourteenth Amendment power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law." Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1146 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998). The Eleventh Circuit shared a similar view in its disposition of Kimel, in which it observed that "where the Supreme Court has held that Congress enacted a statute pursuant to its Commerce Clause powers, we must be cautious about deciding that Congress could have acted pursuant to a different power." 139 F.3d 1426, 1430 n.8 (11th Cir. 1998). In the same case, however, the Supreme Court made no reference to any presumption or need for caution, but rather addressed the Section 5 issue, without any commentary or conditional remarks, immediately after observing that in EEOC v. Wyoming it had previously "found the ADEA valid under Congress' Commerce Clause power...." 120 S. Ct. at 643.

[94] 120 S. Ct. 1740 (2000).

[95] 42 U.S.C. § 13981.

[96] 120 S. Ct. at 1755.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1756.

[100] *Id.* at 1758.

[101] *Id.*

[102] *Id.* at 1759.

[103] *Id.*

[104] 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000).

[105] Most of the circuit courts have upheld the validity of the ADA. *See* Muller v. Costello, 187 F.3d 298 (2d Cir. 1999); Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); Martin v. Kansas, 190 F.3d 1120 (10th Cir. 1999); Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999). *See also* Amos v. Maryland Dept. of Public Safety, 178 F.3d 212 (4th Cir. 1999), *vacated on grant of petition for rehearing en banc* (Dec. 28, 1999). After Kimel was decided, the Seventh Circuit reconsidered its prior decision in Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997), in which it held the ADA to be appropriate legislation under § 5, and then held that it was not. *See* Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University, 207 F.3d 945 (7th Cir. 2000). *See also* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc) (holding the ADA invalid), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct. 1265 (2000); Brown v. North Carolina Division of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (holding unconstitutional ADA regulation). In contrast, the Second Circuit had the post-Kimel opportunity but declined to reconsider its decision in Muller v. Costello, 187 F.3d 298, that the ADA is a valid exercise of Congress's Fourteenth Amendment enforcement powers. *See* Kilcullen v. New York State Dept. of Labor, 205 F.3d 77, 78 (2d Cir. 2000).

It is also unclear how the Supreme Court decisions discussed in this section will affect Title VII, a federal law that has been enforced against the States on a regular basis and that, until the present at least, has been regarded as somewhat of a sacred cow in light of *Fitzpatrick v. Bitzer*. In that case, in an opinion authored 24 years ago by now Chief Justice Rehnquist, the Court held that the Eleventh Amendment did not bar an award of damages under Title VII, finding that Title VII constituted "legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment,"[106] and that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, *see Hans v. Louisiana* [citation omitted], are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[107] The Court appended a footnote to that holding, however, stating the following:

> Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.[108]

Reliance on this footnote may be much ado about nothing. In reaching the conclusion that the ADEA failed the "congruence and proportionality" test and so is not appropriate legislation under Section 5, Justice O'Connor in *Kimel* distinguished age classifications from "governmental conduct based on race or gender,"[109] finding that the former "cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'"[110] She also observed that older persons, "unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a history of purposeful unequal treatment,"[111] and that while "the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision ...."[112] when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve."[113]

These distinctions and observations suggest that the Court may find that Title VII, unlike the ADEA, is oriented toward conduct that would likely be found unconstitutional. In addition, it would be surprising to find a barren legislative record comparable to that at issue in *Kimel* in light of our country's Jim Crow laws and longstanding history of government-sanctioned discrimination. This does not necessarily mean, however, that Title VII satisfies the congruence and proportionality test in all contexts. For example, in *Fitzpatrick v. Bitzer*, which involved the issue of whether Connecticut's statutory retirement benefit plan discriminated against male employees because of their gender, Justice Stevens filed a concurring opinion stating that, while "the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment....I do not believe plaintiffs proved a violation of the Fourteenth Amendment, and because I am not sure that the 1972 [Title VII] Amendments were 'needed to secure the guarantees of the Fourteenth Amendment'...I question whether § 5 of that Amendment is an adequate reply to Connecticut's Eleventh Amendment defense."[114]

In addition, after the Supreme Court decided *Kimel*, it vacated and remanded for further consideration in light of *Kimel* two cases involving another federal law aimed at discriminatory conduct, the Equal Pay Act.[115] In each of these cases, the appellate court held that Congress validly abrogated the States' immunity under that Act. The explanation for the Court's action in these cases may lie in the discussion at the end of the Court's decision in *United States v. Morrisson* in which it contrasted the Violence Against Women Act with the Voting Rights Act, and stated that the latter was directed only at States where there existed a problem of discrimination, while the former applied throughout the country even though "the problem of discrimination against victims of gender-motivated crimes does not exist in all States, or even most States."[116]

Perhaps the same can be said about Title VII. While a number of States had Jim Crow laws, a number did not. De jure discrimination was rampant in the southern states, but not everywhere. Yet Title VII applies to *all* employers within the United States, regardless of whether they come from a State with no history of discrimination at all. Moreover, like another law that the Court held could not be considered as remedial or preventive legislation, Title VII "has no termination date or termination mechanism."[117] None of this is conclu-

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[106] Fitzpatrick v. Bitzer, 427 U.S. at 453.

[107] *Id.* at 456.

[108] *Id.* at 456 n.11.

[109] 120 S. Ct. at 645.

[110] *Id.* (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)).

[111] *Id.* (quotations and citations omitted).

[112] *Id.* at 646.

[113] *Id.*

[114] 427 U.S at 458 (Stevens, J., concurring in the judgment) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

[115] *See* Anderson v. State University of New York, 169 F.3d 117 (2d Cir. 1999), *cert. granted, vacated, and remanded*, 120 S. Ct. 929 (2000); Varner v. Illinois State University, 150 F.3d 706 (7th Cir. 1998), *cert. granted, vacated, and remanded*, 120 S. Ct. 928 (2000).

[116] 120 S. Ct. at 1759.

[117] City of Boerne v. Flores, 521 U.S. at 532. As the Court pointed out in Boerne,

> [t]his is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5. *Id.* at 533.

sive, but it does raise some questions as to whether Title VII's application against the States is entirely free from doubt. At a minimum, it illustrates that these are issues that have yet to be fully developed and resolved, and that they need to be considered.

One last consideration worth thinking about concerns the enforceability of a statute that is not appropriate Fourteenth Amendment legislation. As *City of Boerne v. Flores* illustrates, a statute that exceeds Congress's powers under the Fourteenth Amendment is invalid regardless of whether the defendant is a State or, as in that case, a municipality. Such a statute is enforceable only if it can be sustained as valid Article I legislation, which, as discussed later in this paper, can be enforced against State officials in certain circumstances. While statutes are frequently enacted pursuant to Congress's exercise of its Article I commerce clause powers, *United States v. Morrisson* and a prior case that it relied upon impose restrictions even on those powers.

In the prior case, *United States v. Lopez*,[118] the Supreme Court held that Congress exceeded its commerce clause authority in enacting the federal Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm in a place that the person knows or should know is a school zone. The Court acknowledged that it had previously identified "three broad categories of activity that Congress may regulate under its commerce power,"[119] and quickly disposed of the first two by finding that the statute "is not a regulation of the use of the channels of interstate commerce...nor can [it] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce."[120]

With respect to the third category, the Court observed, first, that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."[121] Those Acts were distinguishable from the Gun-Free School Zones Act, which "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, however broadly one might define those terms."[122] The Court determined, second, that the Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[123] Rejecting the Government's argument that "possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy,"[124] the Court found that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States...This we are unwilling to do."[125]

As did the law's defenders in *Lopez*, the proponents of the Violence Against Women Act in *United States v. Morrisson* sought to justify the Act "as a regulation of activity that substantially affects interstate commerce."[126] The Court found the Act unconstitutional for essentially the same reasons given in *Lopez*, stating that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[127] Contrasting the Act before it "with the lack of congressional findings that we faced in *Lopez*,"[128] the Court observed that the Violence Against Women Act "*is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[129] The Court found, however, that "Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[130] Rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce,"[131] the Court concluded its Article I discussion by asserting, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of victims."[132]

As a result of the Court's subsequent Section 5 analysis in *United States v. Morrisson*, the statute at issue in that case cannot be enforced at all because it is not supported by any valid source of congressional authority. This case and the others discussed in this section thus significantly strengthen the States' immunity in federal and state courts by erecting considerable hurdles that plaintiffs must overcome when seeking to enforce federal laws against the States. Although it may be unlikely that States will be sued under the Violence Against Women Act or hauled into court for patent, trademark, and other intellectual property violations, the States are institutional defendants in cases arising under ADEA, FLSA, the bankruptcy code, and other federal laws. As discussed below, however, the immunity is not an absolute one and may be overcome in a variety of ways.

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[118] 514 U.S. 549 (1995).
[119] *Id.* at 558.
[120] *Id.* at 559.
[121] *Id.*
[122] *Id.* at 561.
[123] *Id.*
[124] *Id.* at 563.
[125] *Id.* at 567–68.
[126] 120 S. Ct. at 1749.
[127] *Id.* at 1751.
[128] *Id.* at 1752.
[129] *Id.* (emphasis in original).
[130] *Id.*
[131] *Id.* at 1754.
[132] *Id.*

B. Waiver or Consent

For example, the States may waive their immunity by consent.[133] This can be done either by legislative or executive action. With respect to the former, a waiver of immunity occurs when a State legislature passes a law in which the State expresses "a 'clear declaration' that it intends to submit itself to our jurisdiction."[134] In determining whether such a waiver exists, the Court has applied the same strict requirements that it has utilized when assessing whether Congress has clearly expressed its intention to unilaterally abrogate the States' immunity by means of federal legislation. As in those cases, the Court has held that "a State will be deemed to have waived its immunity 'only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'"[135] Consent to suit in State court is not enough.[136] Nor is consent to one category of claims sufficient to waive immunity as to another.[137]

As stated previously, waiver of a State's immunity can also result from executive action. The Supreme Court has held that immunity can be waived when "the State voluntarily invokes our jurisdiction."[138] Appearing and defending a case on the merits, however, is not enough by itself to constitute a waiver of immunity.[139] In *Ford Motor Co. v. Dept. of Treasury*, for example, the State of Indiana did not raise the defense of Eleventh Amendment immunity until the case reached the Supreme Court.[140] The Court found that "[t]his was in time, however,"[141] and proceeded to examine whether the Indiana Attorney General had the power under State law to waive the State's immunity. Observing that under the Indiana Constitution "the state legislature may waive state immunity only by general law,"[142] the Court stated that "it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative and executive officers discretionary power to grant or withhold consent in individual cases."[143] In concluding that "no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts,"[144] the Court rejected the idea that "any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued."[145]

A different result is reached when the State voluntarily intervenes in a federal court action. While a State's voluntary intervention does not waive the State's immunity when the intervention is for a "limited" purpose and does "not seek the determination of any rights or title,"[146] a State agency that files a proof of claim in a bankruptcy proceeding "waives any immunity which it otherwise might have had respecting the adjudication of the claim."[147] Although this might seem, as characterized by the Court in *College Savings Bank v. Florida Prepaid*, an "unremarkable proposition,"[148] complicated questions can arise as to the scope of the waiver. Several federal appellate courts have observed that a State in these circumstances waives its immunity as to any counterclaim amounting to "a

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[133] *See, e.g.*, Clark v. Barnhard, 108 U.S. 436, 447–48 (1883).

[134] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. at 2226 (citing Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944)).

[135] Atascadero State Hospital v. Scanlon, 473 U.S. at 239–40 (quoting Edelman v. Jordan, 415 U.S. at 673) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).

[136] *See, e.g.*, Smith v. Reeves, 178 U.S. 436, 441 (1900) ("It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts."); Chandler v. Dix, 194 U.S. 590, 591 (1904) (same).

[137] *See* Alden v. Maine, 119 S. Ct. at 2268 ("To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit.").

[138] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. at 2226 (citing Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906).

[139] *See* Wisconsin Dept. of Corrections v. Schacht, 118 S. Ct. 2047, 2055 (1998) (Kennedy, J., concurring) (citing Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 683 n.18 (1982); Calderon v. Ashmus, 523 U.S. 740, 744 n.2 (1998); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 n.8 (1984); Edelman v. Jordan, 415 U.S. 651, 678 (1974); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 467 (1945)). Despite these cases, the Ninth Circuit found immunity was waived when an agency participated in pretrial proceedings and did not assert immunity until the first day of trial. *See* Hill v. Blind Industries and Services of Maryland, 179 F.3d 754 (9th Cir. 1999), *amended*, 201 F.3d 1186 (2000).

[140] 323 U.S. at 467.

[141] *Id.*

[142] *Id.* at 468.

[143] *Id.*

[144] *Id.* at 469.

[145] *Id.* at 468. *See also* Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1149 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) (conducting same analysis in concluding that the Maryland Attorney General did not waive the State's immunity by litigating the case on the merits in the bankruptcy and district courts and raising Eleventh Amendment immunity for the first time on the appeal to the Fourth Circuit).

[146] Missouri v. Fiske, 290 U.S. 18, 25 (1933) (quotations omitted).

[147] Gardner v. New Jersey, 329 U.S. 565, 574 (1947).

[148] 119 S. Ct. at 2228 n.3.

compulsory counterclaim,"[149] meaning both claims must "arise out of the same transaction or occurrence."[150]

Removal is another area in which courts have addressed the issue of whether the States have consented to federal court jurisdiction. The federal district courts have reached conflicting conclusions on whether the Eleventh Amendment bars the removal of an action originally brought in State court in which the State is the plaintiff. At least two courts have held that such an action is barred by immunity, finding that a State that has not consented to removal cannot be "involuntarily subjected" to federal court jurisdiction.[151] Most of the courts to have addressed the issue, however, have reached the opposite conclusion and held that the Eleventh Amendment is not a bar to the removal of a State court action initiated by a State.[152]

The immunity issue also presents itself in cases in which a State as a defendant removes a case to federal court, and then asserts that the Eleventh Amendment bars the federal action. The Supreme Court addressed such a situation in *Wisconsin Dept. of Corrections v. Schacht*,[153] where a State agency and several of its officials filed an answer in the removed federal court case asserting Eleventh Amendment immunity as a defense. While the Court decided the case on other grounds, Justice Kennedy filed a concurring opinion expressing the view that the Court should, "in some later case,"[154] address whether the State's act of removing the case constitutes a waiver of Eleventh Amendment immunity. Stating that "[i]t would seem simple enough to rule that once a State consents to removal, it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court,"[155] Justice Kennedy observed that "[e]ven if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction."[156] Citing the decisions of several federal appellate courts that have "recognized that consent to removal may constitute a waiver,"[157] he stated that it "is not an insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court."[158]

States may also waive their immunity by accepting federal funding. The "mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[159] But "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and...acceptance of the funds entails an agreement to the actions."[160] Congress's ability to take that action is subject to restrictions, including the requirement that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously...., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[161] Other restrictions include the requirements that "the exercise of the spending power must be in pursuit of 'the general welfare,'"[162] that the conditions "bear some relationship to the purpose of the federal spending,"[163] that the funding grant not violate "other constitutional provisions,"[164] and that the funding not be "so coercive as to pass the point at which 'pressure turns into compulsion.'"[165]

The Supreme Court's Spending Clause cases are tempered by another line of authority in which the Court has made clear that the States cannot be found to have waived their immunity constructively or impliedly. The Supreme Court at one point adopted such a theory in *Parden v. Terminal R. Co.*,[166] holding that

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[149] Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1148 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998).

[150] *Id.*, 119 F.3d at 1149. *See also* Georgia Dept. of Revenue v. Burke (*In re* Burke), 146 F.3d 1313, 1318 n.10 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2410 (1999); Missouri Student Loan Program v. Rose (*In re* Rose), 187 F.3d 926, 929–30 (8th Cir. 1999).

[151] Moore v. Abbott Laboratories, Inc., 900 F. Supp. 26, 30 (S.D. Miss. 1995). *See also* California v. Steelcase, Inc., 792 F. Supp. 84, 86 (C.D. Cal. 1992).

[152] *See* Regents of the University of Minnesota v. Glaxco Wellcome, Inc., 58 F. Supp. 2d 1036, 1040 (D. Minn. 1999) (citing cases and finding Moore v. Abbott Laboratories, Inc. and California v. Steelcase, Inc. to be "against the weight of authority on this issue").

[153] 118 S. Ct. 2047 (1998).

[154] *Id.* at 2054 (Kennedy, J., concurring).

[155] *Id.* at 2055.

[156] *Id.*

[157] *Id.* at 2056 (citing Newfield House, Inc. v. Massachusetts Dept. of Public Welfare, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981); Estate of Porter v. Illinois, 36 F.3d 684, 691 (7th Cir. 1994); Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986); Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 847 (6th Cir. 1984). *See also* Sutton v. Utah State School for the Deaf & Blind, 173 F.3d 1226, 1234–36 (10th Cir. 1999). *But see* Neiberger v. Hawkins, 70 F. Supp. 2d 1177, 1188 (D. Colo. 1999).

[158] *Id.* at 2056–57.

[159] Atascadero State Hospital v. Scanlon, 473 U.S. at 246–47.

[160] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. at 2231.

[161] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).

[162] South Dakota v. Dole, 483 U.S. at 207 (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).

[163] New York v. United States, 505 U.S. 144, 167 (1992).

[164] South Dakota v. Dole, 483 U.S. at 208.

[165] *Id.* at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[166] 377 U.S. 184 (1964).

the State of Alabama, by operating a railroad in interstate commerce, "consented" and waived its immunity under a federal law that subjected railroads engaged in commerce between the States to suit.[167] *Parden*'s constructive or implied waiver theory was expressly overruled in *College Savings Bank*, where the Court held that Florida did not constructively waive its immunity by engaging in the interstate marketing and administration of its prepaid tuition program.[168] "Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would...permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin."[169] Distinguishing its Spending Clause cases, the Court stated that

> Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity.[170]

The Court concluded that "where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity."[171]

There is at least one exception to the rule that the States cannot constructively or impliedly waive their immunity. In ratifying the Constitution, the States have been deemed to have consented to suits brought by the United States.[172] As the Supreme Court observed in *Principality of Monaco v. Mississippi*, "[w]hile that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan."[173] Absent the ability of the federal courts to assert jurisdiction over and resolve controversies between a State and the United States, "the permanence of the Union might be endangered."[174] This "exception" does not represent, however, a significant chink in the States' immunity defense.

First, the United States' resources are limited and so even when federal law authorizes the federal government to bring suit against the States, that is a far cry from suit actually being filed. One congressional response to this type of resource limitation has been to pass legislation, such as the federal False Claims Act, authorizing individuals to bring suit on behalf of the United States. The Supreme Court has expressed "doubt," however, whether this type of delegation is constitutionally permissible:

> The consent, "inherent in the convention," to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.[175]

The Court expanded on this in *Alden v. Maine*:

> 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.[176]

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[167] *Id.* at 192.

[168] 119 S. Ct. at 2228.

[169] *Id.* at 2229.

[170] *Id.* at 2231.

[171] *Id.*

[172] *See* United States v. Mississippi, 380 U.S. 128, 140–41 (1965); United States v. Texas, 143 U.S. 621, 644–45 (1892).

[173] 292 U.S. 313, 329 (1934).

[174] *Id.* (quoting United States v. Texas, 143 U.S. at 645).

[175] Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 (1991).

[176] 119 S. Ct. at 2267. While the federal appellate courts have split on whether the Eleventh Amendment bars such a suit brought under the False Claims Act, *compare* Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 162 F.3d 195 (2d Cir. 1998) (not barred); United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865 (8th Cir. 1998) (not barred) *with* United States *ex rel.* Foulds v. Texas Tech University, 171 F.3d 279 (5th Cir. 1999) (barred); *cf.* United States *ex rel.* Long v. SCS Business and Technical Institute, Inc., 173 F.3d 890 (D.C. Cir. 1999) (states are not a "person" under the False Claims Act), the Supreme Court sidestepped the issue in Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 120 S. Ct. 1858 (2000), by holding that a State is not a "person" under the Act. At the conclusion of that decision, however, Justice Scalia wrote that the Court would "of course express no view on the question whether an action in federal court by a qui tam relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'serious doubt' on that score." *Id.* at 1870 (citing Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). The Court's citation of Justice Brandeis's concurring opinion in Ashwander at the end of this sentence is interesting. Blatchford v. Native Village of Noatak, a much more recent and apposite case that presented an Eleventh Amendment immunity question, was also authored by Justice Scalia, who expressed "doubt"—as opposed to "serious doubt"—that the "Government's exemption from state sovereign immunity...can be delegated...." 501 U.S. at 785. Justice Brandeis's opinion, in contrast, addressed the altogether different principle, in a non-Eleventh Amendment context, that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain

Second, the United States' presence in a case for one purpose "does not eliminate the State's immunity for all purposes."[177] In rejecting the States' Eleventh Amendment immunity defense against the claims of several Indian tribes who intervened in a case in which the United States was a party, the Court in *Arizona v. California*[178] pointed out that the tribes did "not seek to bring new claims or issues against the states" and so "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised."[179] In another case decided the following year, however, the Court stated that "the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs."[180]

This statement takes on special meaning in light of cases such as *Alden v. Maine*, which involved a suit brought by individuals seeking damages from the State of Maine under the Fair Labor Standards Act. Even if the United States intervened as a party in that action, which the Court pointed out it did not,[181] the plaintiffs' claims for monetary relief would likely be barred by immunity because the Secretary of the U.S. Department of Labor has authority to seek only injunctive relief under the FLSA, not damages.[182] The mere fact that the United States files suit does not mean, therefore, that immunity is irretrievably lost.

IV. *EX PARTE YOUNG* AND OTHER LIMITATIONS

Avoiding issues of abrogation, waiver, and consent is only part of the battle. The States' immunity from suit is subject to additional qualifications that restrict its application.

A. *Ex Parte Young*

Perhaps the most significant and familiar of these is the *Ex parte Young* doctrine, based on a decision of the same name,[183] which provides that a plaintiff is entitled to prospective injunctive relief against State officials to ensure their future compliance with federal law. This doctrine is grounded in the notion that this type of relief is not against the State—because a State cannot act unlawfully—and that a State official who violates federal law does not do so on behalf of the State. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."[184] The Supreme Court has thus long recognized that the Eleventh Amendment does not prevent a federal court plaintiff from obtaining injunctive relief on the basis of a State official's continuing wrongful actions. While "prospective and retrospective relief implicate Eleventh Amendment concerns," only "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause."[185] Based on these principles, courts routinely entertain actions in which prospective relief is sought against State officials. As strong as the *Ex parte Young* doctrine is, however, it is limited in its sweep by several significant restrictions.

First, the doctrine is inapplicable when the named defendant is the State or a State agency. In those cases, unless the State's immunity has been validly abrogated or waived, the suit is barred "regardless of the nature of the relief sought,"[186] i.e., whether it is injunctive, declaratory, or monetary.[187]

Second, the requested injunctive relief must be responsive to a continuing violation of federal law. Otherwise, immunity applies, because absent a "claimed continuing violation of federal law," a court has "no occasion to issue an injunction."[188] It is not enough, therefore, for a plaintiff to point to a past violation of the law. Such a violation does not by itself give rise to a "real and immediate threat" of future injury warranting injunctive relief,[189] nor does it provide a sufficient basis for circumventing the bar of Eleventh Amendment immunity, regardless of whether the defendant is a State official rather than the State itself. "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."[190] As illustrated in *Edelman v. Jordan*,[191] this is so even when the relief sought is characterized as equitable in nature.

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whether a construction of the statute is fairly possible by which the question may be avoided." Ashwander v. TVA, 297 U.S. at 348 (Brandeis, J., concurring) (quotations and citation omitted). Thus, Justice Scalia's citation of Ashwander rather than Blatchford enabled him to elevate "doubt" to "serious doubt." In any event, as this sentence in Vermont Agency suggests, it may be futile for Congress to amend the False Claims Act to include the States within the definition of "person."

[177] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 103 n.12 (1984).

[178] 460 U.S. 605 (1983).

[179] *Id.* at 614.

[180] Pennhurst State School & Hospital v. Halderman, 465 U.S. at 103 n.12.

[181] *See* 119 S. Ct. at 2269.

[182] *See* 29 U.S.C. §§ 211(a), 216(b).

[183] 209 U.S. 123 (1908).

[184] Green v. Mansour, 474 U.S. 64, 68 (1986).

[185] *Id.*

[186] Pennhurst State School & Hospital v. Halderman, 465 U.S. at 100.

[187] *See* Seminole Tribe of Florida v. Florida, 517 U.S. at 58 (injunctive); Puerto Rico Aqueduct and Sewer Auth. v. Metcalf, 506 U.S. 139, 146 (1993) (declaratory and monetary); Cory v. White, 457 U.S. 85, 91 (1982) (interpleader); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam) (injunctive).

[188] Green v. Mansour, 474 U.S. at 73.

[189] City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

[190] Papasan v. Allain, 478 U.S. 265, 278 (1986).

[191] 415 U.S. 651 (1974).

In that case, a class of plaintiffs challenging the State of Illinois's administration of a federal-state aid program prevailed in demonstrating that Illinois had improperly delayed payments to aid recipients, resulting in diminished benefits for the plaintiffs.[192] After issuing a preliminary injunction requiring Illinois to make timely payments in the future, the district court issued a permanent injunction requiring "the state officials to 'release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968...and the date of the preliminary injunction....'"[193] After tracing the evolution of the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment,"[194] the Court held that the Eleventh Amendment prohibited the district court from requiring Illinois to pay benefits that should have been paid prior to issuance of the preliminary injunction.

The Court observed that, under the *Ex parte Young* doctrine, immunity principles do not bar truly prospective relief that requires a state official in the future "to conform his conduct...to the requirement" of federal law.[195] "But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing."[196] While the Seventh Circuit in that case approved the injunction, despite its retrospective effect, "because it was in the form of 'equitable restitution' instead of damages,"[197] the Supreme Court rejected that formalism and looked to the real effect of the relief:

> The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself, *Ford Motor Co. v. Department of Treasury*, [323 U.S. 459 (1945)], than it does the prospective injunctive relief awarded in *Ex parte Young*.
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> ....
>
> We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.[198]

The Supreme Court held, therefore, that the retrospective portion of the district court's injunction violated Illinois' Eleventh Amendment immunity, stating that

> [i]t requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on a slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.[199]

Accordingly, the Court invalidated the district court's requirement that Illinois pay any benefits that it withheld prior to the time the district court issued its preliminary injunction.

Third, the *Ex parte Young* doctrine has no applicability when the federal court plaintiff seeks any relief—equitable or monetary—based on the claim that State officials have violated State law. Asserting that "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law,"[200] the Court has found that, "[o]n the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials how to conform their conduct to state law."[201] Even when a federal court has jurisdiction over federal claims in a case, the Eleventh Amendment bars pendent state-law claims because the same principle that prevents federal courts from deciding whether State officials have violated State law "applies as well to state-law claims brought into federal court under pendent jurisdiction."[202]

Fourth, the Supreme Court has held that "permitting an action against a state officer based upon *Ex parte Young*" may be inappropriate "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right...."[203] The Court applied this "exception" to the *Ex parte Young* exception in *Seminole Tribe* in addressing the "intricate procedures" and "modest set of sanctions" that Congress established in the Indian Gaming Regulatory Act,[204] stating "the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under" the Act.[205] While the Court asserted that it did "not hold that Congress cannot authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme,"[206] federal courts have since applied this exception or a variation of it in dismissing claims for injunctive relief brought

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[192] *Id.* at 655–56.
[193] *Id.* at 656.
[194] *Id.* at 663.
[195] *Id.* at 664.
[196] *Id.*
[197] *Id.* at 666.
[198] *Id.* at 665–66.
[199] *Id.* at 668.
[200] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106 (1984).
[201] *Id.*
[202] *Id.* at 121.
[203] Seminole Tribe of Florida v. Florida, 517 U.S. at 74.
[204] *Id.* at 74–75.
[205] *Id.* at 75–76.
[206] *Id.* at 75 n.17.

against State officials under the ADA;[207] the Comprehensive Environmental Response, Compensation and Liability Act;[208] and the 1996 Telecommunications Act.[209]

Fifth, the Supreme Court has limited the reach of the *Ex parte Young* exception in cases brought against State officials in which the State is both the real party to the controversy and against which relief is sought by the suit. "Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State."[210] The Court has found in these cases that "to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle...that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction."[211] "Whether [the State] is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record."[212]

The Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho* provides an interesting illustration of this. In that case, an Indian tribe and its members sued the State of Idaho, several state agencies, and a number of state officials in their individual capacities, claiming that the Tribe's reservation included the banks, beds, and submerged lands of Lake Coeur d'Alene, as well as various rivers and streams that formed part of the lake's water system.[213] The Tribe sought a declaratory judgment establishing its title and entitlement to the exclusive use of this property, and declaring the invalidity of all Idaho laws that purported to regulate or in any way affect the property. The Tribe also sought preliminary and permanent injunctive relief prohibiting the defendants from regulating the land or otherwise interfering with the Tribe's use and enjoyment of the property.[214] The Court held that the Eleventh Amendment barred the Tribe's suit.

Stating the well-known principle that "[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction,"[215] the Court observed that "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests."[216] Starting with the undisputed proposition that "the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent,"[217] the Court observed that the relief sought "would divest the State of its sovereign control over submerged lands,"[218] and proceeded to discuss extensively "the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty."[219] Based on this "relation between the sovereign lands at issue and the immunity the State asserts,"[220] the Court concluded that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable."[221]

As this language suggests, *Ex parte Young* is still a viable exception to the rule that the States cannot be sued without their consent. It also underscores that this is all that *Ex parte Young* is, an exception. The lesson to be learned here is that even when the defendant is an individual who is sued for prospective injunctive or declaratory relief, avoid "reflexive reliance on an obvious fiction,"[222] and undertake instead a careful examination to identify the real parties and interests that are at stake in the litigation.

B. Immunity is Limited to Actions Brought Against the State, its Units, and its Officials in Their Official Capacity

The "real party in interest" rule gives rise to additional considerations that need to be examined. The first is whether the entity being sued is entitled to protection under the Eleventh Amendment. Only a State and its officials in their official capacity can claim Eleventh Amendment immunity because "the protection afforded by that Amendment is only available to 'one of the United States.'"[223] An entity's entitlement to sovereign immunity in State court, however, does not necessarily mean it enjoys Eleventh Amendment im-

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[207] *See* Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8, 1010–12 and n.20 (8th Cir. 1999) (en banc), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct. 1265 (2000).

[208] *See* Waste, Inc. Remedial Design/Remedial Action Group v. Cohn, 60 F. Supp. 2d 833 (N.D. Ind. 1997).

[209] *See* MCI Telecommunications Corp. v. Frisby, 998 F. Supp. 625, 630 (D. Md. 1998).

[210] Alden v. Maine, 119 S. Ct. at 2267.

[211] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997).

[212] *In re* Ayers, 123 U.S. 443, 492 (1887).

[213] 521 U.S. at 264–65.

[214] *Id.* at 265.

[215] *Id.* at 281.

[216] *Id.*

[217] *Id.*

[218] *Id.* at 283.

[219] *Id.* at 286.

[220] *Id.* at 287.

[221] *Id. See also* ANR Pipeline Co. v. Lafaver, 150 F.3d 1178 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999) (applying Coeur d'Alene analysis in holding that the Eleventh Amendment barred claims brought under the Railroad Revitalization and Regulatory Reform Act seeking prospective equitable relief).

[222] Coeur d'Alene, 521 U.S. at 270.

[223] Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400 (1979).

munity.[224] Rather, the Supreme Court has "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"[225] The fundamental inquiry to make, therefore, is whether the agency defendant "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend."[226]

The Supreme Court has not pursued a singular approach in making this inquiry. Rather, it has "sometimes examined 'the essential nature and effect of the proceeding'...and sometimes focused on the 'nature of the entity created by state law' to determine whether it should 'be treated as an arm of the State.'"[227] In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,[228] for example, the Court observed that the agency in question, which was created pursuant to the Constitution's Interstate Compact Clause,[229] was referred to in the Compact as a separate legal entity and political subdivision, that six of its 10 members were appointed by counties and cities and only two by the States that formed the agency, that its funding was provided by the counties and not the States, that its obligations were not binding on the States, that the function it served of regulating land use is traditionally a local governmental function, and that the States had no veto power over its authority to make rules.[230] The Court concluded that this agency was not entitled to Eleventh Amendment immunity.

While not dispositive of the analysis, "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued."[231] The answer to that question proved to be instrumental in *Hess v. Port Authority Trans-Hudson Corp.*,[232] in which the Supreme Court held that the Eleventh Amendment did not bar a claim brought against a bistate transit authority, also created pursuant to the Compact Clause, that operated a commuter train serving New York City and northern New Jersey.

Declaring that "[b]istate entities occupy a significantly different position in our federal system than do the States themselves,"[233] the Court observed that, in contrast to States that are "constitutent elements of the Union,"[234] bistate entities "typically are creations of three discrete sovereigns: two States and the Federal Government."[235] As such creations, "their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has."[236] Noting that several "[i]ndicators of immunity" do not "all point the same way,"[237] the Court pointed out that while eight of the Port Authority's 12 commissioners were required to be resident voters of New York City or other portions of the New York District Port, "this indicator of local governance is surely offset by the States' controls" that all commissioners be State appointees, that the Governors of New York and New Jersey could each block measures of the Port Authority, and that the legislature of both States had the power, when acting together, to augment the Port Authority's powers and responsibilities.[238] The Court also noted that although the Authority's compact and implementing legislation "do not type the Authority as a state agency,"[239] State courts "repeatedly have typed the Port Authority an agency of the States rather than a municipal unit or local district."[240]

Stating that "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our guide,"[241] the Court proceeded to focus on "the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury."[242] That core concern was not implicated because "the Port Authority is financially self-sufficient; it generates its own revenues, and it pays its own debts."[243] As a result, "[r]equiring the Port Authority to answer in federal court to injured railroad workers who assert a federal statutory right...to recover damages does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment."[244] The Court

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[224] *See, e.g.*, Ghassomians v. Ashland Independent School District, 55 F. Supp. 2d 675, 682 (E.D. Ky. 1998) ("Although Kentucky's Supreme Court has eliminated any doubt that local school boards are arms of the state for sovereign immunity purposes...the consensus of federal judges in this district is that local school boards are sufficiently autonomous to fall outside the Eleventh Amendment's protection.").

[225] Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. at 401 (citing Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977); Moor v. County of Alameda, 411 U.S. 693, 717–21 (1973); Lincoln County v. Luning, 133 U.S. 529 (1890)).

[226] Mt. Healthy Board of Education v. Doyle, 429 U.S. at 280.

[227] Regents of the University of California v. Doe, 519 U.S. 425, 429–30 (1997) (footnote and citations omitted).

[228] 440 U.S. 391 (1979).

[229] U.S. CONST. art. 1, § 10, cl. 3.

[230] *Id.* at 401–02.

[231] Regents of the University of California v. Doe, 519 U.S. at 430.

[232] 513 U.S. 30 (1994).

[233] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. at 40.

[234] *Id.*

[235] *Id.*

[236] *Id.* at 42.

[237] *Id.* at 44.

[238] *Id.*

[239] *Id.*

[240] *Id.* at 45.

[241] *Id.* at 47.

[242] *Id.* at 48.

[243] *Id.* at 52.

[244] *Id.*

held, therefore, that the Port Authority was not entitled to immunity.

Although *Hess* involved a bistate entity, since that decision the federal appellate courts have applied the same analysis in addressing the status of single-state or regional transportation authorities. All but one have held that they are not entitled to Eleventh Amendment immunity.[245] The one exception is notable. In holding that the South Carolina State Ports Authority is entitled to immunity, the Fourth Circuit in *Ristow v. South Carolina Ports Authority*[246] based its decision on the close interconnection that existed between the Ports Authority and State treasury upon which it relied for its required expenditures. In light of that relationship, the court found it irrelevant that "a judgment against the Ports Authority cannot be legally enforced against the State,"[247] because "[t]o deny Eleventh Amendment immunity in these circumstances would ignore economic reality."[248] The court held that the agency was entitled to immunity since "a judgment against the Ports Authority involves the 'core concern' of the Eleventh Amendment—the ebb and flow of funds into and out of South Carolina's treasury."[249]

Similar to the Fourth Circuit's practical approach, the Supreme Court 2 years later in *Regents of the University of California v. Doe*[250] rejected a "formalistic" argument that the University of California was not entitled to Eleventh Amendment immunity because the federal Department of Energy had agreed to indemnify the University against an adverse judgment. Stating that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant,"[251] the Court observed that "if the sovereign State of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be 'one of the United States.'"[252] The Court thus found no merit in the contention that "the Eleventh Amendment does not apply to this litigation because any award of damages would be paid by the Department of Energy, and therefore have no impact upon the treasury of the State of California."[253]

An important point is worth noting here. Even though the Eleventh Amendment does not immunize from suit political subdivisions such as counties and municipalities, the Supreme Court has "applied the Amendment to bar relief against county officials 'in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.'"[254] The same is true when the named defendants are State officials rather than the State itself. Ordinarily, "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."[255] These kinds of suits, known as "personal capacity" suits, "seek to impose personal liability upon a government official for actions he takes under color of state law."[256] However, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."[257]

Applying this rule in *Ford Motor Co. v. Dept. of Treasury*, in which Ford sued Indiana officials seeking a refund of taxes that Ford had previously paid, the Court held that the State was the real party in interest because the individual defendants were joined solely "as the collective representatives of the state" and Ford "did not assert any claim to a personal judgment against these individuals for the contested tax payments."[258] The Court reached a similar result in *Edelman v. Jordan*, finding that Eleventh Amendment immunity barred the plaintiffs' request for public assistance benefits that should have been paid but were

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[245] *See* Elam Construction, Inc. v. Regional Transp. District, 129 F.3d 1343, 1345–46 (10th Cir. 1997), *cert. denied*, 523 U.S. 1047 (1998); Mancuso v. New York State Thruway Auth., 86 F.3d 289 (2d Cir.), *cert. denied*, 519 U.S. 992 (1996); Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140 (3rd Cir.), *cert. denied*, 516 U.S. 932 (1995).

[246] 58 F.3d 1051 (4th Cir.), *cert. denied*, 516 U.S. 987 (1995).

[247] 58 F.3d at 1054.

[248] *Id.*

[249] *Id.* at 1054–55. *Cf.* Campaign for Sensible Transp. v. Maine Turnpike Auth., 658 A.2d 213, 217 (Me. 1995) (holding that the Maine Turnpike Authority was not a "person" for purposes of 42 U.S.C. § 1983 because "the State is the real party in interest in the Authorities' activities" and an adverse judgment would reduce its funds, "impacting on the State's fiscal autonomy").

[250] 519 U.S. 425 (1997).

[251] *Id.* at 431.

[252] *Id.*

[253] *Id.*

[254] Pennhurst State School & Hospital v. Halderman, 465 U.S. at 123 n.34 (quoting Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. at 401.)

[255] Alden v. Maine, 119 S. Ct. at 2267. *See also* Scheuer v. Rhodes, 416 U.S. 232, 238 (1974) ("While it is clear that the doctrine of *Ex parte* Young is of no aid to a plaintiff seeking damages from the public treasury...damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office."); Ford Motor Co. v. Dept. of Treasury, 323 U.S. at 462 ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.").

[256] Kentucky v. Graham, 473 U.S. 159, 165 (1985).

[257] Ford Motor Co. v. Dept. of Treasury, 323 U.S. at 464.

[258] *Id.* at 463, 464.

not because "[t]hese funds will obviously not be paid out of the pocket of petitioner Edelman."[259]

Many government officials, of course, will not find themselves on the receiving end of a suit seeking tax refunds or public assistance benefits. The same cannot be said about wrongful termination of employment actions where back pay is at issue. Relying on *Ford Motor Co.* and *Edelman*, one court held that immunity barred a request to seek back pay relief against a State official in his individual capacity:

> If these sums should have been paid, they should have been paid by the State, not by Regan in his individual capacity, and an award of backpay would necessarily have to be satisfied from State funds. Thus, [the] backpay claim is a claim for "a retroactive award which requires the payment of funds from the state treasury," [*Edelman v. Jordan*, 415 U.S.] at 677, 94 S.Ct. at 1362; *see Ford Motor Co. v. Dept. of Treasury*, 323 U.S. at 464, 65 S. Ct. at 350, and is barred by the Eleventh Amendment, absent a waiver of immunity by the State.[260]

Similarly, as another court held in finding that individual state officials were entitled to immunity from back pay damages claims brought against them in their individual capacity, "[u]nder the FMLA [Family Medical Leave Act], plaintiff would be entitled to damages equal to lost wages and benefits, interest, and appropriate equitable relief. 29 U.S.C. § 2617. To the extent that plaintiff is seeking damages in the form of back pay, those damages are barred by the Eleventh Amendment."[261]

This is not meant to suggest that government employees should feel they have carte blanche to violate federal law. Such a violation, however, does not automatically translate into a finding of personal liability. This is so for the additional reason that, under some federal laws, individuals such as supervisors cannot be held personally liable for damages. Under Title VII, for example, an "employer" includes a "person engaged in an industry affecting commerce" and "any agent of such a person."[262] Notwithstanding that a supervisor is an agent of an employer and thus fits within the literal definition of an employer, every federal appellate court to have considered the question has held that a supervisor cannot be held individually liable under Title VII.[263] Courts have similarly held that a supervisor cannot be held individually responsible for damages under the ADEA and the ADA.[264]

While these cases generally recognize that the employer can be held ultimately liable for statutory violations, they nevertheless present additional difficulties for plaintiffs who seek relief against the States under statutes such as the ADEA. The employer rather than the individual is rendered responsible for the acts of supervisors and similarly situated personnel by "incorporat[ing] respondeat superior liability into the statute."[265] "Employer liability ensures that no employee can violate the civil rights laws with impunity...."[266] In light of these cases, therefore, State employees cannot sue their supervisors but can seek redress only from their State agency employers. After the Supreme Court's decision in *Kimel*, however, State employees cannot sue the States under the ADEA. While the Court in *Kimel* noted that virtually all States have passed age discrimination statutes allowing State employees to sue their employers,[267] those statutes do not uniformly provide the same remedies, such as attorneys' fees, that are available under the ADEA. If the Supreme Court extends its holding in *Kimel* to cases arising under the ADA, plaintiffs seeking relief under that statute may also find their choice of remedies to be similarly limited.

Other considerations should be examined even when it is clear that a defendant can be held individually liable. Some courts have held that the Eleventh Amendment applies unless the plaintiff expressly alleges in the complaint that the suit is brought against the defendant in his or her individual capacity.[268] Others have found that "when a plaintiff does not allege capacity specifically, the court must examine the nature of the plaintiff's claims, the relief sought, and the course of proceedings to determine whether a state

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[259] 415 U.S. at 664.

[260] Dwyer v. Regan, 777 F.2d 825, 836 (2d Cir. 1985), *modified on other grounds*, 793 F.2d 457 (1986).

[261] McGregor v. Goord, 18 F. Supp. 2d 204, 210 (N.D. N.Y. 1998).

[262] 42 U.S.C. § 2000e(b).

[263] *See* Lissau v. Southern Food Service, Inc., 159 F.3d 177, 180–81 (4th Cir. 1998); Wathen v. General Electric Co., 115 F.3d 400, 403–06 (6th Cir. 1997); Dici v. Pennsylvania, 91 F.3d 542, 552 (3rd Cir. 1996); Tomka v. Seiler Corp., 66 F.3d 1295, 1314–17 (2d Cir. 1995); Gary v. Long, 59 F.3d 1376, 1399 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995); Grant v. Lone Star Co., B.L., 21 F.3d 649, 651–53 (5th Cir.), *cert. denied*, 513 U.S. 1015 (1994); Smith v. St. Bernard's Regional Medical Center, 19 F.3d 1254, 1255 (8th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587–88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); Yeldell v. Cooper Green Hospital, Inc., 956 F.2d 1056, 1060 (11th Cir. 1992).

[264] *See* Birbeck v. Marvel Lighting Corp., 30 F.3d 507, 510–11 (4th Cir.) (ADEA), *cert. denied*, 513 U.S. 1058 (1994); Miller v. Maxwell's Int'l, Inc., 991 F.2d at 587–88. *See also* Flamand v. American Int'l Group, Inc., 876 F. Supp. 356, 361 n.1 (D.P.R. 1994) (relying on the FLSA, "due to the FLSA's similarity and special relationship to [the] ADEA," in finding that supervisors are not individually liable under the latter statute); Baird v. Rose, 192 F.3d 462, 471–72 (4th Cir. 1999) (no personal liability under the ADA); Alsbrook v. City of Maumelle, 184 F.3d at 1005 n.8 (same); EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1280–82 (7th Cir. 1995) (same).

[265] Wathen v. General Electric Co., 115 F.3d at 405–06 (quotations and citations omitted).

[266] Birbeck v. Marvel Lighting Corp., 30 F.3d at 510.

[267] 120 S. Ct. at 650.

[268] *See, e.g.*, Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989).

official is being sued in a personal capacity."[269] The Supreme Court has not resolved this issue but instead has simply reiterated one federal circuit's "view that '[i]t is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity.'"[270]

Even those courts that have held that public officials can be sued individually for damages have also recognized that "the defense of qualified immunity may be applicable here."[271] In holding that the defendants in their individual capacities were entitled to qualified immunity from claims brought under the Family and Medical Leave Act (FMLA), one court rejected the plaintiff's claim that qualified immunity was inapplicable to an FMLA claim, stating that "contrary to plaintiff's assertion that qualified immunity 'pertains only to constitutional claims,' the United States Supreme Court has held that the defense applies to both constitutional and statutory rights."[272] This defense provides that "government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[273] Thus, the violation of a plaintiff's right does not automatically translate into a finding of personal liability.

C. The Eleventh Amendment Does Not Protect a State from Paying Costs Ancillary to a Valid Grant of Prospective Equitable Relief

While the sweep of the Eleventh Amendment is broad, it does not insulate State treasuries from paying costs that are necessarily incurred to ensure compliance in the future with federal law. "Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*."[274] This is so even when the equitable relief ordered has "a direct and substantial impact on the state treasury."[275] These costs include attorney's fee awards,[276] and need not be based on legislation containing the "clear statement" of immunity abrogation discussed earlier because such a fee award does "not depend on congressional abrogation of the States' immunity."[277] Moreover, these kinds of "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity."[278]

The Eleventh Amendment does immunize the State, however, from paying an attorney's fee award that arises out of relief entered against a State official in his or her personal capacity, such as a damages award. "A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him."[279] Accordingly, "a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the government entity."[280]

D. A State's Immunity in its Own Courts Does Not Extend to Courts of Other States

In *Nevada v. Hall*,[281] the Supreme Court held that even when a State is entitled to immunity in federal court and its own courts, that does not render the State immune from suits brought in the courts of other States. That case arose in the context of a tort claim that California residents brought in the courts of their own State against the State of Nevada. Although California had waived its immunity from tort claims, Nevada waived its immunity only as to the first $25,000 of such a claim. Addressing the question of "whether the Constitution places any limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State,"[282] the Court held that no such constitutional restriction existed, stating that if it were to hold otherwise and thus find "that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union."[283]

Instead of suggesting, however, that a State court can be compelled to entertain a claim against its host State despite that State's assertion of sovereign immunity, the Court expressly asserted otherwise, stating that "no sovereign may be sued in its own courts without its consent,"[284] and that "[o]nly the sovereign's own consent could qualify the absolute character of that immunity."[285] *Nevada v. Hall* strongly implied, therefore, that a suit would be barred when brought by individuals against a State in its own courts without their consent, which is what the Court held 20 years later in *Alden v. Maine*.

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[269] Biggs v. Meadows, 66 F.3d 56, 61 (4th Cir. 1995).

[270] Hafer v. Melo, 502 U.S. 21, 24 n.* (1991) (quoting Melo v. Hafer, 912 F.2d 628 (3rd Cir. 1990)).

[271] Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 416 n.10 (M.D. Pa. 1999) (applying the Family Medical Leave Act). *See also* Baker v. Stone County, 41 F. Supp. 2d 965, 1003 (W.D. Mo. 1999) ("[E]ven if the plaintiffs do have clearly established statutory rights under the FLSA, it would not be apparent to reasonable officials that the defendants' actions in this case were unlawful.").

[272] Knussman v. Maryland, 16 F. Supp. 2d 601, 611 (D. Md. 1998).

[273] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[274] Edelman v. Jordan, 415 U.S. at 668.

[275] Milliken v. Bradley, 433 U.S. 267, 289 (1977).

[276] Hutto v. Finney, 437 U.S. 678, 691–700 (1978).

[277] Missouri v. Jenkins, 491 U.S. 274, 279 (1989).

[278] Hutto v. Finney, 437 U.S. at 695.

[279] Kentucky v. Graham, 473 U.S. 159, 167–68 (1985).

[280] *Id.* at 167.

[281] 440 U.S. 410 (1979).

[282] *Id.* at 421.

[283] *Id.* at 426–27.

[284] *Id.* at 416.

[285] *Id.* at 414.

V. CONCLUSION

The States' immunity from suit is a powerful defense whose strength only seems to be increasing with each new Supreme Court decision. Much of that strength, however, is bottomed on the slimmest of margins. Each of the "States' rights" cases that the Court has issued in the last 5 years, from *Seminole Tribe of Florida v. Florida* to *United States v. Morrison*, was decided by a 5-4 vote. Moreover, the dissenters have made clear that they do not feel bound by the usual rule of *stare decisis* because they are "unwilling to accept *Seminole Tribe* as controlling precedent."[286] Calling that decision "profoundly mistaken and so fundamentally inconsistent with the Framers' conception of any constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court,"[287] the dissenters have expressed the view that "[t]he kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."[288] The Court has already been presented with one such opportunity this Term. Others are sure to follow.

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[286] Kimel, 120 S. Ct. at 653 (Stevens, J., dissenting).

[287] *Id.*

[288] *Id.* at 653–54 (citations omitted).

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