PENUMBRAS OF STATE SOVEREIGN IMMUNITY & NEW FEDERALISM

by

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Introduction

Revival of sovereign immunity under the umbrella of New Federalism has significantly restricted the ability of in-state citizens to seek remedies against State governments for violation of federal employment laws in both federal and State[1] courts. While the language of the Eleventh Amendment[2] only limits the kinds of cases that can be brought to federal court by out-of-state citizens and foreigners, it has been used by the Supreme Court to support a broad application of State sovereign immunity. How can an amendment aimed at limiting the jurisdiction of federal courts be construed to (a) limit delegated Congressional legislative authority under the Commerce Clause and (b) bar in-state citizens from using federal and State courts to seek damages for violation of federal laws? Does State sovereign immunity preclude enforcement of federal laws in State courts under the penumbras of the Tenth Amendment or does the Supremacy Clause require their enforcement? In recent decisions, the Supreme Court has narrowed Congressional authority under the Interstate Commerce Clause and simultaneously used a sliding scale to evaluate when Fourteenth Amendment rights justify abrogation of State sovereign immunity under New Federalism.

This article explores the foundation of State sovereign immunity, the interaction between the Commerce Clause and the Tenth, Eleventh, and Fourteenth Amendments to the U.S. Constitution, and how they affect the rights of individuals to enforce federal employment laws against the States. Part I evaluates the historical context for sovereign immunity. Part II addresses whether the Eleventh Amendment and New Federalism appropriately restrict (a) Congressional authority under the Commerce Clause and (b) in-state citizen suits in federal court. Part III examines the role of the Fourteenth Amendment in abrogating the Eleventh Amendment to facilitate a suit against a State and how the Abrogation Doctrine has been applied to federal employment laws. Part IV analyzes the tension between the penumbras of the Tenth Amendment and the Supremacy Clause and their impact on the ability of an in-state citizen to use State courts to sue his/her own State for damages under federal laws. Part V explores limitations on and waivers of State sovereign immunity in the United States and the European Union. It advocates allowing the States to be sued for violating federal employment laws by modifying sovereign immunity to apply State damage caps to such suits.

I: State Sovereign Immunity - What is the Historical Context?

A. Constitutional Background For and Against Sovereign Immunity

Sovereign immunity enables government to protect itself from lawsuits or place limitations on the scope and amount of recovery. The concept gives a government control over the extent and terms by which it pays its debts. In this way the assets of the public are not quickly depleted to benefit a few injured parties. It assures that assets remain available to support roads, schools and other public endeavors. Some scholars view sovereign immunity as "an inherent attribute of sovereignty,"[3] irrespective of the form of government.

Sources for sovereign immunity in the United States are (a) English common law or natural law principles, (b) views of some "Founders," and (c) a broad reading of the Tenth and Eleventh Amendments of the U.S. Constitution. The Founders were far from being of one mind on the issue of State sovereign immunity and today's Supreme Court justices are strongly divided in their interpretation of the historic antecedents as well.

In THE FEDERALIST PAPERS NO. 39, James Madison (future U.S. President) said of the U.S. Constitution that it "leaves to the several States a residuary and inviolable sovereignty over all other objects." Revolutionary War debts were foremost in the minds of State leaders as they debated the ratification of the United States Constitution in the late 1700s and discussion of sovereign immunity was generally centered on that concern. In accord, Alexander Hamilton (first Secretary of the Treasury) argued in THE FEDERALIST PAPERS NO. 81 that states continued to have the privilege of "paying their own debt in their own way" and that the United States Constitution did not divest the States of this pre-existing right, nor did it provide enforcement for recovery of debts owed by the States.

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Alexander Hamilton maintained that:

> **It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent. . . .* as one of the attributes of sovereignty, is now enjoyed by government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.[4]**

Considering "immunity from private suits as central to sovereign dignity," Justice Kennedy concluded in the 1999 employment case of *Alden et al. v. Maine* that "neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court."[5] He further concluded that although Article I of the Constitution does not expressly make that distinction, the "Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[6] In interpreting the historic foundations, the bare majority of the modern Supreme Court recognized that "States' immunity from suit is a fundamental aspect of sovereignty which States enjoyed before the ratification of the Constitution, and which they retain today."[7]

The Tenth Amendment to the United States Constitution provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Although the Tenth Amendment's "reserve clause" does not specifically address State sovereign immunity, its penumbras can be used to support an argument that sovereign immunity is among the rights reserved to the States (as discussed in Part IV).

In contrast, many scholars today do not support the thesis that States retain strong vestiges of sovereignty.[8] Justice Souter goes further in viewing sovereign immunity as "an obsolete royal prerogative inapplicable to a republic," which was available to the English crown – but not to the colonies – and which the Tenth Amendment did not adopt as a constitutional doctrine.[9] Instead, the right of the people to have remedies against wrong-doing is more fundamental. This is the position he advocated in his 1999 dissent in the *Alden* case.

"Founders" such as Edmund Randolph (first U.S. Attorney General) and James Wilson (delegate to the Constitutional Convention and later a justice on the Supreme Court) recognized, in Wilson's words, that the "government of each state ought to be subordinate to the government of the United States."[10] The Constitutional bargain can be distinguished from that under the Articles of Confederation – wherein each state was expressly reserved "sovereignty, freedom and independence."[11] No such express reservation of sovereign immunity exists in the United States Constitution. The absence of such language should be instructive as to the "plan of the Convention" which signified a change in the nature of States association with the national government.

Justice Brennan's 1976 concurring opinion in *Fitzpatrick* espoused a similar belief that the "States surrendered that immunity, in Hamilton's words, 'in the plan of the Convention' that formed the Union, at least insofar as the States granted Congress specifically enumerated powers."[12] A number of powers (such as treaty making[13] and waging war[14]) are denied the States because they are reserved to the federal government. Central to the discussion of this paper, Article I of the U.S. Constitution vests Congress with the authority to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[15] In addition, the Fourteenth Amendment expanded Congressional authority to pass laws to assure States' compliance with the due process and equal protection clauses (as discussed in Part III). Article III originally extended federal jurisdiction to controversies between States or between a State and a citizen of another State.[16]

In a number of areas, the powers of State governments were expressly prohibited or limited by U.S. Constitutional provisions.[17] With regard to individual rights, States cannot pass or enforce laws or otherwise deny citizens of "life, liberty or property without due process of law"[18] or "equal protection of the laws"[19] or "privileges and immunities."[20] These Fourteenth Amendment clauses have also been interpreted to prohibit the States from infringing upon many of the individual rights listed in the Bill of Rights.[21] "Full faith and credit" is to be given to records and judicial proceedings of other States.[22] Voting rights are protected.[23] Racial discrimination is banned.[24] Arbitrary criminal penalties are prohibited by the ex post facto law clause and bills of attainder clause.[25] State statutes that impair "obligation of contracts" are also outlawed.[26]

B. The Eleventh Amendment Controversy over Federal Jurisdiction

Article III, Section 2, Clause 1 of the original United States Constitution provides that federal judicial authority extends to ". . . Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; . . . between a State . . . and foreign States, Citizens or Subjects." While a few Founders argued that this was designed only to allow States as plaintiffs to pursue claims,[27] there is no language in that constitutional provision precluding suits against States as defendants. Instead, the plain meaning of the language envisions the use of federal courts to settle disputes or controversies in which a State is involved. Echoing this sentiment, Edmund Randolph (U.S. Attorney General and plaintiff's counsel in the *Chisholm* case (*discussed below*)), avowed that the language in Article III permitting suit in federal court "where a state shall be a party" trumped any natural law assumptions concerning sovereign immunity.[28]

In the case of *Chisholm Ex'r v. Georgia*,[29] an assumpsit action[30] was brought by the executor of a South Carolina decedent's estate against the State of Georgia in federal court to compel payment for supplies secured by Georgia Revolutionary War bonds. Siding with Chisholm, the majority of Supreme Court justices concluded that "a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."[31]

The decision against the State of Georgia prompted the Georgia House of Representatives to pass a bill making it a felony (punishable by death) to attempt to enforce the U.S. Supreme Court's *Chisholm* decision.[32] Since the U.S. Constitution provides that no State shall pass a law impairing the obligation of contracts,[33] this Georgia law should have been unconstitutional. Nevertheless, Congress quickly reacted to concerns of debt-laden States by proposing the Eleventh Amendment in 1793, which was adopted by a sufficient number of States by 1798.

The Eleventh Amendment to the U.S. Constitution limits the authority of federal courts to hear certain cases in which a State is a defendant, providing that:

> **The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.**

Ironically, this Amendment removed from the jurisdiction of federal courts the very type of conflict most suitable for resolution by federal courts in an era when "in-state bias" was of considerable concern. Although it does not expressly guarantee States sovereign immunity, few doubted that to be its purpose – *at least as to matters directly listed in the Amendment.* While other State ratifying conventions had proposed broader limits on federal jurisdiction that would preclude "any suit by any person against a state,"[34] such proposals were not adopted.

C. State Nullification Attempts and Sovereignty

An additional perspective on the State sovereignty issue can be gleaned from examining the "nullification resolutions" proffered during the early years of our nation. Georgia's response to the *Chisholm* decision was hardly the only example of a State's attempt to nullify an unfavorable court ruling or an act of Congress.

Thomas Jefferson and James Madison (future Presidents of the United States) reacted to the Alien and Sedition Acts of 1798 by drafting the Kentucky and Virginia Resolutions, respectively. The Sedition Act was aimed primarily at suppressing political opposition to the Federalist Party agenda by making it a high misdemeanor to speak or assemble in opposition to the execution of national laws; it especially targeted editors and printers. These two resolutions challenged the constitutionality of these laws and asserted the right of the States (as sovereigns) to determine their constitutionality. In response, certain Northern States asserted that it was the federal judiciary which should rightly decide the constitutionality of national laws[35] (a precursor to the 1803 *Marbury v. Madison*[36] decision).

Prior to the passage of the Sixteenth Amendment authorizing an income tax, the primary means of raising national revenue was through tariffs. The 1828 "Tariff of Abominations" imposed steep tariffs on iron, hemp and flax, while lowering those on woolen products. Legislatures in Georgia, Mississippi, Virginia and South Carolina drafted resolutions describing the tariff as unconstitutional. John C. Calhoun (Vice President under Andrew Jackson) anonymously penned the South Carolina Exposition and Protest, advocating the "Nullification Principle": the right of a State to nullify a federal law within its borders until three-fourths of the States deemed the law constitutional. This sparked a famous debate in the United States Senate between Robert Haynes (South Carolina) and Daniel Webster. Haynes advanced both the doctrine of nullification and sovereignty, asserting "the very life of our system is independence of the States." Webster, on the other hand, supported the principle that the Constitution and national government are sovereign over the people, proclaiming "Liberty and Union, now and forever, one and inseparable!"[37]

In reaction to the Tariff of 1824, Thomas Cooper (South Carolina) had "declared that the South would have to calculate the value of the federal Union, for the 'question is fast approaching the alternative of submission or separation.'" It was not altogether surprising that South Carolina would be the first State to secede from the Union on the eve of the American Civil War in 1860. In response to the election of Abraham Lincoln as President, the South Carolina legislature declared that "the union now subsisting between South Carolina and the other States, under the name of the 'United States of America' is hereby dissolved." Ten other States eventually followed South Carolina's lead and seceded from the Union, asserting their "sovereign" right to do so.[38]

While slavery issues served as the catalyst for the American Civil War, the constitutional question that was resolved by the war squarely dealt with the State sovereignty issue. States were not sovereign entities that could choose of their own volition to remove themselves from the United States of America; that was not the nature of the federal Union. This also meant that States were not free to "nullify" federal laws they disliked. State laws cannot be an undue burden on interstate commerce (pursuant to the Dormant Commerce Clause philosophy)[39] and have to be consistent with and not pre-empted by federal laws. In the Civil War era, Congressional authority was expanded to enact laws to assure State compliance with the Fourteenth Amendment's due process and equal protection clauses.

Since these conclusions affect the degree of sovereignty a State retains, these points also should have a bearing on the issue of sovereign immunity. If States must comply with federal law and are not fully sovereign, why can't they be sued for damages when they violate federal laws?

II: Does the Eleventh Amendment (a) restrict Congressional authority under the Commerce Clause and (b) prevent use of the federal courts by in-state citizens?

A. Commerce Clause and Traditional Breadth

Article I, § 8, cl. 3 of the U.S. Constitution expressly delegates to Congress the authority "*to regulate commerce with foreign nations, and among the several States and with the Indian tribes*." Some authors have viewed this Commerce Clause as "second in importance to no other provision in the Constitution." James Monroe (a member of Congress under the Articles of Confederation and future U.S. President) believed national regulation was "necessary to preserve the Union; without it, it will infallibly crumble to pieces."[40]

After FDR's New Deal legislation finally survived Supreme Court scrutiny, an expansive reading of the Commerce Clause validated federal legislation ranging from environmental laws[41] to employment practices to civil rights. Justice Brennan, in his concurring opinion in *Fitzpatrick*, viewed Congressional authority to enact Title VII of the Civil Rights Act to be strongly rooted in the enumerated powers of both the Commerce Clause and section 5 of the Fourteenth Amendment.[42]

The Commerce Clause serves as a primary vehicle for regulating business activities. Since the U.S. Supreme Court upheld the constitutionality of the National Labor Relations Act (NLRA) in 1937,[43] federal legislation imposing regulations on private businesses has generally been upheld (as not being an impermissible encroachment on State power). In the 1941 case of the *United States v. Darby*,[44] the Supreme Court used the Commerce Clause to justify the minimum wage and maximum hour requirements of the Fair Labor Standards Act (FLSA) and to prohibit shipment in interstate commerce of lumber created by a private firm violating the FLSA.[45] The *Darby* decision recognized that the "power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution,'"[46] citing *Gibbons v. Ogdon*,[47] the grandparent of all commerce cases. When the "necessary and proper" clause of Art. I, § 8, cl. 18 of the Constitution is appended to the Commerce Clause, it facilitates Congressional laws that "affect" interstate commerce. "The power of Congress over intrastate commerce . . . extends to those activities which so affect interstate commerce . . . as to make regulation of them appropriate means to attainment of a legitimate end."[48]

Although the NLRA contained language initially exempting States and their subdivisions, no such exemption was contained in the FLSA. By 1985, the Supreme Court recognized Congressional authority to apply minimum wage and overtime provisions of the FLSA to local government transportation employees in *Garcia v. San Antonio Metropolitan Transit Authority*,[49] abandoning confused attempts to distinguish "governmental" versus "proprietary" functions of State or local governments. Justice Blackmun, writing for the majority, concluded that:

> **[W]e perceive nothing in the overtime and minimum-wage requirements of FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same . . . obligations that hundreds of thousands of other employers, public as well as private, have to meet.[50]**

The report of the Working Group on Federalism of President Reagan's Domestic Policy Council bemoaned that after *Garcia* "in effect the federal judiciary would no longer entertain federalism challenges to congressional exercise of the commerce power."[51] Justice Souter's dissent in *United States v. Morrison*[52] advanced this sentiment one step further when he advocated treating Commerce Clause questions as nonjusticiable political questions.

B. New Federalism –Decline of the Commerce Clause and Revival of State Sovereign Immunity

"New Federalism" advocates a stronger role for State and local governments and a decreased role for the federal bureaucracy.[53] With the increase in the number of conservative judges being appointed in recent years, the concept of New Federalism is likely to become more and more a keystone of judicial decision-making.[54] Sovereign immunity and its interaction with other facets of the Constitution is but one component of the doctrine.

The perception of the Commerce Clause has changed substantially in the past decade since the elevation of the Eleventh Amendment and the ubiquitous 5-4 decisions fostering "New Federalism"! The 55-year expansion of the plenary nature of the Commerce Clause was halted with the *Lopez*,[55] *Morrison*,[56] *SWANCC*,[57] and *Seminole*[58] decisions. Deferring to State police powers, the Court found the federal Gun-Free School Zones Act of 1990 to be unconstitutional in *Lopez*, as having an insufficient nexus to interstate commerce.[59] Chief Justice Rehnquist – a long-time advocate of a restricted federal government – laid the foundation for "New Federalism" in *United States v. Lopez*. Therein, Chief Justice Rehniquist declared in 1995 that the subject matter of a federal statute must have "substantial

effect" on interstate commerce – citing James Madison for the principle that "powers delegated . . . to federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[60]

With similar reasoning in *Morrison* the Supreme Court in 2000 struck down portions of the Violence Against Women Act,[61] concluding that sexual assaults are "not commercial" in nature and rejecting the "argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[62] Where the regulated activity does not either cross a state line or affect a channel of interstate activity, it must have a "commercial character" or involve an "economic endeavor"[63] to be viable for regulation under the Commerce Clause.[64]

In interpreting Clean Water Act (CWA) regulations, the majority of U.S. Supreme Court justices in *SWANCC* refused to give deference to the Corp of Engineers' Migratory Bird Rule. The Court emphasized the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" and that permitting "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in significant impingement of the States' traditional and primary power over land and water use."[65] In so ruling, the majority ignored clear Congressional intent that the CWA receive the "broadest interpretation" to foster environmental protection, as well as the long-standing recognition that regulation of natural resources (water, birds) fall within the scope of the Commerce Clause. [66] Instead, the Court limited the scope of the CWA to require a significant nexus between wetlands and traditional "navigable waters" and refused to extend jurisdiction to isolated wetlands and nonnavigable, intrastate waters. In refusing to grant deference to the administrative agency, the majority of the Court avoided ruling directly on "significant constitutional and federalism questions" concerning whether Congress had sufficient authority under the Commerce Clause to more broadly define "navigable waters."[67] Where the case can be resolved through statutory interpretation, the Supreme is reluctant to address the Constitutional Commerce Clause question.[68]

New Federalism's protection of State interests intersected with the Eleventh Amendment controversy as jurisdictional issues arose in the 1996 *Seminole Tribe* case. The Seminole Tribe attempted to compel the State of Florida to negotiate gaming rights in good faith under the federal Indian Gaming Regulatory Act through a suit filed in federal District Court. Although Congress is granted express Constitutional authority to regulate Indian Commerce,[69] the Supreme Court declared that "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 nonconsenting States."[70] While decrying judicial activism and the purposive (contextual) approach[71] in other contexts, the 5-4 conservative majority ruling here acknowledged that the "principle" of state sovereignty is not derived from the text of the Eleventh Amendment alone. "[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms,"[72] fundamental postulates implicit in the constitutional design.

Ironically, Indian Tribes are more than "private parties," under the constitutional design; they have their own sovereign characteristics under the U.S. Constitution. The federal government itself and States (as sovereigns) have generally been allowed to bring suits against States even where individuals have been barred from bringing private claims or qui tam actions.[73] It seems incongruous to disallow suit by an Indian Tribe which has sovereign authority and "state-like" legislative duties in other contexts. Furthermore, the Tribe was not seeking monetary damages against the State, but merely equitable enforcement[74] of the duty to negotiate a compact in good faith. The majority opinion, however, views this distinction of remedies as irrelevant in the context of Eleventh Amendment analysis.[75] This case was an even more deleterious limitation of both the Commerce Clause and sovereign rights of Indian tribes than refusal to grant monetary damages to private litigants.

Concluding that its interpretation of the Eleventh Amendment trumped both the Indian Commerce Clause and Interstate Commerce Clause, the 5-4 majority in *Seminole Tribe* overruled the *Pennsylvania v. Union Gas Co.,*[76] a CERCLA environmental decision. The *Union Gas Co*. case had viewed Congressional power of the Interstate Commerce Clause as plenary, as part of the original constitutional understanding – an understanding which could not be changed without express reference in subsequent amendments. *Union Gas Co.'s* plurality decision had also considered the Commerce Clause power to be "incomplete without the authority to render the States liable for damages."[77] In overruling that case, *Seminole Tribe* paved the way for other decisions that would take a similarly restrictive view of the scope of Congressional authority to regulate States under the Commerce Clause, whether applied to intellectual property rights,[78] employee's rights[79] or environmental laws.[80]

Federalism issues concerning the scope of federal authority under the Commerce Clause arise where State law or action potentially conflicts with federal legislation. The outcome involves interpretation of specific statutory language and Congressional intent. While the *SWANCC* of the Clean Water Act decision favored the State, the imposition of federal remedies on the State has been upheld under the Clean Air Act.[81] The courts seem more willing to defer to Congress and use a more textual construction in matters of preemption of State laws. State common law tort remedies have been preempted when they conflict with a comprehensive federal regulatory scheme or express statutory language.[82] Congress appears to have more ability to prevent the use of State law remedies than to avail

private litigants of remedies against the State. While relevant to federalism generally, discussion of pre-emption issues[83] is beyond the scope of this article.

C. Eleventh Amendment is a Limitation on Federal Judicial Jurisdiction – Not a Restriction on Commerce Clause Delegated Congressional Authority

The Eleventh Amendment was a narrowly drafted restriction on federal court jurisdiction, limiting the "judicial power of the United States."[84] Although there is no express reservation of judicial review, apparently the authority of federal appellate review remains viable.[85] The majority decision in *Alden* recognized that "Sovereign immunity . . . does not bar all judicial review of state compliance with the Constitution and valid federal law."[86] The Eleventh Amendment therefore primarily imposes a jurisdictional limitation on lower federal courts.

Arguably, the Supreme Court's majority misstates the issue when it asks whether Congress can validly abrogate State sovereign immunity through the Commerce Clause[87] or other Article I authority. The Eleventh Amendment is a limitation on federal judicial authority,[88] not a limitation on valid federal legislative authority.

The Constitution is a compact in which the States yielded some of their sovereignty "in order to form a more perfect union." The core motivation for that compact was the Commerce Clause. Article I, § 8, cl. 3 of the U.S. Constitution *expressly delegated* to Congress the authority "to regulate commerce with foreign nations, and among the several States and with the Indian tribes,"[89] without any provision distinguishing private versus State-sponsored commercial activity and without any exemption for State sovereign immunity.[90] Nothing in the Eleventh Amendment expressly limits Article I authority.

Where the Constitution grants authority to Congress (as it does with the Interstate Commerce Clause) that authority should not be undermined by strained judicial interpretation. Notwithstanding recent U.S. Supreme Court decisions, nothing in the Commerce Clause itself limits its application to the States, and nothing in the express language of the Tenth or the Eleventh Amendment suggests that either of these Amendments should prevail over the Commerce Clause.[91] Congressional authority over the States was further expanded through the Fourteenth Amendment, as discussed in Part III of this article and appears to be the main avenue today for compelling State compliance to civil rights principles.

While most justices today concede that there are limits to the breadth of the Commerce Clause, there is stark disagreement on where to draw the line and who draws the line. It involves not only a difference in perception of federalism Balance of Power between the States and federal government, but also a Separation of Powers conflict between the legislative and judicial branches of government.[92] In the 1941 *Darby* decision, the Court cautioned that the "judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power."[93] Nor should the court sit as a "superlegislature" to second-guess the wisdom legislative policy decisions,[94] a view now espoused by Justice Breyer through his "purposive" (contextual) approach to statutory construction.[95]

In contrast, Justice Black's concurring opinion in *Heart of Atlanta Motel v. United States* acknowledged in 1964 that while Congress has the right to set policy, the determination of "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question."[96] New Federalism endorses that interpretation and operates as a limitation on Congressional authority as much as it serves as a protection of States rights.[97]

D. Historical Context for New Federalism's Eleventh Amendment Bar on Enforcement of United States Federal Law Remedies against States

After the passage of the Eleventh Amendment, should a United States citizen be able to *sue his or her own State* in federal or State court to compel the State's compliance with federal law?

In elevating the Eleventh Amendment to a broad State sovereign immunity shield under New Federalism, the Supreme Court (in 5-4 decisions) has barred in-state employees from suing their own State for damages in State and federal court under the federal Fair Labor Standards Act,[98] the Age Discrimination in Employment Act (ADEA),[99] and the Americans with Disabilities Act (ADA).[100]

Recent "New Federalism" cases expanding the scope of the Eleventh Amendment have relied on *Hans v. Louisiana*[101] to preclude in-state citizens from suing their own State to enforce federal laws.[102] In this 1890 decision denying an in-state citizen an order compelling the State of Louisiana to honor a bond coupon interest payment, the U.S. Supreme Court postured, "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indigently repelled?"[103] Since many State courts lacked jurisdiction to hear (nonconsensual) suits against the State government,[104] the Court reasoned in *Hans v. Louisiana* that the federal courts surely lacked the power as well (especially when federal jurisdiction was premised on concurrent jurisdiction). Ignoring the judicial maxim of *expressio unius est exclusio alterius*,[105] the Court simply assumed that the Eleventh

Amendment did not need to include that "obvious" limitation on in-state citizens' claims against the State. Strict construction of the Eleventh Amendment has been supplanted by incorrect historical assumptions that the States retained immunity from all citizen suits.

Justice Souter believes that one of the main objectives of the Constitutional Convention was to find a better way to bind the States to federal law. The language of the Eleventh Amendment expressly bars citizens of other States and foreign citizens from commencing suits against a State, but it does not expressly ban a suit by an in-state citizen against his or her own State in either State or federal court. Even Alexander Hamilton's advocacy for State sovereign immunity was aimed primarily at diversity cases involving State law claims (such as contract disputes), not at federal question cases.[106] Under this rationale, claims by in-state citizens premised on federal employment laws should survive.

III. When can States be sued for violating federal employment laws and what role does the Fourteenth Amendment and the Abrogation Doctrine play in facilitating such a suit?

A. Fourteenth Amendment's Abrogation of Eleventh Amendment

The Supreme Court has created the following Abrogation Doctrine to test when a federal law can annul State sovereign immunity. Congress must (1) "unequivocally express . . . its intent to abrogate the immunity," and (2) act "pursuant to a valid exercise of power."[107] In addition, there "must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[108] This test is then applied in the context of a sliding scale of rights – some protected by strict scrutiny and others subject only to a rational basis test.

The court-created "Abrogation Doctrine" permits Congress to regulate the States and "annul" sovereign immunity, but only if pursuant to a valid grant of Constitutional authority. Historical authority is grounded primarily in the Commerce Clause or in the Fourteenth Amendment's Equal Protection, Privileges & Immunities and Due Process Clauses. With the preeminence of the Commerce Clause now being weakened, it is the Fourteenth Amendment that now serves as the primary guardian against a State's encroachment on individual rights. The Fourteenth Amendment provides, in part, in Section 1:

> **. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Although the Fourteenth Amendment was passed to guarantee that States honor citizens' rights of due process and equal protection, a majority of the Supreme Court has made it difficult to abrogate (annul) State sovereign immunity when the litigant is seeking damages or federal remedies from States that are violating federal laws.

The first prong of the Abrogation Test is often satisfied by federal laws, but it is more difficult to satisfy the remaining criteria. While Congress clearly intended to prohibit States (as well as private businesses) from discriminating on the basis of age or disability, the Supreme Court found no "fundamental right" to such protection. States only had to satisfy a "rational basis test" to justify discrimination in the employment sector.[109] Without documentation of widespread abuse by the States, Congress lacked authority to abrogate sovereign immunity and could not facilitate private party damage claims. Finding an absence of evidence of widespread discrimination, the Supreme Court concluded that the second prong was not satisfied in both the *Kimel*[110] (age) and *Garrett*[111] (disability) cases. Also, the "congruence and proportionality" test would not allow the remedy of monetary damages where there was no State pattern of abuse.

In contrast, the Court was more willing to uphold the application of a federal law where a "fundamental right" – such as due process – was involved. The access to the courts was deemed to be such a right in *Lane*[112] and prioritization of the due process clause facilitated abrogation of sovereign immunity. The "congruence and proportionality test" could be satisfied by relocating judicial services.[113] While monetary damages were not directly in issue, providing access to judicial services could become costly.

B. Application of Sovereign Immunity and the Abrogation Doctrine to Employment Law Damage Claims against a State

The United States Supreme Court has examined a number of federal employment discrimination laws to determine their applicability to the State employers. The Tenth and Eleventh Amendments have been used to bar many claims. Most of these cases have applied the Abrogation Doctrine to ascertain whether sovereign immunity should be set aside to permit monetary damage remedies or other nonconsentual remedies in suits brought by in-state citizens against their own State.

1. FLSA

The U.S. Supreme Court upheld both the constitutionality of the Fair Labor Standards Act (FLSA) (as applied to private sector businesses) in *Darby* in 1941 and the authority of Congress to apply FLSA minimum wage and maximum hour requirements to local governments in the 1985 *Garcia* case (*discussed above*). Using broad sweeping language, the majority considered as constitutional the application of fair employment requirements to both private and State employers and did not consider such application to be "destructive of state sovereignty or violative of any constitutional provision."[114]

When the Fair Labor Standards Act (FLSA) came under review by the Rehniquist-Scalia Court in 1999, the Court again played the State sovereign immunity trump card and concluded that State employed probation officers could not sue their own State for overtime pay under FLSA in the landmark case of *Alden et al. v. Maine.*[115] Initially the suit sought damages in federal District Court, but the suit was dismissed on Eleventh Amendment grounds after the *Seminole Tribe* decision. The officers refiled the case in the State Superior Court of Maine. Without directly overruling *Garcia*, the *Alden* decision gutted the effect of *Garcia* or at least limited its effect to FLSA cases involving local government workers. Although the Court indicated that States are still bound by the federal laws, the 5-4 majority of the United States Supreme Court concluded that "powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts."[116]

***Alden* can be distinguished from other key predecessor cases. In *U.S. v. Darby*, the federal government was the plaintiff seeking enforcement of FLSA in federal court (against a private sector business), while Alden was a private citizen seeking monetary damages against the State in State court. In the 1890 case of *Hans* v. Louisiana,[117] an in-state citizen was not allowed to use federal court to seek a State-based remedy, while Alden was precluded from enforcing federal law rights against the State government in State courts. Because the *Alden* case was initiated in State court, the Tenth Amendment was seen as the primary Constitutional foundation for State sovereign immunity. Prior to *Alden*, however, some suits seeking damages pursuant to federal employment law were allowed to proceed in State court without viewing the Tenth or Eleventh Amendment as a constitutional barrier.[118]**

Private damage claims against a State are rarely permitted under New Federalism, however. Even in a case decided before *Garcia*, the U.S. Supreme Court denied overtime FLSA compensation claims to Missouri Department of Public Health State workers in 1973 based on the Eleventh Amendment,[119] indicating that these employees were limited to restitution secured for them by the federal Secretary of Labor. While a federal government-initiated suit against a State is still viewed as permissible (as an exception to sovereign immunity), the Supreme Court is reluctant to allow qui tam claims[120] on behalf of the federal government against the States.[121] Such rulings leave most State employees no effective remedy unless State employment laws afford them protection or unless a State expressly waives sovereign immunity.[122]

This 1999 *Alden* case prompted a well-reasoned dissent by Justice Souter, clarifying historical obfuscations and denouncing the majority's interpretation of both amendments and sovereign immunity principles. Justice Kennedy's majority decision was seen as trying to fit the round peg in the square hole. The dissenting judges believed that Maine should be subject to the national objective of the FLSA because federal legislation enacted through the Commerce Clause and pursuant to the Supremacy Clause is binding on the States, as previously decided in *Garcia*. Consistent with this view, sovereign immunity should not be used as a concept to protect a lesser sovereign from enforcing the laws of a greater (national) sovereign pursuant to valid Constitutional authority.

2. FELA

The national objective of providing compensation to injured railroad workers was sufficient to permit suit against a state-owned railroad under the Federal Employers' Liability Act (FELA).[123] The federal government, under the Commerce Clause, has the authority to regulate practices of the railroads in interstate commerce. Early attempts by States to regulate railroad practices did not withstand constitutional scrutiny.[124] Furthermore, State workers' compensation laws expressly exclude railroad workers from coverage because of the assumption that FELA provides coverage for such workers.[125] Consequently, the majority opinion in *Hilton v. South Carolina Public Railways Commission*[126] upheld the right of the worker to enforce federal FELA cause of action against the State commission in State court.

3. ADEA

The federal Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer of 20 or more employees "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age," if that individual is over 40.[127] ADEA specifically references FLSA, through which aggrieved employees are afforded legal and equitable relief. Statutory requirements of ADEA were expressly applied to subdivisions and agencies of State governments as employers in 1974 amendments to FLSA, and

Congress expressly permitted employees to file civil actions in State or federal court – satisfying the first prong of the Abrogation Doctrine test.

As it had done a year earlier with the FLSA, a bare majority of the Supreme Court used New Federalism to bar in-state employees' suits based on age discrimination laws in 2000. In *Kimel v. Florida Board of Regents*, a Department of Corrections employee, as well as faculty members and librarians of State universities in Florida and Alabama, were all denied the opportunity to exercise their rights against age discrimination under ADEA.[128] The consolidated ADEA *Kimel* cases originated in federal District Court.

The Court used its two-prong Abrogation Doctrine for determining whether ADEA abrogates States' Eleventh Amendment sovereign immunity. A plurality of the Court in *Kimel* concluded first that Congress clearly intended to apply the age discrimination law to the States. However, a different plurality held that the second prong was not satisfied because protection against age discrimination did not rise to the level of a fundamental right under the Fourteenth Amendment, so ADEA was not a valid exercise of Fourteenth Amendment Congressional authority to abrogate State sovereign immunity principles. The right of one to be free of discrimination on the basis of "age" was afforded only "*rational basis*" protection under the Court's interpretation of the Equal Protection Clause[129] and, thus, States were permitted to discriminate on the basis of age if doing so is "rationally related to a legitimate State interest."[130] This 2000 decision concluded that Congress inappropriately elevated age to "heightened scrutiny" protection. Unlike race and gender (which are afforded the higher protection), O'Connor declared that "[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it . . . [so] age is not a suspect classification under the Equal Protection Clause."[131]

Furthermore, ADEA exceeded the Court's doctrine of "*congruence and proportionality*" of remedies. Despite substantial evidence of private sector discrimination and many references in the Congressional Record to discrimination by State governments, the Court found no widespread pattern of discrimination by the States, so monetary damages were not appropriate.[132]

An expanded interpretation of the penumbras of the Eleventh Amendment was again used as the basis for the decision, even though in-state (rather than out-of-state) citizens were bringing the suit against a State entity in federal court. To address this concern, Justice O'Conner echoed Chief Justice Rehnquist's *Seminole Tribe* opinion by noting that the Court "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."[133] She further concluded that although ADEA was a valid exercise of Congressional power to regulate commerce, "[e]ven 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."[134]

Justice Stevens spoke for the dissenting judges who believed that Congress has the power to regulate public as well as private sectors of the workplace and that "[n]either the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power."[135] A plurality of the Court concluded, however, that States were protected from ADEA damage suits by in-state employees, thus leaving State employees to seek remedies only if State discrimination statutes permit damages. Under State laws the protection may not be as broad as under ADEA; Missouri, for example, generally extends age protection to age 70,[136] while the federal ADEA law abolished that age cap in 1987 for most professions. Despite the prohibition against ADEA claims against the State, claims against local government employers have been permitted.[137]

4. ADA

The Americans with Disabilities Act (ADA)[138] prohibits discrimination against individuals with qualified disabilities. ADA Title I deals with employment, while Title II addresses access to public facilities.

The Supreme Court recently upheld the application of Title II of the Americans with Disabilities Act to the States under the Fourteenth Amendment's Due Process Clause. In *Tennessee v. Lane*, A county courthouse lacked an elevator, making the upstairs courtroom inaccessible to a wheelchair-bound defendant who refused to be carried up the stairs. Recognizing that access to the judicial services was a "fundamental right" guaranteed by due process, the Court concluded in *Lane* that the Fourteenth Amendment's due process requirements prevail over State sovereign immunity.[139] In *Lane*, monetary damages were not at issue and access to judicial services was viewed as a proportionally appropriate accommodation under the Court's "*congruent and proportionality test.*"[140]

Under the statutory language of Title I of the Americans with Disabilities Act, private employers (and States) are prohibited from:

> **discriminating against a qualified individual with a disability because of that disability . . . in regard to . . . terms, conditions, and privileges of employment [and are required] to make reasonable accommodations.[141]**

In 2001, however, the Supreme Court struck down State employees' pursuit of monetary damages for ADA discrimination under Title I in *Board of Trustees of the University of Alabama et al. v. Garrett et al.*,[142] refusing to use the Fourteenth Amendment's equal protection guarantees to abrogate State sovereign immunity. A nurse and a

security officer sued the State of Alabama when the State employer forced a reassignment of the nurse after she returned from breast cancer disability leave and disallowed the latter's request for a reassignment based on his asthma disability. Congressional intent to apply Title I of ADA to the States as employers was clear (satisfying prong one of the Court's Abrogation Doctrine). Nevertheless, the Court found that Congress had exceeded its Fourteenth Amendment authority to enforce the Equal Protection Clause, thereby failing prong two of the Court's Abrogation Doctrine.[143] In so ruling, the Court found no legislatively documented record of a pattern of unconstitutional State-based discrimination against disabled employees and rejected the extensive list of examples submitted to the Congressionally-created Task Force on Rights and Empowerment of Americans with Disabilities, attached in Justice Breyer's dissent.[144] Instead, the majority concluded that ADA monetary remedies failed the "*congruent and proportionality test*"; consequently, States retained Eleventh Amendment immunity.

State discrimination against disabilities only has to satisfy the "*rational basis test,*" as the Court had previously ruled with mental retardation.[145] As long as there is a rational basis for "disparity of treatment and some legitimate government purpose" (such as saving the State money), a constitutional violation does not occur.[146] Some justices maintain that only purposeful and intentional discrimination violates the Equal Protection Clause.[147]

Dissenting judges criticize the "*rational basis test*" as "a paradigm of judicial restraint" applicable to lower courts that should not be applied to Congress - a constitutionally separate branch of government. Such application improperly positions the Court as a "superlegislature to judge the wisdom or desirability of legislative policy determinations."[148] Nevertheless, because of such rulings, States (as employers) are not subject to ADA damage suits (unless the State consents to the suit by seeking removal of the case to federal court).[149] However, the Court continues to recognize that the Eleventh Amendment does not protect local governments, which are still subject to private ADA claims.[150]

Even in claims against private employers, the Supreme Court has significantly curtailed the ability of individuals to qualify for protection under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111 et seq. First, the definition of a "qualified disability" has been substantially limited by the Court's decision to examine potential disabilities in their "corrected state" instead of examining the severity of the disability before a remedial fix or accommodation has been applied. Second, a "broad range of jobs," not merely a single job, must be significantly restricted by a disability before the Court will find a "substantial limitation" on the major life activity of working.[151] Third, and even more remarkable, a disability with a substantial impact on work skills alone may not be sufficient for ADA standing, without also showing that performance of "activities central to daily life" have been significantly impaired.[152]

5. Gender Discrimination – FMLA and Title VII

Laws aimed at remedying gender-based discrimination have fared better under Supreme Court scrutiny because race and gender have traditionally been judged under a "*heightened scrutiny*" standard, rather than the "*rational basis test.*" A gender-based classification must "'serve important governmental objectives' and 'the discriminatory means employed [must be] substantially related to the achievement of those objectives . . . [and not based on] overly broad generalizations.'"[153] Because of the application of "heightened scrutiny" to gender-based actions, it is easier to establish unconstitutional discrimination and easier to satisfy the Court's judicially-created Fourteenth Amendment Abrogation Doctrine and "*congruent and proportionality tests.*"

The Family and Medical Leave Act (FMLA) allows up to 12 weeks of unpaid medical leave per year for most workers employed for at least a year by a business with 50 or more employees within a 75-mile radius. The leave can be taken to deal with serious health conditions of the employee, spouse, children or parents, as well as in conjunction with the birth or adoption of a child.[154]

In *Nevada Dept. of Human Resources et al. v. Hibbs*, the Supreme Court (in a plurality opinion) upheld a public employee's right to sue his State for violation of FMLA.[155] The federal statute authorizes public employees to seek damages against State governments, their agencies, and their political subdivisions for violations of FMLA.[156] The intent of Congress to apply FMLA to the States was clear.

Under its Abrogation Doctrine, the Court then turned its attention to the second prong to assess whether FMLA was an appropriate exercise of Congress' Fourteenth Amendment section 5 power. Ironically, the Court offered little direct evidence of Nevada-specific present discrimination, a pivotal point of Justice Scalia's dissent.[157] The majority instead found a history of gender-based discrimination in family medical leave policies by the States (collectively), an assumption that dissenting Justice Kennedy did not find supported by the Congressional Record.[158] Historical stereotypes viewed only women as responsible for family care giving and did not require or allow men to assume domestic responsibilities, thereby discriminating against males as caretakers. Discrimination against females was even more prevalent. Forty to a hundred years ago, State laws were replete with provisions prohibiting women from practicing certain professions (such as law) and restricting job benefits, based in part on the traditional belief that women should remain at "the center of home and family life."[159] Even though State laws have changed in recent times and no longer facially discriminate based on gender, they continue to be applied in a discriminatory manner.

The Court upheld the "prophylactic legislation" to remedy the historical pattern of discrimination by making leave policies available for both men and women, so the employers cannot hire men simply to avoid leave requests. FMLA remedies, including damages, were upheld as "congruent and proportional" to the targeted violation of the Fourteenth Amendment's Equal Protection Clause by States.[160]

In *Pennsylvania State Police v. Suders*,[161] A female former State employee's constructive discharge claim against the Pennsylvania state police was upheld as a viable theory under Title VII of the federal Civil Rights Act of 1964 – subject to the defense that she unreasonably failed to avail herself of the internal procedures for reporting sexual harassment. Sovereign immunity issues were not discussed in this 2004 Supreme Court decision,[162] despite the propensity to raise the issue in most claims against States during the past ten years.

Claims by Connecticut male employees against their State employer under Title VII of the Civil Rights Act of 1964 were permitted in *Fitzpatrick v. Bitzer*.[163] They argued that the State retirement plan discriminated against them on the basis of gender. The 1972 Amendments to the Civil Rights Act allowed monetary damage awards (in addition to injunctive relief and attorneys' fees) against a State government for employment discrimination. In 1976, the Court was more inclined to recognize that "Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment."[164] The enactment of Title VII was seen a valid exercise of Congressional authority under section 5 of the Fourteenth Amendment.[165] Justice Rehnquist, writing for the Court, held that the State:

> **cannot disregard the limitations which the Federal Constitution has applied to her power . . . and the Eleventh Amendment, and principle of sovereign immunity which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.[166]**

Chief Justice Rehnquist framed the issue as the extent to which the Fourteenth Amendment limited the Eleventh Amendment, viewing the Fourteenth Amendment as placing new "limitations on the power of the States and enlargements of the power of Congress."[167] In this opinion there seemed to be more deference to what Congress considered to be "appropriate legislation," without torturing Congressional legislation through the multi-step Abrogation Doctrine test. The prevailing majority view today makes it much less likely that federal laws authorizing damages against the States will be upheld under the judicially-created test of the Abrogation Doctrine. Nevertheless, as the author of the *Hibbs* majority opinion, Rehnquist cited his earlier *Fitzpatrick* opinion as supporting authority.

In his concurring opinion in *Fitzpatrick*, Justice Brennan concluded that "Connecticut may not invoke the Eleventh Amendment, since that Amendment bars only federal-court suits against States by citizens of other States."[168] Instead he framed the issue as "whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII."[169] This position is in accord with this author's view that in drafting the Eleventh Amendment, Congress chose not to expand the exception to federal jurisdiction beyond situations hypothesized by the *Chisholm* case. A "plain meaning" interpretation of the Eleventh Amendment reveals that the "original intent" (of the Founders) was to prevent the federal courts from hearing claims against State governments only if those claims were brought by foreigners or citizens of some other State. The judicial maxim of *expressio unius est exclusio alterius*[170] supports this conclusion. Even out-of-state citizens should be able to sue a State – but only in State court. Direct language of the Eleventh Amendment does not prohibit an in-state citizen from suing his or her own State for monetary damages in State or federal court.

IV. To what extent does the Tenth Amendment preclude an in-state citizen from suing its own State in State court for damages for violating federal laws?

A. Tenth Amendment as a Guardian of State Sovereign Immunity in State Courts

If in-state citizens are precluded from challenging violations of federally created rights in State courts, it is a penumbra of the Tenth Amendment rather than the Eleventh Amendment that should be the source of this preclusion. The Tenth Amendment makes no express reservation of sovereign immunity. Instead, it broadly states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As the Supreme Court recognized in *New York v. United States*:

> **In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question . . . as one of ascertaining the limits of the power delegated to the federal Government under affirmative provisions of the constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.[171]**

Under the rubric of the Tenth Amendment, an "anticommandeering principle"[172] prevents Congress from using Article I powers to compel State government resources to enforce federal laws. Its rationale is premised on a

belief in dual sovereignty and the assumption that federal compulsion would (a) divert State time and resources from local matters, (b) interfere with the power of State citizens to set their own agenda for State legislative action, and (c) blur the accountability between State and federal officials. This anticommandeering principle was first applied to legislative and executive actions.[173]

Congress may validly exercise its Commerce authority where the costs are borne by the federal government[174] or where a federal statute encourages (incentivises) State action without compelling its adherence.[175] While Congress may pre-empt an area of regulation,[176] there are limits to the Constitutional ability of Congress to compel States to implement expensive or controversial federal programs.[177] In reaching the latter conclusion, the Supreme Court emphasized that "the Constitution protects us from our own best intentions. It divides power among sovereigns and among the branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[178]

B. Supremacy Clause v. Tenth Amendment

The scope of the Tenth Amendment is not easily resolved, however, especially when balanced against the breadth of the Supremacy Clause. Article VI of the United States Constitution provides "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Under the pillars of this Supremacy Clause there are times where the State courts will be commandeered to hear claims supported by Constitutional principles.

The "Supremacy Clause" has been used to require State courts to enforce federal laws if the State waived sovereign immunity (permitting private suits in State court under State law) and the federal claim arose from the same facts. While States are not required to waive sovereign immunity in the first instance, the *Testa v. Katt*[179] line of cases require parity between State and federal claims and precludes discrimination against federal claims where the State has otherwise waived sovereign immunity on the subject matter of the case.

Under the *Testa* rationale, if the State allows employment discrimination cases against the State in State court pursuant to a State anti-discrimination law, federal employment discrimination laws should be afforded the same right of enforcement. The waiver of sovereign immunity should apply to both. To the extent State employees can sue in State court for torts or civil rights violations, a suit based on federal question claims in those same areas should be protected as rights or privileges retained by the people.[180] State courts should be constitutionally obligated under the Supremacy Clause to hear the federal right and permit the federal remedy, validly established through the Commerce Clause or other Article I authority, the *Alden* case notwithstanding.

A distinction can be made between federal laws compelling States to hear private actions against (a) other private parties, (b) State officials, and (c) the State itself.[181]

***Testa* involved the first type of action. A private citizen sued an auto dealer at the close of World War II to enforce the federal Emergency Price Control Act, which allowed a person to seek treble damages for overcharges, in addition to costs and attorneys fees. The federal district courts and State courts were granted concurrent jurisdiction under Section 205 of the Act. Rhode Island, however, refused to entertain such suits in its State courts, viewing the remedies as penal. Enforcement conflicted with Rhode Island's established policy against enforcing penal provisions of other States and the federal government. Because the State would enforce its own penal laws, it had the obligation to afford "full faith and credit"[182] to laws of sister States and enforce federal laws under the Supremacy Clause of Article VI of the United States Constitution. The United States Supreme Court emphasized the primacy of federal supremacy since the Civil War and recognized that "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."[183]**

If the State was not allowed to differentiate on the basis of the remedy in *Testa*, federal employment discrimination suits permitting monetary damages should also be enforceable -- even against the State government itself – especially where it has allowed such suits under its State law. Requiring States to comply with federal laws under the Supremacy Clause, but denying remedies to litigants harmed by violations of those laws is illogical.

Claims for monetary damages have been upheld where the suit was characterized as being one against a local official or State official rather than against the State itself.[184] These suits against State officials often take the form of 42 U.S.C. 1983 actions. While these civil rights claims have been upheld when brought in federal court (as not abrogating the States' Eleventh Amendment sovereign immunity), such actions have been struck down when commenced in State court as violating the Tenth Amendment.[185] This seems to be a distinction without a meaningful difference based on unwritten penumbras of both Amendments.

Even Justice Scalia's majority decision in *Printz* recognized that early Congressional laws demonstrate that "the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions . . . appropriate for the judicial power."[186] But Justice Stevens' dissent in *Kimel* is more emphatic, "There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of

sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States."[187]

V. When is State sovereign immunity not a viable defense?

A. Forfeiture of State Sovereign Immunity Defense in the United States

Despite the current Supreme Court's expanded view of the sovereign immunity defense, the doctrine may *not* insulate States from suits in the following categories. State sovereign immunity is forfeited where:

1. **The State:**
   - **A. Voluntarily waives sovereign immunity[188] by statute:**
   - **B. Consents to removal of the case to federal court;[189] or**
   - **C. Consents to a suit or fails to plead sovereign immunity as a defense[190] or**
2. **The "Abrogation Doctrine" applies to:**
   - **A. Fourteenth Amendment due process[191] or equal protection principles;[192] or**
   - **B. Interstate Commerce Clause[193] (extension recently limited) or**
3. **The U.S. Supreme Court is reviewing the case under its Constitutional appellate jurisdiction;[194] or**
4. **Federal government initiates the suit;[195] or**
5. **Another State government initiates the suit;[196] or**
6. **The State would permit a suit under State law while attempting to preclude enforcement of federal law or similar laws of other States;[197] or**
7. **Some subdivisions of the State,[198] such as cities and counties,[199] are sued; or**
8. **State officials are sued in their personal capacity or under 1983 actions,[200] but "official immunity doctrine" or the "public duty doctrine" may provide qualified immunity.[201]**

The U.S. Supreme Court and State supreme courts have recognized that a State can waive sovereign immunity or can consent to be a party in a suit. As is the case with in personam jurisdiction, sovereign immunity is designed to protect the defendant, who can waive its objection to jurisdiction, so a case can be heard in a court with subject matter jurisdiction. A State voluntarily waives the sovereign immunity defense by requesting that the case be removed to federal court.[202]

In *Lapides v. Board of Regents*, the State sought such removal of the college professor's claims under the Georgia Torts Claims Act and 42 U.S.C. § 1983. In a rare unanimous decision, the Supreme Court held in 2002 that the State voluntarily invoked federal jurisdiction as a defendant on State tort claims.[203] Applying *Lapides* to an ADA case (in which the State removed the case to federal court),[204] the Tenth Circuit concluded that the State also waived its sovereign immunity in *Estes v. Wyoming Department of Transportation*.[205] In contrast, where no such waiver occurred, the Supreme Court held that a State employees could not use the federal ADA law to seek damages from their State government employer.[206]

B. Extension of State Caps for Waiver of Sovereign Immunity in Federal Claims

Most States have also enacted statutes (or have State judicial decisions) that allow suits against the State in certain circumstances. A typical statute permits tort suits against the State for injuries that occur on State property or which are caused by State employees in their official capacity. Awards in such suits are typically capped to limit the dollar recovery per person and per incident,[207] with the States abrogating their sovereign immunity shield only up to that monetary cap. Such waiver of immunity has been deemed to extend to suits brought by an out-of-state California citizen who was injured in California as a result of the negligence of a University of Nevada employee who was driving a Nevada-owned vehicle on official State business.[208]

If the State imposed a domestic cap on monetary damages in waiving sovereign immunity, why can't that cap be extended to federal claims as well as an extension of the *Testa* rationale? The sovereign immunity defense ought to be waived in compliance with federal laws to the same extent that State legislation or State court rulings have waived the doctrine on Sate-based tort claims. An alternative approach, therefore, would be to allow States to be sued for violating federal employment laws and civil rights – with the lawsuit tried in State court – and subject to that State's monetary cap on damages. This approach should be adopted by the courts when assessing the viability of employment claims against the States.

Furthermore, to hold that the States must comply with federal laws designed to protect individual rights, but to deny citizens standing to enforce those rights and remedies unfairly subjects those citizens to the compunction of the States. An occasional suit by the federal government for injunctive relief is little consolation to individuals injured by noncompliance.

C. Demise of Sovereign Immunity: European Union Comparison

A comparison to the modern European Union (EU) perspective of sovereignty and federalism is illuminating. Just as the American colonial States surrendered some of their sovereignty in forming the federal government United States of America, so did European countries yield a portion of their sovereignty in joining the EU. The United States and the EU are moving in opposite directions, however, regarding the right of private litigants to sue a State for violation of federal or Community laws. In *Francovich v. Italy,*[209] the European Court of Justice (ECJ) ruled that EU member States must permit private party damage suits against the State for violation of duties under EU law, to "secure member state compliance with the harmonization of law in Europe."[210]

As a result of the evolving federal nature of the EU, the issue of sovereign immunity has been examined more recently in the context of workers' rights by the ECJ, which concluded in *Kobler v. Republik Osterreich* that:

> **The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible [applies] where the rule of Community law infringed is intended to confer rights on individuals, the breach of which is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties.[211]**

As a precondition for a "loyalty bonus," academics had to spend 15 years of service at Austrian universities. Professor Kobler successfully argued that his time at other EU community universities should count toward satisfying that requirement. At issue in that case was the EU principle of freedom of movement for EU workers.[212]

The American sovereign immunity doctrine has its roots in English common law. The United Kingdom of Great Britain, however, yielded a portion of its sovereignty in joining the EU.[213] When the British Parliament adopted laws to exclude Spanish fishing in British waters, the law was successfully challenged in the ECJ *Factortame*[214] case. The United Kingdom unsuccessful argued that British courts lacked the power to enjoin enforcement of an act of Parliament.[215] *Factortame* stands for the supremacy of EU Community law and for the principle that any branch of a member State's government can be sued for violation of provisions of the EU Treaty or under the "direct effect doctrine" applied to a "regulation" or for the failure to implement "directives" where EU rights are thereby jeopardized.[216] The British government now can be sued – even by non- British citizens -- to enforce rights under EU principles, while the United States Supreme Court has precluded in-state citizens from seeking damages when an American State violates many of that citizen's federal rights.

As European States limit the doctrine of sovereign immunity, the doctrine has been revitalized into a greater shield for States of the United States of America. It is ironic that neither approach is strongly rooted in textual language of constitutional documents. "If the Constitution provides little support for the Court's hostility toward member state liability in the United States, then the [European Community] Treaty and implementing legislation provide little support for the ECJ's warm embrace of such liability in Europe."[217] It is a difference of perspective – one emphasizing right of States to be immune from suit and the other focusing on the citizen's right to sue when its nationally-created rights are jeopardized. One scholar classifies the American approach as a "backward-looking judicial federalism," while touting the European approach as "progressive or evolutionary constitutionalism."[218]

Conclusion

Throughout our Constitutional history, courts have struggled with achieving the intended (and appropriate) balance of power between the federal government and the States.[219] New Federalism revives the importance of the State sovereign immunity principle and the inherent conflict between the roles of legislative and judicial branches of government. Also at bay, however, is the protection of individual rights from encroachment by either federal or State governments.[220] Trying to reconcile these competing interests is problematic at best.

Using a broad reading of the Tenth and Eleventh Amendments, the U.S. Supreme Court has shielded State governments from federal statutory remedies for employment discrimination – unless either (a) the State consents to the suit or (b) fundamental rights are coupled with a historical pattern of discrimination by States. Where fundamental rights are involved – such as due process access to the courts – those rights prevail over the sovereign immunity defense and the Abrogation Doctrine is used to accomplish that result.[221] Gender-based discrimination is viewed with heightened scrutiny also, and federal laws (such as the Family Medical Leave Act) do apply to the States, especially since a majority of the Justices believe that there was a historical pattern of gender-based discrimination in State family medical leave policies.[222] In the employment sector, however, discrimination based on age,[223] disability[224] or overtime pay[225] is judged by a "*rational basis test*" and does not rise to the level of a fundamental right, so citizens are precluded from suing their State governments for violating rights under these federal laws. In reaching these conclusions during the past ten years, most United States Supreme Court decisions have inappropriately expanded the scope of the Eleventh Amendment to provide a sovereign immunity shield that prevents State employees from using most federal discrimination laws to seek damages.

Furthermore, the Supreme Court inappropriately has used the Eleventh Amendment to functionally bar access by in-state citizens to federal and State courts as forums for pursuing federal law remedies. In so doing, the

Court has construed the Eleventh Amendment and sovereign immunity as a limitation on Congressional Commerce authority and has narrowly defined the circumstances under which the Fourteenth Amendment and the Abrogation Doctrine can salvage in-state citizen remedies. The clear language of the Eleventh Amendment only limits noncitizens of a State from suing that State in federal court. Nothing in its language should bar (a) Congress from full exercise of its delegated Commerce Clause authority or (b) preclude an instate citizen from enforcing remedies granted under such federal laws. Even if the Tenth Amendment is a source for State sovereign immunity, the *Testa* rationale recognizes that States should be compelled to enforce federal laws in their State courts where similar State law remedies could be enforced. In-state citizens should be allowed to collect monetary remedies for violation of federal laws – up to the statutory cap allowed under State law waivers of sovereign immunity in State-based tort claims.

Strained construction of the Tenth and Eleventh Amendment relegates individual rights to secondary status – contrary to (a) Locke's principles to which most Founders adhered, (b) the intent of the Bill of Rights to limit federal government infringement on individual rights, (c) the Fourteenth Amendment through which individual rights were to prevail over State sovereign immunity, and (d) the Supremacy Clause. To strictly construe Congressional authority under the Interstate Commerce Clause and Fourteenth Amendment, while broadly construing the Tenth and Eleventh Amendment's scope of protection of States against lawsuits, leads to jurisprudential inconsistencies and results-oriented decision-making. Recent Supreme Court decisions have gone far beyond the strict constructionist's view that the federal government lacks powers not enumerated in the Constitution. They establish a hierarchy delineating which Constitutional provision takes priority through extra-constitutional criteria of the Court's own making.[226] In so doing, the Supreme Court is denying citizens basic remedies when their State employer has violated their federal civil rights.

Footnotes

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[1] "State" with a capital S is being used in this article in the early American tradition.

[2] U.S. CONST. amend XI (providing that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State").

[3] Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C.L.REV. 485 (May 2001).

[4] THE FEDERALIST PAPERS NO. 81 (Alexander Hamilton).

[5] Alden et al. *v. Me.*, 527 U.S. 706, 733 (1999).

[6] *Id.* at 714.

[7] *Id*. at 713.

[8] Other academics have also argued that sovereign immunity is not strongly rooted in law. *See, e.g.*, JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987); Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Edwin M. Borchard, *Government Liability in Tort (pts. 1-3)*, 34 YALE L.J. 1, 129, 229 (1924-25); William Burnham, *Taming the Eleventh Amendment Without Overruling* Hans v. Louisiana, 40 CASE W. RES. L. REV. 931 (1989-90); Kenneth Culp Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 CORNELL L.Q. 3 (1954-55); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978); Martha A. Field, *The Eleventh Amendment and other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1; Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); John V. Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423; James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260 (1990); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).; *but see* Hill, *supra* note 3 to the contrary.

[9] *Alden*, 527 U.S. at 764.

[10] Nev. Dept. of Human Resources et al. v. Hibbs et al., 538 U.S. 721, 776 (2003); *see also* Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 56 (1996).

[11] **Arts. Confed., art. 2.**
[12] **Fitzpatrick et al. v. Bitzer et al., 427 U.S. 445, 457 (1976).**
[13] **U.S. CONST. art. II, § 2 cl. 2 (delegating treaty-making power to the President, with the advice and consent of the Senate); U.S. CONST. art. I, § 10 cl. 1 (denying States the right to enter into Treaties).**
[14] **U.S. CONST. art. I, § 8 cl. 10-16 (delegating to Congress war powers, including the authority to declare war, raise and support armies and a navy); U.S. CONST. art. II, § 2 cl. 1 (recognizing the President as the Commander in Chief"); U.S. CONST. art. IV, § 4 (providing that the United States shall protect each State from invasion); U.S. CONST. art. I, § 10 cl. 3 (prohibiting States from engaging in war unless they are actually invaded).**
[15] **U.S. CONST. art. I, § 8, cl. 3.**
[16] **U.S. CONST. art. III, § 2, cl. 1.**
[17] **U.S. CONST. art. I, § 10, cl. 1 (providing that a State shall not "enter into any Treaties, . . . grant Letters of Marques and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass Bills of Attainder, ex post facto Law or law impairing the Obligation of Contracts, or grant any Title of Nobility"); U.S. CONST. art. I, § 10, cl. 2 and 3 (providing that the States shall not (without consent of Congress) "lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for the executing its inspection Laws; and the net Produce of . . . shall be for the Use of the Treasury of the United States . . .; lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay").**
[18] **U.S. CONST. amend. XIV, § 1 (providing that States shall not make or enforce laws that "deprive any person of life, liberty or property, without due process of law").**
[19] **U.S. CONST. amend. XIV, § 1 (providing that States shall not make or enforce laws that "deny to any person within its jurisdiction the equal protection of the laws").**
[20] **U.S. CONST. art. IV, § 2, cl. 1, (providing that States shall not deny or make laws that deny or abridge "Citizens of each State . . . Privileges and Immunities of Citizens in the several States," reinforced by U.S. CONST. amend. XIV, § 1).**
[21] **The Bill of Rights protects listed individual rights from federal Congressional infringement.**
[22] **U.S. CONST. art. IV, § 1, cl. 1 (providing that States shall not deny "Full Faith and Credit . . . in each State to the public Acts, Records, and judicial Proceedings of every other State . . .").**
[23] **U.S. CONST. amend. XIX (providing that States shall not deny or abridge the "right of citizens of the United States to vote . . . on account of sex"); U.S. CONST. amend. XXVI, § 1 (providing that States shall not deny or abridge the "right of citizens of the United States, who are eighteen years of age or older, to vote . . . on account of age"); and U.S. CONST. amend. XXIV, § 1 (providing that States shall not deny or abridge the "right of citizens of the United States to vote in any . . . election for President or Vice-President, for electors . . . or for Senator or Representative in Congress . . .by reason of failure to pay any poll tax or other tax").**
[24] **U.S. CONST. amend. XV (providing that States shall not deny or abridge the "right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude").**
[25] **U.S. CONST. art. I, § 10 cl. 1 (prohibiting States from passing ex post facto laws and bills of attainder and Congress is similarly limited by U.S. CONST. art. I, § 9 cl. 3. A bill of attainder is a law that imposes criminal judgments without judicial proceedings).**
[26] **U.S. CONST. art. I, § 10, cl. 1.**
[27] ***See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-555 (J. Elliot ed., William S. Hein & Co., Inc, 2d ed. 1996), hereinafter ELLIOT's DEBATES, (wherein at 555 John Marshall argued that "It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states" and James Madison *in accord id.* at 553).**
[28] ***See Alden.*, 527 U.S. at 764-768, 775 (Souter, J. dissenting) (distinguishing common law and natural law versions of sovereign immunity).**
[29] **2 U.S. 419 (1793).**
[30] ***See* BLACK'S LAW DICTIONARY 157 (4th ed. 1968). An action in assumpsit is used to recover a debt or to seek damages based on the defendant's nonperformance of a contract or implied promise of compensation.**
[31] ***Chisholm, 2 U.S.* at 452, (Blair, J. majority opinion).**
[32] ***See Alden*, 527 U.S. at 721 and John Alan Doran and Christopher Michael Mason, *Disproportionate Incongruity: State Sovereign Immunity and the Future of the Federal Employment Discrimination Law*, 2003 MICH. ST. DCL. L. REV. 1 (2003).**
[33] **U.S. CONST. art. I, § 10; *see also* Musgrove v. Ga. R.R. & Banking Co., 201 Ga. 139 (Ga. 1948) (wherein Georgia was no more willing to waive sovereign immunity in the mid-1940s when the Georgia Railroad & Banking Company**

brought suit against its State Revenue Commissioner, asserting that Georgia's ad valorem tax interfered with contractual obligations).

[34] 1 ELLIOT's DEBATES at 329 (the New York proposal) and *see also id*. at 336 (the Rhode Island proposal).

[35] ENCYCLOPEDIA OF AMERICAN HISTORY 156 (Richard Morris, ed., Harper & Row, Publishers 1976).

[36] 1 Cranch 137 (1803).

[37] Morris, *supra* note 35, at 198-199.

[38] *Id*., at 271-272.

[39] The "Dormant Commerce Clause" concept prevents the States from enforcing regulations that place a "substantial burden on interstate commerce," especially where the contribution to a State interest is insubstantial. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (wherein the Court invalidated state regulations restricting the length of trucks using highways in the State as a conduit for interstate commerce travel).

[40] THOMAS JAMES NORTON, THE CONSTITUTION OF THE UNITED STATES ITS SOURCES AND ITS APPLICATION 50-51 (Committee for Constitutional Government 1971).

[41] *See, e.g.*, Alaska Dept. of Envir. Conservation v. EPA et al., 540 U.S. 461 (2004) (wherein the Supreme Court upheld the authority of the Environmental Protection Agency to issue a stop-construction order where the State of Alaska failed to assure that best available technology (BACT) would be used in diesel-electric generators at a zinc mine under the Prevention of Significant Deterioration program of the Clean Air Act).

[42] *Fitzpatrick*, 437 U.S. at 457.

[43] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[44] United States v. Darby, 312 U.S. 100 (1941).

[45] *Id*.

[46] *Id*. at 114 (citing *Gibbons v. Ogdon*).

[47] 9 Wheaton 1 (1824).

[48] *Darby*, 312 U.S. at 118.

[49] Garcia v. San Antonia Metro. Transit Auth., 469 U.S. 528, 533 (1985).

[50] *Id*. at 555.

[51] Working Group on Federalism, Domestic Policy Council, The Status of Federalism in America 1-7 (1986) (recommending an across the board reduction in the role of the federal government and a strengthening of federalism which served as the basis for President Reagan's Executive Order 12,372).

[52] 529 U.S. 598, 625, 648-49 (2000).

[53] *See* TIMOTHY J. CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM (Brookings Institute 1988) for a greater understanding of the evolution of New Federalism, especially in the Nixon and Reagan eras.

[54] Richard C. Kearney and Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. OF POLITICS 1008 (1997).

[55] United States v. Lopez, 514 U.S. 549 (1995).

[56] Morrison, 529 U.S. 598.

[57] Solid Waste Agency of Northern Cook County (SWANCC) v. U. S. Army Corps of Engineers, et al., 531 U.S. 159 (2000).

[58] *Seminole Tribe*, 517 U.S. 44.

[59] *Lopez* 514 U.S. 549.

[60] *Lopez* 514 U.S. at 552.

[61] 42 U.S.C. § 13981.

[62] *Morrison*, 529 U.S. at 613.

[63] *See e.g.*, Gonzales et al. v. Raich et al., 545 U.S. 1 (2005) (a recent medical marijuana pre-emption case emphasizing the economic activity and need for comprehensive treatment of interstate drug trafficking).

[64] *Morrison*, 529 U.S. at 611, 617-18.

[65] *SWANCC*, 531 U.S. at 174.

[66] *Id*. at 195-196, (citing Missouri v. Holland, 252 U.S. 416, 435 (1920) (wherein Justice Holmes recognized eighty-five years ago "that the protection of migratory birds is a textbook example of a national problem . . . [that] can be protected only by national action" because of their transitory nature, a point reemphasized by Stevens, J's dissenting in SWANCC)).

[67] *Id*. at 162 and 174.

[68] United States v. Oakland Cannabis Buyers' Cooperative et al., 532 U.S. 483 (2001) (finding no medical marijuana exception in the federal Controlled Substances Act, 21 U.S.C. §841(a). Therefore, there was a direct conflict between the federal law and the California state law that had attempted to carve out such an exception. Furthermore, the Court found that marijuana was not worthy of a medical exception even if an exception had been permissible under

the federal law. Finding a direct conflict with the intent of the federal law, the Court refused to reach the Constitutional Commerce Clause issue).

[69] U.S. CONST. art. I, § 8 cl. 3.

[70] *Seminole Tribe*, 517 U.S. at 73.

[71] *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 85 (Knopf 2005).

[72] *Seminole Tribe*, 517 U.S. at. 54. (Ironically, the justices who most zealously back New Federalism principles claim to be "textualists" in their approach to Constitutional construction. They are in fact applying Breyer, J's "purposive" (contextual) approach, while Breyer and the "liberal" justices take a more strict constructionist view of the Eleventh Amendment or focus instead on "deference" to Congressional intent in applying the federal laws to the States).

[73] *See* Vermont Agency of Natural Resources v. United States, ex rel., Jonathan Stevens, 529 U.S. 765 (2000) (denying the relator the right to bring a qui tam suit in federal court on behalf of the United State against a State). (Even when the Supreme Court has declined the opportunity to premise its ruling on Eleventh Amendment grounds, it as narrowly interpreting the word "person" and looked for specific statutory language to show that Congress intended legislation to apply to States as actors). *See* BLACK'S LAW DICTIONARY at 1414. A qui tam suit is one in which an informant bringing the suit on behalf of a government entity is entitled to some of the monetary recovery.

[74] Notwithstanding the *Seminole Tribe* case, the Court has historically been more willing to allow injunctive or declaratory relief and to permit § 1983 actions against state officers who violate federal rights.

[75] *Seminole Tribe*, 517 U.S. at 58.

[76] 491 U.S. 1 (1989).

[77] *Id.* at 18, 19.

[78] *See* Fla. Prepaid Postsecondary Educ. Bd. v. College Savings Bank, 527 U.S. 627 (1999) (noting that Congress has the authority to regulate scientific and artistic inventions (through patents and copyrights) under U.S. CONST. art. I, § 8, cl. 8, but although such authority is clearly delegated to the federal government (and States were not granted any specific exemption), concluding that States cannot be sued for violation of patents).

[79] *See Alden*., 527 U.S. 706 and Kimel et al. v. Fla. Bd. of Regents et al., 528 U.S. 62 (2000).

[80] *SWANCC*, 531 U.S. 159.

[81] Alaska Dept. of Envir. Conservation, 540 U.S. 461.

[82] *See* Bates v, Dow Agrosciences LLC, 555 U.S. 431, 125 S.Ct. 1788 (2005) (wherein the Supreme Court concluded that the Federal Insecticide Fungicide and Rodentcide Act (FIFRA) preempted some but not all state common law remedies. "Strongarm" pesticide damaged Texas peanut crops while failing to control weed growth. FIFRA does not provide farms with federal remedies, however, FIFRA's labeling requirements and misbranding prohibition "does not preclude the States from imposing different or additional *remedies*, but only different *requirements*") (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 513 (1996)) (concluding farmers were allowed to pursue strict liability design defect, defective manufacturing, negligent testing and breach of express warranty claims).
(distinguished Cippolone v. Liggett Group, Inc. 505 U.S. 504, 515 (1992) (wherein failure to warn claims were pre-empted by the "requirement" verbiage of the Federal Cigarette Labeling and Advertising Act, as amended in 1969, 15 U.S.C. 1334(b) which provides that "No requirement or prohibition based on smoking or health shall be imposed by State law with respect to advertising or promotion of any cigarette the packages of which are labeled in conformity with the provisions of this [Act]")). *See also* 7 U.S.C. § 136v(a) and (b) (FIFRA's "requirements" clause had textual differences and only prohibits state labeling and packaging requirements, but contains a "savings clause" for State regulation of sales and use of pesticides).

[83] *See* JOHN E. NOWARK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 347-52 (6th ed. 2000) (discussing preemption of State and local laws).

[84] One could argue, however, that if the Eleventh Amendment could trump other provisions of the Constitution (by implication) and preclude lower federal courts from hearing damage claims against the States that were brought by her own citizens, the Eleventh Amendment just as logically could trump the U.S. Supreme Court's implied power of judicial review, since the Eleventh Amendment limits the "Judicial Power of the U.S.," not just the jurisdiction of lower federal courts.

The Supreme Court has been unwilling to limit its own implied power of judicial review, however, since it first declared an act of Congress unconstitutional in Marbury v. Madison et al., 1 Cranch 137 (1803) (striking down a minor portion of the Judiciary Act of 1787 -- which granted the Supreme Court authority to hear original writs of mandamus -- on the premise that the law unconstitutionally expanded the Supreme Court's original jurisdiction). However, the Court's exercise of judicial review over acts of Congress was itself an expansion of authority beyond that expressly delineated in Article III of the U.S. Constitution.

***See* Bush et al. v. Gore et al., 531 U.S. 98 (2000) (finding a violation of the Equal Protection Clause in the election counting process and Bush v. Palm Beach County Canvassing Bd. et al, 531 U.S. 70 (2000), and vacating the Florida Supreme Court's judgment that had allowed the counting of ballots). Therein the U.S. Supreme Court extended its**

authority to review decisions of the "sovereign State" of Florida (interpreting its own State law), although, the federal question arguably was not yet ripe at the time the U.S. Supreme Court agreed to hear the case.

[85] ***See*** **Cohens v. Virginia, 19 U.S. 264 (1821), upholding a federal question claim brought by the State in State court and McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), concluding that appellate jurisdiction also exists when a federal question claim is brought against a state in State Court.**

[86] ***See Alden.*****, 527 U.S. at 755.**

[87] **U.S. CONST. art. I, § 8 cl. 3 (providing that Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes").**

[88] ***See*** **McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) (wherein the Supreme Court is reluctant to recognize the Eleventh Amendment as a limit on its own judicial appellate authority, while simultaneous limiting lower federal courts rights to grant remedies against States for violations of federal laws).**

[89] **U.S. CONST. art. I, § 8 cl. 3.**

[90] ***Alden.*****, 527 U.S. at 806 (*wherein* Souter, J. dissenting in *Alden* recognized that "the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty").**

[91] **While the definition of "commerce" could be revisited, to do so would ignore decades of precedent broadly defining commerce in conjunction with the "necessary and proper clause" to include anything that "affects" commerce.**

[92] ***See*** **Jonathan Raban, *A Retired Supreme Court Justice voices Her Fears about Attacks on US Democracy*, GUARDIAN WEEKLY, March 17-23, 2006, at 5, wherein Republican appointed and recently retired United States Justice O'Connor warns that this conflict between the legislative and judicial branch has reached dangerous proportions and threatens our democracy. She decries death threats to judges and Congressional attempts to reign in judicial activism through inappropriate legislative action (Terry Schiavo case) as the beginning of a trail that could lead to dictatorship.**

[93] ***Darby*****, 312 U.S. at 115.**

[94] **Board of Trustees of the University of Alabama, et al. v. Garrett, 531 U.S. 356, 384 (2001).**

[95] **BREYER, ACTIVE LIBERTY, *supra* note 71, at 85.**

[96] **379 U.S. 241, 273 (1964) (Justice Black concurring).**

[97] ***See*** **Ronald D. Rotunda, *Garrett Disability Policy and Federalism: A Symposium on Board of Trustees of the University of Alabama v. Garrett: The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1185 (2002) (supporting New Federalism and its limits on Congressional authority).**

[98] ***Alden.*****, 527 U.S. 706.**

[99] ***Kimel*****, 528 U.S. 62.**

[100] ***Garrett*****, 531 U.S. 356.**

[101] ***Hans v. La.*****, 134 U.S. 1, 15 (1890).**

[102] ***Alden*****, 527 U.S. 706 and *Kimel*, 528 U.S. 62.**

[103] ***Hans*****, 134 U.S. at 15.**

[104] ***See Alden et al.*****, 527 U.S. at 769 (Souter, J dissenting). (noting that Connecticut and Rhode Island initially adopted their previous charters, which did not include sovereign immunity, thus allowing the State to be sued in its own courts, contrary to the majority's claim that sovereign immunity was universal among the States).**

[105] ***See*** **BLACK'S LAW DICTIONARY at 692. The express inclusion of one thing implies the exclusion of things not mentioned.**

[106] ***See Alden*****, 527 U.S. at 764-768, 775 (Souter, J. dissenting).**

[107] ***Seminole Tribe*****, 517 U.S. at 56.**

[108] **City of Boerne v. Flores, 521 U.S. 507, 519, 532 (1997).**

[109] ***Garrett*****, 531 U.S. 356.**

[110] ***Kimel*****, 528 U.S. 62.**

[111] ***Garret.*****, 531 U.S. 356.**

[112] **State of Tenn. v. Lane et al., 541 U.S. 509 (2004).**

[113] ***Lane*****, 541 U.S. at 533.**

[114] ***Garcia*****, 469 U.S. at 533.**

[115] ***Alden.*****, 527 U.S. at 712.**

[116] ***Id.*** **at 755-757; *in accord, see Employees of Dept. of Public Health and Welfare of Mo. v. Dept. of Public Health and Welfare of Mo.*****, 411 U.S. 279, 283 (1973).**

[117] ***Hans*****, 134 U.S. at 15.**

[118] ***See*** **Hilton v. South Carolina Publ. Rys. Comm'n, 502 U.S. 197 (1991). (In *Alden*, 527 U.S. 708, the majority opinion unconvincingly distinguishes this and other cases that conclude that the Eleventh Amendment is just a limitation on federal judicial power and is inapplicable to State courts).**

[119] ***Employees of the Dept. of Public Health and Welfare of Missouri*****, 411 U.S. 279 (1973).**

[120] *See* BLACK'S LAW DICTIONARY at 1414. A qui tam suit is one in which an informant bringing the suit on behalf of a government entity is entitled to some of the monetary recovery.
[121] *See Vermont Agency,* 529 U.S. 765.
[122] *See Hilton,* 502 U.S. 197 (permitting a FELA claim against a State-owned railroad was distinguished by concluding that the State had waived sovereign immunity by entering the market after Congress passed FELA with language that clearly subjected all who operated railroads to suits by injured workers). The concept of "constructive waiver" of sovereign immunity is suspect, however, since College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. et al., 527 U.S. 666 (1999) (refusing to use the Fourteenth Amendment to abrogate Eleventh Amendment sovereign immunity to facilitate a patent infringement claim against a State agency).
[123] 45 U.S.C. §§ 51-60.
[124] Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886).
[125] *Hilton,* 502 U.S. at 202.

[126] *Hilton,* 502 U.S. 197 (distinguishing Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468 (1987), interpreting Parden v. Terminal Railways of Alabama Docks Dept., 377 U.S. 184, as applied to the language of the Jones Act, § 33, 46 U.S.C. § 688 (as applied to seaman injuries)).
[127] 29 U.S.C. § 623(a).
[128] 29 U.S.C. § 621 et seq.
[129] The "strict scrutiny" versus "lower scrutiny" distinction has been used in nonemployment cases as well. *See* Katenbach v Morgan, 384 U.S. 641 (1966) (uphelding the application of the federal Voting Rights Act to compel States to abolish language literacy tests for voting (as discriminatory on the basis of race and ethnicity); *but see Oregon v. Mitchell,* 400 U.S. 112 (1970) (striking down amendments to that law which would have compelled States to lower the voting age to 18 (prior to the adoption of the 26th Amendment).
[130] *E.g.,* Gregory v. Ashcroft, 501 U.S. 452 (1991) (using the "*rational basis test*" uphold Missouri's requirement that judges retire at age 70 based on the generalization that old age affects ability to perform and concluding that an employer's burden of legitimizing a BFOQ defense is higher than the burden on a State to establish a "rational basis" for age-based classifications).
[131] *Kimel.,* 528 U.S. at 83.
[132] *Id.* at 89-90. (This "*congruence and proportionality test*" has been applied to deny remedies against States under a wide range of laws from the Patent and Plant Variety Protection Remedy Clarification Act and the Religious Freedom Restoration Act).
[133] *Id.* at 72-73.
[134] *Id.* at 78.
[135] *Id.* at 93, 97.
[136] *See* MO. REV. STAT. § 213.010(1) (2004).
[137] *See* Smith, et al. v. City of Jackson, 125 S. Ct. 1536 (2005) (in which local police officers over 40 brought an ADEA claim against the City based on differences in salary increases, concluding that ADEA authorizes recovery on a disparate-impact theory, subject to "reasonable factors other than age discrimination" defenses (without addressing sovereign immunity issues) (allowing an age discrimination claim against the local government employer to proceed in federal court, but deeming it to lack a factual basis for a disparate impact claim)).
[138] 42 U.S.C. § 12111 et seq.
[139] *Lane,* 541 U.S. 509.
[140] *See Lane et al.,* 541 U.S. at 533 (relocating judicial services was mentioned as an alternative to costly remodeling of older facilities).
[141] 42 U.S.C. §§ 12111(2), 12112(a) and (b).
[142] 531 U.S. 356 (2001).
[143] *Id.,* 531 U.S. 356.
[144] *Id.* at 389-424.
[145] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).
[146] *Garrett,,* 531 U.S. at 367.
[147] *Id.* at 375 (Kennedy J's concurring).
[148] *Id.* at 384 (Breyer, J dissenting).
[149] Estes v. Wyo. Dept. of Transportation, 302 F.3d 1200 (10th Cir. 2002) (relying on Lapides v. Bd. of Regents of Univ. Sys. of Ga., 251 F.3d 1372 (11th Cir. 2001), *rev'd* 535 U.S. 613 (2002)).
[150] *Garrett,* 531 U.S. at 369.
[151] *See* Murphy v. UPS, 527 U.S. 516 (1999) and Sutton et al. v. United Air Lines, Inc., 521 U.S. 471 (1999).
[152] Toyota Motor Mgf. v. Williams, 534 U.S. 184 (2002).
[153] *Hibbs,* 538 U.S. at 728.

[154] *See* 29 U.S.C. § 2606, et seq., especially 29 U.S.C. § 2612 (a)(1)(C).
[155] *Hibbs et al.*, 538 U.S. at 741 (Stevens, J., concurring in the judgment opinion) (asserting that the Eleventh Amendment is no barrier to a citizen suing his own State).
[156] *See* 29 U.S.C. § 2617 (a)(2).
[157] *See Hibbs et al.*, 538 U.S. at 741-742, (Scalia, J., dissenting) (noting that there is little record of Nevada having a history of such discrimination, since its State allowed Hibbs 12 weeks' leave to care for his wife and maintaining that FMLA should not be broadly applied to all States, but that a State-by-State determination of discrimination is required).
[158] *Id*. at 750 (Kennedy, J., dissenting) (noting that 30 States had adopted family-care laws before FMLA was enacted and the content of these "entitlement programs" (as Kennedy views them) is more properly left to the States to determine).
[159] *Id*. at 729.
[160] *Id*. at 735 (viewing FMLA as remedial rather than a substantive entitlement program from the perspective of the majority opinion).
[161] Pennsylvania State Police v. Suders, 542 U.S. 129 (2004).
[162] *Suders*, 542 U.S. 129.
[163] *Fitzpatrick*, 427 U.S. 445 (1976).
[164] *Id*. at 447 (Brennan, J., concurring).
[165] *Id.* at 547, 454 (Brennan, J., concurring) (seeing Title VII as a valid exercised of Commerce Clause authority).
[166] *Id*. at 454-457 (Rehnquist, CJ majority opinion).
[167] *Id*., at 454 (Rehnquist, CJ, majority opinion).
[168] *Id*., at 457 (Brennan, J., concurring).
[169] *Id*., at 457 (Brennan, J., concurring).
[170] *See* BLACK'S LAW DICTIONARY at 692. The express inclusion of one thing implies the exclusion of things not mentioned.
[171] New York v. United States, 505 U.S. 144, 159 (1992). (involving a State government's Tenth Amendment challenge to the implementation of a federal law, rather than a court jurisdictional issue).
[172] *See generally* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L. J. 319, 369 (Spring 1998/1999).
[173] *See, e.g.*, *New York*, 505 U.S. 144 and Printz v. United States, 521 U.S. 898 (1997) (striking down compulsion of State executives to implement the Brady Handgun Violence Prevention Act).
[174] *See* Hodel V. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264(1981) (upholding a federal mining program where the States were not compelled to expend State funds and the regulatory burden is borne by the federal government if a State chooses not to participate).
[175] *See* FERC v, Mississippi, 456 U.S. 742 (1982) (upholding federal measures to encourage States to develop programs to combat the energy crisis).
[176] *See generally*, *supra* note 82.
[177] *See New York*, 505 U.S. 144 *(*upholding the State of New York's Tenth Amendment challenge to the Low-Level Radioactive Waste Policy Amendments of 1985, which gave the States the Hobson's Choice to take title to radioactive wastes if it did not implement the federal program and assessed surcharges for untimely compliance).
[178] *New York*, 505 at 188.
[179] Testa et al. v. Katt, 330 U.S. 386 (1947).
[180] The 9th Amendment to the Constitution provides that "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In addition, the 5th Amendment provides in part that "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"[180] and the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[180] When Hamilton's rationale that the 11th Amendment applied to diversity cases is coupled with the 9th, 5th and Fourteenth Amendments, suits by instate citizen (and even some claims by out-of-state citizens) could arguably survive in a federal question case.
[181] *See* Seamon, *supra* note 172.
[182] U.S. CONST. art IV, § 1.
[183] *Testa*, 330 U.S. at 391.
[184] *See* Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911) and General Oil Co. v. Crain, 209 U.S. 211 (1908).
[185] Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).
[186] *Printz*, 521 U.S. at 908 (Scalia, J) (acknowledging broader authority to compel State judges than State executives to enforce federal mandates).
[187] *Kimel* , 528 U.S. at 96.

[188] *Alden*., 527 U.S. at 755.
[189] *Lapides*, 535 U.S. 613.
[190] Greene County v. State, 926 S.W.2d 701, 704 (Mo. App. S.D. 1996).
[191] *Lane*, 541 U.S. 509 at 533-624.
[192] *Kimel*, 528 U.S. at 81 (recognizing Congressional authority to "enforce" the Fourteenth Amendment's equal protection clause, but not the authority to "determine what constitutes a violation").
[193] *Fitzpatrick.*, 427 U.S. at 445.
[194] McKesson Corp. v. Div. Alcoholic Beverages and Tobacco, 496 U.S. 18, 26-31 (1990).
[195] *Alden*, 527 U.S. at 755.
[196] *Id*. at 755; Principality of Monaco v. Miss., 292 U.S. 313, 328-29 (1934).
[197] *See generally Testa* discussion in Part IV and Seamon, *supra* note 172.
[198] Sometimes it is difficult to discern whether a board is or is not an arm of the State. *See, e.g*., Thomas v. St. Louis Board of Police Commissioners, et al., 2006 U.S. App. LEXIS 12159 (8th Cir. 2006) (allowing 42 U.S.C. § 1983 claims to proceed in federal court despite Eleventh Amendment challenges). The District Court had relied on changes in Missouri law and a 2005 Missouri Supreme Court ruling (Smith, et al. v. State of Missouri, et al., 152 S.W.3d 275 (2005)) (characterizing the Board as "an arm of the state" (at least in the context of financial liabilities incurred by the board)). Because the United States Supreme Court held in Auer, et al. v. Robbins, et al., 519 U.S. 452 (1997) that Eleventh Amendment immunity did not protect the St. Louis Police Board when it was sued for overtime pay by its officers, the Eighth Circuit Court of Appeals recently reversed a District Court's reliance on *Smith*.
[199] Lincoln Cty. v. Lunig, 133 U.S. 529, 530 (1890).
[200] *See* Ronald D. Rotunda, *Garrett Disability Policy and Federalism: A Symposium on Board of Trustees of the University of Alabama v. Garrett: The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1185 (2002) for discussion of suits that can be brought against state officials (noting that a "state official's actions are 'state action' for purposes of the Fourteenth Amendment, but she is not 'the state' for purposes of the Eleventh Amendment"). *See also*, Mt. Healthy City Sch. Bd. v. Doyle, 429 U.S. 274, 280-81 (1977) and Idaho v. Coeur'd Alene Tribe of Idaho, 521 U.S. 261, 267 (1997*) (*recognizing that while State government agencies are protected by sovereign immunity, local government and boards are not protected). *But see Kimel*, 528 U.S. at 73.
[201] *See* Bachmann v. Welby, 860 S.W. 2d 31, 34 (Mo. App. E.D. 1993). (recognizing that even though State sovereign immunity shield may not extend to municipalities or State officials, limited immunity may exist for governmental functions under the "official immunity doctrine" or "public duty doctrine"). *See, e.g*., Beaver v. Gosney, 825 S.W.2d 870, 874 (Mo. App. W.D. 1992) (recognizing use the "official immunity doctrine" to shield employees from personal tort liability, especially for discretionary duties within their scope of authority. The doctrine also applies to duties owed to the general public).
[202] *Lapides*, 535 U.S. 613.
[203] *Lapides*, 535 U.S 613.
[204] *See* Eric Porterfield, *Eleventh Amendment Immunity After Lapides v. Board of Regents of the University System of Georgia: Keeping States Out of Federal Court*, 55 BAYLOR L. REV. 1243 (2003) (discussing the scope of waiver of sovereign immunity rights in removal cases).
[205] Estes v. Wyo. Dept. of Transportation, 302 F.3d 1200 (10th Cir. 2002).
[206] *Garrett*, 531 U.S. 356.
[207] *See e.g*., MO. REV. STAT. § 537.600 (2002) for the Missouri exclusions from sovereign immunity and MO. REV. STAT § 537.610 (2002) for the liability caps; *see also* James Burt, *The Tortured Trail of Sovereign Immunity in Missouri*, 54 J. MO. BAR 189 (July-August 1998).
[208] Nevada v. Hall, 440 U.S. 410 (1979).
[209] Francovich v. Italy, 1991 E.C.R. I- 5357.
[210] James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 238 (Sp. 2003). *See also* Brasserie du Pecheur SA v. Germany, The Queen v. Secretary of State for Transport ex parte Factortame Ltd, Consolidated Cases C-46 & 48/93, 1996 ECR I-1029.
[211] Case C-224/01, Kobler v. Republik Osterreich, 2003 E.C.R. I-10239, 2003 ECJ CELEX LEXIS 441 at 16 (Sept. 30, 2003).
[212] *See* Art. 48 of EC Treaty (now Art. 39 EC after amendment) and Art. 7(1) of Reg. (EE) No. 1612/68 of the Council (Oct. 15, 1968).
[213] Pfander, *supra* note 210 at 240, 262-265 (discussing the principle of "acquis communautaire" which requires member States contemplating accession to the European Union to accept the established principles that govern membership in the Union).
[214] Brasserie du Pecheur SA v. Germany, The Queen v. Secretary of State for Transport ex parte Factortame Ltd, Consolidated Cases C-46 & 48/93, 1996 ECR I-1029. (consolidating the United Kingdom Factortame case and the German Brasserie case challenging Germany's exclusionary beer purity laws for hearing before the ECJ).

[215] ***See*** **Regina v. Secretary of State ex part Factortame Ltd, 1 All ER 70, 107-08 (H.L.), 3 C.M.L.R. 375, 379-80 (H.L. Oct. 11, 1991) (concluding that it is the duty of a Member State to override national law that conflicts with EU law and to provide remedies in accord with those otherwise available under national law).**

[216] **Pfander,** ***supra*** **note 210 at 248-255. (noting that EU "regulations" are self executing, while "directives" take member State legislation to implement their policies).** ***See also id.*** **at 251 (noting that where the EU Treaty does not appear to require further action from member States to implement a right, the right is actionable because of the "direct effects in the relationship between Member States and their subjects").**

[217] ***Id.*** **at 256.**

[218] ***Id.*** **at 271.**

[219] ***See*** **Jefferson Powell,** ***The Oldest Question of Constitutional Law,*** **79 VA. L. REV. 633, 635 (1933) and Todd Tatelman, Comment,** ***Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a States' Rights Era: Sword or Shield?,*** **52 CATHOLIC UNIV. L. REV. 683 (2003).**

[220] **Individual property rights have been further jeopardized by** ***Kelo v. City of New London,*** **___ U.S. ___, 125 S. Ct. 2555 (2005), wherein the Supreme Court did not consider the 5th Amendment "taking clause" to be a Constitutional limitation on the ability of local governments to exercise eminent domain against nonblighted private property if it had a "public purpose" plan for alternate economic use of the property.**

[221] ***Lane,*** **541 U.S. 509.**

[222] ***Hibbs,*** **538 U.S. 721.**

[223] ***Kimel ,*** **528 U.S. 62.**

[224] ***Garrett,*** **531 U.S. 356.**

[225] ***Alden,*** **527 U.S. 706.**

[226] ***See*** **Garacetti, et al. v. Ceballos, ___ U.S. ___, 2006 U.S. LEXIS 4341 (2006) (concluding that the First Amendment does not prohibit managerial discipline based on an employee's (speech) expressions made pursuant to official responsibilities and that restricting speech associated to a public employee's professional responsibilities does not infringe any liberties the employee might have as a private citizen). Having voted with the 5-4 majority in** ***Garacetti,*** **the Court's newest two justices (Roberts, CJ and Alito, J) are not likely to conclude that public sector employees have any greater rights in future Tenth or Eleventh Amendment challenges.**