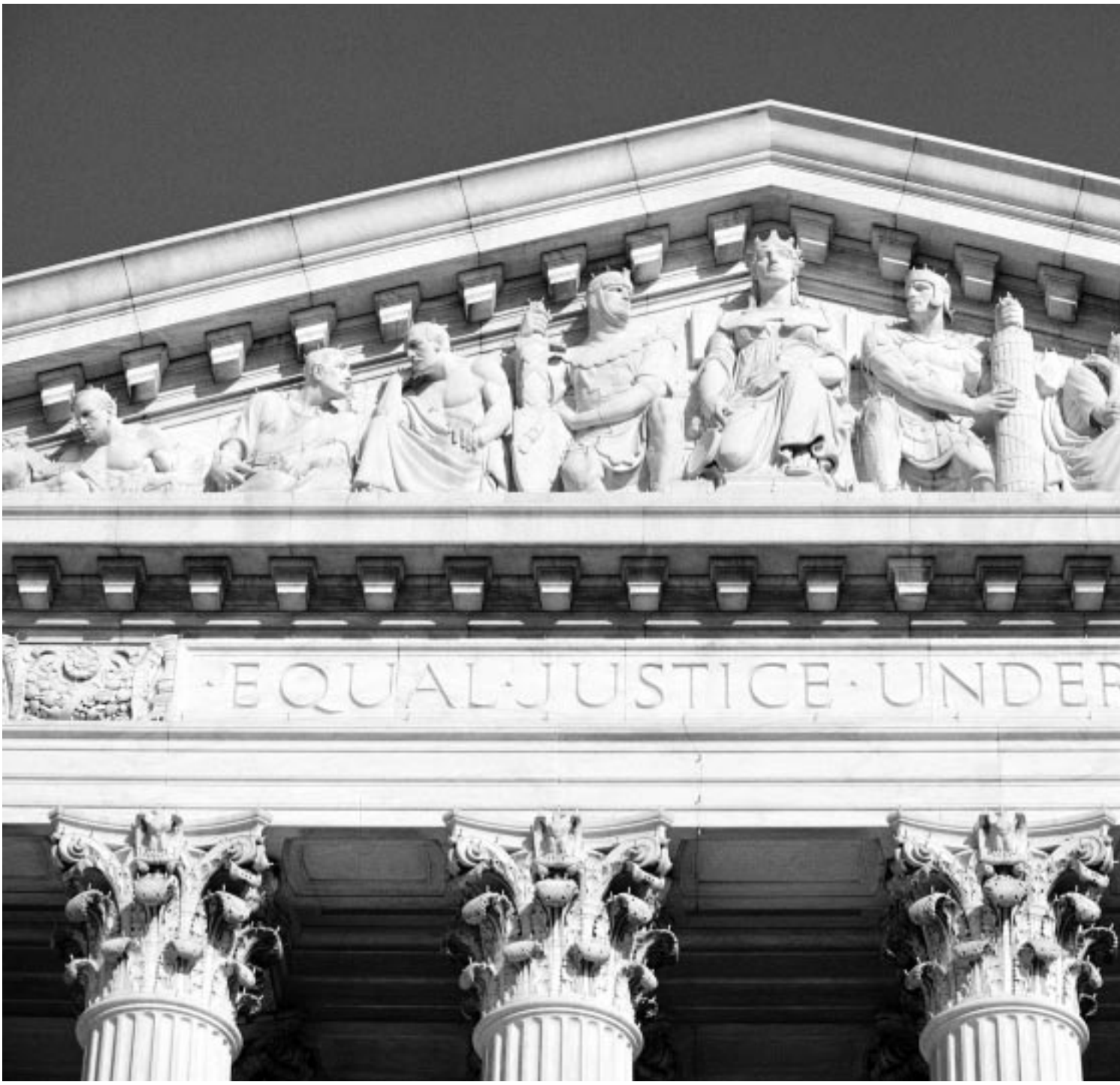

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COVER ARTICLE

Anita R. Brown-Graham

When You Can't Sue the State

STATE SOVEREIGN IMMUNITY

Most people believe that, for every legal wrong, there is a legal remedy. In fact, as far back as 1803, in *Marbury v. Madison*, the U.S. Supreme Court wrote, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[1] For the past eight years, however, the Court, in several sharply divided decisions, has significantly restricted both the federal government's ability to provide remedies for wrongs committed by state governments and individual citizens' ability to use the courts to enforce remedies against state governments for violations of federally guaranteed statutory rights.[2] Each of the decisions on the right to enforce remedies has been decided by a five-person majority consisting of Chief Justice William Rehnquist and Associate Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas. Associate Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens have dissented. This article describes the law on state sovereign immunity before and after the Court's recent decisions and discusses the effects of current law on various areas, particularly employment law.

The Court announced the most recent barrier to relief on January 11, 2000, when it held, in *Kimel v. Florida Board of Regents*, that state employees are barred from bringing suit against the state for violations of the Age Discrimination in Employment Act of 1967 (ADEA) (for details, see the sidebar on page 4).[3] The ADEA is a federal civil rights statute that makes it unlawful for an employer, including a state, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[4] Despite clear evidence of Congress's intent to hold states, like other defendants, liable for violations of the ADEA, the Court held that states could not be subject to suit for monetary damages by individuals. The Court based its decision on the notion of "federalism"—that is, the need to balance the supremacy of the federal government against the autonomy of individual states.

The Court's decision in *Kimel* follows on the heels of its "federalism trilogy," three cases decided at the end of the 1998–99 term. In *Alden v. Maine*, the most important of the three cases, the Court held that state employees could not sue their employer for overtime wages, notwithstanding provisions of the Fair Labor Standards Act requiring payment for overtime.[5] In the two other

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cases—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (hereinafter *Florida Prepaid I* and *Florida Prepaid II*)—the Court held that a state could not be sued for infringing a patent or for engaging in false advertising in violation of federal law.[6]

Several years earlier, the Court had foreshadowed its federalism trilogy in *Seminole Tribe of Florida v. Florida*. In that case the Court found that an Indian tribe was barred from bringing an action against the state of Florida or its governor in federal court under the Indian Gaming Regulatory Act.[7]

The impact of the Court's recent federalism cases is significant. One commentator has observed,

> *For the last 212 years, Americans have been able to sue state governments for violating federal laws and inflicting injuries. There has always been some judicial forum available for redress. The result of [the Supreme Court's recent cases] . . . is that states often can violate federal law with impunity and not be held accountable.*
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> . . . .
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> *The decisions mean a state laboratory can dump toxic wastes in violation of federal laws and those who become ill will have no recourse. A state university can violate copyright laws by making copies of a book and selling it to students for a few dollars less than its usual price, profiting at the expense of the publisher and author. States can ignore patent laws, violating the rights of inventors and patentholders, and no court will be able to grant relief.*[8]

The five justices of the Supreme Court who authored the recent federalism cases believe predictions that states will knowingly violate such laws to be overstated. The four justices who have constituted the minority in each case contend, however, that "the importance of the majority's decision[s] . . . cannot be overstated."[9] Indeed, despite a curious unwillingness to concede that the decisions will affect state conduct, or more specifically state compliance with the federal laws for which private individuals may no longer hold the state liable for violations, even the justices in the majority acknowledge (or perhaps forewarn) that the recent federalism decisions will broadly affect many kinds of cases.[10] The nature and the extent of the impact remain to be seen.

The Rebirth of Federalism

The Supreme Court has defended its recent decisions and their potential impact on people wronged by state governments on the ground that each case's result was compelled by federalism. Issues of federalism arise because the U.S. constitutional system contemplates two levels of government, federal and state, with states playing a central role in the essential functions of the nation. For decades, jurists and academics have grappled with defining federalism and delineating the respective roles of the federal and state governments. The Court's recent federalism decisions not only have expanded state autonomy but also appear to interpret federalism as a nation of dual sovereignty consisting of coequal levels of government.[11]

Controversy over the meaning of federalism is not new. In the 1700s the nation's founders heatedly debated the need to define and protect the position of states relative to the federal government. Throughout the 1800s Southern states repeatedly invoked states' rights in an effort to preserve first slavery and then segregation. In the 1990s and into the year 2000, the Court has again revived debate about the fundamental nature of American federalism. Yet despite a perhaps valiant effort to develop a principled and workable doctrine, the Court has generated more questions than answers by its recent decisions.

The question that immediately arises with each new federalism decision is "What is the effect on Congress's ability to regulate states?" The question can be approached in either of two ways. In the first approach, the inquiry is "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution [the commerce power]." In the second approach, the question is how much protection states enjoy from congressionally imposed

Kimel v. Florida Board of Regents

Analysis of the January 2000 federalism case decided by the Supreme Court

On January 11, 2000, the U.S. Supreme Court held that the Eleventh Amendment to the Constitution barred state employees from bringing suit against their employer for violations of the Age Discrimination in Employment Act of 1967 (ADEA).[1] The consolidated case facing the Court—there were actually three cases—involved employees of the states of Alabama and Florida. All three cases presented the same issue, on which the federal courts of appeal could not agree: can a state be sued for violations of the ADEA?[2] The Court's response in *Kimel v. Florida Board of Regents* settled the conflict among the lower courts but sparked contention that the Court had sounded yet another death knell for the right of private citizens to sue states for violations of federal statutes.[3]

The Cases

The first case involved a group of then-current and former faculty and librarians of Florida State University and Florida International University, including J. Daniel Kimel, Jr., the named petitioner in the Supreme Court case. These university employees, all over age forty, filed suit against the Florida Board of Regents complaining that the board had failed to require the two universities to allocate funds for a previously agreed on market adjustment to the salaries of eligible university employees. The salary adjustments, which were aimed primarily at equalizing the pay of older faculty with that of newer faculty, were withheld for two years as a cost-cutting measure. The plaintiffs contended that the failure to allocate the funds violated the ADEA because of the disparate impact on the base pay of employees with a longer record of service, most of whom were older.

In the second case against the state of Florida, Wellington Dickson filed suit

legal control by the courts.[12] (For a discussion of the effect on local governments, see the sidebar on page 11.)

Federalism and the Tenth Amendment

In the first approach, the issue has been whether federalism protects states from federal legislation enacted pursuant to the national government's commerce power. Beginning in the New Deal era, this inquiry into states' *freedom from regulation* became mostly a formality because, consistent with this period of strong nationalism, Supreme Court decisions virtually transformed Article I's Commerce Clause into a blank check for Congress to regulate any state activity that "affected interstate commerce."[13]

Any inquiry into whether an act of Congress is authorized by the Commerce Clause must be considered against the backdrop of the Tenth Amendment to the U.S. Constitution, which provides that "[t]he 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."[14] On occasion the Court has used this provision to invalidate acts of Congress.[15] However, not until fairly recently has the Court shown signs of putting permanent teeth into the Tenth Amendment inquiry.

In 1992 in *New York v. United States*, the Court blocked federal legislation that required states either to regulate the disposal of radioactive waste according to instructions from Congress or to assume legal responsibility for the waste. The Court's language in this case reflected the justices' new orientation toward federalism. The Court held that the Tenth Amendment prohibited Congress from "commandeering" states to carry out federal purposes by forcing them either to regulate against nuclear waste dumps within their borders or to accept ownership of nuclear waste.[16]

Then in 1995, in *United States v. Lopez*, the Court held that a provision of the Gun-Free School Zones Act that prohibited possession of a firearm within 200 yards of a primary or secondary school exceeded Congress's reach under the Commerce Clause.[17]

Two years later in *Printz v. United States*, following its reasoning in the 1992 *New York* case, the Court found unconstitutional a provision of the 1993 amendments to the federal Gun Control Act of 1968 (the Brady Act) that required local law enforcement officers to run background checks on certain categories of gun purchasers. The Court made clear that the Tenth Amendment prohibited Congress from directing the functioning of state executives, and that the effort to do so under the Brady Act compromised "the structural framework of the dual sovereignty. . . ." Again, the Court stressed that congressional "commandeering" of state resources and usurping of state sovereignty would not be tolerated. The Court explained, "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly."[18]

After *New York*, *Lopez*, and *Printz*, Congress may not rely on the Commerce Clause to (1) regulate state conduct that does not significantly affect interstate commerce or (2) discriminate against states by subjecting them to regulation not generally applicable to other entities. All three freedom-from-regulation cases are important to this article, not because of their individual holdings but because of the increased concern they reflect for state autonomy.

Federalism and the Eleventh Amendment—Sovereign Immunity

The second view of federalism, which is more directly the subject of this article, assumes that states enjoy a *freedom from suit* by individuals seeking monetary damages as compensation for violations of federal statutes. This freedom-from-suit inquiry, used to a more limited extent in the past, has become very prominent in recent case law.

In each of the five recent freedom-from-suit federalism decisions, both the majority and the dissenting opinion devote considerable attention to constitutional history, particularly the history and the development of the Eleventh Amendment to the U.S. Constitution. That amendment states, "The Judicial power of the United States shall not be

During the upcoming term, the Supreme Court will hear arguments on its first "federalism" case involving the Americans with Disabilities Act. Some lower courts have found immunity; others have not.

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against the Florida Department of Corrections alleging that the state refused to promote him because of his age and because he had filed grievances regarding the state's alleged acts of age discrimination. Dickson sought back pay and compensatory and punitive damages.

In the Alabama case, the employees were two associate professors at Alabama State University, aged fifty-seven and fifty-eight at the time they filed their suit. The professors alleged that the university had (1) discriminated against them on the basis of their age, (2) retaliated against them for filing discrimination charges with the Equal Employment Opportunity Commission, and (3) employed

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 the Citizens or Subjects of any Foreign State."[19]

The language establishes sovereign immunity for the states and reflects several policy considerations inherent in dual sovereignty: the need to protect a state's financial integrity; an unwillingness to place an undue burden on a state's ability to apportion scarce resources according to the will of its citizens; and a reluctance to distort a state's separation of powers by impermissibly tipping the balance toward its judiciary.[20] As courts balance those considerations against notions of state accountability, the need for uniformity of laws, and federal preeminence, a fluid framework has resulted. It is a framework that is susceptible to change as the composition of the Supreme Court changes.

Sovereign Immunity before the Rebirth of Federalism

The body of law on the Eleventh Amendment has never been a model of clarity. It has always been characterized by fictional features and fairy-tale distinctions. Yet, before the rebirth of federalism, there were some basic understandings of its parameters. The following questions had relatively clear answers, as indicated.

1. To which courts and cases does the Eleventh Amendment apply?

The Eleventh Amendment has long been interpreted beyond its literal text to prohibit not only suits against states in federal court by citizens of other states but also suits against states in federal court by their own citizens.[21] However, the Eleventh Amendment never was applied to actions brought against states in state court for violations of federal law. In fact, the language of several cases strongly suggested that the Eleventh Amendment did not apply to state court actions.[22]

2. Can Congress take away the states' sovereign immunity?

Sovereign immunity never has been considered absolute. Congress could abrogate the immunity afforded by the Eleventh Amendment using its authority to enforce the Fourteenth Amendment[23] or its power to regulate commerce under Article I of the Constitution.[24] However, congressional intent would not be implied; it had to be unmistakably clear.[25]

3. Can states voluntarily surrender their sovereign immunity?

States could waive the immunity afforded by the Eleventh Amendment.[26] A long-standing line of cases suggested that a state's waiver had to be clear and unambiguous. With one exception, the waiver had to be expressed; it could not be implied from circumstances.[27] The only appropriate sources for expression of a waiver were state legislation, a consensual agreement under the Compact Clause of the U.S. Constitution, or the actions of properly authorized state officials.[28] Moreover, a general statutory waiver of sovereign immunity without specific reference to the Eleventh Amendment or to actions in federal court was insufficient to waive Eleventh Amendment immunity.[29] A waiver of the immunity for litigation in one forum—for example, state court—did not apply to litigation in other forums. States would not be deemed to have waived their Eleventh Amendment immunity simply by entering into a contract with a private party for the provision of goods and services or by participating in a federal program.[30]

The sole exception to the requirement of an expressed waiver arose in cases in which Congress clearly expressed its intent to create a private right of action against states engaged in certain activity and thereafter a state engaged in that activity.[31] This form of relinquishing sovereign immunity was known as "constructive waiver."

4. Does Eleventh Amendment immunity apply when a plaintiff is not seeking monetary damages?

To deal with unconstitutional state action, the Supreme Court had held that Eleventh Amendment immunity was not applicable in cases in which the plaintiff sued state officials directly for "prospective" relief—that is, for a remedy that requires a state official to comply with federal law but does not involve monetary damages.[32] The Court reasoned that, when a state official acts contrary to the federal constitution or

an evaluation system that had a disparate impact on older faculty members. These plaintiffs too sought back pay and compensatory and punitive damages.

The ADEA and Eleventh Amendment Immunity

The ADEA

The ADEA, as amended, makes it unlawful for an employer, including a state, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." The ADEA covers individuals aged forty and over.[4]

The broad prohibitions of the ADEA are not without exceptions. For example,

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In one commentator's view, the Court's federalism decisions mean that a person who becomes ill from toxic wastes dumped by a state laboratory in violation of federal law will have no recourse in the courts.

laws, he or she is stripped of his or her official character and is no longer entitled to Eleventh Amendment immunity. The decision establishing this right is discussed further under question 4 in the next section.

The Court was careful to ensure that a plaintiff's own designation of the type of award he or she was seeking was not determinative of whether the Eleventh Amendment barred the action. For example, in a case in which plaintiffs sought to require state officials to pay retroactive benefits to people wrongfully denied benefits under an invalid state regulation, the Court held that the award would violate the Eleventh Amendment because the money, which would come from the state's general revenues, would closely resemble a monetary award.[33] On the other hand, courts have held that the Eleventh Amendment does not bar plaintiffs from obtaining an order requiring a state institution to pay for a future program of services (that is, to pay prospectively), when the program is necessary to undo the harmful effects of past constitutional violations.[34]

5. Can a state official be sued personally in a case in which the Eleventh Amendment bars suit against the state?

To recover monetary damages for the unconstitutional wrongs of a state official, a plaintiff always could file suit against the official in his or her individual capacity—that is, the plaintiff could seek recourse against the official personally. Such a suit was permissible even in cases in which the state was obligated to indemnify the individual officer.[35]

Sovereign Immunity after the Rebirth of Federalism

Nothing in the text of the Eleventh Amendment answered the specific questions presented to the Court in the recent freedom-from-suit cases. For example, in *Alden v. Maine,* the Court was asked to determine whether sovereign immunity barred lawsuits brought in state courts against states for violations of a federal statute. In *Kimel, Florida Prepaid I,* and *Florida Prepaid II,* the Court was asked to determine the circumstances under which Congress might abrogate or revoke a state's sovereign immunity. The Eleventh Amendment is silent on those issues.

Instead of looking to the body of law set forth in the preceding section, the Court turned to the text of the Eleventh Amendment, the nation's constitutional structure, and the Supreme Court justices' individual interpretations of history to find the answers. The answers given by the five-to-four majority in all the recent freedom-from-suit cases add to, modify, or repudiate each of the foregoing understandings of the parameters of the law.

1. To which courts and cases does the Eleventh Amendment apply?

In a dramatic expansion of sovereign immunity, the majority in *Alden* reversed the Court's position in earlier decisions[36] and declared that any action that would be barred in federal court by the Eleventh Amendment is barred in state court by the greater notion of sovereign immunity. The Court explained that

> *the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. . . .*[37]

The Court maintained that the understanding that a sovereign could not be sued without its consent had been universal in the states when the Constitution was drafted and ratified. Moreover, delegates to state conventions that addressed state sovereignty in their ratification documents had believed, as the leading advocates of the Constitution had, that nothing in the Constitution would strip them of sovereign immunity.

The Court pointed to the enactment of the Eleventh Amendment itself as evidence of this universal belief. The amendment came about in response to the 1793 decision in *Chisolm v. Georgia,* the first case to ask the Supreme Court to address the issue of sovereign immunity. The Court held that nothing in the language of the Constitution prevented it from assuming jurisdiction over the

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an employer may rely on age when it is a "bona fide occupational qualification" reasonably necessary to the normal operation of the particular business. Also, an employer may legally refuse to hire people over the age of forty if it can show that a person would have to be under the age of forty to perform the tasks required of the job in question. Further, an employer may engage in conduct otherwise prohibited if its actions are based on reasonable factors other than age or if it discharges or otherwise disciplines an employee who is over age forty for good cause.[5]

When an employer's age discrimination does not fall within an exception to the act, the ADEA explicitly provides that the employer will be subject to liability for legal and equitable relief.[6] This means that a person whose rights under the ADEA are violated may file a lawsuit to obtain monetary damages, as well as to have a court direct the employer to reinstate, promote, or otherwise return the affected employee to the position he or she would have enjoyed but for the employer's discriminatory action.

The act specifically incorporates the enforcement provisions of the Fair Labor Standards Act. The latter act authorizes employees to initiate actions for back pay "against any employer in any Federal or State court of competent jurisdiction. . . ."[7] In 1974, Congress amended the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State," and it deleted text that had explicitly excluded public entities from the definition.[8] Given such express language, one might ask, how, then, could the Supreme Court hold that state employees may not sue their employer for violations of the ADEA? The answer lies in the Eleventh Amendment to the Constitution and the underlying notions of sovereign immunity.

The Eleventh Amendment

By the literal terms of its text, which refers only to suits brought "by Citizens of

State of Georgia as a defendant in an action by a citizen of another state.[38] The response to the *Chisolm* holding was swift and unfavorable. Congress immediately proposed a constitutional amendment to nullify the Court's decision. With one slight change, that proposal became the Eleventh Amendment to the Constitution. According to the current Court, the Eleventh Amendment simply restored the law to what people believed it to be before the *Chisolm* decision. Moreover, because the amendment was a response to a specific case, it did not embody the universe of understanding on sovereign immunity. Instead, it focused on the particular issue raised by the *Chisolm* case.

The dissenting justices in *Alden,* and many other critics of the majority's opinion, have challenged the majority's interpretations of history. In a lengthy dissent, Justice Souter pointed out evidence of a diversity of attitudes about sovereign immunity among the nation's founders, ranging from the natural law conception of Alexander Hamilton to utter rejection of the principle by James Wilson. Souter's reading of the historical record discerned that only "a doubtful few" were "espousing an indefensible natural law view of sovereign immunity."[39]

It is difficult to assign error or right to either side of the debate, for both sides necessarily based their arguments almost entirely on negative inferences. As one Eleventh Amendment scholar so aptly put it, "[t]he search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire."[40] The majority of justices on the Court believe that because the Constitution itself, excluding its amendments, is silent on state sovereignty, the notion must have been so universally accepted that no one thought its inclusion was necessary. On the other hand, the dissenting justices presume that the Constitution's silence means there was no consensus on sovereign immunity. "[E]ach side [cleverly] listened for the sound of its own position in the silence of the historical record."[41]

2. Can Congress still take away the states' sovereign immunity?

In its 1996 decision in *Seminole Tribe,* the Court reaffirmed the basic principle that Congress may enact legislation that abrogates state sovereign immunity. However, the Court ruled that the Commerce Clause of Article I does not give Congress authority to abrogate a state's immunity from suit directly. The Court therefore limited authority for abrogation solely to Section 5 of the Fourteenth Amendment, which empowers Congress to pass legislation implementing the Fourteenth Amendment.

The Court's basis for the distinction amounts to nothing more than a timing argument. Simply put, the Court's reasoning is that because the ratification of the Constitution did not eliminate states' sovereignty, as confirmed by the Eleventh Amendment, nothing in the text of the Constitution can be read to authorize Congress to abrogate sovereign immunity. But the Fourteenth Amendment was enacted after the Eleventh, so it essentially trumps the Eleventh and any "common understanding of state sovereignty" on which the Eleventh was based. Indeed, the Fourteenth Amendment, "by expanding federal power at the expense of state autonomy[,] . . . fundamentally altered the balance of state and federal power struck by the Constitution."[42]

The Court's reasoning is questionable. When one is construing a law that has been amended, it is not ordinary practice to view a provision added later as trumping any predecessor. More typically, courts seek to make sense of the enactment as a whole. Had the Court adopted the latter practice in *Seminole Tribe,* the inevitable conclusion would have been that states are not fully sovereign. If they were, even the most pressing need could not overcome their sovereign immunity.[43] If they are not, then abrogation under Article I should have as much effect as abrogation under the Fourteenth Amendment.

Moreover, the original Constitution contains a Supremacy Clause, which states that federal law shall be "the supreme Law of the Land; and the Judges of every State shall be bound thereby. . . ."[44] Nowhere in the *Alden* majority opinion does the Court give the plain meaning of that text proper accord. Instead, the Court reads it to mean

another State, or the Citizens or Subjects of any Foreign State,"[9] the Eleventh Amendment bars lawsuits against nonconsenting states in federal court. However, the Supreme Court always has read the amendment more expansively, finding that it bars actions by citizens against their own states unless one of the exceptions to the amendment applies.[10] The exceptions include an express waiver of immunity by states[11] or a clear and valid abrogation of immunity by Congress.[12]

The Court in *Kimel* reaffirmed that the Eleventh Amendment applied to the three consolidated suits, which had been brought by citizens against their own states for violations of the ADEA. Because the plaintiffs did not argue that either of the states had waived its immunity, the issue was whether, in enacting the ADEA, Congress had invalidated or abrogated the states' Eleventh Amendment immunity.

The inquiry into whether Congress had abrogated a state's Eleventh Amendment immunity was predicated on two questions: "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." In response to the first question, the Court held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." The Court agreed that the ADEA satisfied this test: "Read as a whole, the plain language of [the ADEA's] provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees."[13]

The Court was less generous with respect to the second inquiry, though, holding that Congress had not acted pursuant to a valid grant of constitutional authority when it sought to subject states to suit by individual citizens under the ADEA. Interestingly the Court once before had decided a case involving the constitutional validity of the 1974 exten-

merely that *if* Congress has the power to enact legislation that abrogates states' freedom from suit, it may do so.

The Court's changed course on the Commerce Clause does not affect the enforceability against states of civil rights laws that rest on the Fourteenth Amendment. The Fourteenth Amendment provides as follows:

> *Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any persons within its jurisdiction the equal protection of the laws.*
>
> . . . .
>
> *Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

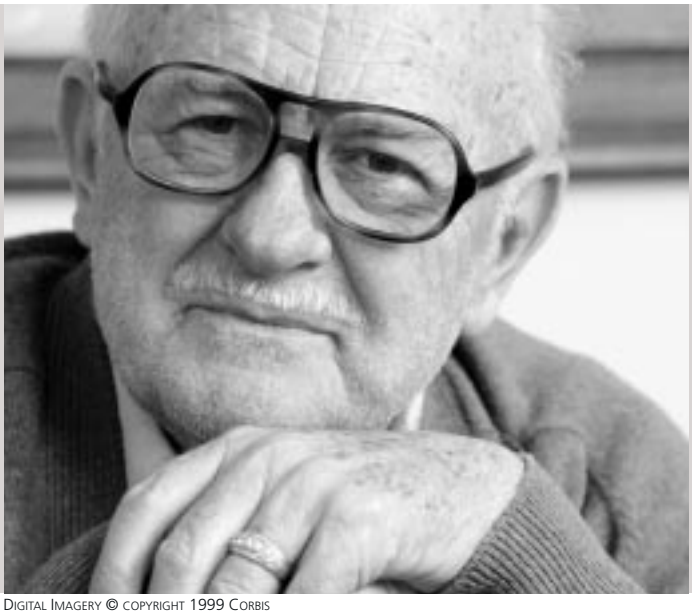
Section 5 is an affirmative grant of power to Congress, and the current Supreme Court has recognized that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."[45] The power granted is that of remedying and deterring violations of rights guaranteed under the Fourteenth Amendment. Thus any resulting legislation may prohibit "a somewhat broader swath of conduct"[46] and need not parrot the precise wording of the Fourteenth Amendment or otherwise confine its parameters to the conduct forbidden by the amendment's text.

The Court also has interpreted Section 5, however, as imposing some limitations on Congress's authority. According to the Court, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[47] In *Florida Prepaid I,* the Court considered the validity of a provision in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) that in effect abrogated states' sovereign immunity. The Court held that the statute, which subjected states to suit for patent infringement, was not appropriate legislation under Section 5 of the Fourteenth Amendment. The Patent Remedy Act failed to meet the congruence-and-proportionality test for two reasons: (1) "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"; and (2) it was unlikely that many of the instances of patent infringement affected by the statute were unconstitutional. The scope of the Patent Remedy Act was out of proportion to its supposed remedial or preventive objectives. The Court found that the "statute's apparent . . . aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."[48] Such aims were proper congressional concerns under Article I and sufficient to meet the standard of the freedom-from-regulation inquiry, but they were insufficient to support an abrogation of the states' freedom from suit because the concerns had little, if anything, to do with the Fourteenth Amendment.

It remains the case that even if Congress has the power to abrogate sovereign immunity under the Fourteenth Amendment, Congress's intent to do so by legislation will be found only when there is clear, specific, and unmistakable language in the statute. The Supreme Court will not infer abrogation in the absence of unequivocal evidence of Congress's intent.[49]

3. Can states still voluntarily surrender their sovereign immunity?

In *Florida Prepaid II,* the Court severely limited the potential for a constructive waiver. (As explained earlier, a state could be deemed to have waived its sovereign immunity by engaging in an activity for which Congress had clearly provided to individuals the right to seek monetary damages against wrongdoers.) The lawyers for the plaintiffs had argued that, under the doctrine of constructive waiver, Florida Prepaid (an agency of the state of Florida) had waived its immunity by "engaging in the interstate marketing and administration of its program" after the Trademark Remedy Clarification Act made clear that such activity would subject violators to suit. Writing for the five-to-four majority, Justice Scalia declared that the doctrine



The Supreme Court's recent decision in* Kimel v. Florida Board of Regents *bars state employees from bringing suit against states for violations of the Age Discrimination in Employment Act.

sion of the ADEA to state and local governments. In *EEOC v. Wyoming,*[14] the Court had held that the ADEA constituted a valid exercise of Congress's power under Article I of the Constitution to regulate commerce among the states. Further, the Court had held that the ADEA did not transgress any restraints imposed on the commerce power by the Tenth Amendment, which specifically reserves to the states those powers of the union not specifically granted to the national government.[15]

The Supreme Court decided recently, however, that Congress's powers under Article I do not include the power to subject states to suit by private individuals. In

of constructive waiver "stands as an anomaly in the jurisprudence of sovereign immunity[] and . . . constitutional law" and that "[w]hatever may remain of . . . the doctrine is expressly overruled." Justice Scalia found it impossible to square the doctrine with the general requirements that a waiver be unequivocal and voluntary. The states' mere presence in a field that is subject to regulation, Justice Scalia contended, should not be deemed unequivocal evidence of a voluntary surrender of a constitutional right to sovereign immunity.[50]

In eliminating constructive waivers, the Court sought to ensure that Congress's power to overcome a state's immunity was limited to statutes enacted under Section 5 of the Fourteenth Amendment. If Congress could subject a state to private lawsuits simply because the state engaged in an area of regulated activity, Congress could essentially obtain waivers by exercising powers authorized by Article I's Commerce Clause, a result the Court already had forbidden.

The Court did provide a narrow exception to its bar against constructive waivers, holding that Congress could continue to seek waivers on the basis of statutes that conferred a gift or a gratuity on the states. Clearly, laws approving interstate compacts or offering federal funds meet this criterion. Little guidance exists, however, on whether the exception will encompass statutes conferring other federal benefits.

States still may expressly waive their sovereign immunity under the standards developed before the recent federalism cases. A waiver will not be inferred, though, in the absence of an express declaration from a proper source. Neither silence nor "constructive consent" (consent implied by a state's actions) will be recognized. In determining the nature and the scope of a state's waiver of its immunity under the Eleventh Amendment, courts will deem an ambiguous statutory waiver to be no waiver.

4. Does sovereign immunity apply when a plaintiff is not seeking monetary damages?

In *Seminole Tribe,* as noted earlier, the Supreme Court dismissed the tribe's claims against the governor of Florida for violations of the Indian Gaming Regulatory Act. The Court reasoned that the intricate remedial scheme set forth by the statute in question applied only against the state. Thus, although the claims against the state were barred by sovereign immunity, the statute also implicitly precluded the tribe's right to bring suit under *Ex parte Young* against an individual official.[51] In *Ex parte Young,* the Court upheld an order restraining a state attorney general from bringing suit under a statute alleged to be unconstitutional, notwithstanding the sovereign immunity bar to action against the state. The case has been read to stand for the principle that permits private suits for prospective relief against state officials alleged to be violating federal requirements. Prospective relief has therefore been presumed to be available to constrain illegal state action, at least until *Seminole Tribe*. This presumption "is nothing short of indispensable to the establishment of constitutional government and the rule of law," Justice Souter argued in his dissenting opinion in *Seminole Tribe*.[52]

Despite *Seminole Tribe, Ex parte Young* is not on its deathbed—yet. A plaintiff may still, albeit in more limited circumstances than before *Seminole,* seek injunctive or declaratory relief[53] against state officials in their official capacity to require them to conform their conduct to federal law if the federal remedial scheme at issue does not apply solely to states. In fact, in the *Seminole Tribe* decision, to minimize the significance of its expansion of the freedom from suit, the Court specifically pointed to the existence of the *Ex parte Young* doctrine as a "method of ensuring the States' compliance with federal law."[54] However, *Seminole Tribe* may have a chilling effect on lower courts' willingness to apply the *Ex parte Young* doctrine. The courts now may hesitate before permitting an action for prospective relief against state officials in cases involving a statute with a comprehensive remedial scheme that does not explicitly provide for such enforcement of its provisions.

5. Can a state official be sued personally in a case in which sovereign immunity bars suit against the state?

The effect of the recent Court decisions on this issue is purely practical. To the

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1996, in *Seminole Tribe of Florida v. Florida,* the Court dramatically reversed its earlier rulings and decided that the sole authority for abrogation of the Eleventh Amendment is Section 5 of the Fourteenth Amendment.[16] Applying this ruling in *Kimel*, the Court reasoned that "if the ADEA rested solely on Congress' Article I commerce power, the [state employees could not] . . . maintain their suits against their state employers" because Congress would have lacked the power to give the employees the right to sue the state.[17]

The next hurdle for the *Kimel* Court, then, was to determine whether the ADEA could have been enacted pursuant to Section 5 of the Fourteenth Amendment. Section 5 permits Congress to enforce the substantive provisions of the Fourteenth Amendment, which include the right to equal protection of the laws and due process of law.[18] Although Congress is not restricted to parroting the language of the Fourteenth Amendment, Section 5 does provide some limitation on Congress's authority. According to the Court, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[19] To meet the threshold test for Section 5 authority, the ADEA had to be an appropriate remedy for a problem of constitutional proportion, rather than an attempt by Congress to redefine the states' legal obligations with respect to age discrimination.

Applying its test of congruence and proportionality to the *Kimel* case, the Court found that the ADEA imposed obligations on state and local governments that were disproportionate to any unconstitutional conduct that might be targeted by the act. The Court's finding was based on a comparison of the ADEA's protections of older employees with the protections provided by the Equal Protection Clause of the Fourteenth Amendment.

According to the Court, "[o]lder persons have not been subjected to a history of purposeful unequal treatment." Thus

The Scope of State Sovereign Immunity

Neither the Eleventh Amendment nor any greater notion of state sovereign immunity serves to bar liability of a local government or its entities.[1] Cities and counties continue to bear liability for violations of statutes like the Fair Labor Standards Act and the Age Discrimination in Employment Act, notwithstanding the state of North Carolina's new exemption from such liability.

Under North Carolina's system of delivering some public services through agencies jointly funded and administered by state and local government, it sometimes is difficult to determine at first glance whether an agency should be characterized as a state or a local one. In these circumstances, courts must determine whether the entity is to be treated as an arm of the state (entitled to protection from liability for violations of federal rights) or as a local government (not entitled). In resolving whether the agency qualifies for sovereign immunity, courts often resort to a technical, fact-intensive inquiry. The factors that they consider generally involve (1) whether a monetary judgment would be satisfied with state funds; (2) how the agency is characterized under state law; (3) how much funding the agency receives from the state; and (4) to what extent the agency is controlled by the state. The most important factor is the first one.

In a recent case, a federal district court held that North Carolina's local school boards are entitled to sovereign immunity from a suit for past overtime wages due under the Fair Labor Standards Act. The court relied on the facts that (1) the N.C. Constitution requires the General Assembly to fund education and (2) local boards of education are subject to close supervision by the State Board of Education.[2] The decision has not yet been reviewed by an appellate court. Earlier courts have held that the campuses of The University of North Carolina system and the campuses of the state's community college system also are entitled to Eleventh Amendment immunity.

Moreover, courts in several North Carolina state law cases have found local government employees to be acting as agents of the state for a variety of purposes.[3] In such cases, courts have held that the state may be held liable for monetary damages under state law for resulting injuries. If the wrongful conduct also violates federal law, the Eleventh Amendment or sovereign immunity might bar individual recovery of monetary damages from the state provided under federal law—and possibly from the county if the court finds that the official was acting as a state policy maker at the time of the wrongful conduct.[4] In this context, it is important to note that an official may be treated as a state official for one purpose and a local government official for another. For example, a prosecutor may be a state official with respect to prosecutorial decisions but a local government official with respect to administrative decisions.[5]

Notes

1. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).
2. Cash v. Granville County Bd. of Educ. (Lawyers Weekly, No. 0-02-0289) (Britt Sr.) (E.D.N.C. Mar. 8, 2000).
3. *See, e.g.,* Vaughn v. North Carolina Dep't of Human Resources, 286 N.C. 683 (1991) (child protective services); EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24 (1992) (sewer permitting).
4. *See, e.g.,* McMillian v. Monroe County, 520 U.S. 781 (1997) (holding that action against county for violation of 42 U.S.C. § 1983, a federal law, was barred when local officer acted as final policy maker for state rather than county).
5. Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992); Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993); Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991).

states may discriminate on the basis of age without violating the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. States may use age as a proxy for other qualities, abilities, or characteristics that are relevant to the state's legitimate interests, even if the reliance on such generalizations does not apply to a particular individual. For example, a state might require recreational personnel who teach physical fitness programs to retire at age fifty because of an assumption that a person over age fifty would lack the necessary agility to teach physical fitness. A particular employee over age fifty being more fit than the average twenty-five-year-old would not make this mandatory retirement rule unconstitutional. When conducting a rational-basis review under the Fourteenth Amendment, the Court "will not overturn such [state discriminatory action] unless varying treatment of different [aged] groups or persons is so unrelated to the achievement of any combination of legitimated purposes that [the Court could] only conclude that the actions were irrational."[20]

In comparison, the ADEA's broad prohibition of age discrimination makes considerably more state employment decisions and practices illegal than would likely be held unconstitutional under the applicable equal protection, rational-basis standard. Under the ADEA a court might well have found that the earlier example of mandatory retirement for physical fitness instructors was illegal. Judged against the backdrop of the constitutional standard of equal protection, though, the ADEA was "so out of proportion to a supposed remedial or preventive objective that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior," in the Court's view.[21] The ADEA therefore failed to meet the standard of congruence and proportionality.

Further, in considering the appropriateness of the remedial measure, the Court determined that the ADEA's legislative record confirmed that "Congress' 1974

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extent that the Court has restricted the opportunity to seek monetary relief from the state, potential plaintiffs will be forced to look to state officials for compensation for injuries. This option has been unaffected by the recent decisions. As long as the unconstitutional or otherwise wrongful conduct is fairly attributable to a particular officer, and the plaintiff seeks relief not from the state treasury but from the officer personally, he or she has the right to sue.[55]

The Response of Lower Courts to the Recent Decisions

Most of the Court's recent freedom-from-suit litigation has been in employment law. Not surprisingly, therefore, as states now more aggressively assert their right to be free from suit for violations of federal laws, most of the resulting litigation in the lower courts is related to employment law.

The Supreme Court has invalidated congressional attempts to abrogate state sovereign immunity under the Fair Labor Standards Act and the Age Discrimination in Employment Act. Lower courts appear to have decided that states also are immune from suit under the Family Medical Leave Act. Similarly, lower courts have generally held that Section 1981 of the Civil Rights Act of 1870 does not abrogate state sovereign immunity in federal courts.[56]

On the other hand, although the Equal Pay Act is an amendment to the Fair Labor Standards Act, most circuit courts of appeal have decided that states are not immune from suit under it.[57] Nor, according to the lower courts, are states immune from suit under Title IX of the Education Amendments of 1972, which prohibits gender discrimination.[58]

The response to the Americans with Disabilities Act has been mixed, with some courts finding immunity and others finding no immunity.[59] The Supreme Court should resolve the uncertainty soon, for it has agreed to hear argument on an Americans with Disabilities Act case this term.

There has been little litigation surrounding Title VII of the Civil Rights Act of 1964 because the Supreme Court decided in 1976, long before the rebirth of federalism, that states were not immune from suit under Title VII.[60] Justice Rehnquist, writing for the Court, found Title VII, which prohibits discrimination based on race, color, gender, religion, or nationality, to be a valid and proper abrogation of a state's Eleventh Amendment immunity. First, congressional intent to abrogate Eleventh Amendment immunity in the statute was clear because the 1972 amendments to the statute specifically authorized federal courts to award monetary damages and attorney's fees against a state government found to have subjected an employee to unlawful employment discrimination under Title VII. Second, Title VII was enacted pursuant to Section 5 of the Fourteenth Amendment.

There has been significant litigation over state sovereign immunity in other areas of the law. For example, the Fourth Circuit Court of Appeals, which defines federal law for North Carolina, held that the Bankruptcy Code provision purporting to abrogate states' sovereign immunity was unconstitutional because the provision could not be sustained under the Fourteenth Amendment's Enforcement Clause (Section 5).[61] Several environmental laws may suffer a similar fate. Federal environmental laws are generally based on Congress's Article I power to regulate interstate commerce. Most would undoubtedly fail the Fourteenth Amendment's congruence-and-proportionality test and are therefore now vulnerable to sovereign immunity defenses by states when private citizens bring lawsuits.

Many have argued that the recent federalism cases and the ensuing lower court cases make clear the Supreme Court's comfort with the idea that in some cases there will simply be no judicial remedy available to ensure state compliance with federal law. However, the Court has been quick to respond that neither the federal government nor another state is limited by sovereign immunity in its right to bring action against a state. Thus, to the extent that the federal government is willing or practically able to bring action on behalf of people injured by state action, states still may face damages for violations of an individual's statutory rights. Similarly a state could bring action against another state to vindicate wrongs

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extension of the Act to the states was an unwarranted response to a perhaps inconsequential problem." Despite references in congressional debates and reports to the practice of age discrimination in employment by public agencies, Congress never identified any pattern of age discrimination by the states, much less any discrimination that rose to the level of constitutional violation, according to the Court. The Court was simply unimpressed with the "assorted sentences [lamenting the pervasiveness of age discrimination] . . . cobble[d] together from a decade's worth of congressional reports and floor debates," or the report on public-employment age discrimination in California. The Court found that this evidence fell "well short of the mark."[22] The lack of "any evidence" for consideration by Congress meant that Congress could not have been responding to a problem of constitutional proportion.

Conclusion

The Court took care to note that the *Kimel* decision

> *[did] not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.*[23]

In North Carolina, state employees who experience age discrimination may sue the state under Section 126-34.1 of the North Carolina General Statutes (hereinafter G.S.). The state provisions closely parallel those of the ADEA, and courts may award monetary damages against the state if they find that a violation has

committed against one of its citizens. Except for the environmental context, though, it is difficult to see how suits by either the federal government or sister states are an appropriate substitute for suits by private citizens.

Conclusion

The Supreme Court's recent decisions purport to be faithful to constitutional text, constitutional structure, and original meaning. Many scholars, lawyers, and potential litigants against state government disagree, though. The five justices in the majority insist that they are developing a workable theory of federalism. On that point, there is even more disagreement. As one scholar puts it, the efforts to give significance to federalism have "produced unprincipled, arbitrary judicial decisionmaking that can disrupt the functioning and accountability of Congress, without providing any principled zone of state power."[62] Clearly the Constitution's presupposition of two levels of government, federal and state, does not by itself affirm or even imply that the higher unit cannot exert preeminence over the subunit. Such an interpretation would render the Supremacy Clause of the Constitution entirely superfluous.

Nonetheless, the law of state sovereign immunity or freedom from suit is as the recent federalism cases have decreed. If the Eleventh Amendment would bar an action in federal court, notions of sovereign immunity bar the action in state court. The exceptions to the Eleventh Amendment or sovereign immunity bar allow plaintiffs to sue the state directly for monetary damages as compensation for violations of federal rights when (1) the state expressly and voluntarily consents to be sued, including situations in which Congress gives the states a gift or a gratuity in exchange for a waiver, or (2) the case concerns a statute in which Congress has made clear its intent to abrogate the states' immunity and the statute is authorized by Section 5 of the Fourteenth Amendment. In cases in which the plaintiffs' primary motivation is to have the illegal conduct cease, plaintiffs sometimes may avoid the issue of sovereign immunity by bringing suit against the state official in his or her official capacity for prospective relief only. However, this recourse may not be available if the plaintiff is suing under a statute with a comprehensive remedial scheme that does not provide for suits against individuals. If recovery of monetary damages is important to the plaintiff, the only recourse available may be to sue the offending state official in his or her individual capacity.

Notes

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
2. *See, e.g.,* New York v. United States, 505 U.S. 144 (1992); United States v. Lopez, 514 U.S. 549 (1995); Printz v. United States, 521 U.S. 898 (1997).
3. Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).
4. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 623(a)(1).
5. Alden v. Maine, 527 U.S. 706, 199 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
6. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank (Florida Prepaid I), 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Florida Prepaid II), 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).
7. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). The Indian Gaming Regulatory Act, 25 U.S.C. § 2710, requires states to negotiate with Indian tribes for the purpose of entering into tribal-state compacts governing the conduct of certain gambling activities on Indian reservations. Further, it authorizes tribes to sue states in federal court to compel good faith negotiations. In dismissing the tribe's claims against the governor of Florida, the court reasoned that the act's comprehensive remedial scheme did not provide a right of action against the governor and therefore Congress must not have intended for one to exist.
8. Erwin Chemerinsky, *Permission to Litigate: Sovereign Immunity Lets States Decide Who Can Sue Them,* 85 American Bar Association Journal, 42, 42 (1999).
9. *Seminole Tribe,* 517 U.S. at 77.
10. *Seminole Tribe,* 517 U.S. at 70.
11. *See Florida Prepaid II*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).
12. New York v. United States, 505 U.S. 144, 155 (1992).
13. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).
14. U.S. Const. amend. X.
15. *See, e.g.,* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

occurred. As a practical matter, therefore, the impact of the *Kimel* decision on state employees may be limited to (1) the foreclosed right to be heard in federal court and (2) the requirement that an employee follow the state administrative procedure, which calls for filing a grievance as provided by G.S. 126-34.

However, *Kimel* is one of a line of cases that have significantly restricted the right of state employees to bring action against states for violations of federal employment statutes. North Carolina has state laws that parallel federal laws in their prohibition of discrimination in employment on the basis of age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition. However, there are no state counterparts to a host of other federal employment laws, including the Family Medical Leave Act. If the trend continues, and it probably will unless the Supreme Court's composition changes, state employees will inevitably lose the right to seek monetary damages for their employer's violation of federal rights that have no state counterparts.

Moreover, *Kimel* and the cases that precede it extend beyond the employment context to affect the rights of all citizens to seek compensation from the state for violation of federal statutes. The potential impact of these cases in civil rights, intellectual property, environmental law, and bankruptcy is vast. Because the Court gave no guidance on the issue, the quantity and the quality of evidence that federal legislation in these areas must reflect to meet the standard of congruence and proportionality remain to be seen. As it stands, the Court appears comfortable with the notion that Congress has the authority to regulate state conduct but not the authority to subject states to suit by individuals when they fail to comply with validly enacted laws. Yet when courts deny citizens the right to seek monetary compensation for violations of these federal laws, they may well be denying Congress the most effective tool for obtaining state compliance.

16. *See New York,* 505 U.S. at 144.

17. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

18. Printz v. United States, 521 U.S. 898, 932 (1997).

19. U.S. Const. amend. XI.

20. Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

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

22. *See, e.g.,* Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 204–05 (1991); Will v. Michigan Dep't of State Police, 491 U.S. 58, 63 (1989).

23. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

24. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (now overruled).

25. Dellmuth v. Muth, 491 U.S. 223, 229 (1989).

26. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

27. Edelman v. Jordan, 415 U.S. 651, 677 (1974).

28. Clark v. Barnard, 108 U.S. 436 (1883); *Atascadero State Hosp.*, 473 U.S. 234; Petty v. Tennessee-Missouri Bridge Co., 359 U.S. 275 (1959).

29. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946).

30. *In re* San Juan Dupont Hotel Fire Litigation, 888 F. Supp. 1033 (W.D. Wis. 1989); *Edelman,* 415 U.S. 651.

31. *See* Pardon v. Terminal Ry. of Alabama Docks Dep't, 377 U.S. 184 (1964).

32. *Ex parte* Young, 209 U.S. 123 (1908).

33. *Edelman,* 415 U.S. at 665.

34. Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986).

35. *See, e.g.,* Greiss v. Colorado, 841 F.2d 1042 (10th Cir. 1988).

36. *See, e.g.,* Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197 (1991).

37. Alden v. Maine, 527 U.S. 706, ___, 199 S. Ct. 2240, 2270, 144 L. Ed. 2d 636, 652 (1999).

38. Chisolm v. Georgia, 2 U.S. 419 (1793).

39. *Alden,* 527 U.S. at ___, 199 S. Ct. at 2273, 144 L. Ed. 2d at 684 (Souter, J., dissenting). Justices Breyer, Ginsburg, and Stevens joined the dissent.

40. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY at 28 (New York: Oxford University Press, 1986).

41. *Constitutional Law,* 113 HARVARD LAW REVIEW 200 (1999).

42. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996).

43. See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity,* 1996 SUPREME COURT REVIEW 1 (1996).

44. U.S. Const. art VI., cl. 2.

45. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (internal citations omitted).

46. Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S. Ct. 631, 643, 145 L. Ed. 2d 522, 540 (2000).

47. *Flores,* 521 U.S. at 520.

48. *Florida Prepaid I*, 527 U.S. 627, ___, 119 S. Ct. 2199, 2210, 144 L. Ed. 2d 575, 593 (1999).

49. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

50. *Florida Prepaid II,* 527 U.S. at ___, 119 S. Ct. at 2228, 144 L. Ed. 2d at 619.

51. *Ex parte* Young, 209 U.S. 123 (1908).

52. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 118 (1996) (Souter, J., dissenting; internal quotations omitted).

53. "Injunctive" relief in this kind of circumstance would be a court order that the state perform, or refrain from performing, a particular act. "Declaratory" relief would be a court declaration of the legality of a state law.

54. *Seminole Tribe,* 517 U.S. at 71 n.14.

55. *See* Sheuer v. Rhodes, 416 U.S. 232 (1974).

56. *See* Freeman v. Michigan Dep't of State, 808 F.2d 1174, 1178–80 (6th Cir. 1987) (collecting cases); *accord* Hafford v. Seidner, 167 F.3d 1074, 1079 (6th Cir. 1999).

57. *See, e.g.,* Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999); Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997).

58. *See* Doe v. University of Ill., 138 F.3d 653 (7th Cir. 1998), *rev'd on other grounds,* ___ U.S. ___, 119 S. Ct. 2016, 143 L. Ed. 2d 1028 (1999); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360 (6th Cir. 1998); Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997).

59. *See* Kimel v. Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998) (finding immunity). *Compare* Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997) (finding that accommodation provisions of ADA and Rehabilitation Act were not valid exercise of Congress's enforcement power under Fourteenth Amendment). The Supreme Court could have answered this question in its *Kimel* decision but failed to do so.

60. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

61. *In re* Creative Goldsmiths of Washington, D.C., 119 F.3d 1140 (4th Cir. 1997); *accord In re* Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997).

62. *See, e.g.,* Frank B. Cross, *Realism about Federalism*, 74 NEW YORK UNIVERSITY LAW REVIEW 1304, 1310 (1999).

Notes

1. Kimel v. Florida Bd. of Regents, ___ U.S. ___, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–631 (1994 ed.).

2. Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2d Cir. 1998) (holding that ADEA validly abrogates states' Eleventh Amendment immunity); *accord* Coger v. Board of Regents of the State of Tenn., 154 F.3d 296 (6th Cir. 1998); Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998); Keeton v. University of Nev. System, 150 F.3d 761 (7th Cir. 1998); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998). *Compare* Humenansky v. Regents of Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (holding that ADEA does not validly abrogate states' Eleventh Amendment immunity).

3. As the law now stands, the *Kimel* decision does not affect the right of local government employees to bring suit against their local government employers for violations of the ADEA.

4. 29 U.S.C. §§ 623(a)(1), 631(a).

5. 29 U.S.C. § 623(f)(1), (f)(3).

6. 29 U.S.C. § 626(c)(1).

7. 29 U.S.C. § 216(b).

8. 29 U.S.C. § 630(b)(2) and note.

9. U.S. Const. amend. XI.

10. Hans v. Louisiana, 134 U.S. 1, 15 (1890).

11. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

12. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

13. Kimel v. Florida Bd. of Regents, ___ U.S. ___, ___, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522, 536 (2000).

14. EEOC [Equal Employment Opportunity Commission] v. Wyoming, 460 U.S. 226 (1983).

15. U.S. Const. amend. X.

16. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

17. *Kimel,* ___ U.S. at ___, 120 S. Ct. at 643, 145 L. Ed. 2d at 539.

18. U.S. Const. amend. XIV.

19. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

20. *Kimel,* ___ U.S. at ___, 120 S. Ct. at 645, 145 L. Ed. 2d at 542, *citing* Vance v. Bradley, 440 U.S. 93, 97 (1979).

21. *Kimel,* ___ U.S. at ___, 120 S. Ct. at 647, 145 L. Ed. 2d at 544, *citing* Flores, 521 U.S. at 532.

22. *Kimel,* ___ U.S. at ___, 120 S. Ct. at 648, 145 L. Ed. 2d at 546.

23. *Kimel,* ___ U.S. at ___, 120 S. Ct. at 650, 145 L. Ed. 2d at 547 (internal citation omitted).