A Right Without Remedy: State Employees After Seminole Tribe and Alden

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A RIGHT WITHOUT A REMEDY: STATE EMPLOYEES AFTER SEMINOLE TRIBE AND ALDEN

Over the past decade, courts have wrestled with state employees' private legal remedy for a violation of the Fair Labor Standards Act. As a result of the decisions in Seminole Tribe v. Florida and Alden v. Maine, state employees lost their right to sue for such violations. This note examines the dilemma faced by employees who find themselves without a path of recourse against state employers. It concludes that both Seminole Tribe and Alden should be overturned because the decisions leave state employees with no realistic remedy.

"If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"  

INTRODUCTION

A fundamental principle of American law is that for every legally-given right, there is a legally-given remedy. After the Supreme Court cases of Seminole Tribe v. Florida and Alden v. Maine, all state employees lost their private legal remedy for violations of the Fair Labor Standards Act (hereinafter “FLSA”). The only legal remedies still available to these employees are to lodge a complaint with the Department of Labor (hereinafter “DOL”) or to file suit against the state based on its own labor laws. Neither of these remedies is adequate to protect the number of people now working for the states. The remedy of having the DOL file suit on behalf of state employees is not adequate, and the Supreme Court has effectively denied these employees due process. Therefore, the Court should reconsider its decisions in both Seminole Tribe and Alden.

In its recent decisions, the Supreme Court has found that the private remedy violates the states' right to sovereign immunity. However, the Court pointed out that the United States may, through the DOL, investigate or file suit on behalf of employees against the states. This suggestion by the Court reveals its fundamental misunderstanding of what the DOL does and how it works. Though the DOL does investigate employers based on employee complaints, neither the majority of its manpower nor budget allocations are devoted to these investigations. The DOL itself states that it does not find complaint-based actions effective for deterring or

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
4 See infra text accompanying note 195.
5 See infra notes 46-49 and 61-68.
few industries that are egregious violators.\(^7\) It also allocates resources to preventing violations through education and consultation with employers.\(^8\) By denying state employees a private action, the Supreme Court is forcing the DOL to reallocate resources in inefficient and ineffective ways.

State employees are now more dependent upon state labor laws for minimum wage and overtime pay protection. For some employees, however, there is no remedy to be found. Six states have no minimum wage law at all.\(^9\) Thirteen states have a minimum wage law that only applies to employees not covered by the federal FLSA.\(^10\) If anything, this shows that the states themselves assumed the protection of the federal laws for certain employees, including state employees.

This Note will first look at the FLSA: its requirements, its coverage of state employees, and the remedies it provides for employer violations. Second, this Note will examine the evolution of the Supreme Court's jurisprudence regarding the constitutionality of the FLSA concerning state sovereign immunity: pre-1996, through such decisions as *National League of Cities v. Usery*\(^11\) and *Garcia v. San Antonio Metro Transit Authority*;\(^12\) and post-1996 through *Seminole Tribe, Alden*, and subsequent appeals court decisions. Third, this Note will analyze the implications of *Seminole Tribe* and *Alden* on the due process and property rights of state employees. Finally, this Note explores the possible solutions for Congress and state employees under current law: filing a complaint with the DOL; seeking a state waiver of immunity as a condition of receipt of federal funds; and seeking redress in state court through state labor laws.

I. Fair Labor Standards Act

To understand the significance of the decisions in *Seminole Tribe* and *Alden*, it is first important to understand the rights that were lost. The FLSA granted state employees the same labor rights as private employees. The FLSA also initially granted those employees the right to sue the state for violations of those labor rights.

A. History

The FLSA was enacted in 1938 as part of the New Deal legislation.\(^13\) It requires that employers pay their workers a minimum wage and compensate

\(^{7}\) *Id.*

\(^{8}\) *Id.*

\(^{9}\) See infra note 278.

\(^{10}\) See infra note 277.

\(^{11}\) 426 U.S. 833 (1976).

\(^{12}\) 469 U.S. 528 (1985).

overtime at one-and-one-half times their hourly wage. The FLSA originally applied only to private employers, not government employers. In 1966, Congress amended the FLSA to extend coverage to state and local government employees engaged in the operation of hospitals, nursing homes, and mass transit systems. In 1974, the FLSA amendments extended coverage to virtually all state employees.

The FLSA has remained flexible to address the problems of modern employers and employees. For example, employees may now receive compensatory (“comp”) time off in lieu of overtime pay. This comp time is paid in not less than one-and-one-half hour increments for each hour of overtime worked.

B. Remedies

The FLSA granted state employees the same rights as private employees: a minimum wage and overtime hours. State employees were also granted the same remedies as private employees. Congress provided three remedies for employer violations of the FLSA: (1) a private right of action by individual employees; (2) a civil action brought by the Secretary of Labor; and (3) an injunction to forbid further violations. A two-year statute of limitations applies to the recovery of back pay. In cases of a willful violation, a three-year statute of limitations applies.

It is the first remedy, a private right of action by individual employees that the Supreme Court in Seminole Tribe and Alden held no longer applies to state employees. It will become clear later in this Note that the other two remedies are not effective either.

II. CONSTITUTIONALITY OF THE FLSA

A. Pre-1996

The constitutionality of the FLSA with respect to state employers has been

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16 DOL Regulatory Fact Sheet No. 007: State and Local Governments Under the Fair Labor Standards Act, available at http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs7.htm (providing general information concerning the application of the FLSA to State and local government employees. “Comp” time allows employees to work overtime in exchange for arriving late, leaving early or even whole days off, dependent upon how much overtime was worked) (last visited Dec. 5, 2001).
17 Id.
20 Id.
21 See infra text accompanying notes 37-67.
questioned with regard to the states' sovereignty under the Tenth and Eleventh Amendments. The Tenth Amendment states: "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." \(22\) The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." \(23\)

Both of these Amendments present a different question for courts when determining the constitutionality of the FLSA. The Tenth Amendment requires that the law be created from a valid power of Congress. The Eleventh Amendment requires that the law properly subject states to suits. It expressly protects states from suits by citizens of another state or foreign countries. Despite the lack of language expressly forbidding it, the Supreme Court also has been hesitant to allow Congress to subject the states to suits by citizens of their own states, if they are employees, for violations of federal labor laws. \(24\)

In 1973, the Supreme Court held that the state of Missouri was immune from suit brought under the FLSA by employees of its state health facilities in *Employees of Dept. of Public Health and Welfare of Mo. v. Dept. of Public Health and Welfare of Mo.* \(25\) The Court found that the 1964 edition of the FLSA \(26\) specifically covered such state hospitals, but the statute did not express clearly enough its intention to supersede the state's immunity from suits brought by individuals. \(27\)

In response, Congress amended the FLSA in 1974. In 1976, the Supreme Court analyzed the constitutionality of the 1974 edition of the FLSA with respect to state employers in *National League of Cities v. Usery.* \(28\) Various cities and states commenced an action against the U.S. Secretary of Labor, seeking declaratory and injunctive relief against amendments to the Fair Labor Standards Act. The cities and states claimed that the amendments, which eliminated the prior exemption from minimum wage and maximum hour requirements for public employees, intruded upon their performance of essential government functions. \(29\)

The Court held that the Tenth and Eleventh Amendments do not forbid action against state employers for violations of the FLSA. \(30\) States are protected from suits, however, where the action is a "traditional governmental function." \(31\) The

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\(22\) U.S. CONST. amend. X.
\(23\) U.S. CONST. amend. XI.
\(24\) See infra text accompanying notes 37-67.
\(27\) *Employees*, 411 U.S. at 285-86.
\(28\) 426 U.S. 833 (1976).
\(29\) *Id.* at 837.
\(30\) *Id.* at 844-852.
\(31\) *Id.* at 851-853.
Court defined "traditional governmental functions" as:

These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens.\textsuperscript{32}

The Court in Usery attempted to draw a line between state functions that Congress could regulate and those that it could not. It chose the rather amorphous "traditional governmental function" test to draw this line.

In 1985, the Supreme Court overruled its decision in Usery with Garcia v. San Antonio Metro Transit Authority (SAMTA).\textsuperscript{33} A public mass transit authority that received substantial federal funding brought action for declaratory judgment to determine whether it was entitled to immunity from the minimum wage and overtime provisions of the Fair Labor Standards Act. The Wage and Hour Administration of the Department of Labor had determined that SAMTA was not a "traditional governmental function" and was therefore subject to suit for violations of the FLSA.\textsuperscript{34} The United States District Court for the Western District of Texas reversed and found that SAMTA was a traditional governmental function.\textsuperscript{35} Upon appeal, the Supreme Court held that "[i]nsofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision."\textsuperscript{36} The Supreme Court appeared to have rescinded its immunity for "traditional governmental functions." At the least, the Court's definition of "traditional governmental functions" became very narrow and difficult for state agencies to fall within. Until 1996, state employees could file suit in federal court against their employers for violations of the FLSA and be confident that they would survive a challenge based on Eleventh Amendment immunity.

B. Post-1996

1. Seminole Tribe v. Florida

In 1996, the Supreme Court drastically diminished the right of a state employee

\textsuperscript{32} Id. at 851.
\textsuperscript{33} 469 U.S. 528 (1985).
\textsuperscript{34} Id. at 529.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 554.
to file suit against her employer in *Seminole Tribe v. Florida.* In this case, the Supreme Court held that states could no longer be sued in federal court for violations of federal law. This meant that state employees could no longer sue their employer in federal court for violations of the FLSA.

The issue in *Seminole Tribe* was not the constitutionality of suing states under the FLSA, but under the Indian Gaming Regulatory Act (hereinafter "Act"). The Act provides that Indian tribes can conduct certain gaming activities on tribal land if authorized by the states in which the activity occurs. The Act requires the state to "negotiate with the Indian Tribe in good faith" and this is judicially enforceable by the following: "The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . ." The plaintiff in *Seminole Tribe* brought suit against the state of Florida to compel good faith bargaining as required by the Act. The District Court denied the state of Florida's motion to dismiss based on sovereign immunity. The Eleventh Circuit reversed this decision, holding that the Eleventh Amendment barred the tribe's suit against the state.

In a 5-4 decision, the Supreme Court affirmed the decision of the Eleventh Circuit and held that the Indian Commerce Clause does not grant Congress the power to abrogate state sovereign immunity. Therefore, an unconsenting state cannot be sued in federal court for a violation of a federal law created under the Indian Commerce Clause. The Court held that, although the Eleventh Amendment does not expressly forbid suits against a state by its own citizens or Indian tribes, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." Therefore, the holding extended the protection of the Eleventh Amendment past its express provisions.

In its decision, the Court articulated a two-part test to determine whether Congress properly abrogated a state's sovereign immunity: (1) did Congress,

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38 Id. at 54-73.
39 Id. at 54.
41 Id.
42 Id.
43 *Seminole Tribe,* 517 U.S. at 52 (1996).
44 Id.
45 Id. at 54.
46 See id. at 54-73.
47 See discussion *infra* 220-273.
48 See *Seminole Tribe,* 517 U.S. at 54-73.
49 Id. at 54 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).
through a "clear legislative statement," unequivocally express its intent to abrogate the state's sovereign immunity; and (2) did Congress act pursuant to a valid exercise of its power under the Constitution?  

The Court found that the Act had a "clear legislative statement" of abrogation. However, Congress did not act pursuant to a valid exercise of its power. The Supreme Court stated that it had previously recognized two valid, constitutional ways to abrogate a state's immunity. In *Fitzpatrick v. Bitzer,* the Court held that Congress can abrogate state immunity using its power under Section 5 of the Fourteenth Amendment. In *Pennsylvania v. Union Gas,* the Court held that Congress can abrogate state immunity using its power under the Commerce Clause.

Stating that the plurality decision was badly reasoned, the Court in *Seminole Tribe* overruled *Union Gas* and held that Congress cannot abrogate a state's sovereign immunity through the Commerce Clause. Now Congress can only abrogate a state's immunity through a law enacted from its powers under Section 5 of the Fourteenth Amendment. The Court reasoned that the Fourteenth Amendment was deliberately created to limit the powers of the states, on behalf of individuals, after the Civil War. States understood and consented to these limitations by passing that amendment. Congress used its power under Section 5 of the Fourteenth Amendment to enact laws, such as Title VII, to combat sex, race, and religious discrimination.

Federal laws enacted under the Commerce Clause, such as the FLSA, could no longer abrogate a state's immunity. Citizens of a state now could no longer sue that state in federal court for violations of federal law, including federal labor laws.

2. *Alden v. Maine*

After *Seminole Tribe,* state employees were unable to sue their employer in federal court for violating the FLSA. They were left with the unconventional alternative of suing the state in state court. Having refused state employees the right to sue the state in federal court through *Seminole Tribe,* the Supreme Court went

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50 Id. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
51 Id. at 56.
52 Id. at 75.
54 Id. at 456.
55 491 U.S. 1 (1976).
56 Id. at 17.
57 *Seminole Tribe,* 517 U.S. at 75.
58 Id.
59 Id.
60 Id.
further in *Alden v. Maine*, refusing state employees the right to sue the state in state court. Petitioners were a group of probation officers who filed suit against their employer, the state of Maine, for violations of the overtime provision of the FLSA. Petitioners originally filed suit in federal court, but after the decision in *Seminole Tribe*, the federal court dismissed the suit for lack of jurisdiction. The petitioners then filed suit in a Maine state court. The suit was subsequently dismissed by both a state trial court and the Maine Supreme Judicial Court on the basis of state sovereign immunity.

On appeal, the U.S. Supreme Court held that Congress did not have the power to subject unconsenting states to private suits in state court. Upon objection by the dissent that state employees have no remaining remedy, the majority responded that state employees can still file a complaint with the United States Department of Labor for violations of the FLSA. The United States, through the DOL, still has the authority to sue states directly for violations of federal law. State employees now can no longer sue their state employer in either federal or state court for violations of federal labor law.

3. Subsequent Circuit Court Decisions

Since *Seminole Tribe* and *Alden*, each circuit has had occasion to follow or distinguish at least one case based on this new Eleventh Amendment doctrine. The variety of the issues in the following cases show the far-reaching effects of *Seminole Tribe* and *Alden*.

The First Circuit followed *Seminole Tribe* in *Mills v. Maine*. Petitioners were state employees who sued their employer for violations of the FLSA. They admitted that the FLSA was enacted pursuant to Congress' power under the Commerce Clause. *Seminole Tribe*, overturning *Union Gas*, had held that laws enacted pursuant to the Commerce Clause could not properly abrogate a state's sovereign immunity to suit. The First Circuit reiterated this holding.

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62 Id. at 711.
63 Id. at 712.
64 Id.
65 Id.
66 Id.
67 *Alden*, 527 U.S. at 760.
68 Id.
69 118 F.3d 87 (1st Cir. 1997).
70 Id. at 38.
71 Id. at 40.
72 *Seminole Tribe*, 517 U.S. at 75.
73 *Mills*, 118 F.3d at 48.
Petitioners argued that the FLSA could have been enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment. The Supreme Court had reaffirmed its decision in Fitzpatrick v. Bitzer by holding that laws enacted pursuant to Section 5 of the Fourteenth Amendment can validly abrogate a state's sovereign immunity to suit.

The First Circuit wrote: "[O]ne cannot read Congress' statement regarding the Act's validity under the Commerce Clause to 'indicate that Congress intended to exclude other applicable constitutional bases for the Act." The First Circuit then went on to analyze whether the FLSA could have been enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment.

Supreme Court precedent indicated that courts look to whether the FLSA is a "rational means" to an end that is "comprehended" by Section 5 of the Fourteenth Amendment. The Supreme Court has articulated a three-part test in this regard: (1) if it "may be regarded as an enactment to enforce the Equal Protection Clause;" (2) if it "is plainly adapted to that end;" and (3) if it "is not prohibited by but is consistent with 'the letter and spirit of the constitution.'"

The First Circuit found that the FLSA did not meet these three requirements. The court held that the petitioners, probation officers, did not constitute "a class of persons characterized by some unpopular trait or affiliation... [that would] reflect any special likelihood of bias [against them] on the part of the ruling majority." They were not a protected or suspect class. The court further stated:

In our estimation, one would be hard-pressed to conclude that the FLSA amendments at issue here are rationally related to eliminating any arbitrary or unreasonable state action. Differences in the manner, method, and amount of payment that private sector and state employees receive, to the extent they exist, usually flow from a myriad of factors, including state budgetary concerns and the levels of public expenditure and taxation deemed proper by normal political processes. However, nothing in the record indicates that anything arbitrary or irrational explains or characterizes the states' practices in this area to the extent they may be

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74 Id. at 41.
76 Mills, 118 F.3d at 44 (quoting Brown v. County of Santa Barbara, 427 F. Supp. 112, 114 (C.D. Cal. (3d Cir. 1976)).
77 Id.
79 Mills, 118 F.3d. at 45.
80 Id. at 47.
81 Id.
82 Id.
prejudicial to state employees. Nor do we think, as the plaintiff probation officers would have us believe, that state employees and private sector employees are so similarly situated that differences in how and when they accrue premium pay for overtime violates the Equal Protection Clause's requirement that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." 83 

Based on this conclusion, the First Circuit dismissed the suit for lack of jurisdiction. 84 

The Court of Appeals for the Second Circuit heard Kilcullen v. New York State Dep't of Labor. 85 This case questioned the constitutionality of abrogating New York's sovereign immunity to suit through the Rehabilitation Act of 1973. 86 The abrogation provision reads: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 87 The Second Circuit rejected New York's argument that this is not a proper abrogation. 88 The court found that, given the legislative history and hearings surrounding the Act, the statute in question could appropriately be characterized as legitimate remedial legislation. 89 Therefore, Congress properly abrogated New York's sovereign immunity through the Rehabilitation Act. 90 

The Court of Appeals for the Third Circuit heard Sacred Heart Hosp. of Norristown v. Dep't of Pub. Welfare. 91 This case applied Seminole Tribe to bankruptcy proceedings. 92 The petitioners in this case argued that Seminole Tribe merely held that Congress could not abrogate sovereign immunity pursuant to the Indian and Commerce Clauses and did not address Congress' other Article I

83  Id. at 48.
85  205 F.3d 77 (2d Cir. 2000).
86  Id. at 79.
88  Kilcullen, 205 F.3d at 79.
89  Id. at 80.
90  Id.
91  133 F.3d 237 (3d Cir. 1998).
92  Id.
powers. They also argued that the Bankruptcy Clause is distinguishable from other Article I clauses because it contains an affirmative requirement of uniformity. Just as the petitioners did in Mills, Sacred Heart asserted that Section 106(a) should be upheld as a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

In turn, the Third Circuit rejected each of these arguments. It held that there is no basis to distinguish the Bankruptcy Clause from other Article I clauses. Nor did the uniformity requirement in the Bankruptcy Clause change this analysis. It held that the Bankruptcy Clause is not a valid source of abrogation power. It also held that there is no evidence suggesting that Section 106(a) was enacted pursuant to any constitutional provision other than Congress' Bankruptcy Clause power, thereby rejecting the petitioners argument that it was enacted pursuant to Section 5 of the Fourteenth Amendment.

On March 12, 2001, the Court of Appeals for the Fourth Circuit decided South Carolina State Ports Auth. v. Fed. Maritime Comm'n. The petitioners were Maritime Services, a company that operates cruise ships that offer gambling. The South Carolina State Ports Authority (SCSPA) does not allow berths to ships whose primary purpose is gambling, though it does allow ships to berth if they allow some gambling. The SCSPA refused to give berth to a ship owned by Maritime Services, claiming that the gambling on-board was the ship's primary purpose.

Maritime Services filed a complaint with the Federal Maritime Commission (FMC) under the Shipping Act of 1984. This Act prohibits discrimination by carriers and terminal operators. The SCSPA responded by arguing that South Carolina's sovereign immunity prohibits private parties from suing the SCSPA before a federal agency. In support, the SCSPA noted that in Ristow v. South Carolina Ports Auth. the Fourth Circuit held that the SCSPA is protected by

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93 Id. at 243.
94 Id.
95 Id.
96 Id.
97 Id. at 243.
98 Id. at 244.
99 Id.
100 Id. at 244.
101 Id. at 243 F.3d 165 (4th Cir. 2001).
102 Id. at 167.
103 Id.
104 Id.
105 Id.
106 South Carolina State Port Auth., 243 F.3d at 167.
107 Id.
108 58 F.3d 1051 (4th Cir. 1995).
South Carolina's sovereign immunity because it is an arm of the state. The Administrative Law Judge (ALJ) agreed and dismissed the suit on sovereign immunity grounds. The FMC then reviewed the case on its own motion. "In reversing the ALJ, the FMC held that sovereign immunity does not bar private suits against the states before federal agencies." The SCSPA appealed.

The FMC and the United States argued that, despite Seminole Tribe and Alden, sovereign immunity for the SCSPA is inappropriate because the FMC is not a court and thus does not exercise the judicial power of the United States, meaning that the proceeding in front of the FMC is not a lawsuit. The Fourth Circuit rejected both of these arguments. It stated that, "while the coordinate branches of the federal government have the broadest latitude in organizing themselves as they see fit, they cannot employ an administrative structure that allows an end-run around the Constitution." The court further looked to the structure of an FMC proceeding:

When a party files a formal complaint under 46 U.S.C. app. § 1710(a), the investigation takes the form of an adjudication. ALJs are the presiding officers for the initial adjudication. The ALJ 'designated to hear a case shall have authority' to, inter alia, 'sign and issue subpenas [sic],' 'take or cause depositions to be taken,' 'delineate the scope of a proceeding,' 'hear and rule upon motions,' 'administer oaths and affirmations,' 'examine witnesses,' 'rule upon offers of proof,' 'act upon petitions to intervene,' 'hear oral argument at the close of testimony,' 'fix the time for filing briefs, motions, and other documents,' and 'dispose of any other matter that normally and properly arises in the course of the proceedings.' Parties may, inter alia, depose witnesses, submit interrogatories, and submit requests for admission from opposing parties.

The court concluded that "[t]he proceeding thus walks, talks, and squawks very much like a lawsuit." South Carolina thus was immune from this proceeding as it would be from a lawsuit in a court of law.

The Court of Appeals for the Fifth Circuit heard Rodriguez v. Texas Comm'n

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109 See South Carolina State Port Auth., 243 F.3d at 167.
110 Id.
111 Id.
112 Id.
113 Id. at 171.
114 Id. at 171-75.
115 See South Carolina State Port Auth., 243 F.3d at 167.
116 Id. at 173 (citations omitted).
117 Id. at 174.
118 Id. at 179.
The petitioner claimed that the Arts Commission infringed on his design for Texas license plates, which he had registered with the United States Copyright Office. The district court granted the Commission's motion to dismiss and entered an order dismissing the complaint for lack of subject matter jurisdiction. Petitioner argued on appeal that the district court's ruling was erroneous because Congress had the power to pass a law that gave petitioner a cause of action for copyright infringement against the state of Texas.

The abrogation provision of the Copyright Act states:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 119, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

The Fifth Circuit held that the abrogation provision was not enacted by Congress through Section 5 of the Fourteenth Amendment and was therefore not a proper abrogation. The court then affirmed the dismissal of the district court.

The Court of Appeals for the Sixth Circuit heard Telespectrum, Inc. v. Pub. Serv. Comm'n of Kentucky. The plaintiff had applied to defendant public service commission for a certificate to construct a wireless telecommunications tower. Following a public hearing, the application was denied. Plaintiff filed an action in the district court, which reversed the decision and ordered defendant to issue a certificate of public convenience and necessity. The defendant appealed.

Under the doctrine of Ex parte Young, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh

\[199\ F.3d\ 279\ (5th\ Cir.\ 2000).\]
\[Id.\ at\ 280.\]
\[Id.\]
\[Id.\]
\[17\ U.S.C.\ § 511(a)\ (1994).\]
\[See\ Rodriguez,\ 199\ F.3d\ at\ 291.\]
\[Id.\]
\[227\ F.3d\ 414\ (6th\ Cir.\ 2000).\]
\[Id.\ at\ 417.\]
\[Id.\ at\ 418-19.\]
\[Id.\ at\ 419.\]
\[Id.\]
\[209\ U.S.\ 123\ (1908).\]
Amendment. The Supreme Court underscored the importance of the *Ex parte Young* doctrine, stating it is an essential part of Eleventh Amendment jurisprudence, and must be upheld "if the Constitution is to remain the supreme law of the land." In this case, Telespectrum sought an order to direct the Commissioners (in their official capacity) to issue the necessary authorizations permitting it to construct the tower. Telespectrum was not seeking compensation for lost profits; it was claiming that by failing to grant the application, the Commissioners were continuing to violate 47 U.S.C. § 332 (c)(7)(B). The court concluded that Telespectrum had shown that its claim is within the *Ex Parte Young* doctrine, and could thus sue the commissioners without invoking sovereign immunity.

The Court of Appeals for the Seventh Circuit heard *Mueller v. Thompson*. The petitioners were employees of the state of Wisconsin and brought suit in a federal district court in Wisconsin against the state for overtime pay to which they claimed to be entitled by the FLSA. The court determined that, in light of *Seminole Tribe*, the only issue was whether Wisconsin had waived its Eleventh Amendment immunity from suit in federal court under the FLSA.

A Wisconsin statute authorizes suits to be brought "in any court of competent jurisdiction" against employers — including the state itself — for overtime pay. Another statute authorizes the state's labor department to adopt rules specifying when work is overtime. Pursuant to this delegation, the department adopted the FLSA to be the law of Wisconsin regarding overtime pay. The petitioner argued that this chain of provisions effected a waiver of the state's Eleventh Amendment immunity from suit in federal court under the FLSA. The Seventh Circuit disagreed. It stated: "The fact that the state's labor department has copied the federal overtime provisions into state law does not transform state into federal law, any more than by copying the Federal Rules of Civil Procedure a state turns its procedural code into federal law." The court further held that enactments made prior to *Seminole Tribe* are unlikely to be a legitimate basis for a proper waiver of

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132 Id. at 159-60.
134 *Telespectrum*, 227 F.3d at 420.
135 Id. at 422.
136 Id.
137 133 F.3d 1063 (7th Cir. 1998).
139 *Telespectrum*, 227 F.2d at 1065.
140 Id. (quoting WIS. STAT. §§ 109.01(2), (3); 109.03(5) (1997)).
141 WIS. STAT. § 103.02 (1997).
142 See *Telespectrum*, 227 F.3d at 1064.
143 Id. at 1070.
144 Id.
145 Id.
immunity.\textsuperscript{146} 

The Court of Appeals for the Eighth Circuit heard \textit{Humenansky v. Regents of the Univ. of Minnesota}.\textsuperscript{147} John Humenansky alleged that the University violated the Age Discrimination in Employment Act (ADEA).\textsuperscript{148} The district court dismissed and concluded that "the suit was barred by the Eleventh Amendment because Congress neither intended to abrogate Eleventh Amendment immunity nor acted under Section 5 of the Fourteenth Amendment in enacting the 1974 amendments that extended the ADEA to cover public employers."\textsuperscript{149} Humenansky appealed.\textsuperscript{150} 

The Eight Circuit first held that the University of Minnesota is "an instrumentality of the state" entitled to invoke Minnesota's Eleventh Amendment immunity.\textsuperscript{151} Next, the court stated that even if the ADEA's text contained a sufficiently clear expression of intent to abrogate, Congress lacked the power to abrogate Eleventh Amendment immunity.\textsuperscript{152} The Commerce Clause, part of Article I of the Constitution, cannot be used to abrogate the Eleventh Amendment's limitation on the Article III jurisdiction of the federal courts.\textsuperscript{153} The court also rejected the argument that the ADEA could have been enacted under Section 5 of the Fourteenth Amendment.\textsuperscript{154} 

The Court of Appeals for the Ninth Circuit heard \textit{Sunshine Family Day Care Servs. v. California Dep't.}\textsuperscript{155} The National School Lunch Program\textsuperscript{156} and the Child and Adult Food Program\textsuperscript{157} provide funding to third-party sponsors, "who in turn reimburse their clients for food those clients provide to eligible recipients."\textsuperscript{158} Sunshine Family Day Care Services was a third-party sponsor until June 1, 1996.\textsuperscript{159} On June 1st, the California Department of Education (CDE), which administers these federal programs in California, imposed a participation freeze based on serious deficiencies within the meaning of 7 C.F.R. § 226.6(c).\textsuperscript{160} 

Sunshine and its former owners, Anne Simmons-Young and Lyle Young, sued
the CDE and its officers and employees. Plaintiffs alleged the following complaint:


The district court held that Eleventh Amendment immunity bars the plaintiffs' suit in its entirety.

Plaintiffs argued that "Congress abrogated the states' sovereign immunity under the National School Lunch Program and Child and Adult Food Program." The court disagreed. It held that "Congress has no power under the Commerce Clause, or other legislative jurisdiction under Article I of the Constitution, to abrogate the states' Eleventh Amendment immunity." The court pointed out that it is possible, even after Seminole Tribe, that "Congress has the power to condition a grant of federal funds on a state's consent to suit and waiver of sovereign immunity, but Congress had not attempted to do so here."

The Court of Appeals for the Tenth Circuit heard Aaron v. Kansas. The plaintiffs were 340 Kansas highway patrol troopers, 42 Kansas Bureau of Investigation Agents, and 18 Conservation Officers employed by the State of Kansas, appealing a bench verdict in favor of the State of Kansas on their wage claims under the FLSA. Based on Seminole Tribe, the Tenth Circuit concluded that the federal courts had no jurisdiction over the state of Kansas and dismissed the appeal. The plaintiffs argued that the 1961 and 1966 amendments to the FLSA, which applied the FLSA to state employers, were not enacted pursuant to the Commerce Clause.

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161 Id. at 2-3.
162 Id. at 3.
164 Id. at 4.
165 Id. at 4-5.
166 Id. at 4.
167 Id.
168 115 F.3d 813 (1997).
169 Id. at 814.
170 Id.
171 Id.
172 Id. at 816 n.2.
The court found that the Senate Report for the 1961 amendments indicated that the amendments, "like the original act, rely on engagement in 'commerce' or in the 'production of goods for commerce' to establish a firm constitutional base for the legislation under the Commerce power." The court thus rejected the plaintiffs claims and dismissed the case.174

III. ANALYSIS

State employees now are severely hindered by the lack of a private right of action against their employers in either state or federal court. In his dissent in Alden v. Maine, Justice Souter wrote that "today the Court has no qualms about saying frankly that the federal right to damages afforded by Congress under the FLSA cannot create a concomitant private remedy."175 This lack of a private remedy creates a blatant violation of due process. State employees have the two requirements for a due process violation: a right and a denial of the process that is due.176

A. The Right

The FLSA guarantees a minimum wage and one-and-a-half times the hourly wage for overtime hours worked.177 When an employee works fifty hours per week at $5.15 per hour, accounting for ten hours at time-and-a-half, he has earned $283.25. That money has become his property in exchange for the services he has performed. If he is not paid one-and-a-half times his hourly wage for the ten hours of overtime he worked than he would only be paid $257.50 that week. The remaining $25.75 are wages he has earned, but not received. The employer is withholding the accrued wages (the property) of the employee in violation of the FLSA.178

The Supreme Court has previously held that such things as welfare benefits are property.179 Accrued wages have just as many, if not more, characteristics of property as welfare benefits. The employee expects to be paid a certain amount for a service and already "owns" his wage once it is earned. He merely awaits the paycheck.

174 Id. at 818.
175 Alden, 527 U.S. at 812 (Souter, J., dissenting).
178 This idea of accrued wages as property is articulated by Carlos Manual Vazquez in his essay, Sovereign Immunity, Due Process, and the Alden Trilogy, 109 Yale L.J. 1927 (2000).
B. What Kind of Process is Due?

Congress created three processes to protect the property rights of employees under the FLSA, including a private right of action by individual employees. After *Seminole Tribe* and *Alden*, state employees are no longer able to exercise their private right of action. These employees must now use either civil action brought by the Secretary of Labor or an injunction to forbid further violations.

Both Congress and the Department of Labor have concluded that a civil action brought by the Secretary of Labor is inadequate to protect most employees. Of all the investigations conducted by the Wage and Hour Division, only approximately seventy-five percent of the convictions lead to employer reimbursements or fines.

The Department of Labor has not only concluded that the civil actions by the Secretary of Labor are inadequate, but it has also shifted its focus away from these procedures. The DOL, through its Wage and Hour Division, has begun to target whole industries for investigation, in contrast to investigations done based on a single employee complaint. The DOL has found that it can protect more employees through these targeted investigations than through smaller complaint based ones.

These targeted industries are frequently low-wage, such as textiles and harvesting, where employees are either too ignorant of the procedures or too intimidated by their employers to file complaints. The DOL has also begun to focus resources on education and consultation. More employees can be protected from FLSA violations by educating employers on the law and how to implement it in their workplaces.

A state employee can still file a complaint with the DOL and an investigation will be conducted. Despite the change in direction, the option is still available through the DOL. However, when an agency, and the Congress that created it, both agree that a procedure is inadequate, it is shocking that the Supreme Court would insist otherwise.

The other option left to state employees is to file an injunction to forbid further violations. An injunction is certainly not an adequate procedure because the

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182 Id. at 28-29 (decreasing the number of compliance actions while increasing education/outreach efforts).
183 Id. at 29.
184 Id.
185 Id.
186 Id. at 28-29.
accrued wages of the employee can never be recovered through an injunction. It is not worth the money for an employee to hire an attorney or risk possible employer recriminations for an employee to file for an injunction.

Further, even if the option of a civil action by the Secretary of Labor were adequate, the mere lack of a private judicial action may be enough to render the process inadequate. The Supreme Court has frequently held that the absence of any judicial forum raises serious due process concerns.\(^{187}\)

In a series of cases regarding Selective Service procedures, the Supreme Court found that a lack of a judicial forum denied the registrant due process. In *Oestereich v. Selective Service System Local Board No. 11*,\(^{188}\) the petitioner was a student at a theological school and was therefore exempt from the draft.\(^{189}\) When he went before the local board, however, he did not bring papers to certify his exemption and his exempt status was revoked.\(^{190}\) The local board denied him the right to a pre-induction judicial review.\(^{191}\) Therefore, petitioner was forced to either report for service and file a writ of habeas corpus or dodge service and use his exemption as a defense in criminal proceedings.\(^{192}\) The Supreme Court held that the lack of judicial proceedings violated due process.\(^{193}\) The Court pointed out that it was unjust for the local boards to be immune from judicial review when their decisions could be based on personal malice or bad faith.\(^{194}\)

When state employees are denied their right to property through the withholding of accrued wages, they are likewise given no judicial proceeding. Employers can withhold wages based on personal malice or bad faith, and there are no private actions which the employee can take. In the Selective Service cases, the registrant could eventually be found exempt by a court through criminal or habeas corpus proceedings. Though these were extreme choices, the registrant did have options remaining without judicial proceedings. The Supreme Court held that these options were not enough.\(^{195}\) Unlike these registrants, a state employee denied his property has no private recourse.

**IV. SOLUTIONS**

Until the Supreme Court reconsiders its position with regard to state employees

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\(^{188}\) 393 U.S. 233 (1968).

\(^{189}\) *Id.* at 234.

\(^{190}\) *Id.*

\(^{191}\) *Id.* at 238.

\(^{192}\) *Id.*

\(^{193}\) *Oestereich*, 393 U.S. at 239.

\(^{194}\) *Id.* at 237.

\(^{195}\) *Id.* at 238.
filing suit against their employers, other solutions must be found. Now that state employees are no longer allowed to sue the state in federal or state court, they must look outside of the courts to find a remedy for their rights. There are three options for these employees to take. First, they can file a complaint with the Department of Labor. Second, they can seek, or ask a court to imply, the consent of states for suits under federal law. Third, they can seek protection from their state labor laws or, if none is there, lobby for the passage of state laws similar to the FLSA.

A. The Department of Labor

All employees, including those working for the states, can file a complaint with the DOL if they believe their federal labor law rights are being violated by their employers. In *Alden*, under criticism from the dissent, the majority pointed this out as the remaining remedy for state employees. An examination of the resources, complaint process, and effectiveness of the DOL, however, reveals this remedy as inadequate due chiefly to the sheer number of state employees.

1. Resources

In his dissent in *Alden*, Justice Souter called this DOL remedy “not much more than a whimsy.” He also pointed out that the DOL lacks the funds to file suit on behalf of every state employee with a grievance under the FLSA. The DOL’s budget fell from $47 billion in 1992 to $32 billion in 1996. Congress has stated that “the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily.”

The number of people employed by the states has steadily increased over the past eight years, from 3.8 million in 1992 to 4.8 million in 1999. It is unreasonable for the Supreme Court to insist that the DOL represent all of these employees. The DOL’s inability to represent all of these employees results in an injustice that the Supreme Court should have recognized and not allowed.

2. Complaint Process

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197 *Id.* at 810 (Souter, J., dissenting).
198 *Id.*
199 See S. REP. NO. 105-29 (1997).
The DOL enforces the FLSA through its Wage and Hour Division. This division conducts investigations and gathers information on wages, hours, and other employment data or practices. It makes recommendations to employers if violations are found. Willful violations may be prosecuted criminally, and the violator may be fined up to $10,000. Willful or repeated violations of the minimum wage or overtime provisions could result in a civil penalty of up to $1000 for each subsequent violation.

An investigation is frequently initiated by an employee complaint. An investigation consists of the following steps:

1. A conference between Wage and Hour representative and representative(s) of the business, during which the Wage and Hour representative will explain the investigation process.

2. Examination of records to determine what laws or exemptions apply to the business and its employees. For example, these records include those showing the annual dollar volume of the business, the manufacture, handling or selling of goods moved in interstate commerce, and work on government contracts.

3. Examination of time and payroll records, note taking or making transcriptions or photocopies of information essential to the investigation.

4. Private interviews with certain employees. The purpose of these interviews is to verify the time and payroll records, to identify a worker’s duties in sufficient detail to determine what exemptions, if any, apply and to determine if young workers are legally employed. Interviews are normally conducted on the employer’s premises, but other arrangements

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205 Id.

206 Id.

207 Id.

208 Id.

209 Id.

210 Id.

211 Id.
may be made. In some instances, present and former employees may be interviewed at their homes, by phone or by a mail interview form.\textsuperscript{212}

(5) When all of the fact-finding steps have been completed, the employer and/or the employer’s representative will be told whether violations have occurred and, if so, what the violations are and how to correct them. If back wages are owed, the employer will be asked to pay the back wages and the employer may be asked to compute the amounts due.\textsuperscript{213}

The investigation process does not protect the interests of the individual employee as a private suit does. The employee does not have counsel to represent him, nor is he kept informed by the DOL as he would be by private counsel. The DOL conducted nearly 36,000 compliance investigations in 1997.\textsuperscript{214} The sheer volume of these investigations guarantees that the complaining employee will not receive the attention that an attorney in a private suit can give. Additionally, the investigation process is not adversarial. The emphasis is on employer compliance and cooperation, not remedial measures for a violated federal right. Employers must agree to the monetary damages or they will not be paid. Contrarily, if an employer loses a private suit, it need not agree to the judgment to be obligated to pay it.

3. Effectiveness

The Wage and Hour Division is not responsible only for enforcement of the FLSA; they also monitor and obtain compliance regarding the Migrant and Seasonal Agricultural Worker Protection Act, certain provisions of the Immigration and Nationality Act, Employee Polygraph Protection Act, the Immigration Nursing Relief Act, the wage garnishment provisions of the Consumer Credit Protection Act, and the Family and Medical Leave Act.\textsuperscript{215} The DOL prefers to enforce the FLSA in ways other than employee-based complaints. In its 1998 Accountability Report, the DOL states:

The Wage and Hour Division’s overall compliance program balances public education and outreach with enforcement efforts using a variety of techniques. In the last several years, Wage and Hour has increased the proportion of compliance efforts in “directed” or “targeted” investigations - as opposed to complaint-based investigations — from approximately 25 to

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{215} Id.
30 percent. Targeted (i.e., non-complaint) investigations are used principally to promote compliance and deter and remedy violations in predominately low-wage industries . . . because violations are more often egregious and complaints less common in these areas.216

The Supreme Court has chosen not to give deference to the experience and expertise of this agency. In Chevron U.S.A., Inc: v Natural Resources Defense Council, Inc.,217 the Court stated, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . "218 The Court has a precedent of giving deference to agency decisions, yet it disregards the DOL when it expresses its inability to adequately execute the FLSA through complaint-based actions.

The Department of Labor further articulates its preference against complaint-based interventions:

Traditional complaint-based interventions had not been effective in securing widespread substantial labor law compliance with the minimum wage, overtime, recordkeeping and child labor provisions of the FLSA . . . Wage and Hour needed to impact or change the behavior and practices of whole industries, particularly those in which violations are most likely to occur – the low-wage industries. These industries were also most likely to employ vulnerable workers who often won't [sic] complain about violations or are less informed about their workplace rights.219

Now that the DOL must take on the complaints of all state employees, it will be forced to divert funds from targeted investigations back to complaint-based investigations, a path which it has already determined does not work.

B. State Waiver of Sovereign Immunity

The second remedy which state employees can seek is a waiver of immunity by the states. If a state waives its immunity to suit, state employees can once again file suit in federal court against their employers for violations of the FLSA. The Supreme Court acknowledged in Seminole Tribe "the unremarkable . . . proposition that States may waive their sovereign immunity."220 A state may waive its immunity

218 Id. at 844.
219 EMPLOYMENT STANDARDS ADMINISTRATION, supra note 180.
220 Seminole Tribe, 517 U.S. at 65.
in two ways. First, it may "directly and affirmatively" waive its immunity in a state statute or constitutional provision. Second, it may "waive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a state's consent to waive its constitutional immunity.'

Determinations of whether a state has waived its immunity are subject to "stringent" standards. A state cannot be deemed to have waived its immunity even by engaging in activities that Congress has made clear would subject a state to suit in federal court. The mere receipt of federal funds is similarly not enough to establish a waiver of immunity. Nor can a state consent to suit in federal court by consenting to suit in its own courts, or by stating its intention to "sue and be sued," or even by authorizing suits against itself "in any court of competent jurisdiction." Absent any contractual obligation, a state can alter the conditions of a waiver and apply those to a pending suit.

In Oklahoma v. Civil Serv. Comm'n, the Supreme Court upheld the constitutionality of the Hatch Act which forbids certain state employees, whose salaries were financed in whole or in part from federal funding, from engaging in political activities. If the state employee violated the Hatch Act and was not fired by the state, the state would be denied the federal funds to finance that position. Oklahoma claimed that the Hatch Act invaded its sovereignty in violation of the Tenth Amendment. The Court found no violation of sovereignty because the state could adopt "the 'simple expedient' of not yielding to what she urges is federal

21 Id.
22 Booth v. Maryland, 112 F.3d 139, 145 (4th Cir. 1997).
23 See Litman v. George Mason University, 186 F.3d 544, 551 (4th Cir. 1999)
26 Litman, 186 F.3d at 552.
27 Id. (citing Atascadero State Hosp., 473 U.S. at 246-47). See also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of Seminole Tribe.").
31 Beers v. Arkansas, 61 U.S. 527 (1858).
33 Id. at 129 n.1.
34 Id.
35 Id.
coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.\textsuperscript{236} The Court held that the federal government "does have the power to fix the terms upon which its money allotments to states shall be disbursed."\textsuperscript{237}

In \textit{South Dakota v. Dole},\textsuperscript{238} the Supreme Court held that Congress can use its power under the Spending Clause\textsuperscript{239} to condition the receipt of federal funds upon certain state actions.\textsuperscript{240} 23 U.S.C. § 158 requires the Secretary of Transportation to withhold a percentage of highway funds from a state if it allows persons under the age of twenty-one to purchase any kind of alcoholic beverage.\textsuperscript{241} The state of South Dakota allowed persons 19 years old or older to purchase beer containing up to 3.2 percent alcohol and, therefore, filed suit to prevent the Secretary of Transportation from withholding five-percent of its federal highway funds.\textsuperscript{242}

The Supreme Court held that 23 U.S.C. § 158 was not an unconstitutional use of Congress' spending power. Incident to its power to provide for the "general Welfare,"\textsuperscript{243} Congress may attach conditions on the receipt of federal funds.\textsuperscript{244} This power is not limited by the direct grants of legislative power found in the Constitution.\textsuperscript{245} Therefore, objectives not within Article I's "enumerated legislative fields" may still be attained through the use of the spending power.\textsuperscript{246}

The Court also held that there are five limitations on the power of Congress to use the Spending Clause to compel state action.\textsuperscript{247} First, the conditions must be for the general welfare.\textsuperscript{248} Second, the conditions on federal funding must be stated "unambiguously."\textsuperscript{249} Third, there must be a reasonable nexus between the condition and the purpose of the federal spending.\textsuperscript{250} Fourth, the grant and the conditions attached may not violate any independent constitutional prohibition.\textsuperscript{251} Fifth, the

\textsuperscript{236} Id. at 143-44.
\textsuperscript{237} \textit{Civil Serv. Comm'n}, 330 U.S. at 144.
\textsuperscript{238} 483 U.S. 203 (1987).
\textsuperscript{239} U.S. \textit{CONST.} art. I, § 8, cl. 1.
\textsuperscript{240} \textit{Dole}, 483 U.S. at 211.
\textsuperscript{241} Id. at 205.
\textsuperscript{242} Id.
\textsuperscript{243} U.S. \textit{CONST.} art. I, § 8, cl. 1.
\textsuperscript{244} \textit{Dole}, 483 U.S. at 207.
\textsuperscript{245} Id.
\textsuperscript{246} Id. (quoting \textit{United States v. Butler}, 297 U.S. 1, 65 (1936)).
\textsuperscript{247} Id.
\textsuperscript{248} Id. "The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." Id. at 207 n.2 (quoting \textit{Buckley v. Valeo}, 424 U.S. 1, 90-91 (1976)).
\textsuperscript{249} \textit{Dole}, 483 U.S. at 207.
\textsuperscript{251} \textit{See Dole}, 483 U.S. at 208. This requirement is as lenient as the general welfare requirement: "Thus, for example, a grant of federal funds conditioned on invidiously
financial inducement offered must not be "so coercive as to pass the point at which 'pressure turns into compulsion.'"

In Litman v. George Mason University, the Court of Appeals for the Fourth Circuit decided a case that dealt with a state waiver of sovereign immunity through receipt of federal funds. Annette Litman was a student at GMU. She filed sexual harassment charges against a professor. Shortly after that, she was unable to find a professor to supervise her senior research project. Litman contended that GMU failed to undertake a proper investigation into her sexual harassment complaint and that the faculty refused to interact with her after they learned that she had filed said complaint. In October 1997, Litman filed suit against GMU and some of its employees alleging that they discriminated and retaliated against her on the basis of her sex in violation of Title IX of the Education Amendments Act of 1972. GMU, invoking its Eleventh Amendment immunity, moved to dismiss the complaint for lack of jurisdiction. Litman maintained that GMU had waived its immunity as a condition to receiving federal funding under Title IX. The district court denied the motion to dismiss, finding that "while Congress does not have 'the authority pursuant to its Article I powers to simply abrogate the States' Eleventh Amendment immunity, Congress does have the power to require the States to waive their immunity pursuant to a valid exercise of its spending power.'"

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed. The court pointed out that the Supreme Court has found that sovereign immunity is an element of state sovereignty, not a limitation on federal judicial power. Sovereign immunity, therefore, is not an absolute limit on the power of federal courts to hear suits against states. It is a protection that states can choose

discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." Id. at 210-211.

252 Id. at 211.
253 186 F.3d 544 (4th Cir. 1999).
254 Id. at 547.
255 Id.
256 Id.
257 Id. at 548.
258 Litman, 186 F.3d at 549 (citing 20 U.S.C. § 1681 et seq. (2001)).
259 Id.
260 Id. The Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1), amended Title IX to make explicit that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments Act of 1972." Id.
261 Id. at 548 (quoting Litman v. George Mason Univ., 5 F. Supp. 2d. 366, 375 (E.D. Va. 1998)).
262 Id. at 557.
263 Litman, 186 F.3d at 551.
264 Id. (citations omitted).
to invoke or choose to waive. The court in Litman found that Spending Clause legislation, as Title IX is, presents the state with a choice: "the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds." Accordingly, the Fourth Circuit held that GMU had waived its sovereign immunity with respect to Title IX when it accepted federal education funds.

Recently, in *dicta*, the Supreme Court reiterated its holding in *South Dakota v. Dole*:

And we have held in such cases as *South Dakota v. Dole* [citation omitted] that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails agreement to the actions . . . Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.

This implies a willingness in the current Court to affirm decisions like Litman.

Congress could now alter its spending legislation to inform states that they are waiving their immunity to suit by accepting certain funds. This cannot work for all legislation, however. The test put forth in *South Dakota v. Dole* still must be fulfilled. First, the legislation must be for the general welfare. Second, the fact that the state will be waiving its immunity by accepting the funds must be stated "unambiguously." Third, there must be a reasonable nexus between the waiver and the purpose of the legislation. Fourth, the grant and the waiver must not violate any independent constitutional prohibition. Fifth, the financial inducement offered must not be too coercive.

C. *State Fair Labor Standards Acts*

The third remedy that state employees can seek is the state labor law in their state. Some state employees are protected by state FLSA's, often modeled after the

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265 Id. See also Dole, 527 U.S. at 676 ("We have long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883)) .
266 Litman v. George Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999).
267 Id. at 557.
268 See Dole, 483 U.S. at 207 n.2.
269 Id. at 207.
271 Id. at 211.
federal FLSA. The laws from state to state can vary widely, however. Twenty-seven states adopted the federal FLSA and any maximum hour or minimum wage legislation that the federal Congress passes: Maine; New Hampshire; New York; New Jersey; Pennsylvania; Maryland; West Virginia; Virginia; North Carolina; Kentucky; Michigan; Wisconsin; Indiana; Illinois; Minnesota; Oklahoma; North Dakota; South Dakota; Idaho; Iowa; Missouri; Nebraska; Montana; Nevada; Utah; Arkansas; and Colorado.274

Ten states — Vermont, Massachusetts, Rhode Island, Connecticut, Delaware, Washington, Oregon, California, Alaska, and Hawaii — adopted the FLSA, but keep their minimum wage at least fifty cents above the federal level.275 Six states — Ohio, Texas, New Mexico, Georgia, Kansas, and Wyoming, have minimum wages that are far below the federal level.276

Thirteen states — Arkansas, Oklahoma, North Carolina, Georgia, Hawaii, Indiana, Kansas, Michigan, Missouri, Montana, Texas, Virginia, and Utah — have FLSAs, but exclude from coverage any employee who is covered by the federal FLSA.277 This is the most ironic and unfortunate situation for state employees. These state employees technically fall within the federal FLSA, and therefore are excluded from state FLSA coverage, but they are no longer protected by the federal law because they cannot sue their employer for violations. In these states, state employees reside in a kind of limbo: protected by neither federal nor state laws. Finally, six states — Florida, South Carolina, Tennessee, Mississippi, Louisiana, Alabama, and Arizona — have no FLSA at all.278

In twenty-five states, state employees have no state law protection for a minimum wage and maximum hours.279 Some states have minimum wages much lower than the federal level. Some states only offer state law protection for those employees not within the coverage of the federal FLSA. Some states have no minimum wage or maximum hour laws at all. For these employees, there is no remedy for employee violations of minimum wage and maximum hours law, either because state law assumes they are protected by the federal FLSA or because there is no state law.

There is not one blanket solution for state employees in search of a remedy after Seminole Tribe and Alden. Filing a complaint with the DOL is the least attractive of the three options this Note has presented. Even if the investigation is successful, the employee will never receive his back pay from minimum wage or maximum

275 Id.
276 Id.
277 Id.
278 Id.
279 Id.
hour violations.

Seeking a waiver of immunity to suit from a state through federal spending legislation is the second option. These waivers would have to be judged on a case-by-case basis by courts to determine if they are legitimate. Certain employees, such as those whose jobs are funded by federal money, will find this option more feasible than others.

Finally, the employees fortunate enough to work for a state with its own FLSA can turn to state courts and agencies for protection under those state laws. Employees in the twenty-five states where the state laws offer no such protection can urge legislators to change those laws.

V. RECOMMENDATIONS

In *Seminole Tribe*, the Supreme Court stated that when precedent is "unworkable or badly reasoned," the Court no longer needs to follow it. The Court further stated that when a case involves interpretation of the Constitution, it is even less constrained by the doctrine of stare decisis. Congress cannot legislate around such a decision. Only a constitutional amendment or a decision by the Supreme Court can revise such an interpretation. The Court needs to be more flexible, therefore, when choosing whether to follow such a precedent.

The decisions in *Seminole Tribe* and *Alden* need to be reconsidered. Justice Souter heavily criticized the decisions in these cases with strong dissents. He revealed both legal and historical errors in the reasoning of the majority. Justice Souter may have been the first to criticize *Seminole Tribe* and *Alden*, but he was most certainly not the last. Numerous legal scholars have seriously questioned the decisions with regard to their interpretation of the Eleventh Amendment.

In *Alden*, Justice Souter compared this interpretation of the Eleventh Amendment to the industrial due process of the *Lochner* era. He predicts that this precedent will share the fate of *Lochner*: overturned and regretted.

Beyond the faulty historical and legal basis of these decisions, public policy concerns require that they be reconsidered. As of 1999, there were 4.8 million state

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281 *Id.* at 65-66.
282 *Id.* at 66.
285 See *Alden*, 527 U.S. at 814 (Souter, J., dissenting).
286 *Id.*
employees in the United States. The Supreme Court now allows state employers to disregard all federal labor laws with barely a threat of repercussions. Those 4.8 million people are left to the "good faith" of their employers with regard to whether they will pay minimum wage or overtime. State governments are, in effect, on the "honor system." This blind optimism of the Court is beyond naive.

The Court has also taken its first step down a slippery slope. Federal law can now guarantee a right, but the states need not respect it, uphold it, or provide a remedy for its violation. These decisions have affected more than just the right to accrued wages. They have had dramatic effects on bankruptcy, patents, copyrights, disability, and employment law, among others. States are being put on the "honor system" for nearly every federal law, one by one. Until the opportunity arises for a willing Supreme Court to reconsider these decisions, action can still be taken by both Congress and state employees to protect state employee rights.

Congress can explore the possibility of attaching conditions to federal funding given to the states. Congress can require, as a condition of receiving the funds, that the state waive its immunity to suit. Such waivers would need to conform to the five requirements of South Dakota v. Dole. First, they must be for the general welfare. Second, they must be stated "unambiguously." Third, there must be a reasonable nexus between the condition and the purpose of the federal spending. Fourth, they may not violate any independent constitutional prohibition. Fifth, the financial inducement offered must not be "so coercive as to pass the point at which 'pressure turns into compulsion.'"

The first requirement would not be difficult to fulfill. In South Dakota, the Supreme Court stated that this general welfare requirement was so lenient as to be almost non-existent. The second requirement is only slightly more difficult than the first. The Court in South Dakota held that even a negative waiver ("states will not be immune" rather than "states waive their immunity") is sufficiently unambiguous to fulfill this requirement. The fourth and fifth requirements are

289 Dole, 483 U.S. at 208.
290 Id.
292 See Dole, 483 U.S. at 208.
293 Id. at 211.
294 Id. at 207, n.2.
295 Id. at 211.
similarly simple to fulfill.

The third requirement is by far the most difficult of the five. The Supreme Court requires a nexus between the condition and the object of the federal funding. Here, Congress would have to find a nexus between state waiver of immunity to suit and the object of the funding. In *Litman v. George Mason University*, the Fourth Circuit found that there was a sufficient nexus between federal Title IX funding and state waiver of immunity for suits brought under Title IX. To duplicate this success, Congress should either attach fact-finding to its grants that justifies the nexus between the waiver and the object of the grant or make that nexus clear in the legislative material regarding the grant and waiver.

Besides a nexus between the waiver and the object of the grant, courts may require that the state program receive a certain minimum percentage of federal funding before the waiver is valid. Courts may be reluctant to allow Congress to invade the immunity of a state unless the federal government is at least providing a significant portion of the funding for that particular program. If the federal government is providing fifty percent of the funding for a program, it has more authority to dictate how that money should be spent and whether the state can be subject to suit regarding that program.

However, not all state employees can be protected by these waivers. Numerous state programs have little to no federal funding and employees of these programs cannot count on a waiver of immunity to apply to them or to hold up under court scrutiny. In this situation, state employees have two remaining options. First, they can seek the help of the DOL in the event of an employer's violation of labor laws. Second, they can turn to state labor laws to protect them. In the twenty-one states without any or adequate fair labor standards acts, state employees can lobby their state legislatures to pass or improve state labor laws. In the thirteen states that only offer coverage for employees not within the federal FLSA, state employees can be considered within this excluded group, either by courts or through legislation.

**CONCLUSION**

Since 1974, virtually all state employees have been covered by the Fair Labor Standards Act. They are entitled to receive the federal minimum wage (currently $5.15 per hour) and one and one-half times their hourly wage for hours worked in excess of forty per week. Until 1996, the Fair Labor Standards Act was applied to the states as to any other employer. State employees had a private right of action against their employer in federal court for any violation of the FLSA.

In 1996 and then in 1999, the Supreme Court decided *Seminole Tribe v. Florida*.

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296 186 F.3d 544 (4th Cir. 1999).
297 *Id.* at 557.
298 See supra text accompanying notes 196-219.
and *Alden v. Maine* and everything changed. State employees no longer have a private right of action against their employers for violations of the FLSA. There are only two remedies remaining for these employees: a civil action filed on their behalf by the Secretary of Labor or an injunction against future violations. The injunction is virtually useless because it cannot give employees their back wages. It is highly unlikely that one employee will take the chance to pursue his employer on behalf of everyone and incur the costs himself.

Civil action by the Secretary of Labor is really all that is left for a state employee. Even the Department of Labor admits that this option is inadequate to protect employees. The DOL has shifted resources away from complaint-based investigations to industry-wide targeted investigations because they are more effective. The Supreme Court has placed this agency in a position where it must shift resources back to an inefficient and ineffective course of action. In the end, it is at the expense of the state employees.

State labor laws are equally inadequate to protect state employees. Six states have no laws at all and fifteen states do not cover employees protected by the federal Fair Labor Standards Act. State employees work assuming that they will be paid the federal minimum wage and time and a half for overtime. Their accrued wages become their property, even if they have not yet received their paychecks. These employees are entitled to due process before they are deprived of their property.

The negative effects of *Seminole Tribe* and *Alden* and their violation of the due process rights of at least state employees justifies a reconsideration by the Supreme Court. The Supreme Court displayed an inexcusable ignorance of the way the Department of Labor and state government really function. The Court should take the next opportunity to reevaluate these decisions and defer to the better judgment of both the Department of Labor and the Congress.

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