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ELEVENTH AMENDMENT FEDERALISM AND STATE SOVEREIGN IMMUNITY CASES: DIRECT EFFECT ON SECTION 1983?

Steven H. Steinglass*

JUDGE PRATT:

Dean Steinglass is going to lead our next discussion, and lead off with a discussion on *Alden v. Maine*.¹

DEAN STEINGLASS:

I was asked to address briefly the impact of the Supreme Court's recent Eleventh Amendment, federalism, and state sovereign immunity decisions on Section 1983 litigation. These cases are unlikely to have any direct or significant impact on Section 1983 litigation in the state or federal courts.² On the other hand, these decisions will likely have a significant impact on non-Section 1983 litigation, including non-Section 1983 civil rights litigation. For example, a few weeks ago the Supreme Court heard an argument in an Age Discrimination and Education Act (hereinafter "ADEA") case involving claims brought directly against the state.³

The recent Supreme Court cases to which I am referring are the Tenth Amendment cases involving the Brady Amendment,⁴ the

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¹ 527 U.S. 706 (1999).

² See *id.*; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 666; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); see also U.S. CONST. amend. XI. The Eleventh Amendment provides:

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.

Id.

³ *Kimel v. Fla. Bd. of Regents*, 120 S.Ct. 631 (2000) In *Kimel*, the Court held that "in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. *Id.* at 650.

⁴ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Brady Handgun Violence Prevention Act imposed unconstitutional obligations on state officials); U.S. CONST. amend. X. This section provides: "The powers not

Eleventh Amendment cases holding that Congress does not have power under the Commerce Clause to abrogate the state's Eleventh Amendment immunity from suit,⁵ and a decision striking down the constitutionality of the Religious Freedom Restoration Act,⁶ and, as Judge Pratt mentioned, *Alden v. Maine*.⁷

Let me focus on *Alden*, which was not a Section 1983 case, but a state court Fair Labor Standards Act case.⁸ The plaintiffs, after having been rebuffed in federal court on their claim for retroactive wages, went into state court where the Eleventh Amendment does not apply.⁹ The United States Supreme Court went beyond the text of the Eleventh Amendment and held that the doctrine of state sovereign immunity predated the ratification of the Eleventh Amendment and, therefore, limited the power of Congress acting under the commerce clause to subject states to suit in their own courts.¹⁰ However, *Alden* creates a number of exceptions.¹¹ The doctrine the Court identifies in *Alden* does not apply to suits against local government, suits brought on claims grounded in the Fourteenth Amendment, nor suits for prospective injunctive relief.¹²

The limitations on the scope of Section 1983 imposed by the Eleventh Amendment and various federalism doctrines do not stem from the recent group of cases, but rather from the decisions that

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." *Id.*

⁵ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *see also* *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631 (2000).

⁶ *See* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress exceeded its constitutional power by enacting the Religious Freedom Restoration Act).

⁷ 527 U.S. 706 (1999).

⁸ Fair Labor and Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201-219 (1998).

⁹ *Alden*, 527 U.S. at 712. The district court dismissed the case after the Supreme Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) made clear that "Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts." *Id.*

¹⁰ *Id.* at 713.

¹¹ *See generally* Steven H. Steinglass, Section 1983 Litigation in State Courts §15.3 (West Group).

¹² *Alden*, 527 U.S. at 756-57.

the Supreme Court reached in the 1970's and the 1980's. These decisions resurrected the Eleventh Amendment and construed the word "person" in Section 1983 as not including states.¹³ Thus for almost three decades Section 1983 plaintiffs had no ability to directly sue states or state officials under Section 1983. Therefore, *Alden* really does not make much of a difference for Section 1983 litigation.

I have also been asked to address *Howlett v. Rose*,¹⁴ a decision in which the Supreme Court held that Florida state courts could not exclude Section 1983 cases against local governmental bodies from their courts.¹⁵ The Court further held in *Howlett* that the states could not interpose a state law defense of sovereign immunity that the state extended to local government.¹⁶

In *Howlett*, the Court relied on a long line of cases, including cases involving what is sometimes known as the "non-discrimination principle."¹⁷ This principle proclaims that states cannot discriminate against federal law when they decide how widely they should open the doors to their courthouses.¹⁸

¹³ See *Edelman v. Jordan*, 415 U.S. 651 (1974) (treating the Eleventh Amendment as a bar to suits for retroactive relief for welfare benefits illegally withheld); *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that in enacting Section 1983 Congress had not evidenced a clear intent to abrogate the Eleventh Amendment); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that neither the state nor a state official acting in his official capacity is a "person" for Section 1983 purposes).

¹⁴ 496 U.S. 356 (1990).

¹⁵ *Id.* at 375. The Court concluded that, "whether the question is framed in pre-emption terms . . . or in the obligation to assume jurisdiction over a 'federal' cause of action, the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state law actions against state defendants, violates the Supremacy Clause." *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 356. See, e.g., *Clafflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 387 (1929). In *Douglas*, the Court held that a state law relating to action against a foreign corporation by a non-resident was unconstitutional. *Id.* at 377. The Court stated, "[S]uch a court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" *Id.*

¹⁸ *Howlett*, 496 U.S. at 356. See, e.g., *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912). The *Mondou* Court's holding that, "An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of

Alden does not seem to be in direct conflict with *Howlett*. *Alden* can be interpreted as simply holding that the *Howlett* principle, that is, the duty of state courts to entertain Section 1983 and other federally created causes of action, does not apply when the suit is brought directly against the state. The Court in *Alden* noted, for example, that the state of Maine regards immunity from suit as one of the highest attributes inherent in the nature of sovereignty.¹⁹ The Court went on to state that there is no evidence that Maine has manipulated its immunity in a systematic fashion to discriminate against federal causes of action.²⁰ The simple fact that Maine has chosen to consent to certain classes of suit, while maintaining its immunity from others, is no more than the exercise of a privilege of sovereignty.²¹ Therefore, under *Alden* and *Howlett*, states are still obligated to entertain Section 1983 cases, but they are not obligated to do so when they are directly against the state. Since the Supreme Court crossed that bridge almost three decades ago and does not permit states to be sued under Section 1983, *Alden* does not impose new limitations on Section 1983 litigation.

This conclusion about the limited impact of *Alden* on Section 1983 may overstate the case. Section 1983 is available not only to enforce federal constitutional provisions rooted in the Fourteenth Amendment but also constitutional claims under the Commerce Clause²² and federal statutory claims enacted under Commerce Clause,²³ not Fourteenth Amendment authority. Therefore, there may be important sub-groups of Section 1983 cases that do not fall

disagreement with its content or a refusal to recognize the superior authority of its source." *Id.*

¹⁹ *Alden*, 527 U.S. at 757.

²⁰ *Id.* at 758. The Court stated, "[A]lthough petitioners contend the State has discriminated against federal rights by claiming sovereign immunity from this FLSA suit, there is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action." *Id.*

²¹ *Id.*

²² *Dennis v. Higgins*, 498 U.S. 439 (1991)(holding that Commerce Clause claims are cognizable under Section 1983).

²³ *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989)(holding that National Labor Relations Act pre-emption claims can be heard under Section 1983); *Maine v. Thiboutot*, 448 U.S. 1(1980)(holding that the "and laws" language in Section 1983 makes the statute available to enforce statutory claims).

within the *Alden* exceptions.²⁴ Moreover, *Alden* signals a direction in which the Court appears to be heading. If the Court views state sovereign immunity as a fundamental, though uncoded, constitutional doctrine, one could imagine the Court revisiting cases that have limited the scope of the Eleventh Amendment in Section 1983 litigation.²⁵ For example, such a reexamination could unravel Section 1983 litigation against local governmental entities in both state and federal court.

Could another generation of federal cases start to extend the Eleventh Amendment and other immunities to local government? The answer is yes, but there is nothing in *Alden* that suggests the Supreme Court is willing to take its concept of federalism and state sovereign immunity that far.

²⁴ See *supra* note 12.

²⁵ See, e.g., *Owen v. City of Independence*, 445 U.S. 662, 646 (1980)(rejecting the application of sovereign immunity to municipalities); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)(noting that the Eleventh Amendment bar against suit applies to states and state officials, but not to municipalities); *Scheuer v. Rhodes*, 416 U.S. 232 (1974)(holding that the Eleventh Amendment does not protect a governor from an individual capacity Section 1983 suit).

