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Fair Labor Standards Act and Sovereign Immunity: Unlocking the Courthouse Door for Texas State Employees.

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COMMENTS

FAIR LABOR STANDARDS ACT AND SOVEREIGN IMMUNITY: UNLOCKING THE COURTHOUSE DOOR FOR TEXAS STATE EMPLOYEES

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"[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[1]

I. INTRODUCTION

As in many other states,[2] a party may not sue the State of Texas without its consent.[3] Thus, in the absence of constitutional or statutory provisions to the contrary, a state may claim sovereign immunity[4] against any suit brought by a private party in both federal[5] and state court.[6] Never-

1. 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (urging that whenever there is a civil wrong committed against an individual, he or she is entitled to legal recourse in recognition of such wrong).

2. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 758 (1999) (recognizing that Maine did not waive its sovereign immunity); Mossman v. Donahey, 346 N.E.2d 305, 315 (Ohio 1976) (finding that explicit consent to be sued applied to Ohio in both state and federal court); Messina v. Burden, 321 S.E.2d 657, 660-61 (Va. 1984) (addressing Virginia state employee immunity and noting that protection extends to employees unless there is state consent to be sued).

3. *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997) (stating that the Texas Supreme Court has long recognized that sovereign immunity protects the State of Texas from lawsuits for damages in the absence of legislative consent to sue the state); Missouri Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970) (maintaining that the state retains immunity from suit unless abrogated by statutory language that is clear and unambiguous).

4. State sovereign immunity is also referred to as "Eleventh Amendment immunity," but this term was qualified as a "misnomer" by the Supreme Court in *Alden v. Maine*. *See Alden*, 527 U.S. at 713. The Court noted that state sovereign immunity is not derived from or limited by the terms of the Eleventh Amendment. *See id.* Thus, "States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Id.*

5. *See id.* at 741 (asserting that the issue of whether Article I grants Congress the authority to abrogate state sovereign immunity is a question of first impression in this case); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-98 (1984) (discussing the origins of the Eleventh Amendment); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (find-

theless, two mechanisms exist to abrogate state sovereign immunity.[7] First, a state may waive its immunity from suit by expressly consenting to suit through state legislation.[8] Second, Congress may override a state's exercise of sovereign immunity by expressly stating an intent to do so "'pursuant to a valid exercise of power'" under the Fourteenth Amendment.[9] As a result, the Eleventh Amendment effectively precludes private individuals from suing a state in both federal and state court for violating a federal statute unless Congress abrogates state sovereign immunity through the Fourteenth Amendment or a state expressly waives its right to claim sovereign immunity.

A state may consent to suit by statute or legislative resolution.[10] In certain instances, Texas has provided statutorily for a limited waiver of

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ing that the Eleventh Amendment protects the constitutional balance between the federal government and the states by barring private suits against states in federal court); Hans v. Louisiana, 134 U.S. 1, 21 (1890) (refusing to allow a citizen to sue his own state in federal court); Bunt v. Tex. Gen. Land Office, 72 F. Supp. 2d 735, 736-37 (S.D. Tex. 1999) (dismissing a state employee's FLSA claim for overtime filed in federal court based on Eleventh Amendment immunity).

6. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 56 (1996) (clarifying that Congress lacks the power under Article I to abrogate the States' sovereign immunity from suits commenced in federal court).

7. *See* Bunt v. Tex. Gen. Land Office, 72 F. Supp. 2d 735, 737 (S.D. Tex. 1999) (stating that "in order for a federal court to have jurisdiction to hear a cause of action brought against a State for violation of federal law, the legislation must have been passed by Congress pursuant to its power to enforce the provisions of the Fourteenth Amendment").

8. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974).

9. *Seminole Tribe*, 517 U.S. at 55 (citing Green v. Mansour, 474 U.S. 64, 68 (1985)); *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (holding that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment"). The Supreme Court specified "a simple but stringent test: '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.'" Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (citing *Atascadero*, 473 U.S. at 242). Prior to the Court's decision in *Seminole Tribe*, there were two provisions of the Constitution that vested congressional authority to abrogate state immunity from suit. *See Seminole Tribe*, 517 U.S. at 59. The Court noted that it endorsed the abrogation of state sovereignty under the Interstate Commerce Clause, art. I, § 8, cl. 3 in one instance only. *See id.* (citing to Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). The Court overruled *Union Gas* in *Seminole Tribe*. *See id.* at 66. In reconsidering its earlier decision in *Union* Gas, the Court dismissed its holding by stating "that none of the policies underlying *stare decisis* require our continuing adherence to its holding." *Id.* The effect of this decision was to leave the Fourteenth Amendment as the only valid source of congressional power to abrogate state sovereign immunity.

10. *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997) (disallowing a suit for private damages for a breach of contract against the State of Texas without its consent).

sovereign immunity.[11] For example, Texas allows individuals to sue under a tort claim if injured by an employee of the state acting within the scope of employment.[12] However, Texas has not expressly consented to suit for violations of the Fair Labor Standards Act (FLSA).[13]

Congress originally enacted the FLSA[14] as an attempt to override state sovereign immunity and make the states amenable to suit in federal court.[15] Nonetheless, in light of two recent Supreme Court decisions denying private citizens access to state court for a state violation of a federal statute, state employees have no meaningful avenue to seek redress under the provisions of the FLSA.[16] Consequently, state employees may not sue the State of Texas to enforce federal law without the state's consent.[17] For instance, in a recent federal district court case, a Texas employee filed suit against the Texas General Land Office, a state agency

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11. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997) (specifying that a governmental unit in the state may be held liable for property damage, personal injury and death under certain conditions); TEX. TAX CODE ANN. § 112.151 (Vernon 1992) (allowing a person to "sue the comptroller to recover an amount of tax, penalty, or interest that has been the subject of a tax refund claim" under certain conditions).

12. Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (Vernon 1997).

13. *See* TEX. LAB. CODE ANN. § 61.003 (Vernon Supp. 2000) (omitting the state from the definition of "employer" for purposes of suit under the Texas Labor Code). The Texas Labor Code codifies many provisions similarly expressed in the FLSA. *See id.*

14. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994 & Supp. IV 1998) (codifying the administration and enforcement of minimum wage, overtime and equal pay provisions).

15. *See* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. Rev. 767, 807 (1998).

16. *See* Alden v. Maine, 527 U.S. 706 (1999) (denying state employees access to state court for a state violation of the Fair Labor Standards Act); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (denying private citizens access to federal court for a state violation of the Indian Gaming Regulatory Act). *See Alden*, 527 U.S. at 749 (summarizing the Court's rationale for preserving state sovereign immunity on several points). First, the Supreme Court maintained that allowing Congress "to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum." *Id.* Furthermore, the Court compared the state structure to the federal structure, stating that because the Federal Government retains its own immunity from suit, it would be unfair to conclude that the States are not entitled to reciprocity. *See id.* Furthermore, the Court remarked that private suits against nonconsenting States for money damages might threaten the financial integrity of the states. *See id.; see also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (stating that "[t]he Eleventh Amendment largely shields the States from suit in federal court without their consent, leaving the parties with claims against a State to present them, if the State permits, in the State's own tribunals").

17. *See* Bunt v. Tex. Gen. Land Office, 72 F. Supp. 2d 735, 738 (S.D. Tex. 1999) (denying state employee's overtime compensation claim under the FLSA against the State of Texas).

and employer, seeking overtime compensation under the FLSA.[18] The federal district court granted the Land Office's Motion to Dismiss, claiming that it lacked jurisdiction over the federal claim as a result of state sovereign immunity.[19] The court also noted that because the Texas Supreme Court has held that the state enjoys immunity from suits arising from breach of contract,[20] the plaintiff's state law claims should also be dismissed.[21]

While Texas continues to assert sovereign immunity to avoid FLSA liability, other states have provided state employees with a legal forum for wage violations by expressly consenting to suit.[22] Specifically, both New York and Wisconsin adopted the FLSA as state law.[23] As a result, New York and Wisconsin state employees may sue their respective states in

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18. *Id.* at 736.

19. *Id.*

20. *Id.* The state employee also asserted various state law claims of promissory estoppel, intentional fraud, detrimental reliance, unconscionable acts, and breach of contract. *Id.*

21. *Id.* at 738 (citing Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 407 (Tex. 1997)).

22. *See e.g.*, N.Y. CIV. SERV. LAW § 1324(1) (McKinney 1999); WIS. ADMIN CODE § 274.08(1)-(2) (West, WESTLAW through 2000 Reg. No. 538).

23. *See* N.Y. CIV. SERV. LAW § 134(1) (McKinney 1999) stating:

> For all state officers and employees . . . the workweek for basic annual salary shall not be more than forty-hours . . . and any such state officer and employee who is authorized or required to work more than forty hours in any week in his regular position . . . shall receive overtime compensation for the hours worked in excess of forty in each week at one and one-half times the hourly rate of pay received by such employee in his regular position; provided, however, that an employee not subject to the overtime provisions of the federal "Fair Labor Standards Act of 1938" . . . may by written agreement with his proper authority exchange hours of work with other employees . . . without overtime compensation.

Id.; *see also* WIS. ADMIN. CODE § 274.08(1)-(2) (West, WESTLAW through 2000 Reg. No. 538) stating:

> (1) This section applies to employes of the state, its political subdivisions, and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.
> (2) The provisions applicable to employees identified in sub. (1) shall be the provisions of the federal Fair Labor Standards Act . . . the regulations of the U.S. department of labor relating to the application of the Act to employes of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employes of state and local governments.

Id.

state court.[24] Texas, however, refuses to afford its employees the same protections.[25]

In an effort to offer some protection to workers, Texas enacted the Texas Payday Law under the spirit of the FLSA.[26] Unfortunately, the law's provisions only apply to private employers, leaving state employees without statutory wage protections.[27] This, together with the unavailability to sue under the FLSA, affirmatively denies Texas State employees any legal redress for wage violations.

This Comment addresses the ramifications of two important Supreme Court cases on the ability of Texas State employees to sue the state for violations of the FLSA. In particular, the Comment examines Texas's current philosophy on the overtime provisions of the FLSA, and compares it to other states like Wisconsin and New York that have already adopted the FLSA as state law, thereby expressly consenting to private party actions for state violations of the FLSA. Part II discusses the history of federalism and interpretive case law regarding the Eleventh Amendment. Part III explains the purpose of the FLSA and offers a brief history of its legislation. Part IV analyzes the labor statutes of New York and Wisconsin and these statutes' relation to Texas's position on the FLSA and sovereign immunity. Finally, Part V argues that by enacting provisions of the FLSA into the Texas Payday Laws and including the state within its definition of an employer, state employees will realize adequate wage protection. In closing, Part VI concludes that a state legislative amendment providing all state employees access to the Texas court system, thereby ensuring protection of employee rights under the FLSA and the Fourteenth Amendment Due Process Clause, protects the best interest of both the State of Texas and its employees.

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24. *See* N.Y. CIV. SERV. LAW § 134(1) (McKinney 1999) (adopting the Fair Labor Standards Act and authorizing New York state employees to sue the State); WIS. ADMIN. CODE § 274.08(1)-(2) (West, WESTLAW through 2000 Reg. No. 538) (providing legislative authority for Wisconsin employees to sue under state law and the Fair Labor Standards Act).

25. *See* TEX. LAB. CODE ANN. § 61.003 (Vernon 1996) (excluding governmental entities as employers under the statute).

26. *Compare* TEX. LAB. CODE ANN. §§ 61-64 (Vernon 1996) (enacting wage claim provisions similar to those found in the FLSA), *with* 29 U.S.C. §§ 201-219, (1994 & Supp. IV 1998) (embodying the entire current version of the FLSA).

27. *Cf.* TEX. LAB. CODE ANN. § 61.003 (Vernon 1996) (noting that statutory wage protections do not apply to government entities or subdivisions thereof).

II. FEDERALISM

The constitutional system of the United States operates through two tiers of power, the federal power and the power of the individual states.[28] Generally, three different forms of constitutional issues arise concerning the structure of the federal system.[29] The first type of question concerns situations in which the federal government has power to act.[30] The second type of question deals with determining the circumstances under which a state government may act.[31] Finally, presuming that a state or federal government acts in accordance with its constitutional authority, the third issue concerns whether a governmental entity may impose certain obligations upon another governmental entity.[32]

The federal system, as designed by the United States Constitution, protects state sovereignty status in two fundamental ways.[33] First, the federal system provides the states with a sizeable portion of the nation's own

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28. *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 749 (2d ed. 1998) (recognizing that our Constitution structures a governmental system with two predominate tiers of power); *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, *in* CONSTITUTIONAL LAW 397, 397-98 (Mark V. Tushnet ed., 1992) (noting that the Framers cultivated a central government which preserved the states as independent sources of authority, thus keeping the doctrine of federalism alive). *See generally* THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (advancing that within the American republic, the people have relinquished power to two separate governments); JOSEPH LESSER, *The Course of Federalism in America: An Historical Overview*, *in* FEDERALISM: THE SHIFTING BALANCE 1-2 (Janice C. Griffith ed. 1989) (stating that federalism should be viewed today as a system consisting of shared governmental functions between states and the federal government all falling under national control that has come to be known as "intergovernmental relations"); Dennis M. Cariello, Note, *Federalism for the New Millennium Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1493-94 (1999) (commenting that the United States consists of two separate governmental entities: the national government and the state government, both of which exist independently to serve the people, coexisting to act as a check on the other).

29. *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 749 (2d ed. 1998) (explaining the issues that naturally arise as a result of the federal structure laid out in the Constitution).

30. *See id.*

31. *See id.*

32. *See id.*

33. *See* Alden v. Maine, 527 U.S. 706, 714 (1999) (declaring that our Constitution designed a federal system which sought to preserve state sovereignty in two ways: first, the Constitution allows the states to retain a considerable portion of the country's main sovereignty, and second, the Constitution grants states concurrent authority with our national government over the people). *See generally* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 61 (1987) (maintaining that as a result of two separate spheres of power we are left with attempting to ascertain where the constitutional framers intended to draw the

sovereignty.[34] As James Madison stated in *The Federalist*, the states "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."[35] Second, the federal constitutional structure protects the original founders' rejection of "the concept of a central government that would act upon and through the States" in support of "a system in which the [s]tate and [f]ederal [g]overnments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"[36] Accordingly, the Eleventh Amendment grants states the authority to exercise power over its own people.[37]

A. *The Eleventh Amendment*

The Eleventh Amendment provides that, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[38] The text does not expressly apply the Amendment to suits by private citizens against their own state.[39] In *Hans v. Louisiana*,[40] however, the

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line between the power reserved to the states and the power reserved to the federal government).

34. *See Alden*, 527 U.S. at 713-15 (recognizing that the structure of the federal system allows states to retain a considerable portion of our nation's sovereignty while maintaining the necessary attributes stemming from that status).

35. *See* THE FEDERALIST No. 39 (James Madison) (proclaiming that while states maintain independent status within the structure of federalism, they are still subject to federal authority as federal authority is equally subject to the states); *see also Alden*, 527 U.S. at 714 (supporting Alexander Hamilton's interpretation of the state's role within a two-tiered system of government).

36. *See Alden*, 527 U.S. at 714 (citing *Printz v. United States*, 521 U.S. 898, 919-20 (1997), quoting THE FEDERALIST No. 15 and interpreting Alexander Hamilton's advocacy of the citizens to be controlled simultaneously by both the national government and the state government).

37. *See* U.S. CONST. amend. XI (declaring that the judicial authority vested in the United States may not be interpreted to include any action against any state in the United States by citizens from another state, nor by any citizen of a foreign state).

38. *Id.* (stating that the constitutional judicial power should not be interpreted to embrace any lawsuit, either in law or in equity, prosecuted against any state in the union by a citizen from another state, or by citizens from any foreign state).

39. *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1686 (1997) (mentioning that the text of the Eleventh Amendment does not state that the amendment applies to the states' own citizens as well); *see also* Christina Bohannan & Thomas F. Cotter, *When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity From Federal Infringement Claims Constitutional in Light of* Seminole Tribe?, 67 FORDHAM L. REV. 1435, 1450 (1999) (noting that in *Hans v. Louisiana*, the Supreme Court reinterpreted the Eleventh Amendment to extend protection to private actions com-

United States Supreme Court held that the Eleventh Amendment protected states from being sued in federal court even by their own citizens.[41] In *Hans*, a Louisiana citizen brought suit in federal court against the state to reclaim the amount of coupons annexed to state bonds and issued under a state legislative act.[42] The court dismissed the suit, and the plaintiff filed a writ of error to the Supreme Court.[43] The Court analyzed whether a citizen may sue a state in federal court when the issue arises under the Constitution or other federal law.[44]

In reaching its monumental decision, the Court reasoned that the Eleventh Amendment was adopted to overrule *Chisholm v. Georgia*.[45] In *Chisholm*, the Supreme Court held that the innate powers of the federal constitution diminish the sovereignty of the states.[46] More specifically, prior to the adoption of the Eleventh Amendment, the adoption of the United States Constitution subjected the states to federal lawsuits regarding state actions and citizens from another state.[47] In *Hans*, the United States Supreme Court reasoned that the Eleventh Amendment sought to restore and constitutionalize the founders' intent that states would enjoy immunity from lawsuits brought against them by private individuals.[48]

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menced against a state by its own citizens, in spite of "the absence of textual support in the Amendment").

40. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890) (discussing the inherent incongruity in allowing citizens of a state to sue that state while simultaneously precluding citizens of other states from exercising the same privilege).

41. *See id.* (explaining that the Eleventh Amendment which explicitly grants states sovereign immunity from private actions instigated by citizens of other states or foreign countries, impliedly grants states the same privileges in regard to its own citizens); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1685 (1997) (echoing the Supreme Court's interpretation in *Hans* that the Eleventh Amendment prevents federal courts from considering suits brought by private citizens against the states).

42. *Hans*, 134 U.S. at 21 (challenging the state of Louisiana in federal court by claiming the Eleventh Amendment only proscribes suits against the state bought by citizens of another state).

43. *Id.* at 4.

44. *Id.*

45. *Id.* at 5.

46. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 423 (1793), *overruled by* U.S. CONST. amend. XI (recognizing that states are comprised of individuals, "and the people individually are, under certain limitations, subject to the legislative, executive, and judicial authorities thereby established").

47. *See Hans*, 134 U.S. at 11 (emphasizing that the Eleventh Amendment actually reversed the Supreme Court's decision in *Chisholm v. Georgia*).

48. *See id.* at 10 (finding that not only did the Eleventh Amendment apply to citizens of other states suing a state, but it additionally applied to citizens of the state suing the state); *see also* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1685 (1997) (recalling that the Supreme Court in *Hans* held that the Elev-

1. Brief Summary of Eleventh Amendment Jurisprudence

Eleventh Amendment jurisprudence has traveled through a tortured path of circuitous Supreme Court decisions and abrogations of *stare decisis*.[49] The Eleventh Amendment derives from the states' collective outrage to *Chisholm v. Georgia*,[50] a Supreme Court decision endorsing a suit brought against the State of Georgia by a citizen of another state.[51] The states immediately responded with extreme hostility towards *Chisholm* by proposing a constitutional amendment.[52] Only two months after the Amendment's introduction, Congress sent the proposed law to the states for approval.[53] Not surprisingly, each House spent only one day dissect-

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enth Amendment applied in cases where citizens of the state sought to sue the state for private damages).

49. *See* Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (summarizing the effect of this most recent Eleventh Amendment decision). In a poignant final paragraph, Justice Souter stated:

> The Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States, but if the present majority had a defensible position one could at least accept its decision with an expectation of stability ahead. As it is, any such expectation would be naïve. The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.

Id.

50. 2 U.S. (2 Dall.) 419 (1793).

51. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 425, 479 (1793), *overruled by* U.S. CONST. amend. XI) (holding that there is "no degradation of sovereignty, in the States, to submit to the Supreme Judiciary of the United States").

52. *See Alden*, 527 U.S. at 720-21 (describing the anger of the Massachusetts and Georgia legislatures that "denounced the [*Chisolm*] decision as 'repugnant to the first principles of a federal government'"). Both legislatures called upon the State's [legislators] to take all necessary steps 'to remove any clause or article of the Constitution, which can be construed to imply or justify a decision, that, a State is compellable to answer in any suit by an individual . . . in any Court of the United States.'" Apparently "Georgia's response was more intemperate [than Massachusetts]: Its House of Representatives passed a bill providing that anyone attempting to enforce the *Chisholm* decision would be 'guilty of felony and shall suffer death, without benefit of clergy, by being hanged.'" *Id.* By tracing back to the responses made by the states after the *Chisholm* decision, the Supreme Court perhaps reinforced its belief that the states have always enjoyed the doctrine of state sovereign immunity. *See id.* at 728.

53. *See id.* at 706, 721 (explaining how quickly the Eleventh Amendment proposal passed through both the House and Senate due to the uproar created by the Supreme Court's recent decision in *Chisholm*).

ing and discussing the meaning of the Amendment, resulting in a unanimous vote in the House and Senate.[54]

Barely one hundred years later, the Supreme Court reconceived the Eleventh Amendment in *Hans v. Louisiana*.[55] Relying on the adoption of the Eleventh Amendment and Justice Iredell's dissenting opinion in *Chisholm*, the Court abandoned its earlier position contravening state sovereign immunity.[56] By holding that a private citizen may not sue a state without the state's consent in federal court for issues arising under federal laws or the Constitution, the Court endorsed the states' intent embodied within the Eleventh Amendment.[57]

Armed with the Supreme Court's interpretation of states' sovereign immunity stemming from the Eleventh Amendment, the states, including Texas, have consistently used the Amendment to express an unwillingness to defend against suits filed without consent in either federal or state court.[58] Correspondingly, the majority of federal courts appear inclined to help states escape liability.[59]

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54. *See id.*

55. 134 U.S. 1, 10-11 (1890) (overruling *Chisholm v. Georgia* by proclaiming that a state may not be sued by its own citizens based on the premise that the case arises under the Constitution or federal law).

56. Hans v. Louisiana, 134 U.S. 1, 13-14 (1890) (agreeing with Justice Iredell that in light of history and experience a state may not by sued by its citizens).

57. *Id.* at 14 (stating that the correct operation of the Eleventh Amendment is that in order for a federal court to hear a suit against a state, the state must consent to be a party).

58. *See* Alden v. Maine, 527 U.S. 706, 735 (1999) (seeing "no reason to believe the founders intended the Constitution to preserve a more restricted immunity" based on the history of the Eleventh Amendment); L. Katherine Cunningham & Tara D. Pearce, Recent Development, *Contraction With the State: The Daring Five-The Achilles' Heel of Sovereign Immunity?*, 31 ST. MARY'S L.J. 255, 258-60 (1999) (reciting the historical background of Texas's sovereign immunity); Robert B. Fitzpatrick, *The Effect of Seminole Tribe and the 11th Amendment in Employment Cases*, SD06 A.L.I.-A.B.A. 113, 116 (1998) (pointing out that the majority of federal courts have held that states may exercise their sovereign immunity in instances where state employees have brought suit against them in federal court). The author explained that one circuit has allowed an action under the FLSA against a local governmental entity; however, it has conflicting opinions on the FLSA issue. *See id.* at 116-17. Additionally, the author noted that most federal district courts remain bound by the law contained in their circuits, however, two courts of appeals, namely, the District of Columbia and the Fifth Circuit have yet to entertain the issue. *See id.* at 117; *see also* Fed. Sign v. Tex. So. Univ., 951 S.W.2d 401, 407 (Tex. 1997).

59. *See* Robert B. Fitzpatrick, *The Effect of Seminole Tribe and the 11th Amendment in Employment Cases*, SD06 A.L.I.-A.B.A. 113 (1998) (outlining the post-*Seminole Tribe* opinions by the federal courts to illustrate that the majority of federal courts have decided that states enjoy Eleventh Amendment immunity in actions involving the FLSA); *see also* Abril v. Virginia, 145 F.3d 182, 184 (4th Cir. 1998) (holding that Congress was powerless to abrogate Eleventh Amendment sovereignty under the FLSA pursuant to its Section 5 powers contained in the Fourteenth Amendment). However, the dissent argued that the protections granted by the FLSA are included in the array of privileges shielded by the

2. Recent Eleventh Amendment Case Law

Just as *Chisholm* and *Hans* represent diametrically opposed rulings, three relatively recent Supreme Court decisions also follow the same seemingly irreconcilable range of unprecedented holdings.[60] In *National League of Cities v. Usery*,[61] the Court overruled an earlier case upholding the constitutionality of the 1961 and 1966 modifications to the FLSA.[62] Barely nine years later, the Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority* overruled *National League of Cities*.[63] Finally, *Pennsylvania v. Union Gas Co.* appeared to overrule *Hans v. Louisiana*; however, for the Court claimed that its ruling in favor of Union Gas precluded the necessity of overruling *Hans*.[64] Pursuant to these holdings, Eleventh Amendment jurisprudence and state sovereign immunity will continue to follow an unpredictable path.

a. *National League of Cities v. Usery*

National League of Cities v. Usery involved a constitutional challenge to the validity of the 1974 amendments to the FLSA, which extended minimum wage and maximum hour provisions to nearly all state employees and state political subdivisions.[65] Specifically, the appellants included

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Fourteenth Amendment, and as such, Congress has Fourteenth Amendment enforcement power to subject a state to FLSA lawsuits without their consent. *See id.* at 191 (Butzner, J., dissenting).

60. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 21-23 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996) (applying the Commerce Clause to a CERCLA claim and concluding that states are liable in federal court as per the power vested in Congress); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (finding that the transit authority was not immune from overtime or minimum wage requirements of the FLSA); Nat'l League of Cities v. Usery, 426 U.S. 833, 838-39 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (addressing the 1974 Amendments to the FLSA and finding that they interfere with state sovereignty).

61. 426 U.S. 833 (1976).

62. Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)). The 1961 amendment of the FLSA added "enterprises" run by states that engaged in interstate commerce to the definition of employer. *Wirtz*, 392 U.S. at 186. In 1966, Congress enlarged the reach of the FLSA to include those engaged in hospital operations, special schools, and institutes of higher education. *See id.* at 186-87.

63. *Garcia*, 469 U.S. 557 (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

64. *See Union Gas Co.*, 491 U.S. at 23 (arguing that the ruling for Union Gas precluded a finding that *Hans* should be overruled).

65. *See Nat'l League of Cities*, 426 U.S. at 852 (holding that the Commerce Clause does not empower Congress with the authority to enforce the minimum wage and overtime provisions of the FLSA against the states "in areas of traditional governmental functions").

individual cities, the National Governors' Conference, and the National League of Cities.[66] The appellants argued that the effect of the 1974 Amendment to the FLSA "'infringed a constitutional prohibition' running in favor of the States *as States*."[67] The Court acknowledged that it had previously sustained two earlier amendments to the FLSA broadening its scope in *Maryland v. Wirtz*,[68] ending with the last amendment passed in 1966.[69] The Court held, however, that the Tenth Amendment bars Congress from exercising power under the Commerce Clause in any way "'that impairs the States' integrity'" in areas of traditional governmental functions.[70]

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66. *Id.* at 836.

67. *Id.* at 837. In addition, appellants complained that the 1974 FLSA amendments imposed substantial costs upon them by denying the states the power to determine their own wages, work hours, and overtime compensation. *See id.* at 845-46. The Court also recognized that imposing the FLSA provisions on states would displace state policies regulating the manner in which governmental services are delivered to the citizens. *See id.* at 847. Examples of state policy displacement include denying the ability of the state to employ unqualified individuals and pay them less than minimum wage during the training process. *See Nat'l League of Cities*, 426 U.S. at 848.

68. 392 U.S. 183, 195 (1968) (finding that state institutions are clearly involved in interstate commerce sufficiently to fall under the powers of the Commerce Clause).

69. *See Nat'l League of Cities*, 426 U.S. at 851 (holding that the 1974 amendments were not within the authority of Congress granted by the Commerce Clause); Maryland v. Wirtz, 392 U.S. 183, 188-93, 195 (1968) *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (sustaining the validity of the combined effect of both the 1961 and 1966 amendments to the FLSA under the Commerce Clause). The 1961 amendment to the FLSA extended its coverage to individuals who were employed in "'enterprise' engaged in commerce or production for commerce." *Wirtz*, 392 U.S. at 186. The 1966 amendments changed the definition of employers by including the states and their political subdivisions with respect to employees of state hospitals, nursing homes, state institutions, and schools. *See id.* The Court held that the FLSA amendments clearly fell under the power vested in Congress by the Commerce Clause. *See id.* at 195-96. However, the Court declined to decide whether the FLSA amendments violated States' sovereign immunity from suit under the Eleventh Amendment. *See id.* at 199-200. Stating that "[q]uestions of state immunity are therefore reserved for appropriate future cases," the Court reasoned that the constitutionality of applying the provisions of the FLSA to the states is not affected by the potential remedies provided by the FLSA that might be unavailable when a state is both the employer and the defendant. *Id.* at 200.

70. *See Nat'l League of Cities*, 426 U.S. at 842-43 (citing *Fry v. United States*, 421 U.S. 542, 547 (1975) for the proposition that the Tenth Amendment relinquishes power to the States that has not been surrendered elsewhere in the Constitution). In addition, the Court set forth four conditions or prerequisites that must be met before a state activity may be considered immune from a federal law enacted under the Commerce Clause. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 n.29 (1981) (discussing the prerequisites that a state must satisfy in order to claim that a congressional enactment under the Commerce Clause is invalid). The four conditions are:

> First, it is said that the federal statute at issue must regulate "the States as States." Second, the statute must "address matters that are indisputably 'attribute[s] of state

Consequently, sovereign immunity again prohibited federal legislative interference with the states' independent ability to regulate areas of traditional governmental functions.[71] Unfortunately, *National League of Cities* failed to define how a "traditional" function differs from a "nontraditional" function, leaving federal and state courts to struggle with the definition of a traditional function for purposes of establishing state immunity under Article I.[72] Nevertheless, the Court finally addressed the issue in *Garcia v. San Antonio Metropolitan Transit Authority*,[73] a case involving a local public transit authority claiming immunity from the wage and overtime provisions of the FLSA.[74]

b. *Garcia v. San Antonio Metropolitan Transit Authority*

Less than a decade after deciding *National League of Cities*, the Court again ignored recent precedent and reversed itself in *Garcia*.[75] The Court stated that state and federal courts' attempts to use the "traditional governmental function" test to define the boundaries of state sovereignty were wholly unworkable and "inconsistent with established principles of federalism."[76] As a result of judicial disparity between state and federal court decisions, the Supreme Court granted certiorari to clarify the issue.[77] Reasoning that neither a historical nor a nonhistorical approach

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sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1985). It was the third requirement that became the issue addressed in *Garcia*. *See id.* at 530 (revisiting the issue raised in *Nat'l League of Cities* as whether the Commerce Clause empowered Congress to enforce the provisions of the FLSA "against the state 'in areas of traditional governmental functions'").

71. *See Nat'l League of Cities*, 426 U.S. at 842 (emphasizing "that there are limits upon the power of Congress to override state sovereignty").

72. *See Garcia*, 469 U.S. at 530-31 (pointing out the shortcomings of the holding in *Nat'l League of Cities* as unworkable and "inconsistent with established principles of federalism"). Although the Court listed a few state governmental activities in *Nat'l League of Cities* it considered "integral" or traditional governmental operations such as police protection, fire prevention, public health, sanitation, and parks and recreation, it cautioned that the list was not exhaustive. *See Nat'l League of Cities*, 426 U.S. at 851 & n.16.

73. 469 U.S. 528 (1985).

74. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56 (1985) (holding that the transit authority did not enjoy immunity from the minimum wage and overtime requirements of the FLSA).

75. *Id.* at 557 (overruling precedent "when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause").

76. *Id.* at 531.

77. *Id.* at 530-31.

for selecting immune governmental functions would suffice, the Court rejected a four-prong test set forth in *National League of Cities*.[78] The Court established that the states retain sovereignty "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[79] Hence, the Court validated Congress's authority to override states' immunity under the legislative power granted by the Commerce Clause.[80] Just four years later, however, in *Pennsylvania v. Union Gas Co.*, [81] the Court revisited the issue of sovereign immunity within the context of the Eleventh Amendment.[82]

c. *Pennsylvania v. Union Gas Co.*

Although *Union Gas* did not involve the FLSA, the case did address a federal statute enacted under the Commerce Clause purporting to permit a suit for money damages against a state in federal court.[83] The Supreme Court's decision further illustrates the Court's consistent divergence from established precedent regarding state sovereign immunity issues.

Surprisingly, the Court returned to its century old decision in *Hans v. Louisiana* for the principle that "sovereign immunity . . . rendered the States immune from suits for monetary damages in federal court even where jurisdiction was premised on the presence of a federal question."[84] Nevertheless, the Court distinguished *Hans* by focusing on the issue of whether legislation passed under the Commerce Clause could override state sovereignty.[85] After deciding that the federal statute at issue did in fact evince an intent to hold states liable for money damages in federal court, the Court moved on to the second dependant issue of whether Congress may use its Commerce Clause power to legislate away state sovereignty.[86] While acknowledging that courts never "squarely resolved"

78. *Id.* at 543-45.

79. *Garcia*, 469 U.S. at 549 (ruling that the transit authority does not enjoy immunity from the FLSA minimum wage and overtime requirements).

80. *Id.* at 557.

81. 491 U.S. 1 (1989).

82. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

83. *Id.* at 5.

84. *Id.* at 7 (returning to *Hans* for the principle that Eleventh Amendment sovereign immunity rendered the states immune from suits in federal court despite the jurisdictional federal question at issue).

85. *Id.* (clarifying that *Hans* held that Congress may abrogate state immunity from suits when the congressional act is pursuant to the power granted by the Enforcement Clause of the Fourteenth Amendment and not the Commerce Clause in Article I).

86. *Id.* at 13 (disagreeing with Pennsylvania that Eleventh Amendment immunity precludes suits for money damages against a state in federal court).

the issue of congressional power under the Commerce Clause, the Court chronicled a long list of its earlier decisions that led it to conclude that Congress may legislatively force suits upon the states for money damages.[87] The Court stated that "the power to regulate commerce includes the power to override States' immunity from suit."[88] The Court qualified its holding, however, by adding that Congress may only override state sovereign immunity if expressed clearly.[89]

Ironically, the Court added that even if it had never before addressed the issue of congressional authority to abrogate state sovereign immunity under the Commerce Clause, "careful regard for precedent still would mandate the conclusion that Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce."[90] Perhaps even more ironic and noteworthy, the Court, probably recognizing the disparity between this opinion and its earlier precedent in *Hans v. Louisiana*, declined to overrule *Hans* by stating, "[g]iven our ruling in favor of Union Gas, we need not reach its argument that *Hans v. Louisiana* [citation omitted] should be overruled."[91]

3. Two Locks Barring the Courthouse Door

Two recent cases resulted in an explosive interpretation of Congress's ability to subject states to private actions brought against them by citizens of the state.[92] The first case, *Seminole Tribe of Florida v. Florida*,[93] resulted in a limited interpretation of Congress's Article I powers, thereby immunizing nonconsenting states from lawsuits filed by private citizens in federal court seeking relief under a federal claim.[94] Like *Union Gas,*

87. *See Union Gas*, 491 U.S. at 14.

88. *Id.*

89. *Id.* at 14-15.

90. *Id.* at 15-16 (utilizing the rationale set forth in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court stated that by virtue of immunity from suit granted under Section 5 of the Fourteenth Amendment, Congress is exercising authority "under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority").

91. *Id.* at 23 (citation omitted).

92. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (concluding that in spite of Congress's unequivocal intent to strip states of their sovereign immunity, the Indian Commerce Clause does not gives Congress such power unless the state consents to a lawsuit); *see also* Alden v. Maine, 527 U.S. 706, 711 (1999) (holding that the powers specifically granted to Congress under Article I of the United States Constitution do not embody the authority to force the states into their own court to answer lawsuits for damages without their consent).

93. 517 U.S. 44 (1996).

94. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (concluding that the Indian Gaming Act passed under Congress's Article I powers authorizing an Indian tribe to sue a state in federal court, does not grant Congress the power to waive a state's sover-

Seminole Tribe did not involve the FLSA, but it set the stage for the Court to hear *Alden v. Maine*[95] three years later. In *Alden*, the Court found that Congress lacked the authority to abrogate a state's sovereign immunity from lawsuits brought by private citizens seeking damages under the FLSA.[96]

a. *Seminole Tribe of Florida v. Florida*

In 1996, the U.S. Supreme Court explained in *Seminole Tribe of Florida v. Florida* that the Eleventh Amendment forbids Congress from forcing a state to be sued in federal court without its consent.[97] The Indian Gaming Regulatory Act (IGRA) mandates to all states a good faith duty to negotiate with Indian tribes concerning the formation of a compact.[98] In addition, the IGRA allows a tribe to file a lawsuit in federal court against

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eign immunity and subject it to suit in federal court); *see also* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1352-53 (1997) (summarizing the *Seminole Tribe* decision that held Congress was unable to use its powers under the Indian Commerce Clause stemming from the Commerce Clause under Article I to mandate that a state be subject to suit in federal court); Alden v. Maine, 119 S. Ct. 2240 (1999), *reviewed by* Moon, Moss, McGill, Hayes & Shapiro, P.A., *State May Not Be Sued for Overtime Pay*, 1999 No. 4 ME. EMPL. L. LETTER 6, at 1 (1999) (commenting that while the *Alden* decision was pending, the United States Supreme Court decided *Seminole Tribe*); James Y. Ho, Note, *State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created by the Eleventh Amendment upon the Federal Courts*, 68 FORDHAM L. REV. 189, 191 (1999) (noting that in *Seminole Tribe*, the United States Supreme Court held that a state's sovereign immunity could not be abrogated by any act passed by Congress acting under its Article I powers, although Congress does have the authority to abrogate a state's sovereign immunity when acting in accordance with its Fourteenth Amendment powers).

95. 527 U.S. 706 (1999).

96. Alden v. Maine, 527 U.S. 706, 711 (1999) (ruling that even explicit statements by Congress to abrogate state sovereign immunity are insufficient when Congress acts pursuant to its Article I powers).

97. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that in spite of Congress's transparent attempt to strip states of their sovereign immunity, the Indian Commerce Clause cannot grant Congress such power because a state may exercise its sovereign immunity under the Eleventh Amendment); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1353-54 (1997); Alden v. Maine, 119 S. Ct. 2240 (1999), *reviewed by* Moon, Moss, McGill, Hayes & Shapiro, P.A., *State May Not Be Sued for Overtime Pay*, 4 No. 1 ME. EMP. L. LETTER 6 (1998).

98. *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7) (West Supp. 2000). Mandating that under Class III gaming activities, authorization, revocation and Tribal-State compacts;

> (7)(A) The United States district courts shall have jurisdiction over–(i) 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 under paragraph (3) or to conduct such negotiations in good faith, (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered

any state for the purpose of forcing the state to perform its duty to bargain with the tribe.[99] The Court held that by abrogating states' sovereign immunity, Congress violated the Eleventh Amendment when it enacted the IRGA under the Indian Commerce Clause.[100] The Supreme Court determined that the Indian Commerce Clause cannot confer such power on Congress.[101] Consequently, Congress may not grant jurisdiction over any state that does not expressly consent to suit.[102]

Seminole Tribe's importance lies in its explicit overruling of *Union Gas* with respect to the issue of whether the Eleventh Amendment prevents Congress from authorizing suits by private parties against non-consenting states, even when the Constitution vests Congress with complete law making authority over a particular area.[103] The Court declared that the Eleventh Amendment restricts Article III judicial power, and that Con-

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into under paragraph (3) that is in effect, and (iii) any cause of action initiated by the Secretary to enforce the procedures proscribed under subparagraph (B)(vii).

Id. at § 2710(d)(7)(A); *see also* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1353 (1997) (emphasizing that the Indian Gaming Regulatory Act permitted Indian tribes the right to engage in gambling provided that the tribe and the state where the gambling would occur agreed to do so upon a valid compact). This law mandates that a state must negotiate with the Indian tribe in good faith, as well as allowing the tribe to file a lawsuit in federal court should a state fail to honor such obligation. *See id.*

99. *See* Indian Gaming Regulatory Act, 25 U.S.C.A. § 2710(d)(7) (West Supp. 2000); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2237 (1996) (explaining that Congress passed the IRGA pursuant to its power to regulate commerce with the Indian tribes under Article I and that the Act allows Indian tribes to engage in specific types of gambling). The Indian tribe must have an existing compact between itself and the state in which such tribal lands are geographically located. *See id.*

100. *See Seminole Tribe*, 517 U.S. at 47 (agreeing that Congress clearly intended to abrogate the sovereign immunity of states under the Indian Gaming Regulatory Act).

101. *See id.* (stating that the Indian Commerce Clause cannot grant jurisdiction over a state if that state does not consent to be sued).

102. *See id.* at 47 (holding that Congress, acting under the Indian Commerce Clause may not abrogate a states' sovereign immunity unless a state has waived their consent to be sued); *see also* Erwin Chermerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1227 (1997) (expressing that the United States Supreme Court, in a 5-4 decision, held unconstitutional a provision of the IGRA permitting states to be sued in federal court in order to enforce Congress's mandate that states negotiate with Indian tribes in good faith to allow for the existence of gambling on Indian reservations); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2237 (1996) (pointing out that in *Seminole Tribe*, a divided United States Supreme Court held certain provision of the IGRA unconstitutional); James Y. Ho, Note, *State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created By the Eleventh Amendment Upon the Federal Courts*, 68 FORDHAM L. REV. 189, 190 (1999) (asserting that a state may use its sovereign immunity to dismiss a suit).

103. *Seminole Tribe*, 517 U.S. at 72-73.

gress can no longer use Article I to circumvent constitutional limitations placed upon federal jurisdiction.[104] Once again, the Court found itself justifying its reversal of earlier precedent by stating, "[g]enerally, the principle of *stare decisis*, and the interests that it serves . . . counsel strongly against reconsideration of our precedent."[105] The Court added, however, that it has "always . . . treated *stare decisis* as a 'principle of policy' . . . and not as an 'inexorable command.'"[106]

The ramifications of *Seminole Tribe* had a rippling effect in every state and federal court, leaving judges doubting all congressional legislation mandating suit in federal court against a state without the state's consent.[107] For example, in *Velasquez v. Frapwell*,[108] the plaintiff, an employee of Indiana University, sued the state in federal court alleging that the state violated the Uniformed Services Employment and Reemploy-

104. *See id.* at 72, 73 n.16 (disagreeing with the dissenting opinion's objection that this decision will foreclose federal jurisdiction over suits enforcing bankruptcy, copyright, and antitrust laws against the states). The Court noted the dissent's fear that the majority's holding would render state compliance with federal law impossible. *See id.* The majority responded by expressing that its decision did not affect the United States's authority to sue a state, the right of individuals to bring suits against state officers for violations of federal laws, or deny the Court the right to review an issue of federal law stemming from a state court decision in which a state has consented to suit. *See id.* at 71 n.14, 72 n.16.

105. *Id.* at 63.

106. *Id.* Furthermore, the Court felt so strongly in justifying yet another reversal of earlier precedent, it explained that when governing decisions are either badly reasoned or unworkable, it "has never felt constrained to follow precedent." *Seminole Tribe*, 517 U.S. at 63 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)). In overruling *Union Gas*, the Court reasoned that *Union Gas* was both badly reasoned because of disparity among numerous separate opinions written by the Justices evidencing a "deeply fractured" decision and sharp departure from established federalism jurisprudence, and unworkable because of the confusion it created among the lower courts. *See id.* at 64. The Court reached back to the 1890 *Hans* decision to justify how badly reasoned *Union Gas* really was. *See id.* (referring to Hans v. Louisiana, 1324 U.S. 1 (1890)).

107. *See* Velasquez v. Frapwell, 160 F.3d 389, 393 (7th Cir. 1998) (citing *Seminole Tribe* and asserting that Congress was without constitutional authority to permit employees to sue a state in federal court for transgressions of the Uniformed Services Employment and Reemployment Rights Act because states are protected from such actions by the Eleventh Amendment); *see also* Driesse v. Fla. Bd. of Regents, 26 F. Supp. 2d 1328, 1334 (M.D. Fla. 1998) (negating Congress's ability to force states into federal court for violations of the Family and Medical Leave Act because states are immune from suit under the Eleventh Amendment); Alden v. Maine, 119 S. Ct. 2240 (1999), *reviewed by* Moon, Moss, McGill, Hayes & Shapiro, P.A., *State May Not Be Sued for Overtime Pay*, 4 ME. EMP. L. LETTER 6 (1998) (asking what is next after *Seminole Tribe* and whether the Eleventh Amendment bars state employees from commencing an action against Maine for FLSA violations and, if so, whether it would also preclude actions potentially based on other federal employment laws).

108. 994 F. Supp. 993 (S.D. Ind. 1998).

ment Rights Act (USERRA).[109] The lower court dismissed the action on Eleventh Amendment grounds.[110] Velasquez appealed to the Seventh Circuit arguing that Congress had the power under Section 5 of the Fourteenth Amendment to enforce the USERRA.[111] The court held that Congress did not intend USERRA to guard an individual's equal protection rights.[112] *Velasquez* is just one case that addressed the uncertainty and aftermath of *Seminole Tribe.*[113] However, the question of whether Congress could abrogate the states' Eleventh Amendment sovereign immunity under a federal statute by forcing states to be sued in state court without their consent was not fully answered until *Alden v. Maine.*[114]

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109. *See* Velasquez v. Frapwell, 994 F. Supp. 993, 994 (S.D. Ind. 1998) (granting Indiana University's motion to dismiss the USERRA claim for lack of subject matter jurisdiction), *aff'd by* 160 F.3d 389 (7th Cir. 1998), *vacated in part by* 165 F.3d 593 (7th Cir. 1999) (realizing that the USERRA was amended the day before its prior decision and that the amendment rendered the federal court without jurisdiction).

110. *See* Velasquez v. Frapwell, 160 F.3d 389, 390 (7th Cir. 1998) (referencing the trial court's opinion dismissing the employee's claim against the University).

111. *Id.* at 391 (stating that Velasquez bases the USERRA's authority upon Section 5 of the Fourteenth Amendment while the United States bases the authority upon the grant of war powers in Article I).

112. *Id.*

113. *See* Joanne C. Brant, Seminole Tribe, Flores *and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 175, 210 (1998) (explaining that after *Seminole Tribe* was decided, numerous federal courts became immersed with new Eleventh Amendment challenges concerning the FLSA); *see also* Balgowan v. New Jersey, 115 F.3d 214, 216 (3d Cir. 1997) (reminding that in 1996, the United States Supreme Court decided *Seminole Tribe*, which resulted in a change in the law dealing with Eleventh Amendment immunity); Biddlecome v. Univ. of Tex., M.D. Anderson Cancer Ctr., No. 96-1872, 1997 U.S. Dist. LEXIS 3170, at *14 (S.D. Tex. Mar. 13, 1997) (concluding that the court lacks jurisdiction to entertain plaintiff's cause of action for violations of overtime pay under the FLSA because it was passed pursuant to the Commerce Clause, which after *Seminole Tribe*, was insufficient to strip a state of its sovereign immunity found in the Eleventh Amendment); Arnold v. Arkansas, 957 F. Supp. 185, 187 (E.D. Ark. 1996) (applying the holding in *Seminole Tribe* to reach the conclusion that Congress is without the power under the Commerce Clause to usurp a state's sovereign immunity, and that consequently, the case must be dismissed because the court lacked subject matter jurisdiction); Blow v. Kansas, 929 F. Supp. 1400, 1401-02 (D. Kan. 1996) (holding that *Seminole Tribe* dictates that only statutes passed pursuant to the Fourteenth Amendment may nullify state sovereign immunity); Chauvin v. Louisiana, 937 F. Supp. 567, 569 (E.D. La. 1996) (concluding that because the FLSA was passed under the Commerce Clause and because the Supreme Court held in *Seminole Tribe* that Congress lacked the power contained in the Commerce Clause to usurp a state's guaranteed Eleventh Amendment sovereign immunity, the court was no longer able to assert federal jurisdiction and entertain lawsuits brought by state employees concerning the state's purported violation of overtime pay found in the FLSA).

114. 527 U.S. 706 (1999).

b. *Alden v. Maine*

In 1992, several probation officers employed by the State of Maine filed suit against the state in U.S. District Court.[115] The probation officers argued that Maine violated the overtime provision contained in the FLSA and sought liquidated damages, as well as compensation for back pay.[116] While the lawsuit was pending, the Supreme Court decided *Seminole Tribe*, stating that Congress lacks Article I power to strip the states of their sovereign immunity from actions brought in federal courts.[117] Subsequently, the district court, relying on *Seminole Tribe*, dismissed the lawsuit.[118] The officers appealed, but the First Circuit Court of Appeals affirmed the district court's ruling.[119]

The petitioners decided to file suit in state court.[120] Again, faced with the ramifications of *Seminole Tribe*, the trial court dismissed the action, and the Maine Supreme Judicial Court affirmed, holding that Maine could exercise its sovereign immunity.[121] The United States Supreme Court granted certiorari in *Alden* because of its apparent conflict with the Supreme Court of Arkansas's decision in *Jacoby v. Arkansas Department of Education,*[122] calling into question the constitutionality of the FLSA provision authorizing private state court actions against states without their consent.[123]

In June 1999, the Supreme Court held in *Alden v. Maine* "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."[124] Moreover, the Court held that Maine had not consented to suit for liquidated damages or overtime

115. Alden v. Maine, 527 U.S. 706, 711-12 (1999) (describing the manner in which Maine's state probation officers filed suit in federal court against Maine for allegedly violating the overtime provisions contained in the FLSA); *see also* Erwin Chemerinsky, *Bulletproof States? Sovereign Immunity Cases Could Bar Recourse for Plaintiffs*, A.B.A. J., Apr. 1999, at 32 (reporting that "a state probation officer . . . sued the state of Maine in federal court for allegedly failing to pay overtime in violation of the federal Fair Labor Standards Act").

116. *Alden*, 527 U.S. at 711-12.

117. *Id.* at 712 (recognizing the difficulty in applying the FLSA to the states).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Alden*, 527 U.S. at 712.

122. 962 S.W.2d 773 (Ark. 1998).

123. *Alden*, 527 U.S. at 712 (citing 29 U.S.C. §§ 216(b), 203(x)); *see* Jacoby v. Ark. Dep't of Educ., 962 S.W.2d 773, 778 (Ark. 1998), *overruled by* Alden v. Maine, 527 U.S. 706 (1999) (reviewing Eleventh Amendment case law and determining "that the weight of authority favors the employees in this matter").

124. *Alden*, 527 U.S. at 712.

pay.[125] The Court recognized that the *Alden* holding by the Supreme Judicial Court of Maine conflicted with the Supreme Court of Arkansas in *Jacoby*, that the FLSA continues to flourish and consequently, Arkansas may be sued in its own state court.[126] Interestingly, in an even bolder move that resulted in a deviation from *Seminole Tribe*, the Court held that while a state enjoys sovereign immunity, sovereign immunity is neither derived from nor limited by the language of the Eleventh Amendment.[127] Rather, the Court reasoned that state sovereignty actually derives from the Tenth Amendment.[128]

Justice Souter's dissent, however, vigorously disagreed with the majority's conclusion.[129] Justice Souter argued that the United States government, acting through Congress, promulgated the FLSA by virtue of its authority to legislate under Article I.[130] Thus, Justice Souter maintained that the Court had previously decided the question of whether Congress has the power to extend FLSA protection to state employees in *Garcia v. San Antonio Metropolitan Transit Authority*.[131]

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125. *Id.*

126. *Id.*; *see also Jacoby*, 962 S.W.2d at 778 (concluding that the U.S. Supreme Court's interpretation in *Seminole Tribe* regarding state sovereignty in state courts did not apply to actions brought under the FLSA, and the Act remains enforceable against state employers in state courts). The *Jacoby* court also argued that the FLSA provision subjecting states to suit for FLSA violations was still valid because of the Supremacy Clause, and as such, state sovereign immunity could not be exercised. *Id.* at 777-78. Additionally, the *Jacoby* court was quick to recognize that a potential problem of uniformity between state courts concerning the concept of "supreme law of the land" and state sovereign immunity exists. *Id.* at 777.

127. *Alden*, 527 U.S. at 713 (noting that case law rejected the idea of conforming state sovereign immunity to the text of the Eleventh Amendment and reflected an unequivocal understanding that the doctrine of sovereign immunity stems historically from the Bill of Rights and not from the Eleventh Amendment).

128. *See* U.S. CONST. amend. X (stating 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"); *Alden*, 527 U.S. at 713-14 (explaining that the Tenth Amendment removes doubt as to the extent of federal power versus the sovereign immunity of the states by reserving the power in the states).

129. *Alden*, 527 U.S. at 760-61 (Souter, J., dissenting) (finding error with the majority's reasoning that the Tenth Amendment confirms state sovereignty because its passage would have rendered the passage of the Eleventh Amendment unnecessary).

130. *Id.* at 761.

131. *Id.* at 761, 800 (arguing that because the issue of enforceability of the FLSA under the Tenth Amendment was previously decided under *Garcia*, serious doubt is cast upon the majority opinion's reliance on the federalism argument); *see also* Garcia v. San Antonio Metro.Transit Auth., 469 U.S. 528, 555-56 (1985) (overruling *Nat'l League of Cities v. Usery* and finding that Congress, under the Commerce Clause, may protect San Antonio transit authority employees under the FLSA's wage and hour provisions).

The *Alden* decision, coupled with *Seminole Tribe*, threatens the power of Congress to enforce certain federal statutes, absent state consent to waive its sovereign immunity.[132] Consequently, the impact of these two cases leaves Congress powerless to act, and the United States Supreme Court has locked the door on the ability of state employees to sue most states for violations of the FLSA.

B. *The Impact of* Alden v. Maine *and* Seminole Tribe of Florida v. Florida *on State Sovereign Immunity*

Alden and *Seminole Tribe* delineate the Supreme Court's current interpretation of Congress's power to enact legislation under Article I, as well as the Court's belief that Congress may not usurp a state's sovereign immunity.[133] Both cases give states the option to utilize the all-too-powerful weapon of withholding consent to suit.[134] In all likelihood, states that have not adopted the FLSA as state law will hide behind the Eleventh Amendment as a shield to deny state employees seeking justice for state violations of the FLSA access to state courts.

As a result of the Supreme Court's holdings in both *Seminole Tribe* and *Alden*, state employees have no judicial forum to litigate claims against a state that has not consented to suit for violations of the FLSA.[135] A careful analysis and comparison of the provisions of particular states, specifically Wisconsin and New York, reveals that the adoption of the FLSA as state law provides an equitable solution to the problem. By examining the statutes of New York and Wisconsin, this Comment proposes that Texas enact similar legislation, thereby guaranteeing that its state employees will have a forum to sue Texas for violations of the FLSA. By enacting such legislation, state employees will enjoy the protections Con-

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132. *See Alden* 527 U.S. at 754 (holding "that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) (stating that Congress cannot authorize suit by private parties against a state without the state's consent).

133. *See Alden*, 527 U.S. at 752, 754 (stating unequivocally that Congress may not legislatively subject a state to suit in either federal court or in its own state court); *Seminole Tribe*, 517 U.S. at 54 (affirming that the Eleventh Amendment precludes Congress from authorizing suits by Indian tribes for prospective injunctive relief against states in state court to enforce legislation enacted under the Indian Commerce Clause).

134. *See Alden*, 527 U.S. at 758 (finding that the State of Maine has exercised a privilege of sovereign immunity by not consenting to certain classes of suits); *Seminole Tribe*, U.S. 517 at 72 (stating that even when Congress has complete lawmaking authority over the subject area of a suit, the Eleventh Amendment prevents suits against unconsenting states).

135. *See generally Alden*, 527 U.S. at 752, 754; *Seminole Tribe*, 517 U.S. at 54.

gress designed the FLSA to furnish, while providing the consent necessary in light of the Supreme Court's decision in *Alden*.

C. *Sovereign Immunity Renders the States Judgment Proof*

Seminole Tribe and *Alden* clearly establish that the Eleventh Amendment bestows sovereign immunity upon individual states and precludes an individual from suing the state in either state or federal court unless the issue arises under the Enforcement Clause of the Fourteenth Amendment.[136] The Supreme Court has repeatedly interpreted, although seemingly unreliably, that the Eleventh Amendment shields the states from any private lawsuit deriving from federal law.[137] Such an interpretation allows the states to violate federal laws by avoiding lawsuits brought against them for private damages.[138] This result is problematic because Article I, Section 8 of the Constitution provides an enumerated list of powers reserved exclusively for Congress, upon which they have relied to pass legislation.[139] Specifically, Article I mandates that "[t]he Congress shall have Power To . . . provide for the . . . general Welfare of the United

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136. *See Alden*, 527 U.S. at 756 (acknowledging that when Congress enacts legislation pursuant to its Section 5 powers granted by the Fourteenth Amendment it may authorize private suits against states that do not consent).

137. *Compare id.* at 752, 754 (refusing to abrogate state sovereignty in federal or state courts); Hans v. Louisiana, 134 U.S. 1, 10 (1890) (holding that in addition to a citizen from another state and a foreign subject being unable to sue a state, a citizen from that state may not sue that state as a defendant because it is violative of the Eleventh Amendment), *with* Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (finding that the principle of sovereign immunity found in the Eleventh Amendment does not negate congressional authority to permit suits against the states in federal courts); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (perceiving no constitutional impediment to subjecting the states to suit for violations of the provisions of the FLSA).

138. *See Alden*, 527 U.S. at 809 (Souter, J., dissenting) (stating "[t]oday's decision blocking private actions in state court makes the barrier to individual enforcement a total one"); *see also* Quillin v. Oregon, 127 F.3d 1136, 1138 (9th Cir. 1997) (determining that Oregon was protected from liability for violations of the FLSA's overtime provisions because Oregon did not waive its immunity thereby allowing its state employees to sue for damages); Bergemann v. Rhode Island, 958 F. Supp. 61, 69 (D.R.I. 1997) (holding that under Eleventh Amendment immunity, Rhode Island was immune from liability involving a lawsuit brought by state employees for violations of the FLSA because Congress may not abrogate a states immunity by merely passing legislation pursuant to Article I of the Constitution); Raper v. Iowa, 940 F. Supp. 1421, 1426 (S.D. Iowa 1996) (finding that state supervisory employees could not sue Iowa under the provision of the FLSA because the facts did not show Iowa's intention to waive its sovereign immunity).

139. U.S. CONST. art. I, § 8 (describing the circumstances under which Congress may enact legislation and remain protected by the United States Constitution).

States."[140] Arguably, "general welfare" includes the right of state employees to receive fair compensation to maintain a satisfactory standard of living.[141] The Supreme Court's decisions in *Seminole Tribe* and *Alden*, however, suggests otherwise.[142]

The significance of these two recent Eleventh Amendment cases is that state employees are left without a forum to sue their state employer for private damages associated with violating the FLSA.[143] Surprisingly, the *Alden* Court recognized that state employees must have some judicial access in order to seek justice.[144] More specifically, the Court stressed that states must cede to federal authority, reasoning that the adoption of the

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140. *Id.* (mandating in Article I, Section 8 that it is the responsibility of the United States Congress to pass specific legislation tailored to betterment of the United States as a whole); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that the Indian Commerce Clause which derives its authority from the Commerce Clause contained in Article I does not give Congress the power to exercise jurisdiction over a state which has not consented to be sued). *But see Alden,* 527 U.S. at 748 (holding that Article I powers delegated to Congress do not include the authority to force nonconsenting states to defend themselves from private actions for damages brought in state courts).

141. *Cf.* U.S. CONST. art. I, § 8, cl. 1 (establishing the Commerce Clause and declaring the power of the clause to affect the states). *But see Alden*, 527 U.S. at 748 (stating that "it is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity").

142. *See Alden*, 527 U.S. at 712 (holding that Congress may not use its Article I powers to subject a nonconsenting state to a private suit in its own state court); *Seminole Tribe*, 517 U.S. at 73 (stating that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

143. *See* Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. REV. 621, 633 (1998) (opining that when the Eleventh Amendment's substantive effect is seriously considered, state legislatures may limit access of their courts and consequently, if taken to the extreme, may "deprive a plaintiff of a forum to vindicate constitutional rights a state has violated"); *see also* Erwin Chemerinsky, *Bulletproof States? Sovereign Immunity Cases Could Bar Recourse for Plaintiffs*, A.B.A. J., Apr. 1999, at 32-33 (asking that if the Supreme Court permits states to exercise immunity even if the result is the unavailability of a judicial forum, how may the "supremacy of federal law be assured or due process provided").

144. *See Alden,* 527 U.S. at 755-57 (suggesting other means available to a state employee to sue a state for violating the FLSA including a state waiving its sovereign immunity, suing a state officer or bringing suit against a municipality or governmental entity not traditionally considered to be an arm of the state). The Court noted that in the first instance, many states, acting on their own volition, have enacted legislation that allows for a multitude of actions to be brought against them. *Id.* at 755 (illustrating that voluntary waiver by a state results in the mitigation of the rigors created by sovereign immunity). Although the Supreme Court found that in the present case the FLSA did not do so, the Court stated that "subject to constitutional limitations . . . the Federal Government [has] the authority or means to seek the States' voluntary consent to private suits." *Id.* (proclaiming that the rigors of sovereign immunity are subject to mitigation by equitable principles that have been afforded by the consent of the sovereign to suit).

Fourteenth Amendment mandated that the states surrender some of their sovereignty.[145] Indeed, under Section 5 of the Fourteenth Amendment, Congress may authorize private lawsuits against states that do not consent to suit.[146] In addition, the *Alden* Court stated that sovereign immunity shields states from liability, but not municipal entities or state officers.[147] Unfortunately, neither one of these protections prevent a state from asserting its immunity against state employees in either federal

145. *Id.* at 756 (allowing that Section 5 of the Fourteenth Amendment empowers Congress with the authority to abrogate state sovereign immunity).

146. *See id.* (proclaiming that in consideration of adopting the Fourteenth Amendment, citizens mandated that the states relinquish some of their sovereignty traditionally reserved for them by the Constitution to enable Congress to authorize private actions against states that had not waived their immunity thereby acting in accordance with enforcement power found in Section 5); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (announcing that Congress has the ability, pursuant to Section 5 of the Fourteenth Amendment, to decide what constitutes "appropriate legislation," thus providing for private actions brought against states in circumstances where it would otherwise be constitutionally impermissible). Although the United States Supreme Court recognized the underlying principles of Eleventh Amendment state sovereign immunity in *Hans v. Louisiana*, it believed that state sovereign immunity under the Eleventh Amendment was nonetheless limited by the enforcement provisions found in Section 5 of the Fourteenth Amendment. *See id.* (noting that Congress may enforce the terms of the Fourteenth Amendment by using the power granted to it found in Section 5 of the amendment). In reaching its conclusion in *Hans*, the Court reasoned that Section 5 grants Congress the authority to enforce by appropriate legislation the substantive provisions contained in the Fourteenth Amendment. *See id.* (explaining that sovereign immunity under the Eleventh Amendment may be hindered by Congress's ability to pass befitting legislation according to its enforcement provisions found in Section 5). The Court acknowledged that the substantive provisions found in the Amendment impose significant limitations on state authority. *See id.* (finding that state authority becomes restricted due to the substantive provisions found in the Fourteenth Amendment). When Congress takes action under Section 5, it is both exercising its plenary legislative power within the meaning of the constitutional grant, and exercising such authority under a particular section of an amendment whose other sections, because of their own terms, place limitations on state authority. *See id.* (reasoning that Congress performs a dual role when acting under Section 5 because Congress is utilizing both the legislative authority bestowed to it by the Constitution, as well as the authority found within a specified section of an amendment that places limitations on state governance).

147. *See Alden*, 527 U.S. at 756 (emphasizing that state sovereignty is limited because it does not bar all suits against state municipalities or state officers); *see also Ex parte Young*, 209 U.S. 123, 129 (1908) (explaining that a federal court possesses jurisdiction in an action involving a state officer to enjoin state official actions which violate federal law, independent of the fact that the state itself remains immune). *See generally* Charles Alan Wright et. al, *Federal Practice and Procedure Jurisdiction and Related Matters*, 17 FED. PRAC. & PROC. JURIS.2D § 4231 (1988) (noting that *Ex parte Young* was one of the three most important United States Supreme Court cases handed down and its effects serves to bring actions which might escape judicial review within federal judicial review and to force the states to comply with the restrictions contained in the United States Constitution which they quite possibly would be able to safely ignore).

or state court for violations that do not fall within the reach of the Fourteenth Amendment.[148]

III. THE FAIR LABOR STANDARDS ACT

Congress created the FLSA[149] during a period in which America became increasingly concerned with society's general well-being.[150] Exercising its Commerce Clause authority,[151] Congress enacted the FLSA to achieve certain minimum labor standards.[152] Responding to a "call upon a Nation's conscience, at a time when the challenge to our democracy was the tens of millions of citizens who were denied the greater part of what the very lowest standards of the day called the necessities of life,"[153] the FLSA serves its purpose well. Furthermore, the legislation benefited the "millions of families in the midst of a great depression . . . trying to live on income so meager that the pall of family disaster hung over them day to day . . . and when one-third of a nation was ill housed, ill clad, and ill nourished."[154] The FLSA requires employers to pay a minimum wage to non-exempt employees and compensate them at a rate of one and one-half times their regular pay rate for any hours worked over the standard forty-hour work week.[155] The Act has evolved into an increasingly important piece of federal legislation by ensuring that all non-exempt

148. *See* Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. REV. 621, 652-53 (1998) (contending that state employees who have argued that the FLSA addresses equal protection issues will be unsuccessful against a state arguing sovereign immunity because courts are hesitant to extend the amendments meaning beyond gender and racial issues).

149. Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (1994).

150. *See id.* (expressing Congress's need to address labor conditions existing in America requiring statutory regulation upon a finding that industries engaged in commerce employed labor practices detrimental to the success of a minimum standard of living necessitous to workers productivity, health, and overall well-being).

151. *See* Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 739 n.14 (1980) (stating that "Congress enacted the FLSA under its commerce power"); United States v. Darby, 312 U.S. 100, 109-10 (1940) (establishing a comprehensive legislative plan for preventing the shipment of American-made products manufactured under inadequate labor standards between the states).

152. *See Barrentine*, 450 U.S. at 739 (declaring that the policy of the Act was to correct and eliminate detrimental labor conditions affecting the "health, efficiency, and general well-being of workers").

153. H.R. REP. No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2817.

154. *Id.*

155. *See* 29 U.S.C. §§ 206-207 (1994 & Supp. IV 1998) (providing national minimum wage requirements and overtime pay provisions for hours worked greater than a forty-hour work week); 29 U.S.C. § 213 (1994 & Supp. IV 1998) (exempting certain classes of employees from the minimum wage and overtime requirements of the FLSA). For example, any employee working in a bonafide administrative, executive or professional capacity or as outside salesman are exempt. *See id.* at § 213(a)(1).

American workers receive fair compensation.[156] Until 1974 however, states consistently asserted sovereign immunity against lawsuits filed by state employees under the FLSA. Thereafter, Congress included a state within the meaning of "employer."[157]

A. *History of the Fair Labor Standards Act*

Congress enacted the FLSA in 1938.[158] At the time, Congress determined that labor conditions proved "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[159] In 1941, the Supreme Court upheld the FLSA as a valid exercise of Congress's commerce power.[160] Courts have consistently recognized that Congress passed the FLSA with the express motive of allowing a sizeable portion of American workers the ability to maintain a minimum standard of living.[161] For example, in *A.H. Phillips, Inc. v. Walling*,[162] the Supreme Court noted that Congress promulgated the FLSA in order to ensure the furtherance of social progress by guaranteeing to all individuals a "fair day's pay for a fair day's work."[163]

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156. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706-07 (1945) (urging that Congress's intent in passing the FLSA was to ensure American workers that they would be able to work in an environment which allowed them to sustain a minimum standard of living).

157. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, § 6(a)(1), 88 Stat. 55 (codified as amended at 29 U.S.C. §§ 203(d), (x)) (1994) (defining employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization," and further defining a public agency as including "the government of a State or political subdivision thereof"); *see also* Alden v. Maine, 527 U.S. 706, 808 (1999) (Souter, J., dissenting) (pointing out that in 1974, Congress amended the FLSA to extend the minimum wage and maximum hour provisions to nearly all public employees working for the states as well as their political subdivisions).

158. Fair Labor Standards Act of 1938, ch. 676 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994) (expressing Congress's need to address the labor conditions that existed in America in the 1930's).

159. *Id.*

160. *See* United States v. Darby, 312 U.S. 100, 123 (1941) (finding the means adopted by the FLSA valid for the protection of interstate commerce by suppressing "nationwide competition in interstate commerce by goods produced under substandard labor conditions").

161. *See* Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974), *overruled by* McLaughlin v. Richard Shoe Co., 486 U.S. 128 (1988) (recognizing the need to provide employees with a minimum standard of living); *see also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706-07 (1945) (restating Congress's purpose in passing the FLSA).

162. 324 U.S. 490 (1945).

163. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

Originally, the FLSA had a limited definition of "employer."[164] The FLSA provided an exemption for states acting as employers, thereby allowing the states to circumvent the Act's provisions.[165] However, Congress later specifically amended the Act to include states in the definition of "employer."[166]

B. *Amendments to the Fair Labor Standards Act*

In 1961, Congress added "enterprises" run by states and engaged in commerce or production of goods for commerce within the definition of employers covered by the FLSA.[167] Five years later, Congress again amended the FLSA to remove the state employer exemption concerning certain non-exempt employees working in schools, institutions, and hospitals.[168] The Supreme Court approved both the 1961 and 1966 amendments in *Maryland v. Wirtz*.[169] In 1973, the first sign of difficulties with enforcement against the states arose in *Employees v. Missouri Public Health Department*.[170] In that case, the Court held that the 1966 amend-

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164. *See* Alden v. Maine, 527 U.S. 706, 808 (1999) (Souter, J., dissenting) (discussing how the 1974 amendment to the FLSA extend the Act's provisions to almost every public employee employed by the states).

165. *See id.* (discussing how the 1974 amendment to the FLSA deleted the exemption previously created for the state employer under the original Act of 1938); Maryland v. Wirtz, 392 U.S. 183, 186 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 883 (1976) (stating that extending the FLSA's minimum wage amendments to state schools, institutions, and hospitals was constitutional, and Congress was not exceeding its Commerce Clause authority by including the additions).

166. *See* Fair Labor Standards Act of 1938, Pub. L. No. 93-259, §§ 6(a), 13(e), 88 Stat. 58, 64 (codified as amended at 29 U.S.C. §§ 203(d), (x) (1994)); Nat'l League of Cities v. Usery, 426 U.S. 833, 838-39, *overruled by*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (summarizing the history of the FLSA through its more significant amendments).

167. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 2, 75 Stat. 65 (codified as amended at 29 U.S.C. § 203(r)-(s) (1994)).

168. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Title I, §§ 101-103, Title II, § 215(a), 80 Stat. 830-32, 837 (codified as amended at 29 U.S.C. § 203(r) (Supp. 1998) (removing the exemption for employees working in state-owned schools, mental institutions, nursing homes and hospitals); *see Alden*, 527 U.S. at 808 (Souter, J. dissenting) (affirming that Congress amended the FLSA in 1966 to delete the state exemption which applied to specific categories of state employees, namely, those working in schools, hospitals, and institutions); Maryland v. Wirtz, 392 U.S. 183, 186-87 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (listing all the categories of covered employees added by the amendment, including the removal of the state exemption for state schools, institutions, and hospitals).

169. *See Wirtz*, 392 U.S. at 193-97 (affirming the district court of Maryland's decision that the 1961 and 1966 amendments fell within Congress authority under the Commerce Clause).

170. 411 U.S. 279 (1973).

ment to the FLSA did not, on its face, permit a citizen of a state to sue that state in federal court.[171] In response to *Employees,* Congress amended the FLSA again in 1974.[172] By including a "public agency" within the definition of employer, Congress extended both the maximum hours and the minimum wage provisions to virtually every state employee.[173] Specifically, Congress amended Section 216(b) of the FLSA to permit the recovery of damages against a public agency "in any Federal or State court . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[174] By this action, Congress brought both the states and their political subdivisions further within the reach of the FLSA.[175] The 1974 amendment prompted the National League of Cities to challenge Congress's authority to abrogate state sovereign immunity, causing the Supreme Court to strike down the Congressional grant of authority in 1976.[176]

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171. Employees v. Mo. Pub. Health Dep't, 411 U.S. 279, 285 (1973).

172. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 6(a), 13(e), 88 Stat. 58, 64 (codified as amended at 29 U.S.C. § 203(d) (1994); *see* Wilson-Jones v. Caviness, 99 F.3d 203, 207 (6th Cir. 1996) (explaining that Congress amended the FLSA to add a clear statement of intent to abrogate the states' immunity, previously found lacking by the Court in *Employees v. Mo. Pub. Health Dep't*); Carey v. Whitte, 407 F. Supp. 121, 122, 124-25 (D. De. 1976) (mentioning that "[t]he legislative history of the 1974 Amendments to . . . section [216(b)] was expressly designed to overcome the ruling in *Employees*").

173. H.R. REP. No. 93-913, at 28 (1974) *reprinted in* 1974 U.S.C.C.A.N. 2811, 2812 (summarizing the reasoning behind the congressional intent to amend the FLSA in 1974); *see Nat'l League of Cities*, 426 U.S. at 836, *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (reasoning that Congress amended the FLSA in 1974 to extend both the minimum wage and maximum hour provisos to virtually every state employee); *see also Alden*, 527 U.S. at 808 (Souter, J., dissenting) (reciting that Congress amended the FLSA in 1974 to afford state employees the "'minimum wage and maximum hour provisions'"); *Caviness*, 99 F.3d at 207 (mentioning that Congress amended the FLSA in 1974 to "add a clear statement" as required by the United States Supreme Court in *Employees*, to express Congress's unequivocal intent to subject states to lawsuits in federal court under the FLSA).

174. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 58, 68 (codified as amended at 29 U.S.C. § 216(b)–(c) (1994)) (permitting monetary damages for employees against a state in any federal or state court for violations of the FLSA's overtime provisions). The provision also authorizes the Secretary of Labor to bring actions against an employer for unpaid wages and damages. *Id.* However, this is not a practical solution because the Labor Department has neither the resources nor the personnel to effectuate this remedy.

175. *See id.* (including public agencies as an agent of the states or political subdivision in the definition of employers for purposes of liability under the FLSA).

176. *Nat'l League of Cities*, 426 U.S. at 852, *overruled* by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that the 1974 amendment "'operate[s] to directly displace the States' freedom to structure . . . traditional governmental functions'" [citation omitted] and is therefore not within Congress's constitutional authority).

C. *Recent FLSA Case Law Involving the States As Defendants*

The majority of federal courts have held that states, as well as their agencies, enjoy Eleventh Amendment immunity from FLSA lawsuits.[177] In *Abril v. Virginia*,[178] the Fourth Circuit dismissed on sovereign immunity grounds a FLSA lawsuit by state prison employees against Virginia.[179] Similarly, in *Wilson-Jones v. Caviness*,[180] the Sixth Circuit, using the *Seminole Tribe* decision, held that state employees seeking damages for FLSA violations could not sue the state in federal court.[181] Likewise, in *Taylor v. Virginia*,[182] a district court ruled that the Eleventh Amendment granted immunity to Virginia against a private action filed against the state in federal court by state employees working at the Virginia Department of Transportation.[183] Specifically, the court denied the plaintiffs' claims reasoning that Congress did not "'manifest a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'"[184]

These cases illustrate that the majority of state and federal courts vigorously seek to uphold state sovereign immunity under the Eleventh Amendment. Notably, the Fifth Circuit has yet to decide the matter. However, Texas currently remains shielded from lawsuits by state em-

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177. *See* Robert B. Fitzpatrick, *The Effect of Seminole Tribe and the 11th Amendment in Employment Cases*, SD06 A.L.I.-A.B.A. 113, 116 (1998) (outlining the opinions by the federal courts post-*Seminole Tribe* to illustrate that a majority of such courts have held that states enjoy Eleventh Amendment immunity in actions involving the FLSA); *see also* Abril v. Virginia, 145 F.3d 182, 184 (4th Cir. 1998) (holding that Congress was powerless to abrogate Eleventh Amendment sovereignty under the FLSA pursuant to its Section 5 powers contained in the Fourteenth Amendment). *But see id.* at 194 (Butzner, J., dissenting) (arguing that the protections granted by the FLSA are included in the array of privileges shielded by the Fourteenth Amendment, and as such, Congress does indeed possess Fourteenth Amendment enforcement power to subject a state to lawsuits without their consent).

178. 145 F.3d 182 (4th Cir. 1998).

179. Abril v. Virginia, 145 F.3d 182, 184 (4th Cir. 1998).

180. 99 F.3d 203 (6th Cir. 1996).

181. Wilson-Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996) (holding that in light of the recent *Seminole Tribe* decision, the Sixth Circuit must conclude that the FLSA provision purposively giving federal courts subject matter jurisdiction over actions against states for violating the FLSA's "minimum wage and maximum hour provisions" is in fact unconstitutional and consequently, the federal district court was powerless to exert jurisdiction over the case).

182. 951 F. Supp. 591 (E.D. Va. 1996).

183. Taylor v. Virginia, 951 F. Supp. 591, 592 (E.D. Va. 1996).

184. *Id.* at 602.

ployees for violations of the FLSA under the doctrine of sovereign immunity.[185]

D. *States That Have Adopted the FLSA as State Law*

Texas refuses to join the few states, such as Wisconsin and New York, that have adopted the FLSA as state law.[186] By adopting the FLSA as state law, these states have expressly consented to lawsuits brought against them under state wage laws by state employees, thereby waiving sovereign immunity.[187] While Texas remains in the majority of states withholding consent to suit, states that have adopted the FLSA provision

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185. *See* Bunt v. Tex. Gen. Land Office, 72 F. Supp. 2d 735, 738 (S.D. Tex. 1999) (stating that the Fifth Circuit has not addressed the issue of whether Congress intended for the FLSA to be enforceable against state employers in federal court).

186. *See, e.g.*, N.Y. CIV. SERV. LAW § 134 (McKinney 1999) stating:

> [f]or all state officers and employees . . . the workweek for basic annual salary shall not be more than forty-hours . . . and . . . any such state officer and employee who is authorized or required to work more than forty hours in any week in his regular position . . . shall receive overtime compensation for the hours worked in excess of forty in each week at one and one-half times the hourly rate of pay received by such employee in his regular position; provided, however, that an employee not subject to the overtime provisions of the federal "Fair Labor Standards Act of 1938" . . . may by written agreement with his proper authority exchange hours of work with other employees . . . without overtime compensation.

Id.; WIS. ADMIN. CODE §§ 274.08(1)-(2) (1999) stating:

> [t]his section applies to employes of the state, its political subdivisions, and any office department, independent agency, authority, or authorized to be created by the constitution or any law, including the legislature and the courts . . . . [t]he provisions applicable to employes identified in sub. (1) shall be the provisions of the federal Fair Labor Standards Act . . . the regulations of the U.S. Department of Labor relating to the application of the Act to employes of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employes of state and local governments.

Id.

187. *See* German v. Wis. Dep't of Transp., 589 N.W.2d 651, 653 (Wis. App. 1998) (concluding that § 109.03(5) provides the authority to waive Wisconsin's sovereign immunity concerning state employee wage claims against the state for overtime compensation). The court further explained that the right to sue granted by § 109.03(5) allows employees the opportunity to sue employers for overtime compensation stemming from "hours and overtime regulations" without having to first pursue the claim with the Department of Workforce Development. *Id.* Moreover, the court concluded that the state legislature has "expressly consented to suits by employees against the State as an employer under ch. 109." *Id.* at 654. The court based it conclusion on the explicit language contained in § 109.03(5) which provides that "[e]ach employe shall have a right of action against any employer for the full amount of the employe's wages due." *Id.* Furthermore, the court examined the definition of employer in § 109.01(2) which "includes the state and its political subdivisions." *Id.* Consequently, after piecing the statutes together, the court held that the unequivocal language in § 109.03(5) which gives employees the right to sue their em-

and include the state as an employer, serve as models to alleviate the injustice of state employees being denied a forum to seek relief for private damages.[188]

1. New York Legislation

In 1958, New York enacted Civil Service Law Section 134 to address basic annual salaries and overtime compensation.[189] Section 134 mandates that all state officers and employees shall not work more than forty-hours per week without overtime compensation.[190] Such overtime compensation shall be "one and one-half times the hourly rate of pay received by such [state] employee in [the course of] his regular position."[191] New York's Civil Service Law further provides that any compensation received for personal service in any state department, agency, institution, or division qualifies the individual for overtime compensation under the statute.[192] Because New York enacted the overtime provision set forth in section 134 prior to Congress's amending the FLSA to include states as employers, courts could arguably interpret the law to mean that the State of New York did not deliberately waive its Eleventh Amendment sovereign immunity protection.[193] The language of section 134, however, indicates a willingness to allow suits brought by state employees against New York because New York mandates overtime pay protection for its state

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ployers, along with the statutory definition of an employer found in § 109.01(2) constitutes the necessary "clear and express statutory consent" to be sued. *Id.*

188. *Cf.* WIS. STAT. ANN. § 109.03(5) (1999) (announcing that "[e]ach employe shall have a right of action against any employer for the full amount of the employe's wage due on each regular pay day as provided in the section' in any court of competent jurisdiction").

189. N.Y. CIV. SERV. LAW § 134 (McKinney 1999) (establishing statutory protections enabling state workers guaranteed overtime compensation, salaries, and maximum number of hours worked during a week).

190. *Id.*

191. *Id.*

192. *Id.* § 134(7).

193. *See* Alden v. Maine, 119 S. Ct. 2240 (1999), *reviewed by* Harvery Randall, *Overtime and FLSA*, 1999 No. 7 PUB. EMP. L. NOTES (NYDER) 156 (1999) (hypothesizing that it is arguable that because the overtime provision found in Section 134 of a New York Civil Service Law preceded Congress's passage of the 1974 amendment, New York was not consenting to suit for FLSA violations), 1999 WL No. 7 PEMLIN 156.

employees.[194] Specifically, section 134 allows an individual to challenge a state law in state court.[195]

2. Wisconsin Legislation

Wisconsin represents another state that has adopted the FLSA as state law.[196] Indeed, Wisconsin incorporated the FLSA into state law in 1971.[197] The state has succeeded in its endless efforts to adhere to the Declaration of Policy found in Section 111.80 of Subchapter V, State Employment Labor Relations.[198] Section 111.80 enumerates specific public policy goals set forth by Wisconsin concerning "labor relations and collective bargaining in state employment."[199] Namely, Section 111.80 recognizes three primary areas of concern: the public, the state employee, and the employer.[200] These interests are primarily dependent upon the consistency and maintenance of "fair, friendly and mutually satisfactory employee-management relations in state employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise."[201] Wisconsin's Declaration of Policy also seeks to maintain efficient and constructive employment relations for all state employees, as well as ensuring that the state government promotes all public policy interests through efficient administration.[202] Finally, Wisconsin's public policy mandates that negotiations concerning the agreements and conditions of state employment must stem from a mutual, voluntary agreement existing between the state, its agents acting as employer, and its employees.[203]

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194. *See* N.Y. CIV. SERV. LAW § 134(1) (McKinney 1999); *see also* Alden v. Maine, 119 S. Ct. 2240 (1999), *reviewed by* Harvery Randall, *Overtime and FLSA*, 1999 No. 7 PUB. EMP. L. NOTES 156, at *2 (1999) (acknowledging that Section 134 of New York's Civil Service Law allows for overtime pay at "time and one-half" to individuals employed by the state), 1999 WL No. 7 PEMLIN 156.

195. *See* Alden v. Maine, 119 S. Ct. 2240 (1999), *reviewed by* Harvery Randall, *Overtime and FLSA*, 1999 No. 7 PUB. EMP. L. NOTES 156, at *2 (1999) (noting that actions for purported violations of Section 134 which is state law, may be brought in state court), 1999 WL No. 7 PEMLIN 156.

196. *See* WIS. ADMIN. CODE § 274.08(1)-(2) (1999).

197. *See* 1999 No. 7 PUB. EMP. L. NOTES 156, at *2 (1999) (noting that Wisconsin had enacted the FLSA as state law before Congress had amended the FLSA in 1974), 1999 WL No. 7 PEMLIN 156; WIS. ADMIN. CODE § 274.08(1)-(2) (1999); WIS. STAT. ANN. § 111.80 (West 1988).

198. *See generally* WIS. STAT. ANN. § 111.80.

199. *Id.*

200. *Id.* § 111.80(1).

201. *Id.* § 111.80(2).

202. *Id.* § 111.80.

203. WIS. STAT. ANN. § 111.8(1)-(3).

The Wisconsin Administrative Code statutorily applies to all state employees and employers of the state's political subdivisions.[204] The Code further states that

> [t]he provisions applicable to employes . . . shall be the provisions of the federal Fair Labor Standards Act . . . the regulations of the U.S. department of labor relating to the application of the Act to employes of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employes of state and local governments.[205]

In addition, Wisconsin specifically allows plaintiffs to bring wage claim actions in state court, without requiring an administrative wage claim filing prior to bringing suit.[206] Every Wisconsin state employee has the right to bring a claim in any court with appropriate jurisdiction against a state employer seeking the full amount of the employee's wages.[207] Similarly, the Wisconsin Minimum Wage Law provides that the definition of an employer extends to the state.[208] This wage law specifically serves to ensure that state employees may seek redress against a state employer for state wage law violations.[209]

While these statutes apparently signify Wisconsin's willingness to waive sovereign immunity in lawsuits brought by state employees against the state for state wage law violations, the Seventh Circuit held in *Mueller v. Thompson*[210] that Wisconsin has not clearly expressed in its legislation an intent to waive the sovereign immunity defense for FLSA violations.[211] In particular, the court held that just because the state's labor department

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204. *See* WIS. ADMIN. CODE § 274.08(1) (1999).

205. *Id.* § 274.08(2).

206. *See* WIS. STAT. ANN. § 109.03(5); German v. Wis. Dep't of Transp., 589 N.W.2d 651, 653 (Wis. App. 1998) (concluding that Section 109.03(5) precludes the state of Wisconsin from claiming immunity from suit).

207. WIS. STAT. ANN. § 109.03(5) (announcing that "[e]ach employe shall have a right of action against any employer for the full amount of the employe's wages due on each regular pay day as provided in this section . . . in any court of competent jurisdiction").

208. *Id.* § 104.01(3)(b) (providing that "'[e]mployer' includes the state, its political subdivisions and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts").

209. *See id.* § 109.03(5); *German*, 589 N.W.2d at 654 (determining that "[t]he plain statement in § 109.03(5) giving employees a right of action against their employer's . . . in § 109.01(2), constitutes the required 'clear and express' statutory consent to suit").

210. 133 F.3d 1063 (7th Cir. 1998).

211. *See* Mueller v. Thompson, 133 F.3d 1063, 1064 (7th Cir. 1998) (construing the Wisconsin statute authorizing suits for wage violations "in any court of competent jurisdiction" as a waiver of sovereign immunity only with respect to state overtime laws and not the FLSA).

copied the FLSA into state law does not transform state law into federal law.[212] The court noted that when Wisconsin enacted the statutes, states enjoyed immunity from FLSA provisions and enforcement.[213] However, *Mueller* merely notes that Wisconsin has not statutorily waived its sovereign immunity in federal court.[214] Notwithstanding the *Mueller* decision, the Wisconsin statutory provisions indicate a strong willingness to allow state employees the right to litigate in state court for violations of the Wisconsin Minimum Wage Law.[215]

The Wisconsin statute serves as a model for legislative efforts to maintain peaceable relations between a state and its employees. Texas should adopt a statutory model like Wisconsin, ensuring positive relations with its employees. Although Texas has enacted similar wage protections in its labor code, the state has deliberately omitted itself as an employer from its provisions.[216]

IV. THE TEXAS PAYDAY LAW

Texas has not incorporated all provisions of the FLSA into the Texas Labor Code.[217] Currently, no statutory provision exists recognizing the specific protections found in the FLSA as applied to Texas as an employer. While the Texas Payday Law (TPL) provides for enforcement of wage violations for non-state employees against their private employer, Texas has not included itself in the definition of employer in its labor statutes.[218]

The TPL attempts to prevent employers from illegally withholding wages by providing wage claimants with a means for judicial enforcement

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212. *Id.* (concluding that merely copying the FLSA 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").

213. *See id.* at 1065 (observing that at the time the provision including the state as an employer was enacted, the FLSA had not been amended to override state immunity).

214. *See id.* (stating that the drafters of the Wisconsin provision most likely did not have federal courts in mind by including "'any court of competent jurisdiction'" in the statutory language).

215. *See generally* WIS. STAT. ANN. § 109.01(2) (West 1988) (defining broadly the provisions including the state as an employer); WIS. ADMIN. CODE § 274.08(1)-(2) (West 1988) (applying the wage and hour provisions of the code to employers of the state and local government of Wisconsin).

216. *See* TEX. LAB. CODE ANN. § 61.003 (Vernon 1996) (shielding the State of Texas from liability under the Texas Payday Law).

217. *See id.* §§ 61-64.

218. *See id.* § 61.003 (omitting "the United States, this state, or a political subdivision of this state" under the definition of employer).

of such claims.[219] Section 61.003 of the Labor Code expressly states, however, that the TPL does not apply to the United States, Texas, or any political subdivision of Texas.[220] Consequently, state employees do not enjoy the benefit conferred on private employees for seeking vindication of wage rights disputes.

If an individual works for a private, non-state employer, Texas makes a good faith effort to provide such employees with legal redress for wage claims.[221] In particular, the Code makes it a criminal offense for an employer to deliberately avoid paying wages owed to an employee or former employee.[222] The TPL provides that an employer commits an offense if, after the employee demands the unpaid wages, the employer fails to pay.[223] Furthermore, the Code provides that an employer commits a distinct and separate offense for every pay period that the employee earns wages that the employer intentionally fails to pay.[224] As a final incentive to ensure compliance, the Code lists a TPL offense as a felony in the third degree.[225]

A. *Texas's Current Position on Wage Claims and Sovereign Immunity*

The TPL illustrates Texas's contradictory position on the payment of wages to state employees.[226] The statute creates a private employers' liability for an intentional failure to pay its employees by making such action a crime.[227] Conversely, the statute does not mandate criminal or monetary penalties against the state for wage violations.[228] In fact, the statute does not provide state employees with a forum in state court against the state for damages resulting from failure to pay wages or violations of the FLSA.[229] Alternatively, Texas provides non-state employees

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219. *See* Holmans v. Transource Polymers, Inc., 914 S.W.2d 189, 194 (Tex. App.—Fort Worth 1995, writ denied) (finding that the remedy afforded by the Payday Law was designed to "preserve the right to a jury trial for an action brought on a debt for unpaid wages").

220. TEX. LAB. CODE ANN. § 61.003 (Vernon 1996) (refusing to permit the Texas Payday Law to apply to state entities).

221. *See id.* §§ 61-62.

222. *See* TEX. LAB. CODE ANN. § 61.019(a)(1) (Vernon 1996 & Supp. 2001).

223. *See id.* § 61.019(a)(2).

224. TEX. LAB. CODE ANN. § 61.019(c) (Vernon Supp. 2001).

225. *See id.* § 61.019(d).

226. *See id.* (stating the circumstances constituting the commission of a crime by an employer for not paying wages due an employee).

227. *See id.*

228. *See id.* § 61.003.

229. *See* TEX. LAB. CODE ANN. § 61.062(a) (providing for judicial review for claimants only after "[a] party . . . has exhausted the party's administrative remedies under this chapter may bring a suit to appeal the order"). While the Texas Payday Law provides a

the right to bring suit after the individual has exhausted all available administrative remedies.[230] Specifically, Section 61.062(a) of the Texas Labor Code establishes judicial review for "[a] party who has exhausted . . . administrative remedies under this chapter [to] bring a suit to appeal the order."[231] As a result, before a non-state employee may file suit, the employee must first file an administrative wage claim.[232] Section 61.051 of the Texas Labor Code lists the administrative process a party must satisfy in order to attempt to collect unpaid wages against an employer.[233]

1. Texas's Position on Wage Claims

The Texas Labor Code serves to protect the interests of non-state employees.[234] Despite this protection for private employees, no state statute specifically protects state employees against violations of unpaid wages or other FLSA protections. For example, the TPL provides that all employers shall pay their employees at least twice a month unless the employee

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claimant with the opportunity to seek judicial review only after satisfying the Texas Workforce Commission's administrative remedies, § 61.003 exempts Texas from the definition of employer, thereby disallowing a state employee to seek judicial review for any wage claim issue existing between that state employee and Texas. *See id.* § 61.003

230. *See id.* § 61.062(a); *see also* Holmans v. Transource Polymers, Inc., 914 S.W.2d 189, 194 (Tex. App.—Fort Worth 1995, writ denied) (providing that the Payday Law is "a statutory remedy that co-exists with the common-law remedy of a suit in court"). In *Holmans*, the plaintiff filed a common-law debt action against his former employer for unpaid sales commissions and expenses and subsequently filed a claim with the Texas Employment Commission (TEC) (currently named the Texas Workforce Commission) under the Texas Labor Code. *See id.* at 190. Dissatisfied with TEC's findings, the plaintiff withdrew his administrative claim so that he could pursue his common-law debt claim in a state district court. *See id.* Transource claimed that the district court lacked subject-matter jurisdiction because Holmans failed to exhaust his administrative claims under the TPL. *See id.* The court held that these two remedies co-exist because the remedial scheme provided by the TPL does not furnish a reasonable substitute for the Sixth Amendment right to a jury trial. *See id.* at 192.

231. TEX. LAB. CODE ANN. § 61.062(a) (Vernon 1996).

232. *See id.* § 61.051.

233. *See id.* (providing the necessary steps an individual must undertake when filing a wage claim:

(a) [a]n employee who is not paid wages as prescribed by this chapter may file a wage claim with the commission in accordance with this subchapter.
(b) [a] wage claim must be in writing on a form prescribed by the commission and must be verified by the employee.
(c) [a] wage claim must be filed not later than the 180th day after the date the wages claimed became due for payment.
(d) [t]he employee may file the wage claim:
(1) in person at an office of the commission; or
(2) by mailing the claim to an address designated by the commission).

234. *See id.* § 61.001 (providing the definitions applicable to the Texas Payday Law); *see also id.* §§ 61.003, 61.019, 61.062(a).

satisfies the relevant FLSA exemptions for professional employment.[235] Texas, however, pays employees once a month. Thus, the state seemingly violates its own law but for excluding itself within the definition of employer.[236] In order to provide state employees with their constitutionally guaranteed legal rights, Texas must waive its sovereign immunity and permit its employees to bring suit seeking liquidated damages for violations of the FLSA.

2. Texas's Position on Sovereign Immunity

Historically, Texas courts have acknowledged that sovereign immunity protects the state from suit unless the state has waived its sovereign immunity claim.[237] In addition, Texas courts have recognized that sovereign immunity embraces two underlying principles: (1) immunity from suit, and (2) immunity from liability.[238] In the first instance, Texas explicitly retains immunity from private actions, absent legislative consent, despite the level of the state's liability.[239] In the second situation, even if the Texas legislature has granted consent to the lawsuit, the state may still enjoy immunity from liability.[240] In short, while Texas may recognize liability for a claim asserted, sovereign immunity bars a remedy unless the state legislature consents to suit.[241] In that regard, the state legislature

235. *See id.* §§ 61.011(a)-(c); *see also* Fair Labor Standards Act of 1938, 29 U.S.C. § 213 (1996) (exempting such employees as executives, administrators or professional among many other diverse employees).

236. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 213 (1996) (explaining that employers are required to adhere to wage and hour limits, unless the employee is exempt); TEX. LAB. CODE ANN. § 61.011(b) (Vernon 1996) (defining the conditions under which an employer is liable for payment of wages to an employee).

237. *See* Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (holding that Texas enjoys sovereign immunity from lawsuits brought by private individuals); *accord* Griffin v. Hawn, 161 Tex. 422, 424-25, 341 S.W.2d 151, 152-53 (1960) (affirming *Hosner v. DeYoung* and concluding that the State of Texas was immune from actions brought against it by a private citizen).

238. *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997) (quoting *Mo. Pac. R.R. Co. v. Brownsville Navigation Dist.*, which enumerated the ways in which Texas enjoyed sovereign immunity); *see also* Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970) (listing the principles espoused in the doctrine of sovereign immunity to provide a clear understanding of how Texas can escape a lawsuit).

239. *See* Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970) (explaining that even if a state does not deny its liability, it remains shielded by sovereign immunity).

240. *See id.* at 813 (indicating that legislative intent to consent to a suit by itself, is not enough to strip Texas of its immunity).

241. *See Fed. Sign*, 951 S.W.2d at 405 (stressing that the Texas State Legislature must expressly consent to a lawsuit by a claimant in order for that party to have any chance of recovering damages); *Mo. Pac. R.R. Co.*, 453 S.W.2d at 813 (ordering that the legislature holds the key for a claimant seeking to sue Texas).

must express permission for a particular action through clear and unambiguous language.[242] Therefore, in order for state employees to bring suit against Texas for violations of the FLSA, the Texas State Legislature must clearly articulate Texas's express consent to suit in state court for violations of the FLSA.

V. Two Wrongs Do Not Make a Right for Texas State Employees—A Possible Solution

Without a legislative enactment adopting the FLSA as state law, Texas can continue to escape liability for FLSA violations against state employees simply by asserting sovereign immunity. This results, however, in the problem of denying state employees with legitimate wage claims access to Texas courts. The answer lies in Texas's willingness to adopt the FLSA as state law, thus waiving its sovereign immunity and consenting to suit, in order to assure its employees the same protections provided by the FLSA.

A. *Texas Must Amend the Texas Payday Law to Include the State as an Employer*

By adopting the FLSA as state law, Texas will ensure that its state employees have the state's express consent to be sued in state court for violations of the FLSA. The amendment will protect state employees' constitutional rights and alleviate many of the public policy concerns expressed by the FLSA. More importantly, however, an amendment results in fair compensation.

Fair compensation for work was one of Congress's primary objectives in passing the FLSA in 1938.[243] Arguably, it would seem that Texas, like the federal government, would want to fairly compensate its state employees for all of the hours worked that exceed a regular forty-hour work week. The language found in the TPL, however, suggests otherwise.[244] If Texas amended the TPL to include itself as an employer amenable to suit,

242. *See* Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994) (declaring that the legislature's language must be clear and unambiguous); Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980) (proclaiming that unless the state legislature unambiguously consents to a lawsuit, plaintiff may not sue the state).

243. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (1994) (expressing Congress's desire to correct poor labor conditions existing in America in the 1930s upon a finding that industries engaged in commerce employed detrimental labor practices); *see also* Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 706-07 (1945) (reporting that FLSA was created in response to the disparity in bargaining power among parties to employment contracts affecting interstate commerce adversely).

244. *See* Tex. Lab. Code Ann. § 61.003 (Vernon 1996).

the TPL would provide fair compensation and a forum to sue the state when the state failed to pay its employees in accordance with the FLSA.

Amending the TPL to include Texas as an employer will also serve public policy concerns found in the FLSA.[245] For example, Section 202 of the FLSA states that Congress enacted the FLSA to ensure the general well-being of workers and the free-flow of goods in interstate commerce.[246] Without a forum to sue Texas for back pay and overtime violations protected by the FLSA, state employees do not benefit from the public policy goals expressly set out by Congress in the FLSA.[247]

B. *Adopting the FLSA as State Law Affords Constitutional Protections to State Employees*

Section 1 of the Fourteenth Amendment to the United States Constitution mandates that no state shall "deprive any person of life, liberty, or property, without due process of law."[248] The Due Process Clause confers rights "to administrative procedures, to judicial review of administrative decisions, to judicial procedures, and to judicial remedies."[249] Notwithstanding the plain language of the clause, the Supreme Court has held that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"[250] Some "core liberty interests," such as freedom from physical restraint, have been deemed protected, independent of state law.[251] However, because the Court has granted states broad latitude to create property interests, states must have the converse power to deny property interests if

245. *See generally* Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (1994) (expressing Congress's need to ensure American workers a minimum standard of living and to promote workers' productivity, health, and overall well-being).

246. *See id.* § 202(a).

247. *See id.* (promulgating legislation to protect laborers after finding working conditions in the 1930s detrimental to American workers).

248. U.S. CONST. amend. XIV, § 1.

249. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) (remarking on the wary and embarrassing pronouncements frequently found in case law approaching the doctrine of substantive due process).

250. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

251. Bolling v. Sharpe, 347 U.S. 497, 499-50 (1954) (asserting that while "liberty" includes freedom from bodily restraint as well as other unidentified interests, the Constitution prohibits states from infringing on an individual's liberties without due process); *see* Bd. of Regents v. Roth, 408 U.S. 564, 572 n.11 (1972) (discussing the expansive definition of liberty).

those interests are not core.[252] This means that the state also has broad latitude to deny property interests if those property interests exceed core liberty interests.[253]

By denying state employees a state forum to sue Texas for violating a federal statute, Texas deprives a claimant of property, liberty, and due process of law. Thus, by consciously choosing to withhold its consent under the TPL, Texas fundamentally violates state employees' core constitutional rights.[254] The ability to sue Texas for liquidated damages for violations of any federal law, such as the FLSA, is itself a property right that should be protected by the Fourteenth Amendment of the Constitution.[255] Indeed, the Fourteenth Amendment specifically seeks to protect such things as receiving a just settlement for violations of the FLSA.[256]

When an individual seeks compensation for overtime, that claim stems from a property right.[257] The Supreme Court held in *Fitzpatrick v. Bitzer*,[258] that states' Eleventh Amendment immunity may be limited by the Fourteenth Amendment.[259] In *Cleveland Board of Education v.*

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252. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93. COLUM. L. REV. 309, 328 (1993) (discussing how Due Process protections are "frequently bound up with state law, but the nature of the connection is left ambiguous").

253. *See id.* at 329 (pointing out that states may not "truncate the core of constitutional meaning," but they may go beyond it by granting more protections). Professor Fallon further states that "[w]ithin our federal system, state law definitions of liberty and property should control unless they offend the Constitution's protective purposes." *Id.*

254. *See* Ved P. Nanda, *Access to Justice in the United States*, 46 AM. J. COMP. L. 503, 507 (Supp. 1998) (warning that the question remains concerning why a state should have the ability to put itself in the position of deciding which particular injuries it should be held responsible for and asking whether justice is best served by allowing a government to remain unaccountable). The author questioned whether those most affected by sovereign immunity are in a position to voice their dissent and further argued that if Eleventh Amendment sovereign immunity causes such inequitable results, people should demand that the doctrine be reversed. *See id.* In addition, the author noted that there is a popular belief in the United States that the term justice is equated with the term "fundamental right." *See id.* at 503. People working in the legal profession, however, often associate justice with substantive due process and asking under what circumstances individuals have access to the American legal system. *Id.*

255. *See generally* U.S. CONST. amend. XIV, § 1.

256. *See generally id.*

257. *See* Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1754 (1997) (writing that "Congress has the power under Article I to create 'property' rights for purposes of the Due Process Clause simply by placing mandatory obligations on the states").

258. 427 U.S. 445 (1976).

259. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (stating that "'the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

Loudermill,[260] the Court reiterated that the Due Process Clause requires the state to afford an individual the opportunity for a hearing before depriving the individual of a significant property interest.[261] Moreover, in *Perry v. Sindermann*,[262] the Court referred to its simultaneous decision in *Board of Regents v. Roth*[263] in stating that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules . . . that support his claim of entitlement to the benefit."[264]

Likewise, when Texas chooses to exclude itself from the definition of employer under the TPL, the state deprives employees of a protected liberty interest guaranteed by the Fourteenth Amendment. Indeed, the entitlement of having a guaranteed forum to sue Texas for violations of the FLSA is fundamental to an individual's liberty.[265] Unquestionably, all individuals should have equal access to courts in order to seek justice for a wrong committed against them.

Finally, withholding consent to suit in state court by state employees for violations of the FLSA denies state employees due process of law.[266] Due Process guarantees that all individuals have equal access to our judicial system. As a result, Texas must either amend the TPL or enact new

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260. 470 U.S. 532 (1985).

261. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citing to Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). Loudermill was a state employee terminated for omitting a pertinent criminal conviction on his application for employment. *Id.* at 535. He was not given an opportunity to respond to the charge of dishonesty by challenging his dismissal prior to his termination. *Id.*

262. 408 U.S. 593 (1972).

263. 408 U.S. 564 (1972).

264. Perry v. Sindermann, 408 U.S. 593, 601 (1972) (finding that an employment contract with an explicit tenure provision is evidence of a formal understanding sufficient to support a teacher's claim of entitlement to continued employment). Certainly, the FLSA is a rule that should sufficiently support an employee's claim of entitlement to his overtime wages under the Due Process Clause. *But see* Chauvin v. Louisiana, 937 F. Supp. 567, 570 (E.D. La. 1996) (refusing to find any Fourteenth Amendment basis for plaintiff's claim that he holds a property interest in his wages). The district court in *Chauvin* distinguished both *Perry* and *Loudermill*, by finding that any vested property interest the plaintiff may have had in his overtime wages evaporated with *Seminole Tribe*. *See id.*

265. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 149, 163 (1803) (stating that "[t]he 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").

266. *See* U.S. CONST. amend. XIV, § 1. An argument can be made that a state employee's due process rights protected by the Fourteenth Amendment are violated when a state refuses to waive its sovereign immunity. Although the Supreme Court in *Alden* did not hold that a state's assertion of immunity under the Eleventh Amendment was unconstitutional, the FLSA explicitly illustrates Congress's intent to subject states to legal action for violations of the FLSA. If a state employee is deprived of a judicial forum in both federal and state court because of his employer's immunity from suit, they are deprived of due process under the Fourteenth Amendment.

legislation giving its consent to suit in state or federal court for alleged damages resulting from violations of the FLSA.

In sum, the necessary remedy to protect state employees working for Texas is to encourage legislation waiving Eleventh Amendment sovereign immunity, thus giving state employees a forum in state court for lawsuits against Texas for purported violations of the FLSA. Presently, an inequality of protection exists between non-state employees and state employees. While Texas has done an excellent job protecting the wage security of non-state employees, no similar statute protects state employees. Amending the Texas Payday Law to eliminate the exclusion of state employees resolves this situation. Texas legislators should take the initiative, following the examples of New York and Wisconsin, and give state employees the protection to which they are entitled.

VI. CONCLUSION

After the Supreme Court decided *Seminole Tribe*,[267] federal and state courts were left with the untenable burden of trying to ascertain whether state employees could sue a state for damages resulting from violations of federal laws.[268] The Supreme Court resolved the issue in *Alden*, and now that the Eleventh Amendment affords states protection from lawsuits brought by private citizens for federal claims in state and federal court

267. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress, acting under the Indian Commerce Clause, derived from Commerce Clause power found in Article I may not abrogate a state's sovereign immunity unless the state has waived its consent to be sued); *see also* James Y. Ho, Note, *State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created by the Eleventh Amendment Upon the Federal Courts*, 68 FORDHAM L. REV. 189, 190 (1999) (noting that in *Seminole Tribe*, the United States Supreme Court held that a state's sovereign immunity could not be abrogated by any act passed by Congress acting under its Article I powers, although Congress does have the authority to abrogate a states sovereign immunity when acting in accordance with its Fourteenth Amendment powers).

268. *See* Robert B. Fitzpatrick, *The Effect Of Seminole Tribe and the 11th Amendment in Employment Cases*, SD06 A.L.I.-A.B.A. 113, 116-17 (1998) (stating that the opinions by the federal district and circuit courts post-*Seminole Tribe* illustrate that the majority of federal courts have decided that states enjoy Eleventh Amendment immunity in actions involving the FLSA); *see also* Abril v. Virginia, 145 F.3d 182, 191 (4th Cir. 1998) (holding that Congress was powerless to abrogate Eleventh Amendment sovereignty under the FLSA pursuant to its Section 5 powers contained in the Fourteenth Amendment). *But see id.* at 193 (Butzner, J., dissenting) (arguing that the protections granted by the FLSA are included in the array of privileges shielded by the Fourteenth Amendment, and as such, Congress indeed has Fourteenth Amendment enforcement power to subject a state to lawsuits without their consent, in all FLSA actions).

unless the state waives its sovereign immunity.[269] As a result of *Seminole Tribe* and *Alden*, state employees are left without a forum to sue a state for liquidated damages resulting from alleged violations of the FLSA.[270] Denial of a judicial forum creates obvious and severe problems for state employees with limited opportunities to protect their rights.[271] Fortunately, individuals employed by states that have already adopted the FLSA as state law, such as Wisconsin and New York, remain protected and have access to state courts to entertain such lawsuits.[272] Wisconsin serves as the model state of a governmental entity seeking to protect its state employees and to improve the labor relations between an employer and employee. Texas would be well-served by following Wisconsin's example and modeling its legislative efforts by incorporating the FLSA into the Texas Payday Law.

Undoubtedly, the Eleventh Amendment remains a powerful weapon to protect a state from defending itself in a lawsuit. As previously discussed, Texas has a rich history of enjoying its sovereign immunity under the

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269. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Article I powers delegated to Congress do not include the authority to force nonconsenting states to defend themselves from private actions for damages brought in state courts).

270. *See generally id.*; Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

271. *See Alden*, 527 U.S. at 809 (Souter, J., dissenting) (stating that the *Alden* "decision blocking private actions in state courts makes the barrier to individual enforcement a total one"). Souter acknowledged the authority of the Secretary of Labor to bring suit for damages for FLSA violations, but added that this remedy is insufficient to provide redress. *See id.* at 810. *See also* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 770 & n.19 (1998) (noting that most federal statutes can be enforced by the United States government, but the government lacks the financial "resources to become the front line of federal law enforcement"). The author also pointed out that "[n]othing in *Seminole Tribe* affects Congress's power to make the states suable in federal court by the United States." *Id.* at 770 n.19; Linda Greenhouse, *Court's Votes Favor States; Justices Deliver Blow Against Federalism*, L.A. DAILY NEWS, June 24, 1999 (discussing the *Alden* ruling and how it leaves state employees with no options), *available at* 1999 WL 7027061. The reporter noted, however, that individual federal agencies may still enforce federal law violations by the states, but the labor department lacks the resources to sue on each complaint. *See id.*

272. *See* Harvey Randall, *Overtime and FLSA:* Alden v. Maine, *U.S. Supreme Court, #98-436, June 23, 1999*, No. 7 PUB. EMP. L. NOTES, 156 (1999) (noting that Wisconsin had enacted the FLSA as state law before Congress had amended the FLSA in 1974 to include the states as employers), 1999 WL No. 7 PEMLIN 156; *see also* WIS. STAT. ANN. § 111.80 (West 1988) (adopting the FLSA as state law); WIS. ADMIN. CODE § 274.08(1)-(2) (1999) (West, WESTLAW through 2000 Reg. No. 538) (providing that "[t]his section applies to employes of the state, its political subdivisions, and any office, department, independent agency, authority institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts").

Eleventh Amendment.[273] Like many states, Texas zealously guards its sovereign immunity.[274] Indeed, in certain instances it is important to uphold the doctrine of sovereign immunity to protect the state's treasury and to protect itself against a flood of litigation.[275]

However, in the instance where the state denies a state employee a forum to sue the state for possible violations of the FLSA, Texas does not benefit by asserting its sovereign immunity. By not answering a claim, Texas sends its employees the message that the state is not employee-friendly and does not concern itself with its employees' general well-being, even though the United States Congress sought to protect employees when it enacted the FLSA. Texas must not send such a message. Other states, such as New York and Wisconsin, send a positive message to their state employees reiterating that their state can be trusted as an employer. Furthermore, state employees can feel assured that they will receive pay for their hard work. As the Supreme Court concluded in *Walling*, all employees are entitled to "a fair day's pay for a fair day's work."[276]

Unless Texas expressly waives its Eleventh Amendment sovereign immunity by legislative enactment, its state employees will not have similar legal recourses as those available to non-state employees. Like non-state employees protected by the TPL, state employees are similarly entitled to receive just compensation from their employer. Because the state intentionally wrote itself out of the language of the TPL, an inequality remains tipped in the state's favor. Non-state employees reap the benefits of Texas's effort to ensure a forum for pay disputes for all employees. State employees deserve the same protection.

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273. *See generally* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997) (recounting Texas sovereign immunity history).

274. *See id.* (recognizing Texas's long history of upholding the doctrine of sovereign immunity); *see also* Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. REV. 621, 632 (1998) (warning that most states, particularly Virginia, zealously protect their immunity in instances where overtime wages are in question, and therefore an employee seeking to enforce his rights to overtime wages lacks a forum unless the state takes deliberate steps towards waiving its immunity through a statute, an amendment, or other affirmative actions).

275. *See, e.g.*, Nat'l League of Cities v. Usery, 426 U.S. 833, 846-47 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (observing that substantial costs may be imposed by disturbing the sanctity of state sovereign immunity); *see also* Sharon J. Kronnish, Comment, *Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act*, 1981 DUKE L.J. 116, 125 (1981) (discussing the Supreme Court's rationale for upholding sovereign immunity as a way of protecting the "'public treasury or domain, or interfer[ing] with the public administration'").

276. *See* A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

In conclusion, the *Seminole Tribe* and *Alden* decisions must be taken seriously by state legislators who must quickly respond with a legislative enactment waiving Texas's Eleventh Amendment sovereign immunity and adopting the FLSA as state law. Above all, it is the rights of state employees' that must be preserved, rights recognized in 1938 by the United States Congress when it enacted the FLSA. Furthermore, public policy concerns addressed by Congress in the FLSA should apply equally to all Texans. As Wisconsin and New York have already recognized, the FLSA clearly pronounces that a state must be held accountable to its employees and ensure that all employees have equal access to the courts. A legislative enactment will ensure state employees' general well-being and foster friendly labor relations between Texas and its employees. It is now up to the state legislators to take action in light of the most recent decision in *Alden* and open the courthouse doors to state employees.[277]

277. *See generally* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Article I powers delegated to Congress do not include the authority to force nonconsenting states to defend themselves from private actions for damages brought in state courts).